NAMIBIA'S SUPREME COURT AT 30 YEARS

A Review of the Superior Court's Role in the Development of Namibia's Jurisprudence in the Post-Independence Era

Edited by
TAPIWA VICTOR WARIKANDWA
&
JOHN BALORO

Et lux in tenebris lucet – and the light shines in the darkness!

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Edited by:
Tapiwa Victor Warikandwa
Doctor of Laws, Senior Lecturer, School of Law, Faculty of Commerce, Management & Law, University of Namibia
&
John Baloro
Professor of Law, School of Law, Faculty of Commerce, Management & Law, University of Namibia

Project Director:
Peter S. Shivute
Chief Justice, Supreme Court of the Republic of Namibia

Project Coordinators:
Sebastiaan Shampapi Kandunda
Chief Legal Officer within the Office of the Judiciary, stationed at the Supreme Court of Namibia
&
Kemanya Ndapewa Amkongo
Senior Legal Officer (Research Assistant) at the Supreme Court of Namibia

2022

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PUBLISHER

This publication would not have been possible without the generous financial support of the Konrad Adenauer Foundation.

Please note that the views expressed herein are not necessarily those of the Konrad Adenauer Foundation.

The publication is also available online at www.kas

Konrad Adenauer Foundation
P.O. Box 1145
Windhoek
Tel: +264(62) 22 5568
info@kas-namibia.org www.kas.de/namibia

©Supreme Court of Namibia, University of Namibia

ISBN: 978-99916-39-64-2 (epub)
ISBN: 978-99916-39-63-5 (hardcopy)

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Cover Design:	John Meinert Printing (Pty) Ltd
Editors-in-Chief:	Doctor Tapiwa Victor Warikandwa and Professor John Baloro
Layout:	Doctor Tapiwa Victor Warikandwa
Project Director:	Chief Justice Peter S. Shivute
Project Coordinators:	Mr Sebastiaan Shampapi Kandunda & Ms Kemanya Ndapewa Amkongo
Language Editor:	Doctor Nelson Mlambo
Publisher:	Konrad Adenauer Foundation P.O. Box 1145 Windhoek, Namibia Tel: +264 (62) 22 5568 info@kas-namibia.org www.kas.de/namibia

Year of Publication: 2022

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FOREWORD

Article 79(2) of the Namibian Constitution confers on the Supreme Court appellate jurisdiction to 'hear and adjudicate appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder'. The Supreme Court also has jurisdiction to hear matters referred to it for decision by the Attorney-General 'under the constitution' and with such other matters as may be authorised by an Act of Parliament. It also hears Presidential election challenges as a Court of first instance and final recourse in terms of section 172 of the Electoral Act, 2014 (Act No. 5 of 2014). For the past 30 years of its existence, the Supreme Court has been a beacon and keeper of constitutional democracy and the rule of law in Namibia. The court's decisions endeavour to reflect the aspirations and values of the Namibian people as articulated in the Constitution.

To commemorate 30 years of the existence of the Supreme Court of Namibia, legal minds in Namibia and beyond collaborated on a collection of scholarly articles aimed at analysing and critiquing various leading judgments of the apex court for the past 30 years. During this period, judges of the Supreme Court presided over a plethora of cases and they made decisions that impacted the everyday lives of individuals and the functioning of State institutions. Much of the judicial work during this period was self-consciously oriented towards using the constitution as a tool to improve the wellbeing of individuals and transform society for the common good. The collection of articles by our distinguished contributors to this book captures some of these landmark decisions made by the court.

I am pleased to commend this book to each and every reader who will go through its pages. The book contains a critical analysis of decisions and jurisprudence developed by the Namibian Judiciary. The articles therein offer an insightful exposition of the philosophy of the Supreme Court from an academic vantage point – with a perspective other than that of the court that made the decision under discussion. The book has endeavoured to incorporate as many of those views as possible, so as to include a variety of areas of interest. However, the contents of the chapters and the views expressed therein are entirely those of the learned authors.

It is not practical for me to identify and thank each and every individual contributor personally. Instead, a list of those who contributed to this publication can be found in the acknowledgement section which follows this Foreword. I would, however, like to express, on behalf of the Namibian Judiciary and on my own behalf, our profound gratitude to all our distinguished contributors for taking the time - busy as they are in their day to day careers - to pen down their reflections on the work of the court. Such instances of voluntary public service are few and far between in Namibia. It is my fervent wish and hope that an exercise of this nature will become a normal occurrence for legally trained professionals to take up the quill and parchment so

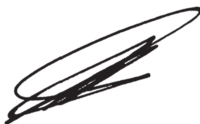
as to share their insights on the law in Namibia. This book represents a valuable collection of materials on the jurisprudence of the Supreme Court. It is a good reference point not only to academics, but also to legal practitioners and judicial officers. It will certainly be a useful resource for all interested in the work of the courts and in the rule of law.

This project is grateful to the Konrad Adenauer Stiftung (KAS) for providing the necessary technical and financial support towards the preparation and publication of this book. Without KAS's assistance, this book would have been but a pipe dream. I therefore, would like to thank KAS for its continued support to the administration of justice in Namibia.

I am also indebted to the Project Committee which was formed to oversee the preparation and publication of the book. The Project Committee consisted of representatives of the University of Namibia and staff members in the Office of the Judiciary attached to the Supreme Court. Professor John Baloro and Doctor Tapiwa Victor Warikandwa represented the University of Namibia, while Mr Sebastiaan Kandunda and Ms Kemanya Amkongo represented the Supreme Court. My thanks also go to the Review Committee from the University of Namibia School of Law under the stewardship of Professor John Baloro, for performing its editorial functions dutifully and diligently. The time and effort the Review Committee expended to review, edit and keep track of the authors' manuscripts is appreciated as it is reflected by the accuracy of every contribution. I look forward to further exciting collaborative initiatives between the Office of the Judiciary and the School of Law in future. I would also like to particularly thank Doctor Tapiwa Victor Warikandwa, who invested considerable amounts of his personal time to review and comment on each and every chapter submitted for publication.

As I have said above, I hope that this collection of materials will not be the first and last of its kind. My expectation is that it inspires a culture of legal writing among our legal practitioners and academics. The Namibian jurisprudence is fast evolving and legal writing is the best way to stimulate its growth and dissemination.

It is my distinct pleasure to present this historic book to the legal fraternity, academics and indeed the general public. I invite you to read avariciously the very stimulating and diverse views expressed in it. I have no doubt that you will find them the way I have described them.



Peter S. Shivute
Chief Justice of the Republic of Namibia
Supreme Court, Windhoek

PREFACE

In terms of the provisions of the South African Supreme Court Act, Act 59 of 1959, the Judiciary of South West Africa (SWA) was merged with that of South Africa, resulting in the High Court of SWA becoming the SWA Provincial Division of the Supreme Court of South Africa. The effect thereof, was that the Appellate Division of the Supreme Court of South Africa maintained jurisdiction over the decisions of the SWA Provincial Division of the Supreme Court of South Africa, to hear and adjudicate over matters brought before it on appeal from the SWA Division or any other provincial or local division. With the coming into force of the Namibian Constitution in 1990, the Supreme Court of Namibia became the highest court of appeal for the new nation in terms of Article 79 of the Constitution, reinforced by the Supreme Court Act 15 of 1990.

The mandate and powers of the Supreme Court are regulated by Articles 78, 79 and 138 of the Namibian Constitution. The Supreme Court hears appeals against High Court decisions and matters referred to it for decision by the Attorney General, particularly those that concern constitutional questions. The court can also hear matters as may be authorised by Act of Parliament, regulate its own procedures and make rules of the Court. The Chief Justice of Namibia (currently His Lordship Peter S. Shivute) presides over the Supreme Court of Namibia. The Supreme Court of Namibia thus has a comprehensive and balanced history in which it has gradually developed legislation and common law in the country. This unique function of the Supreme Court is worth examining. This book thus traverses over nearly three decades of the legal proceedings and cases decided by the Supreme Court of Namibia. It examines the controversies and conflicts emanating from some of the Supreme Court's decisions and the impact of such decisions and the common law its justices developed.

The Supreme Court of Namibia has delivered key judgements which are fundamental to Namibia. The Supreme Court has: 1) confirmed the prohibition of corporal punishment at state schools; 2) made provision for treason suspects to be afforded legal representation (*Government of Namibia and Others v Mwilima and Others* (SA29-01, SA29-01) [2002] NASC 8 (7 June 2002)); 3) ruled that confessions obtained due to the occurrence of "coercive actions" at the hands of the military or police to obtain testimonies are inadmissible (*State v Malumo and 24 Others* (CC 32/2001) [2015] NAHCMD 213 (7-14 September 2015)); 4) ruled that long term jail sentences are unconstitutional; 5) ruled that third party claims on adultery are outdated; and 6) held an agreement on the expansion of the coastal holiday settlement of Wlotzkasbaken to have been unlawfully and unilaterally changed by the Erongo Regional Council and decided in favour of the home owners (*Erongo Regional Council and Others v Wlotzasbaken Home Owners Association and Another* (P) A 202 /2007) (P) A 202 /2007) [2007] NAHC 95 (12 December 2007)).

The book is a project of the Office of the Judiciary in the Republic of Namibia, in collaboration with the School of Law of the University of Namibia. This book project is meant to celebrate the Supreme Court of Namibia's 30th anniversary. It aims at describing the Namibian Supreme Court's structure and powers, and it focuses on the Court's work in deciding leading cases of constitutional law, civil rights, criminal law, delict, administrative law, labour law, and commercial law, amongst other areas of law. The book therefore, seeks not to merely critique the judgements of the Supreme Court of Namibia but to objectively examine how the Supreme Court has informed the development of Namibia's judiciary system and the country's developmental aspirations since independence. In principle, the book interrogates how the Court and its justices have shaped life and law in Namibia. In this regard, the book seeks to highlight how the Supreme Court of Namibia has shaped legal rules in pursuit of the country's developmental aspirations. For this reason, the book seeks to address questions such as amongst others, the following: 1) has the Namibian Supreme Court interpreted the law in Namibia in pursuit of the country's developmental goals?; 2) To what extent has the Namibian Supreme Court contributed to legislative development in Namibia?; 3) Are Supreme Court judges sensitive to Namibia's traditional practices and developmental aspirations?; 4) Is the Supreme Court working together with other arms of government to unyoke Namibia from the post-independence effects of apartheid?; 5) Is the transformation of the Namibian judiciary and the general society a key feature of the Namibian Supreme Court's rulings?

November 2021

Project Director

Peter S. Shivute
Chief Justice of the Republic of Namibia, Supreme Court, Windhoek

The Editors

Doctor Tapiwa Victor Warikandwa and Professor John Baloro

School of Law, Faculty of Commerce, Management & Law, University of Namibia

ACKNOWLEDGEMENTS

We want to thank the distinguished contributors to this book, whose valuable chapters led to the success of this project. A multi-authored publication such as this one requires enormous team effort. The contributors to the book project addressed issues related to how the Supreme Court of Namibia has adjudicated new and complex issues related to the Supreme Court's historical background (the Supreme Court of Namibia from 1990 to date), the Supreme Court and its role in the development of the law in Namibia, and the role of the Supreme Court in ensuring continuous legal and judicial education or any matters pertinent thereto. As such, featuring in this book project are writings of a judge, jurists, deans, law professors, law lecturers and practicing attorneys. Their fair-minded assessments of the Supreme Court are highly appreciated. It is therefore, anticipated that in due course, the book will become a guide for lawmakers, scholars, and any interested parties in understanding the legal history of the Supreme Court of Namibia and how it has developed legislation and common law in the country.

Furthermore, we are grateful to the Konrad Adenauer Foundation for providing the funding for publishing this book. Without their generous funding, this book project would not have seen the light of day. We also want to thank the project director, Chief Justice Peter S. Shivute, and project coordinators, Mr Sebastiaan Shampapi Kandunda and Ms Kemanya Ndapewa Amkongo, who steered the project to its success. Special thanks also go to the Supreme Court of Namibia and the University of Namibia for releasing their officials to work on the novel and significantly welcome publication. It is anticipated that the book will set a platform for future contributions of a similar magnitude, if not better.

November 2021

The Editors

ABOUT THE EDITORS

Tapiwa Victor Warikandwa is a Senior Lecturer in the School of Law at the University of Namibia. He studied for his Bachelor of Laws, Master's degree and Doctoral degree at the University of Fort Hare in South Africa. He specialises in International Trade Law, Labour Law, Indigenisation Laws, Mining Law, and Constitutional Law amongst other disciplines. In addition, he has published seven books in the areas of Jurisprudence, Labour Law, Women's Rights, Mining Law, Land Rights, and Economic Law, amongst other discourses. Prior to coming to Namibia, Tapiwa Victor Warikandwa worked as a legal officer and later legal advisor in the Ministry of Public Service, Labour and Social Welfare. He also worked with the law reviser of the Ministry of Justice in Zimbabwe, reviewing laws administered by the Ministry of Public Service, Labour and Social Welfare. Tapiwa Victor Warikandwa also completed an ordinary and advanced training course in Labour Law Making at the International Labour Organisation's International Training Centre in Turin, Italy. On numerous occasions, Tapiwa Victor Warikandwa was actively involved in the activities of the Cabinet Committee on Legislation on behalf of the Ministry of Public Service, Labour and Social Welfare. He has also attended numerous work-related conferences and business meetings such as the 2007 International Labour Conference in Geneva, Switzerland and the African Regional Labour Advisory Council meetings to name but a few. Tapiwa Victor Warikandwa has also published articles in accredited peer reviewed journals. He has also served as a Post-Doctoral Fellow with the University of Fort Hare in South Africa and presented papers at conferences in and outside South Africa.

John Baloro is a Professor of Law and former Dean of the Faculty of Law (now School of Law) of the University of Namibia. He received his legal training at Law schools in Ghana (Faculty of Law of the University of Ghana), the United States of America (Temple University Law School) and the United Kingdom (The London School of Economics and Political Science, University of London). He was called to the Bar in Ghana in September 1985 and is both a Barrister and Solicitor of the Supreme Court of Ghana. Professor Baloro has been involved in legal education and research for a period spanning over 38 years in various law schools on the African continent. During this period, Professor Baloro has received many academic awards, the most recent of which include a merit sabbatical award in 2018 for outstanding academic leadership conferred by the University of Namibia and the Commonwealth Professional Fellowship (CPF) conferred by the Commonwealth Scholarship Commission in 2017.

ABOUT THE PROJECT DIRECTOR AND PROJECT COORDINATORS

Peter S. Shivute (Project Director) is the Chief Justice of the Republic of Namibia. He served as a Magistrate in the judiciaries of both Zambia and Namibia. The President of the Republic of Namibia appointed him Judge and Judge-President of the High Court in 2001 and he served the Namibian Judiciary in that capacity until his appointment as Chief Justice in 2004. Chief Justice Peter S. Shivute read law at Trinity Hall, University of Cambridge, where he obtained a Bachelor of Laws (LLB) Honours Degree in 1991. In 1995, he was awarded a Chevening Scholarship by the United Kingdom's Foreign and Commonwealth Office to do a Master's Degree in Law at the University of Warwick, United Kingdom, where he obtained a Master's Degree (LLM) in Law in Development. Chief Justice Shivute also holds other qualifications in Development Studies and Management. In his capacity as Chief Justice, Chief Justice Shivute is the Head of the Judiciary of Namibia, overseeing its administration as well as the over 700 members of the Office of the Judiciary. Furthermore, he is also the Chairperson of the Judicial Service Commission and the Board for Legal Education. Chief Justice Shivute is a member of the Southern African Chief Justices Forum (SACJF), a body consisting of Chief Justices in the Southern African Development Community (SADC) region, as well as the Chief Justices of Uganda and Kenya. Lastly but not least, he is a past Chairperson of SACJF - a position he held for 3 consecutive terms.

Sebastiaan Shampapi Kandunda (Project Coordinator) holds a Bachelor of Arts (Psychology and Political Science), Baccalaureus Juris (B-Juris) and Bachelors of law (LLB) (Honours) from the University of Namibia. He is an admitted legal practitioner of the High Court of Namibia and a member of the Law Society of Namibia since 2015. In addition, he is also an Accredited Mediator of the High Court of Namibia since 2014. He is employed as a Chief Legal Officer within the Office of the Judiciary stationed at the Supreme Court of Namibia. Prior to the abovementioned appointment, he served as a Legal Officer of the High Court from 2012 until his promotion to Senior Legal Officer in 2016. He has assisted in the development of the Training Manual of Judicial Assistants and Legal Clerks of the High Court of Namibia. He also assisted the Namibia Employers Federation (NEF) in conducting the impact of SMEs on the Namibian economy in 2008. As an undergraduate student, he participated in various surveys conducted by the Multi-Disciplinary Research Center, University of Namibia. He has also attended various educational trainings and programmes including the *Aspirant Judges Training Programme*, an initiative of the Namibian Judiciary, which aimed at creating a pool from which judges can be appointed. In 2020, he was appointed to the Project Committee that was formed to oversee the preparation and publication of this book.

Kemanya Ndapewa Amkongo (Project Coordinator) is an admitted Legal Practitioner and member of the Law Society of Namibia, and an accredited High Court mediator. She holds an LLM (Masters) from the University of Birmingham, specialising in International Law. She also holds a Baccalaureus Juris (B-Juris) and Bachelors of Law (LLB) (Honours) from the University of Namibia. Ms Amkongo is employed as a Senior Legal Officer (research assistant) at the Supreme Court of Namibia. She also served in the same capacity at the High Court of Namibia. Before joining the High Court, Ms Kemanya Ndapewa Amkongo was attached as a candidate legal practitioner at Nakamhela Attorneys, where she was exposed to various areas of the law including Administration of Estates and Wills, Commercial Law, and Criminal and Civil procedure. Kemanya Ndapewa Amkongo is also a recipient of the British Foreign and Commonwealth Office Chevening Scholarship. Moreover, she has assisted in the development of the Training Manual of Judicial Assistants and Legal Clerks of the High Court of Namibia. Ms Amkongo also participated in the basic Aspirant Judges Training programme in 2015 and 2016, a programme that offers training to magistrates' and judges' researchers, to empower them to aspire for appointment to the High Court. In 2020, she was appointed to the Project Committee formed to oversee the preparation and publication of this book.

ABOUT THE AUTHORS

Bernhard Tjatjara was born in Kavango East and received the LLM (Master of Laws) with specialisation in Corporate Law from the University of South Africa (UNISA) in 2019 and LLB (Bachelor of Laws), B-Juris degrees from the University of Namibia (UNAM) in 2006 and 2012 respectively. He previously worked as a Prosecutor (Okakarara Magistrate's Court) and a Senior Prosecutor (Outjo Magistrate's Court) under the Office of the Prosecutor-General, Ministry of Justice, during the years 2007 to 2009. Furthermore, he also worked on the bench as a Senior Magistrate (Windhoek Magistrate's Courts - Katutura and Luderitz Street) and a Principal Magistrate (Swakopmund Magistrate's Court) under the Magistrate's Commission during the years 2009 to 2012. In addition, Bernhard Tjatjara served as a Law Officer at the Namibia Competition Commission from 2013 to January 2015. In February 2015, he became a Commercial Law Lecturer at the Department of Social Sciences, Namibia University of Science and Technology (NUST); and also, an Assistant Lecturer at the Law Faculty, UNAM, from 2015 to 2017, in the Diploma Programmes. He teaches Commercial Law, Company Law and Media Law at NUST. His research interests include areas of company law, commercial law, money laundering and criminal law.

Boniface S. Konga has served as a Prosecutor in the Office of the Prosecutor General and currently he lectures at Namibia University of Science and Technology (NUST), Department of Social Sciences, Criminal Justice and Legal Studies Section. He holds the following qualifications: BJuris, LLB, LLM (UNAM), and LLM in Human Rights Law (UNISA).

Dennis U. Zaire is a Senior Programme Manager at Konrad Adenauer Foundation. Currently he holds the following academic accolades: LLB (Hons, University of Hull – UK); LLM – International Business Law (University of Hull - UK); LLM – International Trade Law (University of Nottingham Trent – UK). Zaire has written and published on various topics regarding law, politics and general issues of interest to society in Namibia. He has co-edited a publication on Namibia's Foreign Relations. He is also currently a Doctoral candidate in Law at the University of Namibia's School of Law.

Dunia Prince Zongwe is an author, an academic and a consultant. He currently works as an Associate Professor at Walter Sisulu University (WSU) in the Department of Legal Studies, where he also heads the Mercantile Law Unit. Previously, he has worked at the University of Namibia (UNAM), where he taught several modules in the Faculty of Law. Prof. Zongwe specialises in finance, human rights, development, and constitutionalism, focusing specifically on Africa. An Editor of the Namibia Journal of Managerial Sciences (NJMS), he has written extensively

on those issues. He has published some works on finance and contracts, which sits at the interface of law and economics in a number of law reviews, including the *SADC Law Journal, Peking University Journal of Legal Studies,* and *American University International Law Review*. A World Bank consultant since 2013, he has carried out consulting projects for such clients as the European Union (*Domac*); the Law Society of Namibia (LSN); UNESCO; the National Petroleum Corporation of Namibia (Namcor); Oxford University Press (*International Law in Domestic Courts*); and the Communications Regulatory Authority of Namibia (CRAN). Since 2008, Prof. Zongwe has presented lectures at nearly 50 conferences at many institutions and universities, including the African Union, Yale University, and the University of Ghana. He has received several merit scholarships and awards, such as the Human Sciences Research Council (HSRC, South Africa) runner-up Certificate of Excellence for Best Presenter award in 2016, the Cornell Institute for African Development fellowship in 2007, the Law Society of Namibia Prize for Best LLB Student in 2007, and the University of Namibia Vice-Chancellor's Medal (twice). In 2007, he was also offered a foreign clerkship by the Constitutional Court of South Africa. Prof. Zongwe studied at the University of Namibia, Université de Montréal, and Cornell University, where he earned his LLM and JSD degrees.

Felicity !Owoses holds a B-Juris, LLB (UNAM), and she is the Chief Legislative Drafter at the Ministry of Justice, and a Commissioner of the Law Reform and Development Commission, Namibia.

Gita K. Keshava is a lawyer who is based in Canada where she practices civil litigation and international arbitration. She completed her Masters in Law (BCL) at Oxford University in 2016, specialising in comparative human rights law. Gita subsequently clerked at the Supreme Court of Namibia in 2017, before returning to Canada. She was admitted as a legal practitioner in 2019 in the province of Alberta and subsequently in the province of British Columbia in 2020.

John Baloro is a Professor of Law and former Dean of the Faculty of Law (now School of Law) at the University of Namibia. He received his legal training at Law schools in Ghana (Faculty of Law of the University of Ghana), the United States of America (Temple University Law School) and the United Kingdom (The London School of Economics and Political Science, University of London). He was called to the Bar in Ghana in September 1985 and he is both a Barrister and Solicitor of the Supreme Court of Ghana. Professor Baloro has been involved in legal education and research for a period spanning over 38 years in various law schools on the African continent. During this period, Professor Baloro has received many academic awards, of which the most recent includes a merit sabbatical award in 2018 for outstanding academic leadership conferred by the University of Namibia, and the Commonwealth Professional Fellowship (CPF) conferred by the Commonwealth Scholarship Commission in 2017.

Kelvin C. Vries graduated from the University of Namibia in April 2018 with an LLB degree. He has since interned at the Law Reform and Development Commission of Namibia and he is undertaking his LLM in Human Rights and Democratisation in Africa at the University of Pretoria. Before embarking on his postgraduate studies, he was a registered Candidate Legal Practitioner at the Justice Training Centre in order to be admitted to the High Court of Namibia. He takes a cross-cutting interest in human rights and he holds advanced certificates in disability rights, sexual minority rights and socio-economic rights. Mr Vries is currently co-authoring a publication for the Global Campus Human Rights Journal entitled "Migration-related detention of children in Southern Africa: Developments in Angola, Malawi and South Africa" - a product of his work at the Children's Unit of the Centre for Human Rights. In addition, Mr Vries is also undertaking an internship at the Southern African Litigation Centre which promotes and advances human rights and the rule of law in southern Africa, primarily through strategic litigation support, advocacy and capacity strengthening. Mr Vries understands that the law is only valuable if it changes and protects the lives of all citizens for the better. He describes himself as an academic activist for human dignity and substantive equality. As such, he takes interest in African philosophy, constitutionalism, social justice and judicial behaviour. Both the chapter in this book and his ongoing thesis explore some of these aspects.

Kennedy Kariseb lectures in the Department of Public Law and Jurisprudence, School of Law, University of Namibia. He also serves on the board of the National Heritage Council of Namibia. His qualifications include, a B-Juris and LLB (Honours) degrees from the University of Namibia, a postgraduate certificate in Human Rights Implementation from the University of Luzern, Switzerland, an LLM (*cum laude*) from the University of Pretoria and a Doctor of Laws degree from the University of Pretoria. His areas of research are broadly blended between international human rights law (particularly the African regional human rights system), comparative law and gender law.

Leonard Tjiveze holds a B-juris, LLB (Hons), and LLM (by thesis) (UNAM). He is a Namibian lawyer working for the Ministry of Justice in the Directorate of Legal Aid.

Lizazi Eugene Libebe is a former Magistrate and lectures in the School of Law at the University of Namibia, in the Department of Public Law and Jurisprudence. He holds a B-Juris and LLB (UNAM) as well as an LMM in International Law (UCT). His areas of interest and publications include public international law, natural resources law, economic law, environmental law and policy, African jurisprudence, decolonisation, law of evidence, family law, statutory interpretation, legislative drafting, sociology, philosophy, and criminal law.

Lotta Ambunda-Nashilundo is an admitted Legal Practitioner and member of the Law Society of Namibia. She holds an LLM (Masters) from the University of

Namibia, specializing in Constitutional law. Mrs Ambunda-Nashilundo worked as Chief Legal Officer in the Directorate of the Registrar of High and Supreme Court, Office of the Judiciary and as a research assistant since 2011- March 2020 to the Honourable Deputy Chief Justice of Namibia. At the time of the publication, Mrs Ambunda-Nashilundo joined the local bar and currently is a member of the Society of Advocates of Namibia since December 2020.

Mariette Hanekom is a holder of a BA (Hons) (Journalism) and LLB (Stellenbosch). She is a Lecturer, Legal Studies, at the Namibian University of Science and Technology. Mariette Hanekom is also a Legal Practitioner in the High Court of Namibia and Supreme Court of SA (Cape of Good Hope Provincial Division), Conveyancer and Notary, and Sworn Translator of the High Court of Namibia (English/Afrikaans).

Marvin Awarab (BJuris, LLB (UNAM), LLM (University of Cape Town)), is a Lecturer and former Head of Department, Public Law and Jurisprudence, in the former Faculty of Law (now School of Law), University of Namibia.

Masake Pilisano holds an LLD (Stellenbosch University), LLM (Stellenbosch University), Masters in Policing Practice (Southern Business School), LLB and BJuris (University of Namibia). He is a Lecturer, Deputy Head of Department, and Acting Head of Department of Social Sciences, Faculty of Human Sciences, Namibia University of Science and Technology. He is admitted to the List of Professional Investigators (Counsel Support Section) of the International Criminal Court (ICC). In addition, Masake Pilisano also served in various capacities in the Namibian Police Force, including serving as a Unit Commander, Subdivision Head, and Staff Officer to the Commissioner of the Criminal Investigation Directorate.

Ndjodi Ndeunyema recently completed his DPhil in Law at the University of Oxford, where he also completed three master's degrees: the MPhil in Law as an Africa-Linacre Scholar, and the BCL and the MSc in Criminology as a Rhodes Scholar. He completed his LLB and BJuris from the University of Namibia. At present, Ndjodi Ndeunyema is a Research Director for the Oxford Human Rights Hub and he serves as a Founding Editor of the University of Oxford Human Rights Hub Journal.

Ngutjiua Hijarunguru is a Lecturer in the Department of Social Sciences at the Namibia University of Science and Technology (NUST), where she lecturers Introduction to Alternative Dispute Resolution and Human Rights in the Criminal Justice System. Before joining the academe in 2019, she worked as a legal officer for the Law Society of Namibia. She attained her LLB from the University of the Western Cape (RSA) and holds a Masters in Alternative Dispute Resolution from the University of Missouri (USA). She has experience in labour and civil litigation.

Peter S. Shivute is the Chief Justice of the Republic of Namibia. He has served as a Magistrate in the judiciaries of both Zambia and Namibia. The President of the Republic of Namibia appointed him as a Judge and Judge-President of the High Court in 2001 and he served at the Namibian Judiciary in that capacity until his appointment as Chief Justice in 2004. Chief Justice Peter S. Shivute read law at Trinity Hall, University of Cambridge, where he obtained a Bachelor of Laws (LLB) Honours Degree in 1991. In 1995, he was awarded a Chevening Scholarship by the United Kingdom's Foreign and Commonwealth Office to do a Master's Degree in Law at the University of Warwick, United Kingdom, where he obtained a Master's Degree (LLM) in Law in Development. Chief Justice Shivute also holds other qualifications in Development Studies and Management. In his capacity as Chief Justice, Chief Justice Shivute is the head of the Judiciary of Namibia, overseeing its administration as well as the over 700 members of the Office of the Judiciary. He is also the Chairperson of the Judicial Service Commission and the Board for Legal Education. Chief Justice Shivute is a member of the Southern African Chief Justices Forum (SACJF), a body consisting of Chief Justices in the Southern African Development Community (SADC) region as well as the Chief Justices of Uganda and Kenya. He is a past Chairperson of the SACJF, a position he held for 3 consecutive terms.

Phillipus Balhao (BJuris, LLB (Hons, University of Namibia), LLM (Intellectual Property, Stellenbosch University)) is a Senior Lecturer in the School of Law, at the University of Namibia. He is also a Legal Practitioner of the High Court of Namibia.

Samuel Kwesi Amoo was appointed a member of the academic staff of the Faculty of Law, University of Namibia, in August 1995 and retired in December 2018 as Associate Professor. He was involved in both undergraduate and graduate tuition, and he performed various administrative responsibilities including being the Dean of the Faculty of Law and Acting Director of the Justice Training Centre (JTC). Prof. Amoo has written extensively on the Namibian legal system in books and reputable journals of international standing and his publications include *An Introduction to Namibian Law* and *Property Law in Namibia,* both of which are prescribed textbooks. He has also undertaken some legislative drafting assignments including the drafting of the consolidated Draft Consolidated Bill of the Agricultural (Commercial) Land Reform Act, 1995 and the Communal Land Reform Act 5 2002 of Namibia, Regulations for the Appeal Tribunal established under the Communal Land Reform Act, Regulations for the National Council for Higher Education, the Constitution of the Namibia Red Cross and Amendments to the Namibia Red Cross Act. He was a guest speaker and visiting lecturer at the Hedmark University College, Norway; Pacific Lutheran University, Tacoma, USA; Rhodes University, South Africa; The Tropical Institute of Community Health and Development, Kisumu, Kenya; Northwestern University School of Law, Chicago, USA; Xiangtan University, Hunan Province, China; Renmin (People's) University of China, Beijing, China and the Katholieke Universiteit, Brussels, Belgium. He is also an alumnus of the Oxford

Round Table. Prof. Amoo holds a Master of Laws degree from the University of Toronto, Canada and is an Advocate of the Supreme Court of Zambia, Attorney of the High Court of Namibia and he has served as a Commissioner of the Namibia Law Reform and Development Commission, a member of the Board for Legal Education, the National Council for Higher Education, the Namibia Qualifications Authority Council and a member of the Governing Board and legal advisor of the Namibia Red Cross.

Stefan Schulz is a Deputy Director (academic) in the Department of Social Sciences at the Namibia University of Science and Technology (NUST), where he coordinates the Bachelor of Criminal Justice Honours programme. Before joining the academe in 1998, he worked as a public prosecutor and district judge in Rostock (Germany). His recent publications include the review of the book *Human trafficking: Applying research, theory, and case studies*, *Journal of Human Trafficking*, DOI: 10.1080/23322705.2019.1658983 (2019), and co-authored (with Hennie Bruyns) Corrections in South Africa. *Encyclopedia of Corrections*, https://doi.org/10.1002/9781118845387.wbeoc263 (2017).

Tapiwa Victor Warikandwa is a Senior Lecturer in the School of Law at the University of Namibia. He studied for his Bachelor of Laws, Master's degree and Doctoral degree at the University of Fort Hare in South Africa. He specialises in International Trade Law, Labour Law, Indigenisation Laws, Mining Law, and Constitutional Law amongst other disciplines. He has published seven books in the areas of Jurisprudence, Labour Law, Women's Rights, Mining Law, Land Rights, and Economic Law, amongst other discourses. Prior to coming to Namibia, Tapiwa Victor Warikandwa worked as a legal officer and later legal advisor in the Ministry of Public Services, Labour and Social Welfare. He worked with the law reviser of the Ministry of Justice in Zimbabwe in reviewing laws administered by the Ministry of Public Services, Labour and Social Welfare. Tapiwa Victor Warikandwa also completed an ordinary and advanced training course in Labour Law Making at the International Labour Organisation's International Training Centre in Turin, Italy. On numerous occasions, Tapiwa Victor Warikandwa was actively involved in the activities of the Cabinet Committee on Legislation on behalf of the Ministry of Public Services Labour and Social Welfare. He has also attended numerous work-related conferences and business meetings such as the 2007 International Labour Conference in Geneva (Switzerland) and the African Regional Labour Advisory Council meetings, to name but a few. Tapiwa Victor Warikandwa has also published articles in accredited peer reviewed journals. He has also served as a Post-Doctoral Fellow with the University of Fort Hare in South Africa and presented papers at conferences in and outside South Africa.

Yvonne Dausab holds a Bachelor of Arts (Law), LLB from the University of the Western Cape and a Master of Laws degree from the University of Pretoria. She is an admitted legal practitioner of the High Court of Namibia since 2000 and a Notary

Public since 2015. The President of the Republic of Namibia appointed her Minister of Justice effective 21 March 2020. She is the erstwhile Chairperson of the Law Reform and Development Commission for a five-year period since April 2015 until her current appointment. Ms Yvonne Dausab, prior to the above appointments, was the Deputy Dean of the Faculty of Law at the University of Namibia and a lecturer, for a total period of seven years. She has published and has interest in the areas of access to justice, disability rights, children's rights and constitutional and human rights law. Her last publication was on *Visser v Minister of Finance: A Missed Opportunity to Clarify the Equality Provision within a Namibian Disability Rights Paradigm* (2017) - published in a book she also co-edited with Professor Dunia Prince Zongwe entitled: *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry*.

ABBREVIATIONS

ACHPR	African Charter on Human and People’s Rights
AG	Attorney General
AU	African Union
BA	Bachelor of Arts
BCL	Bachelor of Civil Law
BJuris	Baccalaureus Juris
CC	Close Corporation
CJ	Chief Justice
Con Court	Constitutional Court
CPF	Commonwealth Professional Fellowship
CRAN	Communications Regulatory Authority of Namibia
CSC	Commonwealth Scholarship Commission
ECN	Electoral Commission of Namibia
ESC	Economic, Social and Cultural Rights
GB	Great Britain
HC	High Court
HRDC	Human Rights and Documentation Centre
HRSC	Human Sciences Research Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
JSC	Judicial Service Commission
JTC	Justice Training Centre
KAS	Konrad-Adenauer-Stiftung
LAC	Legal Assistance Centre
LC	Lower Courts
LLB	Bachelor of Laws
LLD	Doctor of Laws
LLM	Master of Laws
LRDC	Law Reform and Development Commission
LSN	Law Society of Namibia
LTD	Limited
NAM	Namibia
NASC	Namibia Superior Courts
NJMS	Namibia Journal of Managerial Sciences
NUST	Namibia University of Science and Technology
PER/PELJ	Potchefstroom Electronic Law Journal
PhD	Doctor of Philosophy
PTY	Proprietary Company
RDP	Rally for Democracy and Progress
RSA	Republic of South Africa
SA	South Africa

SACJF	Southern African Chief Justices Forum
SADC	Southern Africa Development Community
SC	Supreme Court
SCA	Supreme Court of Appeal
SCN	Supreme Court of Namibia
SWA	South West Africa
SWAPO	South West Africa People's Organisation
UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAM	University of Namibia
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America
USA	United States of America
WSU	Walter Sisulu University

CHAPTER 1

The Role and Function of the Supreme Court of Namibia and its Contribution to Constitutionalism and Jurisprudence

Peter S. Shivute*

1.1 INTRODUCTION

The basic feature of the Namibian legal system is that it is a hybrid system characterised by the doctrine of constitutional supremacy and an entrenched Bill of Rights. It is a hybrid legal system having elements of civil law, common law and customary law. With the demise of the apartheid regime, the new constitutional order eradicated the era of parliamentary supremacy and substituted it for constitutional supremacy and the rule of law. Chapter 3 of the Namibian Constitution imports a human rights culture into the Namibian legal order.[1]

Article 1(6) of the Constitution entrenches the doctrine of constitutional supremacy by providing that the Constitution is the supreme law of the land and therefore, the ultimate source of law in Namibia. All other laws in Namibia trace their legitimacy and source from the constitution.[2] The Constituent Assembly, a body tasked with the drawing up of the Constitution, acutely aware of the implications that may arise from a legal lacuna during the transition period to Independence, included in the constitution Article 140. Article 140 provides that all laws which were in force immediately before the date of Independence remained in force until such time that they were repealed or amended by an Act of Parliament or until declared unconstitutional by a competent court of law. Article 140 of the Constitution thus introduced a hybrid legal system into the Namibian legal order, with two formal legal systems existing in harmony within the national legal system.

* I would like to acknowledge and thank Justice (Rtd) Gerhard Maritz, formerly Judge of Appeal at the Supreme Court, who provided input in an earlier draft of this chapter. He provided valuable input, especially on the contribution of the Supreme Court of South West Africa to constitutionalism before Independence. My thanks also go to Mr Sebastiaan Kandunda, Chief Legal Officer at the Supreme Court, who did the initial research on the Namibian legal system and on the Supreme Court's structure as well as its mandate. Any errors that may manifest in the work remain entirely mine.

1 The key liberal values were informed by a set of principles developed by the governments of Canada, France, Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland as well as the United States of America, during negotiations for Namibia's independence, which were accepted by all parties to the negotiation.

2 SK Amoo (2008) *An Introduction to Namibian Law: Materials and Cases* Macmillian Education Namibia Publishers (Pty) Ltd: Windhoek.

The Administration of Justice Proclamation 21 of 1919 introduced Roman-Dutch law as the common law of Namibia. This position was further affirmed by Article 66(1) of the constitution which provides that both the customary law and common law of Namibia in force on the date of Independence shall remain valid to the extent that such law is not inconsistent with the constitution or any other law. The Namibian common law largely comprises of a mixture of Roman-Dutch and elements of English common law. In other words, the Namibian legal system is characterised by legal pluralism.

According to Article 1(3) of the Constitution, there are three main organs of State, namely the Executive, the Legislature and the Judiciary. The relationship between these organs is regulated by the doctrine of separation of powers and the rule of law. Another important feature of the constitution is the Bill of Rights which is embodied in Chapter 3 of the Constitution. The Bill of Rights outlines the 16 fundamental rights and freedoms which voice the carpet values and spirit of the independent Namibian nation. Most jurisprudence post-Independence revolves around the application and interpretation of Chapter 3 of the Constitution. The Bill of Rights, is understood to have occasioned a paradigm shift in the legal landscape from a culture of parliamentary sovereignty to a rights-based philosophy. Its importance is evidenced by the fact that the rights and freedoms in Chapter 3 are entrenched.[3] Therefore, this chapter discusses the role and function of the Supreme Court of Namibia and its contribution to constitutionalism and jurisprudence in the post-independence era. The chapter also provides an overview of the chapters in this book.

1.2 THE JUDICIARY

As stated above, the Constitution, being the supreme law of Namibia, establishes the principle of separation of powers between the three organs of the State, namely the Executive, the Legislature and the Judiciary. Each organ of the State has a specific responsibility as provided for in the constitution and together they exist to promote the well-being of the inhabitants of our country.

As a custodian of the Constitution and a guarantor of the fundamental rights of all of citizens, the judiciary assumes a pivotal role in our society based on the rule of law. An impartial and independent judiciary is fundamental to our democratic way of life as it exists to uphold peace, order, equality and good governance through the application and interpretation of the constitution and laws.

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3 Article 25(1) entrenches the fundamental rights and freedoms in the following terms: "Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid […]" The proviso is not relevant to the present discussion.

Prior to the attainment of Independence and the adoption of the Constitution, which created an independent judiciary and a Supreme Court of the sovereign nation, the courts of Namibia were an extension of the judicial system of South Africa. The Administration of Justice Proclamation 21 of 1919 established the High Court of South West Africa (as Namibia was then known). The Appellate Division Act, 1920 (Act No. 12 of 1920), granted the Appellate Division of the Supreme Court of South Africa jurisdiction to adjudicate on appeals emanating from the High Court of South West Africa. By virtue of the Supreme Court Act, 1959 (Act No. 59 of 1959), the High Court of South West Africa became a division of the Supreme Court of South Africa and was renamed South West Africa division of the Supreme Court of South Africa.[4] This also meant that the jurisdiction of the Appellate Division to adjudicate upon appeals originating from the South West Africa Division had been retained.

The adoption of the Namibian Constitution in 1990 created two categories of courts in our legal system - being the Superior Courts and the Lower Courts. The Superior Courts consist of the Supreme Court and the High Court. The Lower Courts are made up of various Magistrates' Courts across the country. Unlike some other jurisdictions around the world, there is no separate Constitutional Court. Both the Supreme Court and High Court have jurisdiction to hear and adjudicate on constitutional matters.

1.3 THE SUPREME COURT

This section of the chapter outlines the composition, appointment of judges, jurisdiction, and binding nature of the Supreme Court's decisions.

(a) Composition

Article 79(1) of the Namibian Constitution provides that the Supreme Court shall consist of a Chief Justice, a Deputy-Chief Justice (who deputises the Chief Justice in the performance of his or her functions under the Constitution or any other law), and additional Judges such as the President of the Republic of Namibia may, on the recommendation of the Judicial Service Commission, appoint. Acting Judges of the Supreme Court may also be appointed by the President, on recommendation of the Judicial Service Commission, to fill casual vacancies in the court from time to time or as ad hoc appointments to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, if in the opinion of the Chief Justice it is desirable that such persons should be appointed to hear such cases by reason of their knowledge of or expertise in such matters.[5]

In terms of Article 79(2) of the Constitution, the Supreme Court is to be presided over by the Chief Justice. The Supreme Court has 3 sessions per year in which a number of cases per session are heard. Ordinarily, 3 judges constitute a quorum of

[4] Section 44 of Act 59 of 1959 and the First Schedule to it.

[5] Article 82(2) of the Namibian Constitution.

the Supreme Court. In matters of constitutional and public importance, an uneven number of more than 3 judges constitutes a quorum of the Court.

(b) Appointment of Judges

The Judicial Service Commission (JSC) is an independent and constitutionally established body charged with making recommendations for the appointment, discipline or removal from office of judges, the Ombudsman and the Prosecutor-General. All appointments of the judges to the Supreme Court are made by the President of the Republic of Namibia on the recommendation of the JSC.[6] The JSC is required to, as far as practicable, have due regard to affirmative action and the need to have a balanced structuring of judicial offices when making recommendations to the President for the appointment of persons to judicial offices.[7]

Article 85(1) of the Constitution provides for the composition of the JSC, which consists of the Chief Justice, the Deputy Chief Justice, the Attorney General, and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia.

(c) Jurisdiction

Sitting at the apex of the judicial hierarchy, the Supreme Court of Namibia is the highest court in the land. Article 79(2) of the Constitution provides for the general jurisdiction of the Supreme Court. It is primarily a court of appeal and its appellate jurisdiction covers appeals emanating from the High Court, including appeals involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder. It also sits as a court of first instance in matters referred to it by the Attorney-General.[8] The Court also has jurisdiction to deal with such other matters as may be authorised by an Act of Parliament.[9] Accordingly, section 16 of the Supreme Court Act, 1990 (Act No. 15 of 1990), confers on the court jurisdiction to review proceedings of the High Court or any lower court or any statutory administrative tribunal or authority. This review jurisdiction may be exercised *ex mero motu* whenever it comes to the notice of the Supreme Court or any Judge of the Supreme Court that an irregularity has occurred in any such proceedings notwithstanding that such proceedings are not

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6 Article 82(1) of the Namibian Constitution.

7 Section 5(1) of the Judicial Service Commission Act, 1995 (Act No.18 of 1995). The phrase “judicial offices” is defined under section 1 of the Judicial Service Commission Act as meaning “the office of the Chief Justice; the Judge-President of the High Court; a judge of the Supreme Court; a judge of the High Court; the Ombudsman and for the purposes of this Act, the Prosecutor-General.”

8 As to the recent discussion of the nature of the matters that may be referred to the Supreme Court by the Attorney-General under this Article, see *Ohorongo Cement (Pty) Ltd v Jack’s Trading CC* (SCR1-2013) [2020] NASC (19 March 2020).

9 Article 79(2) of the Namibian Constitution.

subject to an appeal or other proceedings before the Court.[10] An important limitation respecting the Court's review jurisdiction is that a person is not entitled to institute such review proceedings in the Court as a court of first instance as of right.[11]

(d) Binding nature of decisions of the Supreme Court

The judgment of a majority of the judges is the judgment of the court, but where there is no judgment to which a majority of the judges agree, the hearing must commence *de novo* before a freshly constituted court with the requisite quorum.[12] Where at any stage of the hearing of any matter in the Supreme Court a judge constituting the quorum dies or retires or otherwise becomes incapable of acting or is absent, the hearing will proceed if two or more judges remain. If only one judge remains, the hearing will be adjourned and the matter will be heard *de novo* before a freshly constituted court with the requisite quorum.[13] A Judge is at liberty to concur with the judgment of another Judge without writing his or her own judgment; or to write a concurring or dissenting judgment. Where one of the judges constituting the quorum becomes unavailable to act after the hearing but before the delivery of the judgment, the remaining judges constituting a majority of the Court may deliver a valid judgment provided that they agree on the outcome thereof.[14] If they do not agree, then the matter must be heard *de novo*.

The doctrine of *stare decisis* is recognised in the Namibian legal system. As such, decisions of the High Court bind lower courts while those of the Supreme Court are binding on all other Courts of Namibia (High Court and Lower Courts), including all persons in Namibia, unless reversed by the Supreme Court itself, or contradicted by an Act of Parliament lawfully enacted.[15]

1.4 THE CONCEPT OF CONSTITUTIONALISM

Whatever else the concept of "constitutionalism" may embody, it undoubtedly involves principles such as constitutional checks and balances, the protection of individual rights and freedoms, the establishment of a liberal democracy and the separation of powers. Its principal focus is that of a government limited by the requirements of legality and legitimacy under a constitution as the supreme law. The notion of constitutionalism serves to define what it is that "grants and guides the legitimate exercise of government authority".

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10 For an insightful exposition of how this jurisdiction may be exercised by the Court, see *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SC).

11 Ibid. See also the proviso to section 16(2) of the Supreme Court Act.

12 Section 13(1) of the Supreme Court Act.

13 Section 13(2) of the Supreme Court Act.

14 Section 13(4) of the Supreme Court Act. See also, amongst others, *Wirtz v Orford & others* 2005 NR 175 (SC).

15 Article 81 of the Namibian Constitution. As to the scope of the application of this Article, see *S v Likanyi* 2017 (3) NR 771 (SC).

The concept of "constitutionalism", as described by the political scientist and constitutional scholar, David Fellman[16], "is descriptive of a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials."[17] Professor Fellman also opines that:

> Throughout the literature dealing with modern public law and the foundations of statecraft, the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme law of the country. It may therefore be said that the hall mark of constitutionalism is the concept of limited government under a higher law.[18]

As already stated in this chapter, our State, as common with many modern states, comprises 3 branches of State, namely the Executive, the Judiciary and the Legislature. Each of these organs has its independent functions as outlined in the Constitution. Our Constitution, being the supreme law of our land and a document unlike any other, espouses values and aspirations of the people of Namibia and aims at ensuring that the evils of our history are not repeated. It is also the Constitution's object that every person in our country enjoys the fruits of a democratic state.

1.5 NAMIBIA A CONSTITUTIONAL STATE

Our Constitution as a whole makes it explicit that Namibia is a constitutional state. The Constitution provides that the key principles upon which Namibia is founded are democracy, the rule of law and justice for all.[19] The founders of our Republic established a society where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary. They accordingly resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all its citizens justice, liberty, equality and fraternity.[20] State authority is vested in the people of Namibia, but they exercise their sovereignty 'through the democratic institutions of the State.'[21] The Constitution is the fundamental law of our Republic[22] and all other laws must conform to it. All administrative bodies and administrative officials are enjoined to act fairly and reasonably and to comply with

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16 In PP Wiener (ed.) (1973) *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas.* Charles Scribner's Sons, Vol. 1, 485.
17 Ibid.
18 Ibid.
19 Preamble to the Constitution.
20 Preamble to the Constitution.
21 Article 1(2) of the Constitution.
22 Ibid.

the requirements imposed upon them by common law and legislation. Persons aggrieved by decisions and the exercise of the acts of officials have the right to seek redress before a competent court or tribunal.[23] This is the key Article in the Constitution providing for administrative justice.

Article 78 of our Constitution vests the power to administer justice in the judiciary. In sub-Article (3), it guarantees the independence of the judiciary by providing that:

> No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.

As noted above, Article 81 specifically accords judgments of the Supreme Court of Namibia special binding power in that "[…] 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".

These constitutional provisions were recited to highlight that Namibia undoubtedly is a constitutional state and whatever decisions the courts make in the cases that come before them, are really those that give content to the provisions of the Constitution and ensure that the rights and obligations set out therein are given content. The end result is the development of the concept and culture of constitutionalism. The Constitution itself and legislation set out the parameters under which such rights and freedoms should be exercised, enjoyed or enforced. Doubtless, the task of developing the concept and culture of constitutionalism is an onerous one and is not to be taken lightly by any judicial officer. In exercising this function, many judgments dealing with diverse subject matters have been delivered by our courts exemplifying the courts' commitment to the Constitution and constitutionalism.

1.6 THE NAMIBIAN JUDICIARY'S CONTRIBUTION TO CONSTITUTIONALISM AND THE RULE OF LAW

The High Court of Namibia was at the forefront of the development constitutionalism. This task commenced well before Independence. The pioneering work undertaken by the High Court's constitutional predecessor, the Supreme Court of South West Africa, has formed building blocks for the development of our constitutional jurisprudence. Therefore, although this book is primarily on the Supreme Court's contribution to constitutionalism and the rule of law in independent Namibia, I feel constrained by the reason of posterity to record and acknowledge the sterling

[23] Article 18 of the Constitution.

contribution the Supreme Court of South West Africa has made to constitutionalism, particularly during the decade leading to Independence and also to record some of the seminal contributions by our High Court after Independence. The judiciary's contribution to a justiciable Bill of Rights and the promotion of a human rights discourse generally before Independence are aspects that have hitherto not received much recognition or acclaim. It is apposite, therefore, to commence the discussion of the courts' contribution to constitutionalism by examining the work of the High Court, starting with the work done by its constitutional predecessor before Independence.

(a) Contribution by the South West Africa division of the Supreme Court of South Africa before Independence

Perhaps the first steps by the judiciary in Namibia to establish the concept and culture of constitutionalism within the broader matrix of a structured instrument of human rights were taken during what may rightly be referred to as a period of judicial activism in the 5 years immediately preceding Namibia's Independence. Tentative, as they may now appear, those steps were most significant – taken at a time when even the subject index of the law reports in South Africa had no section dealing with "human rights" or constitutional law.

It is now part of the legislative history of this country that a "Bill of Fundamental Rights and Objectives" was enacted as an annexure to Proclamation R101 of 1985. Its purpose was to curb the powers of the then National Assembly, a legislative body created by the Proclamation as a limited form of self-government under South African colonial rule. Notwithstanding the limited scope of its application, the Bill of Rights created, for the first time in our history, a constitutional template of recognised fundamental rights against which the legality of enactments by a particular legislature could be judicially reviewed.

The judges of the then Supreme Court of South West Africa (the constitutional predecessor of what is now known as the High Court of Namibia) soon used the provisions of this Bill of Fundamental Rights and Objectives to strike down the provisions of section 2(1)(a) of the Terrorism Act 83 of 1967, in *Heita's* case.[24] With this as basis, they ordered the release of a detainee held without trial under security legislation (the then notorious Proc AG 26 of 1978) from arrest and detention in *Katofa's* case.[25] They declared section 9 of the Residence of Certain Persons in South West Africa Regulation Act 33 of 1985 to be unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights in the cases of *Eins*[26] and *Chikane*.[27] They struck down provisions of section 2(1) of Act

24 *S v Heita & others* 1987 (1) SA 311 (SWA).

25 *Administrator-General for South West Africa and another v Katofa* 1986 (1) SA 800 (SWA).

26 The facts and holding of the Supreme Court of South West Africa were recounted in the appeal judgment in *Cabinet for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A).

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

16 of 1988 which inhibited the right to freedom of expression at public meetings in the *Nanso*[28] case. Although some of these cases have been overruled by the then Appellate Division of the Supreme Court in South Africa, the learned judges of the then Supreme Court of South West Africa demonstrated a clear commitment to constrain the exercise of legislative power by reference to a Bill of Rights.

Moreover, in what is perhaps one of that court's most important decisions within the context of judicial constitutionalism, it unanimously condemned legislation earlier enacted to create separate representative authorities for 11 so-called "population groups" as being contrary to the Bill of Fundamental Rights.[29] This notorious piece of legislation, the Representative Authorities Proclamation AG 8 of 1980, was politically proffered to be a reflection of the "will" of the people of South West Africa after the Turnhalle conference and the 1978 - elections in which, as is well-known, the current governing party had no part in. Scrutinised at the request of the then interim government, the Full Bench of that Court - of which two later became Chief Justices[30] of our Supreme Court were part of - unanimously held that the rights and privileges of the "population groups" however constituted, were unequal and discriminatory; and that the provisions of the Proclamation were in conflict with some of the articles of the Bill of Rights, in particular the right to equality and non-discrimination.

This finding, based on the very provisions of the enactment on which the South African Government sought to allow a limited form of self-government, judicially exposed that the claim of "separate but equal" form of localised government was nothing but an indefensible ruse for discriminatory practices under the veil of legality. It judicially sounded the death knell for the unsustainable and indefensible practices and policies of apartheid and discrimination. After that judgment, there was simply no basis on which – even the government of the time - could morally or politically defend those structures. The implications of the judgment were far reaching and, in a sense, laid a judicial groundwork for the road to Independence.

Under a limited Bill of Rights, the Supreme Court of South West Africa, the predecessor of the High Court of Namibia, made a significant contribution, under trying circumstances, towards constitutionalism and a human rights culture in the country. Seminal decisions of that Court served as precedent and building blocks during the formative years of our jurisprudence after Independence. That era epitomises the true personal independence of the judges who served at the time and their commitment to the rule of law and constitutionalism. That courage and commitment have served as a source of inspiration to all of us in the judiciary.

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[28] *Namibia National Students' Association & others v Speaker of the National Assembly for South West Africa & others* 1990 (1) SA 617 (SWA).

[29] 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 (RSA)* 1988 (2) 832 (SWA).

[30] Chief Justices Hans Berker and Johan Strydom.

(b) Contribution of the High Court of Namibia

The High Court was at the forefront of developing the culture and concept of constitutionalism in Namibia. It has interpreted the constitution in such a way that it is truly a living document ensuring the enjoyment of individual rights and freedoms by citizens and other persons living in Namibia. As we have seen before, this culture of constitutionalism developed a decade before Independence and continued to date. The High Court has made a significant contribution to the interpretation of the constitution and constitutionalism. Some of the cases in which this contribution was made are highlighted below. Presented with the new constitution with a comprehensive Bill of Rights, the earlier High Court judgments sought to give content to the provisions of the Bill of Rights. In *Mwandingi,*[31] the High Court had to grapple with the question whether the new State of Namibia was liable to compensate the respondent in respect of delicts allegedly perpetrated by servants of the previous administration at a time when that administration controlled Namibia. It was contended on behalf of the Minister of Defence inter alia, that there was a presumption that reference in any law to any action or conduct was presumed to be a reference to a lawful or valid action. As a delict constituted wrongful conduct, therefore, the words "anything done under such laws […]" in Article 140(3) of the Namibian Constitution did not include wrongs committed by the previous Government. It was further contended that Article 140(3) did not operate retrospectively and therefore did not affect pending proceedings. The court rejected these submissions, reasoning that Article 140(3) was couched in the widest possible terms and that the words "anything done", when used in an instrument such as the Constitution should be given their general meaning, without limiting them to anything "lawfully" done. Accordingly, read in the context of the Constitution as a whole, Article 140(3) had not only accomplished a complete transfer of powers from the previous Government but also signalled an acceptance by the new Government of all that had previously been done under the laws in force immediately prior to Independence, which included the delict committed against Mr Mwandingi.

Other subject matters dealt with by the High Court are varied and cover such diverse areas as the right to the dignity of prisoners so that they are not subject to leg irons when appearing in court;[32] the right for accused persons to be presented with contents of dockets;[33] the rights of persons living with HIV/AIDS;[34] the rights of foreigners to adopt minor Namibian children;[35] discriminatory common law rules prohibiting children born out of wedlock from inheriting by intestate succession;[36]

31 *Mwandingi v Minister of Defence* 1990 NR 363 (HC).
32 Reported on appeal as *Namundjepo & others v Commanding Officer, Windhoek Central Prison & another* 1999 NR 271 (SC).
33 *S v Nassar* 1994 NR 233 (HC).
34 *Nanditume v Minister of Defence* 2000 NR 103 (LC).
35 *NS v RH* 2011 NR (2) 486 (HC).
36 *Frans v Paschke* & others 2007 (2) NR 520 (HC).

the imprisonment of civil debtors;[37] the right of members of the Police Force to make unfavourable comments in public on the administration of the force.[38]

(c) Contribution of the Supreme Court

As the contribution of the Supreme Court is highlighted in the next chapters of this book, it is apposite to simply mention in passing some of the judgments of the Court that contributed to the development of constitutionalism and the country's jurisprudence. As the court of last instance, the Supreme Court considers that it is under a duty of ensuring that judgments delivered by it are just and constitutionally validated.

The *ex parte* application by the Attorney-General[39] to the Supreme Court to interpret and clarify the relationship between the Attorney-General and the Prosecutor-General, illustrates an imperative function of the judiciary, namely interpreting the constitution and legislation in order to test the latter against the former. The judgment establishes important principles for interpreting the constitution of which the following is of special relevance to the topic under discussion:

> In a constitutional State the government is constrained by the constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. There are structural limitations and procedural guarantees that limit the exercise of state power. "It means in a single phrase immortalised in 1656 by James Harrington in The Commonwealth of Oceana […] 'a government of laws and not of men'".

In this leading case, the main issues were whether, by virtue of the provisions of Article 87 of the constitution, which affords the Attorney-General the final responsibility for the Office of the Prosecutor-General, the Attorney-General had the authority to:

i) Instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any manner;
ii) Instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;

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37 *Julius v Commanding Officer Windhoek Prison & others; Nel v Commanding Officer Windhoek Central Prison & others* 1996 NR 390 (HC).

38 *Kauesa v Minister of Home Affairs & others* 1994 NR 102 (HC).

39 *Ex Parte Attorney-General In re: The relationship between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC).

iii) Require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal prosecutorial authority.

It is not necessary to recite the entire case as its facts and the principles stated therein are well-known. It suffices to observe that the Supreme Court decided that since the Office of the Prosecutor-General was independent, according to the Constitution of Namibia, the final responsibility referred to in Article 87 must be interpreted in a manner that achieves the purpose of the Constitution. Furthermore, although reference was made to constitutions of other jurisdictions the Court noted that these constitutions were all different and that the provisions, of the Namibian Constitution were the ultimate source of reference, and for purposes of comparative study, those constitutions with the same wording could be considered subject to the principles and values of our constitution. Therefore, the Supreme Court held that, "final responsibility" meant only financial responsibility for the Office of the Prosecutor-General and the duty of the latter was to account to the President, Executive and the Legislature. Thus, the third question above was answered in the affirmative but the first two in the negative.

Another case, in which the Supreme Court was confronted with the task of testing legislation against the Constitution, is *Africa Personnel Services*.[40] Briefly, the issues in this case boiled down to one core question, namely, whether the prohibition of labour hire in terms of section 128 of the Labour Act, 2007 (Act No. 11 of 2007) (the Labour Act) contravened Article 21(1)(j) of the Constitution. In this detailed judgment, numerous arguments were considered and reasons given for the finding that the prohibition of labour hire was in contravention of Article 21(1)(j) of the Constitution.

The *Rally for Democracy and Progress* case[41] provides us with another epic example of the judicial climate in our country. This case revolved around the disputed results of the Presidential and National Assembly election as contemplated by the then applicable Electoral Act, 1992 (Act No. 24 of 1992) conducted on 27 and 28 November 2009. The appellants' application in the High Court was filed one hour and thirty minutes late, following which the respondents raised a point *in limine*, seeking to dismiss the application, which the High Court upheld. On appeal the Supreme Court held, *inter alia*, that the exceptional circumstances of this case justified the Registrar's decision to accept the documents late. The matter was referred back to the High Court for adjudication as that Court was in a better position to do so. This judgment was effectively respected by all parties involved.

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40 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others* 2009 (2) NR 596 (SC).

41 *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC).

The above case illustrates respect for Court decisions and dedication to acting to carrying out said decisions, by citizens, State institutions and political parties. This is something we, as a nation, can pride ourselves on, as it, amongst other things, contributes to a constitutional and peaceful country.

Another important case decided by the Supreme Court is *Ex parte Attorney-General in re: Corporal punishment.*[42] In this case the Supreme Court illustrated the vigour with which our courts should protect human rights in the following ringing terms:

> The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.[43]

Namibia's Constitution provides protection even to the rights of accused persons, and accordingly our courts have a duty to protect these rights. In *Mwilima*[44], our courts were faced with a very controversial issue. The core issue in this particular application brought before the Supreme Court was whether the first appellant was under a legal duty to provide legal aid to the respondents in this case. The Supreme Court held that the complexity of the case required that they be legally represented and that the Government had to provide such representation, since "those applicants who could not afford legal representation would not have a fair trial as guaranteed by the provisions of Article 12 of the Constitution: as there was a duty upon the first appellant [the Government] to uphold the provisions of the Constitution,"[45] Following this judgment, legal representation was provided by the Government to the accused persons in that trial. This case is still ongoing[46] and legal representation is to date afforded to the remaining accused persons. The Government followed the judgment because it is indeed in line with our constitution: yet another example of courts ensuring that our Constitution is upheld at all costs. It thus, can be respectfully accepted, that the judiciary makes its principal contribution to the development of constitutionalism in Namibia through the exercise of its constitutionally assigned responsibilities.

Although the judiciary and government at large must be commended for the progress made in protecting and upholding the constitution, there is always room for improvement and many shortcomings which have to be addressed. One such shortcoming is the delay in the administration of justice. This, in itself, goes contrary

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42 *Ex parte Attorney-General in re: Corporal Punishment by Organs of State* 1991 NR 178 (SC).

43 Ibid, 179.

44 *Government of Namibia & others v Mwilima & all other accused persons in the Caprivi Treason Trial* 2002 NR 235 (SC).

45 *Mwilima* case (Note 44 above) 264B.

46 An appeal was pending in the Supreme Court at the time of writing.

to the rights guaranteed under Namibia's Constitution. Initiatives have been taken in response to the genuine concerns raised about the areas in which judicial performance should improve and a lot of progress has been made in this regard.

The High Court has introduced case management and electronic filing systems which endeavour, amongst other things, to speed up the process of litigation. The idea is ultimately to roll out the system to all the courts in the country. Members of the judiciary are also committed to ensuring that this blot on the proud record of judicial performance and independence is nipped in the bud. This is our personal commitment.

1.7 CONCLUSION

After a long era of apartheid and many struggles, our country's men and women have fought for and earned our freedom; we have taken back our rightful position as owners of this country. We do, however, now have the sacred responsibility of ensuring that the past never repeats itself and this can be achieved by vigorously and sincerely protecting our constitutional dispensation and always acknowledging areas in need of improvement and striving, wholeheartedly, to address them appropriately. There can be no room for complacency.

The judiciary is dedicated to this task and we can pride ourselves in the progress we have made in the contribution towards the development of the concept and culture of constitutionalism in our democracy. The judiciary's contribution to constitutionalism and jurisprudence is self-evident in many judgments surveyed in this book.

1.8 OVERVIEW OF CHAPTERS

In Chapter 1, Chief Justice Peter S. Shivute reflects on the 30 years of the judiciary in post-independence Namibia. He outlines that after a long era of apartheid and many struggles, Namibia's men and women have fought for and earned our freedom; Namibians have taken back their rightful position as owners of the country. However, Chief Justice Shivute, emphasises that there is a sacred responsibility (especially on the part of the judiciary) of ensuring that the ugly side of the past never repeats itself and this can be achieved by vigorously and sincerely protecting Namibia's constitutional dispensation and always acknowledging areas in need of improvement and striving, wholeheartedly, to address them appropriately. There can be no room for complacency. The judiciary is dedicated to this task and Namibians can pride themselves in the progress made in the contribution towards the development of the concept and culture of constitutionalism in the country's democracy. The judiciary's contribution to constitutionalism and jurisprudence is self-evident in many judgments surveyed in this book.

In Chapter 2, Yvonne Dausab and Kelvin Vries contribute to the ongoing debate about whether transformative constitutionalism is compatible with the African context in general and the Namibian context in particular. This is achieved through an analysis of transformative constitutions and constitutionalism in their own right, followed by what they connote when yielded together as 'transformative constitutionalism'. In comparison with the South African Constitution, the chapter finds that the preamble and content of the Namibian Constitution makes it transformative in nature. This status alters the normative framework of constitutionalism and as such, transformative constitutionalism deviates from the traditional practice of constitutionalism - as imported by western forces. In this way, transformative constitutionalism can be seen as complimentary to the decolonisation project and therefore, compatible with the African context. The chapter hopes to be a reflection on the extent to which the Supreme Court has broken ties with the previous order and has since embraced transformative constitutionalism. Against the odds, the Supreme Court in the first decade after independence moved away from a culture of authority and furnished a culture of justification. This new approach was not always appreciated in the following decade, with judgments that resurrected ideologies of the old legal order. Today, Courts are at cross-roads between consolidating traditional notions of constitutionalism or embracing the Constitution's transformative nature. The Chapter concludes with recommendations for ways in which Judges can best uphold their mandate as the guardians of the Namibian Constitution - its values, its aspirations and its people.

In Chapter 3, Ndjodi Ndeunyema argues that the Namibian Supreme Court, as the apex court in the national judicial hierarchy, plays a central role in the project of constitutional development. This mandate is exercised principally through judicial interpretation in the resolution of legal disputes. This therefore, renders the Namibian Supreme Court as the principal interpreter of the meaning and scope of the provisions of the Namibian Constitution. Ndeunyema proceeds to point out that absent from the Constitution is an express internal interpretative clause, whether general or specific, to the Bill of Rights provisions. The author thus adopts an eclectic methodology and considers the predominate trio of theoretical approaches to constitutional interpretation: original intent, textualism and purposivism. This analysis principally locates itself within the Constitutional human rights jurisprudence of the Supreme Court and also references High Court decisions of seminal importance. These decisions were evaluated with the aid of scholarly literature that examines the various interpretative approaches. He concludes that through the use of the purposive interpretation method, the Supreme Court has offered a durable framework for constitutional interpretation, especially given that the Constitution drafters omitted to incorporate provisions that would guide the interpreter.

In Chapter 4, Kennedy Kariseb argues that comparative (foreign case) law has for quite obvious reasons informed the jurisprudence of the Supreme Court of Namibia. This is no surprise given the fact that more and more consideration

of foreign decisions is becoming standard practice for courts all over the world, so much so that one can say that it has become an inherent part of judicial practice. He points out that the determinants leading to this reality are not only obvious but are equally kilometric. To elaborate this with reference to Namibia, the mechanical and historical linkages between (Roman-Dutch) common law jurisdictions; the legal duty placed on the Supreme Court as the highest court that can make pronouncements on cases, especially cases of first impression; Namibia's constitutional values which resemble universal human rights principles; its history and birth out of the efforts of the international community; globalisation and the swift paradigm shift towards the harmonisation of laws generally, all make a compelling case for reliance on foreign jurisprudence. Kariseb concludes the chapter by pointing out that there are persuasive arguments on either side of the board for relying on foreign case law in Namibia. This makes the choice of either reinforcing or rejecting comparative foreign case law extremely difficult. Nevertheless, there are at least two possibilities to this challenge, one of which is a position based on a radical and confrontational approach that suggests that nothing good can come from foreign law given its formative colonial or alien roots. Such an exclusionary approach presupposes that foreign law is colonial in nature and is distinct from domestic (African) systems. Accordingly, its application would reinvent the wheels of colonialism, distort traditional African conceptions of law and depreciate peculiar municipal circumstances and contexts. As such, African courts, especially Namibian courts, should exclusively rely on domestic legal case law and material in developing its jurisprudence as this will remedy the historical imbalances brought about by the colonial past.

In Chapter 5, Stefan Schulz and Ngutjiua Hijarunguru argue that there is no room for any unfettered legislative authority shooting from the hip whenever dissatisfied with the constitutional law constructed by the Supreme Court. Otherwise, as they further contend, the Supreme Court's judicial review powers would become meaningless; the rule of law would be reduced to a lofty ideal and parliamentary sovereignty reintroduced through the backdoor. There is however, also no room for an apex court to overstep the boundaries between judicial politics and ordinary politics. The 'last say', which in constitutionalism, is ironically always also the first say, has been reserved for the original constitutional power, in French constitutionalism: pouvoir constituant originaire - the only true constitutional power. But this power does not vest in an ordinary parliament, nor in its capacity as constitutional legislator.

In Chapter 6, Dunia Prince Zongwe and Bernhard Tjatjara argue that the right to human dignity has had a tangible impact on development in Namibia. In this chapter, the authors sought to measure the scale of the transformation brought by the recognition of the right to dignity by reviewing the Supreme Court's jurisprudence relating to that right since independence. Their review revealed a clear commitment from the country's highest court to implement the right to dignity and human rights in general. In other words, the Supreme Court has emphasised the transformative role of the Namibian Constitution, as enshrined in the clear

mandate it gives lawmakers to redress the injustices of the past and the one it gives to courts to implement the laws, the Constitution, and human rights, including human dignity.

In Chapter 7, Samuel Kwesi Amoo argues that jurisprudential theories on the nature and function of law almost invariably deal with the relationship between theories of law and the legal process. In other words, hypotheses on law are meant to be utilised as tools to analyse law towards a better understanding of the law and the legal system. The task of unravelling and understanding the nature of law is an enterprise that encompasses the application of legal theories to the entire legal process including judicial process and the promulgation of the law. Judicial decisions and judgments are not determined by only a strict interpretation of application of the positive law but they are also influenced by factors outside the law including ideological factors which are frequently implicit rather than openly avowed; a phenomenon descried by Justice Oliver Wendell Holmes as "inarticulate major premises". Amoo concludes that the jurisprudence of the Superior Courts of Namibia has been greatly influenced by both the pre- and post-independence historical and constitutional development of Namibia. The pre-independence jurisprudence of both the South African and Namibian superior courts especially on issues relating to human rights was greatly determined by adherence to the dictates of parliamentary supremacy and analytical positivism.

In Chapter 8, Lotta N. Ambunda-Nashilundo and Gita K. Keshava discuss the decision by the Supreme Court of Namibia in the *State v Gaingob 2018 (1) NR 211(SC)* case in so far as life imprisonment is concerned. The authors point out that precedents from the Supreme Court are binding on all courts, unless reversed by the court itself. Ambunda-Nashilundo and Keshava point out that a trial court exercises a discretion during the sentencing of a convict. Factors such as the type and seriousness of the crime, the circumstances of the offender and the interest of society are considered in formulating an appropriate sentence. The landmark decision by the Supreme Court in the case of *Gaingob* determined that although it is in the trial court's discretion to impose an appropriate sentence, an inordinately long term of imprisonment which 'takes away all hope of release' from an offender is unconstitutional and against the inherent right to dignity afforded to an accused by the Constitution. The Supreme Court aligned itself with the judgment of *S v Tcoeib* 1999 NR 24 (SC) in reiterating that after the abolition of the death penalty in 1990, a sentence of life imprisonment is the most severe form of punishment a Court can impose in deserving cases. This chapter looks at the general principles on sentencing and how they have been applied by the Namibian Courts. Specifically, the chapter examines the effect of the Supreme Court judgment on the sentencing discretion of a trial court and what effect the judgment has on offenders already sentenced to inordinate long sentences. Life imprisonment is therefore the preferred sentence where the circumstances of the case would justify the removal of the offender from society for a considerable time because society legitimately needs to be protected against the risk of a repetition of such conduct or because the

offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation. The authors plausibly conclude that in setting aside and substituting the sentences with life imprisonment, the Supreme Court created more visible hope to the offenders of being released in terms of section 115 of the Correctional Service Act, 9 of 2012.

In Chapter 9, Masake Pilisano argues that there are a series of lessons that can be learnt from the past three decades of the Namibian jurisprudence. In this chapter, Masake demonstrates that the accountability of transnational corporations for transnational crimes is recognised in Namibia. However, up to date, the Supreme Court in Namibia is yet to be seized with an opportunity to adjudicate over transnational corporations for international crimes. This is notwithstanding the fact that there was a rebellion attack that was directed at the unarmed civilian and government installations in the former Caprivi region. These events, though condemned, presented Namibia's judiciary with an opportunity to prosecute and punish perpetrators of international crimes as well as the possibility of extending investigations on the role played by corporations.

In Chapter 10, Boniface S. Konga demonstrates that religious freedom is important in democratic societies as it enhances other rights - among them the right to liberty and dignity. However, Konga contends that democracy does not entail that harmful religious practices should be accepted, hence the limitation clause in the Constitution. Allowing harmful religious practices to flourish in a democratic state would imply that the state has failed to uphold its constitutional duty of protecting rights and values so dear to many. He concludes the chapter by pointing out that the enjoyment of true democracy of which Namibia is founded, requires enforceable guarantees to ensure general freedom, one of them being the right to religion.

In Chapter 11, Felicity !Owoses argues that judicial law-making is justified by scholars and practiced by the judges of the Supreme Court of Namibia. Others view it as a breach of separation of powers. The Supreme Court in the exercise of judicial discretion under article 25(1) of the Namibian Constitution, in some cases chose to declare statute law invalid and in other cases chose to save statute law by applying the remedial measures of severance; and reading in to cure the invalid statute, or chose to read down a statute to conform to the Constitution. The principles of democracy and the rule of law mandate the Supreme Court of Namibia to develop a consistent and coherent system of constitutional law, and justify their arguments. This chapter explores the approach of the Supreme Court to statute law during constitutional review. The aim is to advocate for a systematic approach to constitutional review.

In Chapter 12, Marvin Awarab assesses the extent to which the Namibian Constitution affords protection to the freedom of trade in Namibia. The chapter sought to decisively evaluate the permissible restrictions placed upon the right to freedom of trade which is constitutionally guaranteed. The Constitution of Namibia

includes a host of fundamental rights and freedoms in its Bill of Rights. These fundamental rights and freedoms as enshrined in the Bill of Rights may be subject to limitation and/or derogation. The Supreme Court as a court of law has a mandate to promote and ensure the effective enforcement of constitutionally guaranteed rights and freedoms. Namibia is a developing country which is faced by socio-economic challenges. In addressing these socio-economic challenges, the State is required to play an active role in encouraging trade in the country. Therefore, in assessing the constitutionality of restraint of trade contracts by looking at the right to freedom of trade as guaranteed under the Bill of Rights, the author also refers to the principles of State policies as included in Chapter 11 of the Constitution. Article 95 is of particular importance in the discussion of this chapter as it is aimed at promoting people's welfare. The enforcement of restraint of trade contracts may be seen as going contrary to the freedom of trade because such contracts may negate the object of promoting people's welfare as it prevents free trade. Although Article 95 principles are not enforceable on their own; the proper enforcement and implementation of such principles will be possible if a correlation is made between Chapter 3 rights and Article 95 principles through purposive interpretation of the Constitution and/or judicial activism. The Supreme Court as seen in this chapter has on numerous occasions pronounced itself on the application of principles of state policy to enforce socio-economic rights guaranteed by the Constitution, and one of such rights being the right to free trade. This chapter investigated the constitutionality or otherwise of restraint of trade contracts.

In Chapter 13, John Baloro and Phillipus Balhao argue that litigants who fail or neglect to follow the procedure of the court as set out in the rules of the court must seek condonation to remedy their non-compliance. In this chapter, Baloro and Balhao scrutinised the practice of the Supreme Court regarding condonation applications. The legal principles governing condonation applications in the Supreme Court as laid down in case law have been examined. Tendencies have also been identified relating to various factors of condonation applications in the Supreme Court by means of a basic statistical analysis. Data was collected from reported and unreported judgments of the Supreme Court. The authors conclude that the Supreme Court of Namibia has been flexible in its approach towards condonation applications. Furthermore, the Supreme Court has readily laid down legal principles regarding condonation applications to guide litigants and lower courts.

In Chapter 14, Eugene Libebe and Tapiwa Victor Warikandwa point out that whilst the tort or delict of malicious prosecution provides redress for those prosecuted without cause, it is however, notoriously difficult to prove because of the requirements on the claimant. The Supreme Court's approach, like in most of the commonwealth, seems to carefully guide the action for malicious prosecution than any other law of tort, hence the number of unsuccessful actions. This raises questions whether the threshold for proving malicious prosecution is very high and perhaps untenable. The law with regards to malicious prosecution in Namibia, can now only be preferable

for the claimant and his/her legal representative to explore other remedies before delving into the difficulties of an action for malicious prosecution. Whereas, the Supreme Court was reluctant to stretch its hand and develop the common law on malicious prosecution in a constitutional dispensation, it will also be interesting to see the development of jurisprudence on constitutional damages in *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa (SA-2017/7) [2019] NASC 2 (28 February 2019)* and the other similar treason trial cases. The authors conclude that further research should examine whether there is a need to develop the common law on malicious prosecution in Namibia as was envisaged in the High Court judgment of *Mahupelo v Minister of Safety and Security and Others*.

In Chapter 15, Mariette Hanekom argues that the Namibian Constitution expressly protects the right to freedom of speech and expression, including that of the media, as a fundamental freedom. However, it also states that this right must be exercised subject to the reasonable restrictions imposed by the law of defamation (a person's right to a good name, protected by the similarly guaranteed right to dignity). This chapter examines the post-independence judicial approach to striking a balance between the right of freedom of speech and expression of the media on the one hand, and the right to dignity (and the right not to be defamed) on the other hand. Although very few defamation claims end up in court (the majority are either settled or die a silent death), there have been some judgements handed down, which allowed the Courts to test pre-independence legal approaches against the freedom of expression (including the freedom of expression of the media) required in a constitutional dispensation. The law of defamation inherited by Namibia at the time of Independence tended to favour the aggrieved individual at the expense of the media, and initially the courts seemed reluctant to change this.

In Chapter 16, Tapiwa Victor Warikandwa and Eugine Libebe advance a strong case for African countries to rethink their reliance on comparative law, with particular reference to third party claims on adultery. It is evident that comparative law has largely been employed as a tool for advancing social engineering in pursuit of western imperialist agendas. African countries have lost their identities and value systems through employing foreign legal systems to regulate their societies. Decolonisation has failed to take place as African economies are still regulated through western laws. It is therefore imperative that reliance on comparative law be reviewed in African law schools, in legal practice, in courts and any other relevant legal institutions. If at all comparative law must continue to be relied upon, it is proposed that it be done within the African context. Such comparative study must focus on, 1) studying how transplanted foreign laws in Africa have negatively impacted on Africa's development; and 2) evaluating how to integrate African Customary Law in Africa's legal system. To achieve this objective, African scholars must be encouraged to publish rigorously, advancing the Pan-African Law Agenda from a scientific perspective. Pan-African comparative law must thus be made a mandatory part of every African law school's curriculum as part of the decolonisation agenda. Legal academic literature must also be relevant to the African context as

opposed to the current curriculum in which legal textbooks are written in Europe for use in Africa. However, this approach only serves to promote imperialist agendas and undermine Africans' developmental goals.

In chapter 17, Leonard Tjiveze and Tapiwa Victor Warikandwa point out that citizenship is an important concept because with it comes a lot of benefits and an extension of rights that would otherwise not be enjoyable without being a citizen of a specific country. The concept of citizenship describes the state of being a member of a political community. This includes owing allegiance to the community and being entitled to enjoy all the protections and rights flowing therefrom. Tjiveze and Warikandwa also point out that the lack of a concise and articulate definition of the words ordinarily resident in the Namibian Constitution and statutes has left its application of the provisions with those words to the discretion of the administrative personnel of the relevant bodies, which if one is aggrieved by it, may seek redress in a competent court of law as stated in the Namibian Constitution. Underpining the authors' arguments is the realisation that it is not possible to speak of the evolution and development of almost any aspect of Namibian life without referring to the bitter past of colonialism and apartheid from where most of Namibia's legal systems have been inherited. The laws were based on racial segregation and the applicability of the citizenship laws would later be found to be against the new world order where all persons are to be equal. This leaves the legal fraternity as no exception to the dents and perhaps some polishing of the development of laws, for instance, citizenship laws as discussed in the chapter.

In Chapter 18, Dennis U. Zaire points out that on 21 March 2020, Namibia celebrated 30 years of independence. During this time, the country managed to conduct 26 elections at national and sub-national level, which included Six Presidential and Six National Assembly elections. Generally, elections in Namibia are conducted in an atmosphere of peace and stability and are largely free from violence. Elections results of the majority of these elections have been accepted by the majority of stakeholders over the years as legitimate, credible and representing the wishes of the majority of the Namibian people. Since independence, elections have been lauded and declared as 'free and fair' by local, regional and international observers. However, some stakeholders, which include certain opposition parties, refer to (some) previous elections in the country as 'unfair' and this has triggered public debate on the future of the country. This includes the 2004 and 2009 Presidential and National Assembly elections. Controversy on the fairness or lack thereof of elections results ended in a number of elections disputes being contested in the courts. The highest court of appeal in the country, the Supreme Court of Namibia (SC), delivered judgements in the appeal submitted to the court in elections disputes. This chapter discusses how the SC has dealt with these disputes, how its judgments in electoral matters reflect on the court, and if the nature of its decisions, thus far, instil confidence in the independence of the highest court of appeal in the land. The chapter asserts that the SC, thus far in its judgments, held on to the *status quo* and avoided rocking *the political boat*, all in the name of peace and political stability in Namibia. As a result, the court may have avoided providing

clear and unequivocal directions on elections matters which could help with a clear interpretation of future disputes. Thus, the court is likely to entertain more disputes on elections matters in future as more clarity will be sought by contesting parties.

In Chapter 19, Kelvin C. Vries argues that Namibian courts have held that constitutional adjudication requires value-based judgments to be articulated based on the values, norms and aspirations of the Namibian people. Using a legal anthropological approach, the chapter identifies constitutional, political and cultural indicators that demonstrate how Ubuntu can be construed as a Namibian value, norm and aspiration. Moreover, it argues how the elevation of Ubuntu to a constitutional value (as has been done in South Africa) achieves two goals. First, it allows us to cultivate a truly egalitarian society in which inherent humanity and the equal worth of every human being is recognised. This is especially crucial on a continent where Africans have been historically and systematically dehumanised and discriminated against. Second, the chapter argues that Ubuntu provides the best or at least a better interpretation of the right to the equality of minorities in Namibia. Ubuntu's emphasis on humanity, compassion, well-being and equal dignity makes it the ideal value to protect minorities with the force required by the egalitarian aspirations of the Namibian Constitution. The Court's current approach to equality jurisprudence leaves much to desire, especially with respect to two minority groups namely, HIV positive persons and sexual orientation minorities. In two separate cases, the Supreme Court has hesitated to invoke the equality clause to protect these two minority groups against discrimination in cases that necessitated such protection. By interpreting these two cases in light of Ubuntu, the chapter goes beyond the mere theorising of Ubuntu but also showcases its practical application in constitutional adjudication. By recognising the humanity of individuals through their community, Ubuntu provides an opportunity for a revolutionary interpretation of equality and inclusiveness not only in Namibia but possibly in the whole of Africa.

CHAPTER 2

Transformative Constitutionalism in the Apex Court of Namibia: A Reflection of 30 Years of Jurisprudence

Yvonne Dausab and Kelvin Vries

2.1 INTRODUCTION

An appreciation of transformative constitutionalism requires a rich understanding of the evolution of constitutionalism in Africa as a tool to realise the developmental agenda and set apace the decolonisation project. Shortly after the coming into effect of the Namibian Constitution and during the negotiations for the democratisation of South Africa, Africa was experiencing a wave of democratisation following the collapse of the Soviet Union.[1] “There was a growing concern on the abilities of western liberal constitutional models to meet the peculiar needs of African situations characterised by widespread poverty, underdevelopment, wide ethnic and cultural diversity as well as African communitarian orientation”.[2] In addition, there was also a declining dominance of liberalism and a corresponding rise in social democracy or liberal egalitarianism.[3]

In the new wave of constitutionalism, organs of state were now required to be active participants in the emancipation of previously marginalised groups and restoring the socio-economic imbalance which had been skewed by centuries of oppression. As such, the traditional notions of constitutionalism became incompatible with the robust aspirations of African societies. Transformative constitutionalism was particularly lucrative for the South African and Namibian contexts because of its logic founded on “the assumption of the potential for law to resolve the legacies of colonialism and apartheid.”[4]

Since transformative constitutionalism has been described as “an ideal model to anchor constitutionalism and respect for human rights in Africa”[5], this chapter clarifies the extent to which this rings true for the Namibian context. In essence, it is a useful tool for South African human rights jurisprudence yet critics remain suspicious especially of its supposed use as a tool of decolonisation. There is

1 E Kibet & C Fombad (2017) “Transformative constitutionalism and the adjudication of constitutional rights in Africa” Vol. 17 *African Human Rights Journal* 349.
2 Ibid.
3 H Klug (2000) *Constituting democracy: Law, globalism and South Africa’s political reconstruction*. Cambridge University Press: Cambridge.
4 I Shai (2019) “The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections” Vol. 19 *African Human Rights Law Journal* 502.
5 Kibet & Fombad (Note 1 above) 341.

indeed ongoing debate about the applicability of transformative constitutionalism for the African context. Kibet and Fombad go as far as ranking transformative constitutionalism as a potential “antidote for past failures”[6], while Zongwe describes it as a “Trojan Horse designed to introduce into South Africa an ideological project driven by a group of influential theorists in the United States”.[7] Therefore, a probe into whether transformative constitutionalism is fit for Africa in general and the Namibian context in particular must follow before any attempt to demonstrate the extent to which courts have embraced Transformative Constitutionalism can be made.

This Chapter aspires to reflect on the extent that superior courts have broken ties with the formalistic legal culture of the past and have since embraced transformative constitutionalism. Divided into three decades since independence, the chapter scrutinises whether the Supreme Court has maximised on the opportunities the court has been presented with to uphold and preserve the transformative agenda of the Constitution. The first part, “the daring decade”, shows the courts’ early commitment to transformation through landmark judgments that still find relevance today, judgments that paved the way for transformative constitutionalism and have become the cornerstone of reference for constitutional interpretation in Namibia. The following decade, “blast from the past”, left courts with the burden to search for the values and norms of the Namibian people with limited guidelines in place, with some bringing justice to interpretation and others relying on legal principles that have no place in the new constitutional dispensation. The last decade, “crossroad crisis”, was not as stagnant as the second, with some progressive judgments but also with equally missed opportunities for the social justice agenda. The chapter concludes with brief recommendations on how Courts can best, through constitutional interpretation, fuel the vehicle of transformative constitutionalism of which they are the drivers.

2.2 COMPATIBILITY OF TRANSFORMATIVE CONSTITUTIONALISM FOR THE NAMIBIAN CONTEXT

2.2.1 Transformative Constitutions

The Constitutions of Brazil, India and South Africa have all been described as “transformative constitutions”.[8] What sets these constitutions apart from other constitutions is the make-up of the constitutional framework that bears the imprints

6 Kibet & Fombad (Note 1 above) 348.

7 D Zongwe (2019) “The dangers of transplanting transformative Constitutionalism into Namibia” Vol. 11 *Namibia Law Journal* 88-119.

8 O Vilhena, U Baxi, and F Viljoen (2013) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*. Pretoria University Law Press: Pretoria.

of a 'collective resistance' and maps a "collective future".[9] In its first sitting in 1995, the Constitutional Court in *S v Makwanyane*[10] pronounced the South African Constitution as a transformative document. It held that:

> In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[11]

A transformative constitution is not born from judicial interpretation, but from its content as expressly articulated in the Constitution. In *Makwanyane,* the Court referred to the jurisprudential past in contrast with the demands of the new constitutional order.[12] Using the post-amble of the Interim Constitution as reference, it held that what the constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[13]

By this standard, the Namibian Constitution most certainly qualifies as a "transformative constitution". The Preamble of the Namibian Constitution recognises the importance of human dignity and equality in a society based on freedom, justice and peace. It distances itself from the racism preserved by apartheid and colonialism and goes on to establish a democratic government which is empowered to effectively maintain and protect the new constitutional order. The Constitution is quite ambitious with aspirations to eliminate racism,[14] misogyny,[15] and ensure that no person is discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.[16] A central objective is, "aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices".[17] In *Ex Parte Attorney General,*

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9 A Narrain (2014) "Brazil, India, South Africa: Transformative Constitutions and their role on LGBT Struggles" Vol. 20 *International Journal on Human Rights 152.*

10 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

11 Ibid.

12 Ibid, 262.

13 Ibid, 262.

14 Article 23(1) of the Namibian Constitution.

15 Article 23(3) of the Namibian Constitution.

16 Article 10(2) of the Namibian Constitution.

17 Article 23(2) of the Namibian Constitution.

Namibia: In re Corporal Punishment by Organs of State,[18] the Court held the following comments about the Constitution:

> It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

For this reason, colonialism as well as the "practices and ideology of apartheid from which the majority of the people of Namibia suffered for so long" are firmly repudiated.

This shared history of "past discriminatory laws or practices" as expressed in the Namibian Constitution is what makes Namibia prone to comparative studies with South Africa. In both countries, colonisation and subsequent subjection to the Apartheid regime yielded similar social, economic and educational imbalances. Despite legislative, policy and even judicial efforts to reverse these imbalances, South Africa and Namibia continue to have the largest and second largest wealth gap in the world respectively.[19]

Namibia and South Africa share an agenda to redress[20] the social, economic and educational imbalances induced by past discriminatory laws and practices - Apartheid in particular. Yet, the Namibian Constitution differs significantly from the South African Constitution in that socio-economic rights are not included under the Bill of Rights as are civil and political rights (with the exception of education). Instead, socio-economic rights enjoy provisions under the principles of state policy.[21] The legal effect is that the Bill of Rights is "enforceable by the Courts"[22] while principles of state policy are "not of and by themselves legally enforceable by any Court."[23] The Courts are however, entitled to have regard to the said principles in interpreting any laws based on these principles.[24] The most decisive reason for the diverging approaches to socio-economic rights can be traced to the drafting and negotiations of the respective constitutions.

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18 *Ex parte Attorney General, Namibia: in re Corporal Punishment by Organs of State* 1991 (3) SA 76 Nm SC.

19 The World Bank "Gini index" (World Bank Estimate) <https://data.worldbank.org/indicator/SI.POV.GINI>.

20 Namibia's efforts date back to 2007 with the introduction of Transformation Economic and Social Transformation Framework (TESEF) and subsequently replaced with the National Equitable Economic Empowerment Framework (NEEEF), which is at an advanced staged to be considered by Parliament, hopefully during this financial year ending March 2021.

21 Article 95(a-l) which is the policy framework for the promotion of the welfare of the people and the provision socio-economic amenities.

22 Article 5, 25(2) of the Namibian Constitution.

23 Article 101 of the Namibian Constitution.

24 Article 101 of the Namibian Constitution.

During the drafting of the Namibian Constitution, the Constituent Assembly made it clear that they do not want to be accountable for providing social and economic rights.[25] The Constituent Assembly during the drafting of the interim South African Constitution was divided on this aspect. The essential contention was to what extent the bill of rights "would facilitate transformation of South African society".[26] The eventual outcome was that the Bill of Rights did not guarantee the right to housing and health care *per say,* but rather that everyone shall have *access* to the right to housing and health care. This final form to which socio-economic rights took, "underlines the idea that government cannot be left to its own devices altogether in making decisions about how these rights are to be realised."[27] It entails a measure of judicial review over governmental action.

In Namibia, an explicit exclusion of judicial review in the realisation of socio-economic rights has placed courts in an awkward position but not entirely without recourse.[28] Rectifying the social and economic imbalances caused by the past is central to the "transformative agenda" of the Namibian Constitution. This integral task has now been largely placed in the hands of the executive and legislator, making it subject to political will. For Courts to maintain their legitimacy, they too must be active contributors to the transformation project. Progressive judges that take on robust interpretation of the Namibian Constitution are of the utmost importance, a characteristic embodied by transformative constitutionalism. Nevertheless, this clear-cut distinction between civil-political and socio-economic rights is a common trait of a liberal document and has therefore, placed into question the 'post liberal nature' of the Namibian Constitution which in turn places in question the compatibility of transformative constitutionalism for the Namibian context.

Klare holds that post-liberalism, while not the only approach, is the best approach to interpreting a transformative constitution. He distances the South African Constitution from classical liberal documents, describing it as social, redistributive, caring, positive, horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission. [29] Despite the non-justiciability of socio-economic rights, Horn insists that the Namibian Constitution has definite elements of a caring community. The emphasis on gender in articles 10

25 N Horn (2014) "Transformative constitutionalism: A post-modern approach to constitutional adjudication in Namibia" in N Horn & M Hintz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* Konrard Adenaeur Stiftung: Windhoek 251.

26 ZM Yacoob (2004) "Issues and debates in the South African Constitutional negotiations in the context of the apartheid evil and the struggle for democracy" Paper delivered by ZM Yacoob, Justice of the Constitutional Court of South Africa University of Chicago Law School, January 2004, 4.

27 Ibid, 5.

28 J Nakuta (2009) "The justiciability of social, economic and cultural rights in Namibia and the role of NGOs" in N Horn & A Bösl(eds) *Human Rights and the Rule of Law in Namibia* 97, where the idea of direct and indirect enforcement of ESC rights is espoused.

29 K Klare (1998) "Legal Culture and Transformative Constitutionalism" Vol. 14 *South African Journal on Human Rights* 153.

and 23(3), multiculturalism in article 10, 19 and 23, environmentalism, transparent and participatory government and the extension of democratic principles to the private sphere are all elements of a caring Constitution.[30] Furthermore, *Article 95* creates opportunities that allow for a social democratic reading or even a moderate post-liberal reading a viable proposition, especially since the Constitution explicitly stands for a mixed economy.[31] The Constitution seems to create a welfare state without undermining the capitalist structures of the pre-independent economy. Horn concludes that without being legalistic, one can say the Namibian Constitution has enough elements of a caring constitution in this context, and that "social democracy" is a serviceable label for some of the Constitution's aspirations (equality, redistributive, social security), but it does not capture the essential features such as multiculturalism, close attention to gender and sexual identity, emphasis on participation and governmental transparency, environmentalism and the extension of democratic ideals into the "private sphere".[32]

The struggle against Apartheid can be read in both a civil and political context and a socio-economic one, although Sachs and Davis seem to read it in terms of a civil and political context.[33] This view is plausible in terms of the "conventional thinking about the role of law in social transformation".[34] Transformative constitutionalism however, is a deviation from the traditional framework of constitutionalism and the role of the law in transformation. The Namibian Constitution is not robbed of a "socio-economic reading" of its struggles against apartheid simply because of the exclusion of socio-economic rights from the Bill of Rights. Firstly, because the inclusion of these rights in the Constitution itself regardless of its "lesser" status is still a remarkable break from the normative framework of constitutionalism.[35] Secondly, the Indian Constitution like the Namibian Constitution makes a distinction between civil and political rights and socio-economic rights. Yet, Baxi is of the view that, "the Indian Constitution is as much a truly inaugural post-colonial constitution as is the South African Constitution".[36]

2.3 CONSTITUTIONALISM

A constitution is commonly designed to limit the powers of government and prevent anarchy and authoritarianism. It is generally defined as "a document, written or unwritten, which governs, regulates and allocates powers, functions and duties amongst the different agencies within the state and between the governed and the

30 Horn (Note 25 above) 252.
31 Article 98 of the Namibian Constitution.
32 Horn (Note 25 above) 251-252.
33 U Baxi (2013) "Preliminary notes on transformative constitutionalism" in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, Pretoria University Law Press: Pretoria, 31.
34 Ibid.
35 Ibid.
36 Ibid.

government."[37] The view where constitutionalism was, "simply understood as the idea of limited government, was transplanted into African constitutional thought mainly through the agency of European colonial powers who acted as patrons of the decolonisation process and handed down to the newly independent African states' constitutions modelled after European constitutions".[38]

The practice of constitutionalism however, goes beyond limiting government action. It poses a higher standard than a constitution and it is described not in substantive terms but *functional* terms[39] and includes attributes of respect and protection of fundamental human rights and freedoms, separation of powers and an independent judiciary, to mention a few.[40] Even constitutions that mirror the elements of constitutionalism do not necessarily give rise to it. Constitutionalism therefore, demands more than just lip service to its components; additionally, it requires the implementation of institutions that will ensure compliance and accountability. This can be through national human rights institutions like the Ombudsman, but it can also be through the Courts.

It is important to pay attention to the historical events that gave rise to the popularity of transformative constitutionalism in Africa. During the time of the drafting of the Namibian and South African Constitutions in the late 80s and early 90s, there was a declining dominance of liberalism and a corresponding rise in social democracy or liberal egalitarianism.[41] In addition, there was growing recognition of the inabilities of the Western liberal constitutional model to resolve the challenges of third world countries. In other words, the rise of transformative constitutionalism in Africa was due to a growing need to decolonise African constitutions. Whether transformative constitutionalism actually works towards decolonising the law is discussed elsewhere in the Chapter.

As shown earlier, the South African Constitution frames socio-economic rights in a justiciable nature, which in turn has a bearing on the practice of constitutionalism, particularly the separation of powers. For now, it is sufficient to appreciate that a robust transformative or social agenda is likely to shift out of place the rigid and rusty confines of constitutionalism. This shift away from traditional concepts of constitutionalism can be viewed as one way of Africa's attempt at the decolonisation project and attending to the particular aspirations of African societies. Kibet and Fombad articulate the need for this shift away from traditional constitutionalism as follows:

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37 C Fombad (2014) "Strengthening constitutional order and upholding the rule of law in central Africa: Revising the descent towards symbolic constitutionalism" Vol. 14 *African Human Rights Law Journal* 414.

38 Kibet & Fombad (Note 1 above) 349.

39 D Grimm (2012) "Types of Constitutions" in M Rosenfeld & A Sajo (eds) *The Oxford handbook of comparative constitutional law*, Oxford University Press: Oxford, 105.

40 L Henkin (1998), "Elements of constitutionalism" Vol. 60 *International Commission of Jurists: The Review* 11-22.

41 Klug (Note 3 above).

> The traditional notion of constitutionalism is inadequate in meeting peculiar needs of transitional societies emerging from traumatic pasts characterised by war, deep divisions or political repression. In such societies, constitutions and law generally have to do more including addressing past injustices and crises as well as inspiring hope for a better future. Inevitably, the law and politics divide faces the greatest challenge as the law is engaged in mediating political change […] This necessitate[s] a Constitution designed not only to limit government powers in the traditional sense, but also to institute social and political transformation as a means of lending legitimacy to the new constitutional and political order. A constitutional and political change that would not help to emancipate previously-oppressed groups and create an egalitarian society in which the interests of all are protected would suffer a serious legitimacy problem, hence the need for a transformative constitution and the idea of transformative constitutionalism.

Transformative Constitutionalism thus requires active promotion and participation from the state in terms of bettering the lives of people - a duty which the Courts are not exonerated from. Transformation acknowledges that tools of inequality can be systematic and that the state must through all its organs play an active role in transforming the society. It is in this way that transformative constitutionalism deviates from traditional liberalism. Therefore, any criticism of transformative constitutionalism or its applicability to a particular context cannot rely solely on the traditional standards of constitutionalism; it must be done with an appreciation of the transformative agenda of the Constitution and the extent to which that agenda alters the normative framework of constitutionalism. Without doing so, such criticism runs the risk of being accused of an attempt to maintain western ideologies as captured in the traditional understanding of constitutionalism.

2.4 TRANSFORMATIVE CONSTITUTIONALISM

Karl Klare, in an article that set the scene for the Jurisprudential Debate on the topic, defined transformative constitutionalism as:

> […] a long-term project of constitutional enactment, interpretation and enforcement committed […] to transforming a country's political and social institutions and power relationships in a democratic participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through large scale nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform' but short of or different from revolution in any sense of the word.[42]

[42] Klare (Note 29 above) 150.

This definition is wide enough to accommodate different transformative constitutions with different socio-political agendas. But it has also given rise to concerns about the "methodology" of transformative constitutionalism.[43] It therefore becomes necessary to clarify that transformative constitutionalism is not a jurisprudential or interpretive model.[44] It is a *priori* point of departure to implement the values of the constitution in the lives of people - it is a tool for transformative justice.[45] Judges are the guardians of the Constitution and in turn, the protectors of the transformation project. "While the text of the Constitution is the vehicle for political, economic and egalitarian social transformation, the judiciary enjoys the powerful and influential position of being the driver of this vehicle."[46] This position of trust follows that the judiciary must assume a more assertive position than in ordinary traditional contexts.[47]

Transformative constitutionalism requires judges to "justify their decisions not only by reference to precedence and other legal authority, but by reference to certain overarching principles and values". [48] This sort of value-based judgment however, is not apolitical. In *S v Acheson,* the Court understood a value judgment as, "one that cannot primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognisance of the social conditions, experiences and perceptions of the people of Namibia".[49]

In the *Corporal Punishment by Organs of State case,* Bekker, CJ held that, "the making of a value judgment is only possible by taking into consideration the historical background with regard to social conditions and evolutions".[50] This cognisance of the historical context is what Klare refers to as the "historical self-conscious doctrine".[51] Zongwe however, insists that transformative constitutionalism will "over-politicise constitutional adjudication".[52] Klare does not necessarily attempt to justify the political nature of transformative constitutionalism but rather opted to show how even in cases of liberal readings of the constitution, such interpretations are nevertheless politically motivated. Relying on the arguments of realism, Klare insists that judges cannot exclude their personal and political values from the interpretive process, arguing that judicial constraint and judicial activism are equally political. In respect of transformative constitutionalism, adjudicators need constant reminders through the process of adjudication to be aware of the values and objectives of the constitution and to consider it. Interpreting, adjudication and implementing the constitutional text must lead to fulfil the ideals of the constitution: a non-racial, non-

43 Zongwe (Note 7 above) 9.
44 Horn (Note 25) 251.
45 Ibid.
46 Kiebet & Fombad (Note 1 above) 358.
47 Kiebet & Fombad (Note 1 above) 357.
48 E Mureinik (1994) "A bridge to where - Introducing the interim Bill of Rights" Vol. 10 *South African Journal on Human Rights* 33.
49 *S v Acheson 1991 (2) SA 805 (NM).*
50 *Corporal Punishment by Organs of State* case (Note 18 above).
51 Klare (Note 29 above) 55.
52 Zongwe (Note 7 above) 17.

discriminatory, and democratic society. In this process it is inevitable to include political issues and conclusions.[53] The Constitution is informed by politics - to rob constitutional interpretation of political considerations is likely to impede the transformation project. As put by Pierre De Vos, transformative Constitutionalism requires judges to:

> […] rethink the traditional views and assumptions with which they approach difficult issues. Our Constitution is a transformative one, a Constitution that places a duty on judges to rethink their world, to take responsibility for creating, through constitutional interpretation, this new world that will be different from the apartheid world we lived in. This in turn, requires judges to try and identify the ways in which individuals and groups have been marginalised in the past - and to think the other - and to interpret the provisions of the Constitution in ways that will prevent the further marginalisation and oppression of such individuals or groups.[54]

Another criticism of transformative constitutionalism is that it undermines the separation of powers doctrine. This criticism must be qualified. The separation of powers is a core component of constitutionalism - transformative or otherwise.[55] Generally, the separation of power connotes that the legislators make the law, the judiciary interprets the law and the executive enforces the law.[56] There is, however, “no universal model of separation of powers’.[57] Whether the separation of powers achieves its purpose will be determined by assessing whether the objective to ensure a single entity does not exercise too much power is adequate.[58] An absolute separation of powers threatens constitutionalism just as much as the undermining of the doctrine.

During apartheid, the separation of powers was understood to be absolute.[59] This assured unprecedented powers for the parliament, where members were expected to vote along party lines.[60] The Constitutional Court in South Africa has held that the criteria of checks and balances in a democratic society ensures that, “there is no separation that is absolute”.[61] The Court continued by expressing that, “[…] no constitutional scheme can reflect a complete separation of powers: the scheme

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53 Horn (Note 25 above) 246.

54 P De Vos (2001) “Freedom of religion v drug traffic control: The Rastafarian, the law, society and the right to smoke the ‘holy weed’” Vol. 5(1) *Law, Democracy & Development* 104.

55 Henkin (Note 40 above).

56 P Langa (2006) “Transformative Constitutionalism” Vol. 17(3) *Stellenbosch Law Review* 357.

57 *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) 108.

58 ZM Yacoob (2014) “Separation of powers in a democratic South Africa: An evolving process” Contribution by retired Justice Zak Yacoob at the 2nd Stellenbosch Annual Seminar on Constitutionalism in Africa 17-19 September 2014, 1.

59 Yacoob (Note 58 above) 1.

60 Yacoob (Note 58 above) 1.

61 De Vos (Note 54 above) 108.

is always one of the partial separations".[62] Ultimately, it is, "the judiciary that determines the exact contours of the separation of powers within the context of the constitutional and legal frame work of that particular country at a particular time."[63]

The supremacy of the Constitution broadens the scope of the judiciary to interpret the law. In other words, the transformative ideal of the Constitution requires judges to change the law to bring it in line with values of the Constitution. The issue arises in finding the "fine line" between transformation and legislation. "Overly activist judges can be as dangerous for the fulfilment of the constitutional dream as unduly passive judges. Both disturb the finely-balanced ordering of society and endanger the ideals of transformation."[64] Kibet and Fombad summarise the role of the judiciary in respect of transformative constitutionalism as follows:

> Transformative constitutionalism, simply put, aims at achieving social and political transformation through the law. It focuses on attaining substantive justice and substantive equality and entrenching egalitarianism in social and political relationships generally. To achieve this, transformative constitutionalism embraces judicialism, giving the law and, by extension, the courts a prominent place in the transformation process. This requires a judicial consciousness of the historical background that informs the present social and political situations it seeks to redress. In addition, it necessarily demands less insistence on legal and procedural technicalities that quite often defeat the enforcement of substantive rights and duties under the law.[65]

2.5 TRANSFORMATIVE CONSTITUTIONALISM AND UBUNTU

This section is a brief response to Zongwe's view about "the dangers of transplanting transformative constitutionalism in Namibia" particularly his view that transformative constitutionalism has worked as a "wasteful distraction from the necessity to decolonise law and evolve a richer and more indigenous jurisprudence."[66] Zongwe argues that, "South African constitutional law largely articulated a truly African philosophy" and that the transformative agenda could have been based entirely on Ubuntu.[67] In this way, transformative constitutionalism "ostracises Ubuntu".[68] This view is premised on a presumption that if it were not for transformative constitutionalism, judges and lawyers could have developed political theories based on Ubuntu to give content to the Constitution.[69] In contrast, this chapter argues that

62 De Vos (Note 54 above) 109.
63 Yacoob (Note 58 above) 3.
64 Langa (Note 56 above) 358.
65 Kiebet & Fombad (Note 1 above) 365-366.
66 Zongwe (Note 7) 20.
67 Ibid.
68 Ibid.
69 Ibid.

the neglect of Ubuntu and other African philosophies in African jurisprudence is not due to the "dominant nature" of transformative constitutionalism but rather due to the constraints of legal culture. In fact, we argue that the use of transformative constitutionalism has encouraged the comprehension of Ubuntu as a legitimate legal notion[70]. In other words, transformative constitutionalism has been a stepping stone for the rise of Ubuntu. Without it, the inherent distrust for philosophies, especially African philosophies that exist outside our stubborn legal culture would have been as stagnant as it was three decades ago.

This argument requires us to understand the nature of legal culture. In its most general sense, Nelken defines legal culture as the 'stable patterns of legally orientated social behaviour.'[71] Klare defines it as the 'professional sensibilities, habits of mind and intellectual reflexes' of the bench and the bar.[72] Legal culture determines "what counts as a persuasive argument (and what doesn't); what kinds of arguments, possibly valid in other discursive contexts are deemed outside the professional discourse of lawyers"[73] and so on. [74] The nature of legal culture 'as with all aspects of a culture [is that] it changes in response to new situations, but it also reproduces itself'.[75] Thus, legal culture tends to act as an echo chamber in which it reproduces itself in such a way to fit its existing form even in times of daring change.[76] This is clearly problematic for a society that wants to 'break free from the past'.

Transformative constitutionalism has created a doorway, as narrow as it may be, to break free from the constraints of the existing legal culture. It has given justification for African jurisprudence to shift away from traditional notions of legal order. But transformative constitutionalism, perhaps unintentionally, has achieved something greater. Scholars have drawn inferences from transformative constitutionalism to demonstrate Ubuntu as a feasible notion of law.[77] In this way, transformative constitutionalism works to disrupt the existing homogenous nature of legal culture. In his book, *The making of South African Legal Culture,* Chanock demonstrates how "the development of the South African legal system in the early twentieth century was crucial to the establishment and maintenance of the systems that underpinned

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70 TW Bennet, AR Munro & PJ Jacobs (2018) Ubuntu: An African Jurisprudence Juta: Cape Town, 60-61. Here, the authors argue that, "[…] Ubuntu has been invoked in a variety of wide contexts and its general function has remained constantly as a "new and independent metanorm in the SA legal system".

71 D Nelken (2004) "Using the concept of legal culture" Vol. 29 *Australian Journal on Legal Philosophy* 1-26.

72 Klare (Note 29 above) 166.

73 Ibid.

74 Ibid 167.

75 M Chanock (2004) *The making of South African Legal Culture 1902-1936* Cambridge University Press: Cambridge, 23.

76 Ibid.

77 C Himonga, M Taylor & A Pope (2013) "Reflections on judicial views on ubuntu" Vol. 16(5) *Potchefstroom* 370-429. See also DP Zongwe (2016) "The articulation of an African philosophy of equality as legacy of the South African Constitution" Vol. 31 *Southern African Public Law* 32. Bennet (Note 70 above).

the racist state, including control of population, the running of the economy and the legitimisation of the regime".[78] This is true for most if not all African countries, especially Namibia where the South African legal culture has been transplanted in its entirety. This cannot be the legal culture we rely on to decolonise Africa in general and South Africa and Namibia in particular.

While transformative constitutionalism deviates from traditional notions of legal order as imported by European forces, it still operates within the existing legal culture. We do concede that African philosophies should be the drivers in decolonising the law but we are not of the view that transformative constitutionalism, whether hegemonic or otherwise, is an "enemy" of the decolonisation project. Instead and perhaps controversially, we suggest that the decolonisation of legal culture may elevate transformative constitutionalism to Ubuntu. Like Klare, we are of the view that the more we deviate from the confines of the existing legal culture, the more likely we will achieve the socio-political aspirations of a transformative constitution.[79] What we suggest, which is different from Klare, however, is that moving away from the confines of legal culture may not necessarily consolidate transformative constitutionalism but may give rise to the use of novel philosophies that are either "unfit" or 'incomprehensible' within the existing echo chamber of Namibian and South African legal culture. Transformative constitutionalism has penetrated the existing legal culture because although it draws inspiration from Ubuntu, it is packaged in a western ideology. Nevertheless, transformative constitutionalism draws heavily from the African philosophy too. This is not nullified by the fact that it was promoted by an "American leftist scholar" nor from the fact that it also draws inspiration from Critical Legal Studies. Rightfully, Zongwe warns that in an attempt to decolonise the law and legal education, we should avoid doing it in a manner where we simply make way for a "more sophisticated foreign legal ideology [to] colonise legal education" and constitutional interpretation.[80] Any criticism of transformative constitutionalism as a component of decolonisation, however, must put greater weight on the features of the philosophy itself. In the case of transformative constitutionalism, it is a considerable shift from traditional notions of legal order and features and embracing some elements of Ubuntu. In this way, transformative constitutionalism should be seen as complimentary to the mission to decolonise the law in Africa. As seen in landmark judgments in South Africa[81], it seems as though fundamental human rights are better protected where Courts have been shown to embrace transformative constitutionalism.

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[78] Chanock (Note 75 above) 23.

[79] Klare (Note 29 above) 166-187.

[80] Zongwe (Note 7 above) 19.

[81] *Grootboom v Government of the Republic of South Africa 2000 (1) SA 46; Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC); Minister of Health v Treatment Action Campaign 2002 (10) BCLR 1075 (CC).*

2.6 TRANSFORMATIVE CONSTITUTIONALISM IN THE APEX COURT

2.6.1 The Daring Decade: 1990-1999

The judiciary in the first 10 years of post-independent Namibia was faced with a daunting task: to move away from a culture of authority and consolidate a culture of justification.[82] This was not an easy mission. First, “the judiciary is the institution that was the least transformed in the wake of independence”.[83] Second, the judgments of the Court would often run the risk of being accused of maintaining the previous political order.[84] Despite these apparent hostile conditions, the Court delivered judgments that were bold, transformative and embraced a culture of rights. “The early judgments caught the attention of the international community and were praised as forerunners of constitutional interpretation in Southern Africa”.[85]

This was most evident in S *v Acheson*, a case where the ruling party had substantial interest. The case concerned a person who was suspected of co-operating with a covert military unit of the South African Defence Forces to kill Anton Lubowski, a prominent member of the SWAPO Party. The Court was faced with taking a constitutional approach to bail applications or buying into the populist line of the majority and the SWAPO Party – and it opted for the former. The Court held:

> […] 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 and permeate the processes of judicial interpretation and judicial discretion.[86]

This case represents a turning point in the legal culture of Namibia. The Court was guided by constitutional principles and values in the interpretation and application of the law and its discretion. At a time where ‘old habits’ were expected to ‘die hard’, the Court was conscious of the demands of the new constitutional order and made it clear that the Constitution was indeed the supreme law of the country. This new value-orientated approach was largely demonstrated in criminal courts. In *S v*

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82 Mureinik (Note 48 above) 32.

83 P Von Doepp (2008) “Context-sensitive inquiry in comparative judicial research: Lessons from the Namibian judiciary” Vol. 41(11) *Comparative Political Studies* 1521.

84 N Horn “State versus Acheson revisited fourteen years later” presented by the Human Rights and Documentation Centre at the University of Namibia, 19 November 2003 1-2.

85 Ibid 3.

86 *Acheson* case (Note 49 above) 48 9J-10C.

Scholtz, the Supreme Court ruled that the State was obliged to disclose the contents of the police docket of the accused - a practice unknown to the undemocratic era.[87] In the *Corporal Punishment by Organs of State Case,* the Court relied on the "norms and values" of the Namibian people as the interpretive tool to determine the constitutionality or otherwise of corporal punishment as imposed by organs of the state. The judgment was substantially more comprehensive than *Acheson* on where we should look to find the values and norms of the Namibian people. The court held that we must look to the following to find the values and norms of the Namibian People:

1. A value judgment which requires objectivity;
2. Contemporary norms, aspirations, expectations and sensitivities of the Namibian People as expressed in;
3. National institutions;
4. The Constitution; and
5. Emerging consensus of *values in the civilised international community* which Namibia forms part of.[88]

Weichers[89] argues that the values are those principles that "contained the promise of a future state conforming to all the tenets of constitutionalism." In other words, the values of the Constitution are embedded in the constitutional guarantees of the rule of law, recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system, and regular elections.

For the sake of comparison, Weichers referred to the "future state", in *Acheson* the court refers to "ideals and aspirations", and in *the Corporal Punishment by Organs of State case* the court refers to *"*aspirations and expectations". All these terms refer to things that are yet to be achieved. It is an acknowledgment that justice is a "long term project" induced through "large scale change". This is a showcase of the Courts' early commitment to transformative constitutionalism.

Another important judgment that significantly moves away from a state of authoritarianism to an open and free democracy based on human rights and justice is *Kauesa v Minister of Home Affairs.*[90] In the Kauesa case, "A junior officer appeared on national television and accused senior white officers of racism and being disloyal. He was internally charged with misconduct in terms of *Police Regulation 58(32)* for undermining the authority of the police leadership structures.

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87 *S v Scholtz 45 1997 (1) BCLR 103 (NmS).*

88 *Corporal Punishment by Organs of State* case (Note 18 above) 189.

89 M Weichers (2010) "The Namibian Constitution: Reconciling legality and legitimacy" in A Bosl, N Horn & A Du Pisani (eds) *Constitutional democracy in Namibia*: *A critical analysis after two decades* Macmillan Education Namibia: Windhoek, 52.

90 *Kauesa v Minister of Home Affairs and Others, 1996 (4) SA 965 (NMS).*

Kauesa argued that the Regulation restricted his constitutional right to freedom of speech."[91]

The High Court dismissed the application on the premise that there is a specific difference between fundamental rights and fundamental freedoms. Fundamental rights form part of 'the law of Namibia', while fundamental freedoms are exercised, subject to, or limited by the laws of Namibia whenever they may be in conflict.[92] The legal effect was that there was now a supposed hierarchy of rights and freedoms, where the freedoms are subject to fundamental rights.

The Supreme Court held that constitutional issues cannot be answered with reference to technical issues alone. The appropriate way for the Supreme Court to approach the problem was to look at it within the broader spectrum of the Constitution and the Namibian society. The Supreme Court rejected the position of the High Court that whenever there is an infringement of a fundamental right, the freedom must be restrictively interpreted. Instead, the Supreme Court opted, "to be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights".[93] While it may be true that some of the utterances of the appellant were indeed offensive, the necessity to deal with "the practice of racial discrimination and the ideology of apartheid […] expressly prohibited by art 23(1) of the Constitution" was more important.[94] The Supreme Court confirmed the right of the appellant to participate in an uninhibited and robust manner in a debate of public concern, such as the lack of transformation and affirmative action in the police force. Debates such as these, the Court commented, are the essence of democracy[95] and were not enjoyed under the previous regime.

The Daring Decade created the framework for transformative constitutionalism in Namibia, even before it was popularised by Klare in 1998. Despite the commendable judicial activism during the time, a deficit remained as will become clear below: the courts fell short of establishing a concise guideline for the source of the "norms and values" of the Namibian People. Even the guidelines in *Corporal Punishment by Organs of State* have been misconstrued in subsequent judgments. Furthermore, the cases that enjoyed a transformative interpretation pertained to civil and political rights and not so much to ESC rights. Rightfully so, the anticipation for the second decade was that Economic, Social and Cultural Rights (ESC) would be afforded the same opportunity and that courts would strengthen the guidelines for the source of ideals, aspirations, values and norms of the Namibian People.

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91 Ibid.

92 *Kauesa v Minister of Home Affairs and Others, 1995 (1) SA 51 (NM)* 57.

93 Ibid 981.

94 Ibid 982.

95 Horn (Note 84 above) 27.

2.7 Blast from the Past: 2000-2009

2.7.1. Chairperson of the Immigration Selection Board v Frank and another

In the beginning of the second decade, the Supreme Court was presented with a number of opportunities to develop the scope for Transformative Constitutionalism in Namibia; one of such opportunities was in *Chairperson of the Immigration Selection Board v Frank and another.*[96] The Frank decision is arguably the most devastating judgment for constitutional interpretation in Namibia.

Ms Frank was a German citizen who had lived and worked in Namibia for a number of years. She was co-habiting with her Namibian partner, Ms Khaxas, and the two were raising Ms Khaxas' son together. When Ms Frank applied for a permanent residency permit, the Immigration Selection Board rejected her application, without giving reasons. The High Court found that the Board had no reason to reject Ms Frank's application, and ordered it to issue her a permit.

The High Court further concluded that a same-sex partnership falls under the common law principle of universal partnerships, a common practice recognised by the courts between a man and a woman living together as husband and wife, but who are not married legally. Referring to Article 10 of the Namibian Constitution, the Court concluded that if a man and a woman could enter into such a relationship, and since the partnership was so strong that a court of law would divide the assets if it dissolved, in terms of the constitutional equality principle of Article 10(2), two lesbian women should also be able to enter into such a partnership. The Court held that the word "sex" in Article 10(2) included sexual orientation as a non-discriminatory category.

The Immigration Board appealed to the Supreme Court, which overturned the High Court judgment. The Supreme Court held that to require a court to read a homosexual relationship into, "the provisions of the Constitution and/or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted 'purposively'". The Court nevertheless stated that nothing in its judgment justified discrimination against homosexuals as individuals, or depriving them of the protection of other provisions of the Constitution.

The Court erred in two major respects: it resurrected the ideology of parliamentary sovereignty prevalent during apartheid and bought into views of the majority at the expense of the values and principles articulated by the Constitution. These are evident in the following paragraph of the judgment:

[96] *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC).

> In regard to the judicial authority, the Namibian Constitution is ambiguous. The judicial authority is vested in the Namibian Courts by Article 78(1). But 78(2) makes their independence subject to the Constitution and the law. Although Article 78(2) provides that the Cabinet or Legislature or any other person may not interfere with the Courts in the exercise of their judicial functions, Article 81[97] provides that a decision of the Supreme Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means, so it would appear, that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of *High Court of Parliament which in an exceptional case, may contradict the Supreme Court,* provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all the provisions of Chapter 3 relating to fundamental human rights.

Although there can be no doubt of the power of the Namibian High Court and Supreme Court to declare any statute, or part thereof, unconstitutional in terms of Article 25(1)(a),[98] *it seems that Parliament arguably has the last say,* but this certainly could not have been the intention of the makers of the Namibian Constitution, and although not a full discussion of this article and what was intended, the following extract from Bangamwabo[99] is quite instructive and we take a leaf from it to conclude on this point, as thus:

> When the courts review legal or political acts by government, they are vindicating constitutionalism and the rule of law. They are ensuring that power is exercised within the confines of the Constitution. If Parliament could contradict the judiciary by passing an ordinary Act of Parliament, procedural limitations such as the special majority provisions would become meaningless, for then, Parliament could simply disguise itself as a "High Court of Parliament" and do so by simple majority what is required by special majority…making the judicial review powers meaningless and reducing the rule of law to a mere lofty ideal.[100]

97 Article 81 provides that, "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".

98 Article 25(1)(a) provides that, "[…] and any law or action in contravention shall to the extent of the contravention be invalid: provided that: a competent court […] shall have the power and the discretion in an appropriate case to allow Parliament, to correct any defect in the impugned law or action within a specified period […]".

99 FX Bangamwabo (2010) "Constitutional supremacy or parliamentary sovereignty though back doors: understanding article 81 of the Namibian Constitution" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia: A critical analysis after two decades* Macmillan Education Namibia: Windhoek, 251-260.

100 Ibid, 257.

a) Parliamentary supremacy?

Appropriately, former Justice of the Constitutional Court of South Africa, Justice Yacoob warned that, "it is necessary for us all to understand that judges have a special responsibility in countries in which the Constitution is supreme":

> The supremacy of the Constitution brings with it the consequence (often not fully understood) that neither Parliament nor the Government is supreme. Because constitutionalism is a relatively new phenomenon and there is the real possibility that judges will determine cases without giving full weight to the fact that the legislature and the executive are not supreme. I have always had to guard against this attitude because the absence of appropriate vigilance might result in the beginnings of a slippery and inevitable slide from constitutional supremacy to parliamentary supremacy.[101]

The *Frank* case has in fact fallen victim to this "slippery and inevitable slide". The Court held that it cannot "take over Parliament's function by ordering a law of parliament to extend 'spouse' to mean a partner in a permanent same sex life partnership'". But as shown earlier in the chapter, transformative constitutionalism broadens the duty of the judiciary; particularly it requires judges to change the law to bring it in line with the values of the Constitution. This is evident from Article 25 of the Namibian Constitution that empowers Courts to declare unconstitutional laws as invalid or allow the relevant authority to correct the defect in a specified time.

The judicial authority is not as ambiguous as the Supreme Court claims. The constitutional mandate of the courts is clear in provisions throughout the Constitution particularly in Article 5, 78, 79, 80 and Article 81. The Court interprets Article 81 to mean that the decisions of the Supreme Court are subject to the Constitution and the law. It seems as if the Court interpreted "the law" (Acts of Parliament) with the same force as the Constitution. This is evident through the court's reference to the legislator as the "High Court of Parliament". In one breath, the Court undermines the supremacy of the Constitution, separation of powers and the independence of the judiciary. Essentially, this judgment threatens constitutionalism in general and stampedes transformative constitutionalism in particular. "It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justification for their decisions. Under transformative constitutionalism, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."[102]

b) Majoritarianism?

Constitutionalism in Namibia and South Africa was born to qualify majoritarianism, which in the past facilitated the oppression and marginalisation of minority groups.

[101] ZM Yacoob (2013) "Reflections of a retired judge" in O Vilhena, U Baxi, F Viljoen *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* Pretoria University Law Press: Pretoria, 610.

[102] Langa (Note 56 above) 353.

Yet, the Court in essence based its conclusion that non-heterosexual relationships were not accepted in Namibia on the grounds that, "the President of Namibia as well as the Minister of Home Affairs (at the time of the judgment), have expressed themselves repeatedly in public against the recognition and encouragement, while no member of the ruling party expressly opposed these views when the matter was brought before Parliament."

Early in its jurisprudence, the South African Constitutional Court positioned the place of "public opinion" in constitutional interpretation. In a case where the Court was tasked to determine whether the death penalty was constitutional, the Court held, "the question before us is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence." The Court held:

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.[103]

The Frank judgment was a fundamental setback not only for transformative constitutionalism, but for constitutional democracy. While the Court made proper reference to the need for a value judgment, the court erred in relying on the rhetoric of politicians (or even the majority) as the source of those values as opposed to the values and principles of the Constitution. The court referred to the, "moral standards, established beliefs, social conditions, experiences and perceptions of the Namibian people" as important considerations in constitutional interpretation. The court however, cited male-dominated institutions as being the key sources of national values, and focused on mainstream, majority values to the neglect of a minority and vulnerable group. This is highly problematic in a country as diverse as Namibia.[104] "The idea that there are certain things that the majorities, the strong and the powerful ought to never be allowed to do, and that society has more than

103 *Makwanyane* case (Note 10 above) 88.

104 D Hubbard (2010) "The paradigm of equality in the Namibian Constitution: Concept, contours and concerns" in A Bösl, N Horn & A Dupisani *Constitutional Democracy in*

just a moral obligation towards the vulnerable and powerless is neither lamentable nor a mere qualification of majoritarianism. It is also more than just an idea. It is a fundamental constitutional principle, a standard integral to our humanity."[105]

2.7.2. Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Trial (Mwilima Case) [106]

As anticipated, the lacuna on the place of ESC rights was addressed by the Supreme Court at the beginning of the second decade. Unfortunately, it is one of the very few cases that the court has decided on regarding ESC rights but nevertheless has set a good precedence on the matter. The court had to determine whether the government could be compelled to provide free legal aid to the hundreds accused of treason, despite a claim of a limitation in state resources - legal aid is provided for under state policy and therefore not enforceable in a court of law. The right to be defended by a legal practitioner of your choice, however, is guaranteed under the Bill of rights.

The court held that due regard to the resources of the state cannot be used as a justification to limit the fundamental human rights and freedoms established in Chapter 3 of the Constitution. The Court emphasised that the circumstances of the case are key to determining if legal aid should be provided. The factors in each case are unique and, in every case, where there is an absence of legal representation this will not necessarily result in a guarantee of legal aid.[107] In this case, the state was charging individuals with limited access to evidence, limited language abilities and the seriousness of the crime outweighed any possibility to limit access to legal aid.

The court did not overemphasise on state resources at the expense of a value orientated judgment. While it dealt with a basic civil right, the right to a fair trial, the realisation of this right had an economic effect - free legal representation. In an excellent exercise of legal activism, the court linked free legal representation with the right to a fair trial guaranteed under the Constitution and the International Covenant on political and Civil Rights. Consequently, the judgment narrowed the justiciable gap between socio-economic rights and civil-politico rights.

An important principle underpinning the Constitution is the right to a fair trial. The Court did not pay mind to the technicalities of the architecture of the Constitution,

Namibia: A Critical Analysis After Two Decades McMillan Education: Windhoek, 240-241.

[105] Justice Yacoob (Note 26 above) 6.

[106] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Trial 2002 NR 235 (SC).*

[107] Y Dausab & K Pinkoski (2017) "Visser v Minister of Finance: A Missed Opportunity to Clarify the Equality Provision within a Namibian Disability Rights Paradigm" in DP Zongwe & Y Dausab *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry* Law Reform and Development Commission: Windhoek, 102.

particularly the legal distinction between legal representation and legal aid. In the circumstances before the court, a denial of free legal representation provided for by the state would have undermined the right to a fair trial. It seems as though where a claimant can show a close enough link between his or her claim and a protected right, such claims become justiciable. Perhaps in the foreseeable future, the right to dignity can be used as a stepping stone to realise the right to housing and health and the right to life as a stepping stone to realise the right to food and water.

For the rest of the decade, ESC rights collected dust within the constraints of principles of state policy. The progressive approach of the court in *Mwilima* took a back seat and the substandard tools of ordinary interpretation took precedence in the venture to determine the values and norms of the Namibian people. Despite high hopes, the Supreme Court in the second decade failed to bring clarity to the true source of Namibian values. Arguably, constitutional interpretation was stagnant for the second decade of independence and in some circumstances, fowl interpretations of the Constitution have resulted in further marginalisation of certain groups. The courts in the third decade are perhaps now faced with an even more vigorous task than in the first decade: to redirect the value directives of the court and leave enough gas to fuel the vehicles of transformative justice.

Both in *Kauesa* and *Frank*, there were fundamental differences between the High Court and the Supreme Court judgments. In fact, in the *Frank* case, the Supreme Court did constitutional interpretation a disfavour as opposed to the High Court as in the case of *Kauesa.* In the mentioned cases, how is it that Judges from the same era, interpreting the same Constitution, come to contrasting judgments? This speaks to the disconnect between the old-fashioned approach and interpretation of the law and the demands of a Transformative Constitution. Despite the showcase of the judiciary will to embrace transformative constitutionalism in the early years of independence, the rigid, formalistic and technical legal culture in the country, of which Judges form a part of, is finding it difficult to comprehend the transformative nature of the Namibian Constitution.

Although this is the dominating narrative, it does not remain unchallenged. This is the legal culture that Karl Klare speaks of; one that challenges our approach to the law. It rejects the use of ordinary tools of interpretation to constitutional interpretation. Instead, the legal culture that Karl insists on is one that encourages legal scholars to rethink the role of lawyers and the law and radically transform our understanding of legal interpretation in line with the human rights era. The approach in the Frank Elizabeth judgment for instance, has since lost favouritism and has been highly criticised. It is worth to mention that the issue finds itself in front of our courts once again. Therefore, it will be interesting to witness whether the issue will survive an ever more aggressive transformative era.

2.7.3. Crossroad Crisis: 2010-2019

With the commencement of the third decade, the Supreme Court decisions have been at cross-roads, with some embracing transformative constitutionalism and some buying into the old narrative. Despite some progressive judgments, the pivotal criticism here is the inconsistency. An important element of transformative constitutionalism is that it demands consistent commitment as progressive judgments are often stagnated by less progressive judgments, thereby putting a hold to transformation as a whole. To this end, we now turn to post 2010 cases to show how Namibian Courts still find themselves at cross-roads.

The third decade has done a decent job at closing the gap of the second decade: Where do courts look to find the sources of Namibian values and norms? In an interesting balance of rights, the courts have in the third decade had to balance traditional or populist views with contemporary norms in a bid to translate through its judgment, the authentic values of the Namibian people.

2.7.3.1. JS v LC[108]

In *JS v LC,* the Court was tasked with an issue relating to the boundaries of marital privilege whereupon in a showcase of judicial activism, the Supreme Court on its own accord raised the issue of whether a claim by a spouse against a third party for damages resulting from adultery was still sustainable in law. The court held that the element of wrongfulness was determined with “reference to the legal convictions of the community and public policy which is now informed by our constitutional values and the changing nature of the prevailing norms of society.”

The Court further held that the *mores* or norms of society must include an assessment of constitutional norms, adding that “public policy is now steeped in the Constitution and its value system”. The court further held that marriage and the right to find a family are foundational values entrenched in our Constitution and conceded to the importance of protecting the institution of marriage.

The Court however, was not convinced that the action of a delictual claim against a third party protected marriages from adultery. The Court held that, “If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that”. The court further held that the action has “lost its social and moral substratum” and is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association, while the perpetuation of its patriarchal origin in the form of the damages to be awarded is incompatible with the “constitutional values of equality in marriage and human dignity”. The Court concluded that the action for adultery therefore, lacks the

[108] *JS v LC 206 (4) NR 939 SC.*

wrongfulness necessary to sustain a delictual claim - and so abolished it without actually declaring it to be unconstitutional.[109]

The views of society in this judgment were sourced from court judgments and constitutional values. A week after the judgment was delivered in *JS v LC,* the High Court in the case of *Van Straten v Bekker*[110] independently came to the same conclusion. Here the Court also relied on judicial criticism to determine the values and norms of the Namibian people; however, it did not place such heavy reliance on the South African case, as did the Supreme Court.

2.7.3.2. ES v AC[111]

In a battle between formalist and substantive law, the Supreme Court correctly reaffirmed the place for substantive reasoning in our jurisprudence. The Court was tasked to determine whether an individual can deny a blood transfusion even if it meant it was not in the best interest of her minor children. The High Court declared that the patient was not *compos mentis* to make a Durable Power of Attorney for Health where she indicated that upon her religious beliefs, she did not want a blood transfusion even though she made it before her operation. Horn describes the High Court decision as “another unfortunate victory for formalistic law”:

> It is unfortunate that such an important issue was again dealt with by choosing a formalist approach rather than allowing substantive legal argument. The minimalist approach of the Court not to consider the second pillar of the application since it would have made no difference to the outcome is general practice in Namibian and other common law courts. Yet it does not contribute to transformation of a constitutional state. While the case was loaded with constitutional issues, and ready for a transformative judgment - to use the vocabulary of former South African chief justice and acting judge of the Namibian Supreme Court, Justice Pius Langa, and American academic Karl Klare - it all came to naught. No guidelines for the future regarding the conflict between the constitutional rights of the individual and her legal obligations towards her children were addressed.[112]

The case was however, appealed and the Supreme Court in *ES v AC* took a transformative approach to the constitutional interpretation with many commendable quotes from the judgment for future cases. The court built on the criteria established in *Corporal Punishment by Organs of State*; the Court referred to the Constitution, International Agreements of which Namibia is part of, and contemporary norms as

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109 D Hubbard (2017) “Infusions of the Constitution into the Common Law” in N Horn & MO Hinz, (ed) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* Konrad Adenauer Stiftung: Windhoek, 230.

110 *Van Straten v Bekker (I 6056/2014) [2016] NAHCMD 243 (31 August 2018).*

111 *ES v AC* 2015 (4) NR 921 (SC).

112 Ibid.

the pillars of Namibian values. Additionally, like in *JS v LC*, the court referred to other jurisdictions that promote human rights:

> The principle of patient autonomy must be the overriding principle that guides the courts in cases such as the one presently before the court. This is consistent with the trend in many common law jurisdictions throughout the world and the promotion of rights to liberty, privacy, and health as embodied in a range of international instruments to which Namibia is a party, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. To accept the argument of the respondent would significantly impair the principle of patient autonomy and potentially greatly restrict the liberty of parents. In *Malette v Shulman et al.,* Robins JA commented at 334 that 'individual free choice and self-determination are themselves fundamental constituents of life. To deny individuals freedom of choice with respect to their health care can only lessen, and not enhance, the value of life.[113]

More importantly, the Court laid down principles that future constitutional cases with similar rights can rely on for guidance. Comprehensive judgments of this sort are helpful in the determination of future cases with similar circumstances such as for example abortion rights, where courts would be expected to balance patient autonomy and bodily integrity with other competing rights. Here the judgment did not come to a naught, it was detailed and did in fact unload the complexities and constitutional issues and, in this way, embraced transformation:

> The right to choose what can and cannot be done to one's body, whether one is a parent or not, is an inalienable human right. Were courts to hold that the right of parents to exercise this right would be limited in the best interests of children, the logical endpoint may be that parents of young children should not be employed in the armed forces, that they should be prohibited from engaging in high-risk sports, or publicly censured for consuming non-prescribed drugs and alcohol. The most extreme application of this principle might require a parent being compelled to undergo an operation for the purposes of organ donation if his or her child required a kidney to survive.

Even though as a society we recognise and promote the importance of families and relationships, the court is also compelled to protect the liberty, self-determination and dignity of the individual, especially in matters where medical treatment to one's own person is concerned.[114]

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[113] Ibid 72.
[114] Ibid 100.

2.7.3.3. Visser v Minister of Finance[115]

The next chapter of the Supreme Court should now be about testing the bounds of transformative constitutionalism without fear or favour and without compromising the integrity of the Judiciary. The third decade has provided the Supreme Court with multiple of such opportunities, one of which was in *Visser v Minister of Finance;* a brief summary of the case is extracted as below:

The appellant instituted an action against the Motor Vehicle Accident Fund for compensation after being blinded in a collision with a motor vehicle. The alleged damages or losses suffered by the appellant exceeded N$9 million. The compensation payable by the Fund is however capped pursuant to Regulations published by the Minister resulting in the appellant not being able to recover all his damages or losses from the Fund.

The appellant attacked the aforesaid cap averring that the Act constituting the Fund was unconstitutional in that it authorised the caps contrary to Articles 8 and 10 of the Constitution and that the failure to specifically categorise a different cap for persons with disabilities amounted to discrimination, which alternatively impacted on the dignity of disabled persons and also failed to recognise the fact that disability fell within the concept of "social status" as used in Article 10(2) of the Constitution. The appellant, in the alternative, attacked the Regulations issued pursuant to the Act, which put the caps in place, averring that the delegation to the Minister of those powers amounted to an impermissible delegation as the legislator delegated its legislative powers, that the Regulations were arbitrary, *ultra vires* and as it did not specifically provide for disabled persons, it was contrary to Articles 8 and 10 for the same reasons articulated in respect of the constitutional challenge in respect of the Act.

The Supreme Court held that neither the Act nor the Regulations were contrary to Article 8 and/or 10 of the Constitution as there was no differentiation between or discrimination against equally positioned persons and hence it was not necessary to decide whether disability could be said to fall within "social status" as used in Article 10(2). The constitutional challenges thus failed. In its justification that cappings did not amount to discrimination against persons with disabilities, the court held that:

> Insofar as the delictual claims are concerned, these remain intact insofar as disabled persons are concerned and insofar as the damages exceed the capped amounts. As pointed out above, the special features relevant to disabled persons are taken cognisance of when his/her claim for damages is assessed. Insofar as the disabled person's claim falls within the caps it is paid out in full. Whether a driver, e.g. unlawfully or negligently drives

115 *Visser v Minister of Finance (SA 89/2014) [2017] NASC 10.*

> over the leg of a blind person or a person with full sight they are equally placed when it comes to a claim against the Fund. There is simply no question of unequals being treated equally or equal persons being treated unequally. Similarly situated persons are treated similarly. There is simply no discrimination when it comes to claimants against the Fund. They are entitled to claim the damages in common law which considers all the individual idiosyncrasies of such claimants as far as the amount of damages are concerned. Insofar as the damages exceed the cap they are entitled to the cap and, insofar as it does not, they are entitled to compensation equal to their damages. There is no positive obligation on the State to do more than this even if the disability amounts to a social status. Without such obligation they are, like all other affected persons, only entitled to equal treatment which, as indicated above, is what the Act and Regulations provide for.

Subsequently, the court found it irrelevant to assess whether disability amounts to “social status”. The court held that even if it does, there is no basis for the submission that the Act and/or the Regulations treat equally positioned persons differently or conversely treat persons unequally positioned equally. The court held further that, “in view of what is stated above, equally positioned persons are treated equally and the issue of differentiation does not even arise. Never mind discrimination in its pejorative sense”.

The court applied a formalistic approach and found it unnecessary to apply neither substantive reasoning nor delve into the constitutional jurisprudence of whether persons with disabilities fall under the constitutionally protected category of non-discrimination on the grounds of “social status”; whether or not the applicant would be successful in his/her claim. It seems this was another missed opportunity at developing Namibia’s young constitutional jurisprudence. Perhaps the Supreme Court should have on the very least ventilated the issues pertaining to disability rights and the equality provision, without simply restoring to apply the test set out in the *Muller*[116] decision that should not have been blindly followed without the consideration of the facts set out therein. Like many others before, this chapter therefore, hopes to encourage the bench to be slightly more pro-active in the development of our legal theory and constitutional jurisprudence.

The case also speaks to the socio-economic element of transformation. Where the court did not overemphasis on state resources in *Mwilima,* the court here paid heavy regard to the financial capacity of the state. The relationship between Article 95 and 101 is that the Courts are not required to limit the principles of equality because of the resources of the state. The courts must give regard to both the resources of the state and the principles of equality for legislation. Article 101 does not prevent the court from using cases to develop jurisprudence on equality, while

116 *Muller v President of the Republic of Namibia 1999 NR 190 (SC).*

allowing the case decision to fall in favour of state resources and capability.[117] Regardless of the decision in Visser, the Supreme Court should have seized the opportunity to elaborate on the meaning of equality and its relationship to disability. A court should consider policy considerations in the decision but it cannot be limited by those policy considerations in themselves.[118]

2.8 RECOMMENDATIONS

- Judges must appreciate their heightened role in the new constitutional dispensation. "This includes a psychological shift to appreciate the high expectations placed upon their shoulders and assume a more confident position in the scheme of government." This is a central theme of transformative constitutionalism: that the judiciary is the guardian of the Constitution - its values, aspirations and people. This was well articulated in *Acheson* and *JC v LC.*

- The Namibian Constitution aspires to break free from the discriminatory laws and practices of the past and the ideologies that legitimised them including parliamentary sovereignty, majoritarianism and an ill-suited practice of the separation of powers doctrine. This means that "pre-constitutional boundaries can no longer determine the rule of interpretation and courts should not be tied up by common law rules or judgments that have no relevance for the constitutional dispensation".[119] The devastating consequences of relying on pre-constitutional boundaries are evident in the *Frank* case.

- Generally, there is a consensus that constitutional issues require a value-orientated approach - the contention is the source of these values. In the past, majoritarianism was used to facilitate the oppression of vulnerable and marginalised groups. The new constitutional dispensation rejects this ideology. Courts can no longer rely on the say so of Parliament, the rhetoric of a politician (unless as the representatives of the people a clear policy position informed by public consultations is articulated) or even the majority of the people simply determining, without a scientific assessment, who can and who cannot enjoy their rights. The Court provided guidelines for the source of values in the *Corporal Punishment by Organs of State* judgment.
- Judges must not be over-technical in constitutional interpretation. Our Constitution demands 'less insistence on legal and procedural technicalities that quite often defeat the enforcement of substantive rights and duties under

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117 Dausab (Note 107 above) 102.

118 Ibid.

119 N Horn (2016) *Interpreting the Interpreters: A Critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence* 272.

the law.'[120] In this regard, the Courts came to commendable judgments in *Kauesa* and *Mwilima.*

- Namibia has a young constitutional jurisprudence. Judges must look towards developing this jurisprudence despite the outcome of a judgment. This is likely to create cohesion in jurisprudence and guide future cases. Nothing in the Constitution prevents the Courts from developing jurisprudence and setting precedence for future cases on complex and difficult issues. The Court did well in *ES v AC* but neglected to do so in the *Visser* judgment.

2.8 CONCLUSION

The Namibian Constitution is a transformative constitution - a clean break from the past. It cultivates a democratic society based on human dignity, equality, freedom, justice and peace. The new constitutional dispensation entrusts the judiciary to be the guardians of the Constitution. This requires judges to emancipate themselves from the rigid, formalistic and technical legal culture of the past that often legitimised the old legal order. It also requires a shift from traditional notions of constitutionalism and a move towards embracing transformative constitutionalism. Judges now have a duty to justify their decisions with the principles and values that underpin the Constitution. This connotes a value-orientated approach. To avoid a resurrection of the past, majoritarianism cannot be left to determine the norms and values of the Namibian people. These values are expressed in national institutions and the Constitution itself. Making a value judgment also requires consideration of the historical background with regards to social conditions and evolutions as well as the emerging consensus of values in the civilised international community, which Namibia forms part of. If we are to achieve the aspirations of the Namibian Constitution and truly consolidate a culture of rights, the judiciary *must* appreciate their role as the protectors of the Constitution and facilitators of change, and exercise their independence without fear or favour and without compromising the integrity, impartiality and independence of the judiciary.

[120] Kiebet & Fombad (Note 1 above) 366.

CHAPTER 3

Interpreting the interpreter: An appraisal of the Supreme Court of Namibia's approach to Constitutional interpretation

Ndjodi Ndeunyema

3.1 INTRODUCTION

The Namibian Supreme Court, as the apex court in the national judicial hierarchy, plays a central role in the project of constitutional development. This mandate is exercised principally through judicial interpretation in the resolution of legal disputes. This therefore, renders the Namibian Supreme Court as the principal interpreter of the meaning and scope of the provisions of the Namibian Constitution.[1] However, absent from the Constitution is an express internal interpretative clause, whether general or specific, to the Bill of Rights provisions.[2] I will thus adopt an eclectic methodology and consider the predominate trio of theoretical approaches to constitutional interpretation: original intent, textualism and purposivism. This analysis principally locates itself within the Constitutional human rights jurisprudence of the Supreme Court, but will also reference High Court decisions of seminal importance. These will be evaluated with the aid of scholarly literature that examines the various interpretative approaches.

With respect to original intent, the Supreme Court has indeed relied on originalist reasoning in a variety of decisions - ranging from the early *Cultura 2000*[3] decision to the more recent "Reverse Onus Case"[4] and *Kashela*[5] decisions. However, the principal challenge, it will be argued, concerns the methodology to be applied in determining such founder's intention. The Supreme Court's convention of only offering a cursory reference to the intention of the founders will be lamented in light of the absence of an evidence-based approach to establishing intention, and one that examines the available historical Constitutional drafting documents such as the Constituent Assembly Debates or the 1982 Constitutional Principles. The textualist approach also finds jurisprudential support in the 'Reverse Onus Case' which emphasised language in ascertaining the underlying meaning and purpose of a Constitutional provision.

1 Herein after "the Constitution".
2 Compare Articles 20(4) and 259(1) of the 2010 Kenyan Constitution; Section 39(1) of the 1996 South African Constitution.
3 *Government of the Republic of Namibia and Another v Cultura 2000* 1993 NR 328 (SC).
4 *Attorney-General of Namibia v Minister of Justice and Others* 2013 (3) NR 806 (SC) ('Reverse Onus Case').
5 *Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC).

Nevertheless, it will be advanced that the approach of purposivism - applied through value judgements - has been the enduring method to Constitutional interpretation since the Supreme Court's early decisions of *Mwandinghi*[6] and *Cultura 2000*, decisions which have endorsed the seminal dictum of Mohamed J in *Acheson*[7] that the Constitution is a "mirror reflecting the national soul" and one that identifies ideals, aspirations and values. This values approach, it will be advanced, has not been without difficulty in light of questionable applications such as in *Frank*[8] and *Mushwena.*[9] A significant contributor to this is the uncertainty in the identification of values.

Moreover, with the view to offer a framework to purposivism through value-judgments, the chapter will normatively argue why the Namibian Constitution ought to be affirmed as a "transformative constitution", which is a recent neologism largely attributed to Karl Klare and invoked to particularly characterise the South African and Kenyan constitutions. It will be argued that interpreting the Constitution through the prism of transformative constitutionalism would allow the Supreme Court to deepen its impact upon the lives of everyday Namibians. This is by prioritising those interpretations that can aid in realising transformative imperatives including the social and economic actualisation of particularly the downtrodden in Namibian society.

Given that this chapter's ambition is to examine the approaches to constitutional interpretation found in the Supreme Court's jurisprudence, this chapter is not necessarily aimed at proving that any given judicial decision is right or wrong. As such, the chapter will be limited to an analytical engagement of what the interpretative approaches represent, as well as their respective strengths and weaknesses, which will be pursued through a mix of normative and doctrinal methods. It also draws on constitutional comparative perspectives including Kenya, South Africa and the US.[10]

3.2 ORIGINAL INTENT

One approach to constitutional interpretation is original intent. An original intent approach is one that enquires into what the drafters of a constitution intended to include (and exclude) within the scope of the relevant provision in the manner that they have framed it. Therefore, original intent can be generally described as an interpretative exercise in historicism, one that limits the eligible interpretations to the principles that express the historical intentions of the drafters of a constitution.[11]

6 *Minister of Defence v Mwandinghi* 1993 NR 63 (SC).

7 *S v Acheson* 1991 NR 1 (HC).

8 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

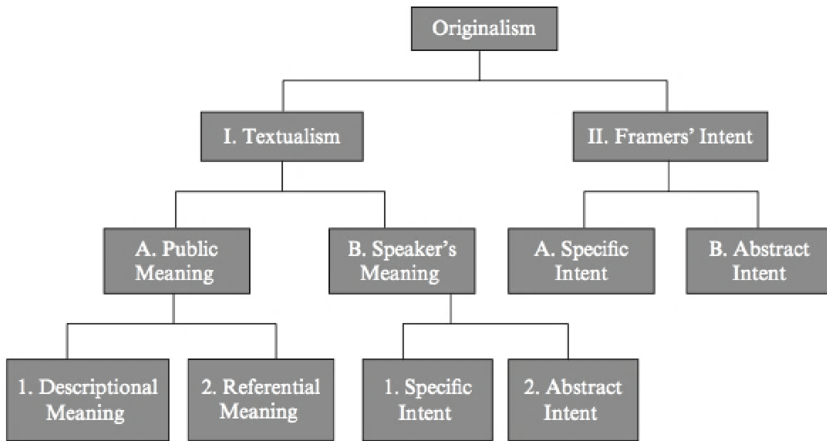
9 *S v Mushwena* 2004 NR 276 (SC).

10 On the basis for comparativism as persuasive perspectives in Namibia see *Attorney General v Minster of Justice* 2013 (3) NR 806 (SC) para 8 (Shivute CJ).

11 R Dworkin (1989) *Law's Empire* Harvard University Press: Cambridge, 360.

Original intent is a species of the broader category of originalism that seeks to prioritise how to determine and apply the meaning of a provision based on the intention of those who drafted a given text. There is no single approach to originalism. The below figure (1) by David Brink is a useful graphic representation of the panoply of manifestations of originalism.[12]

Figure 1: Varieties of Originalism[13]



The analysis in this chapter will focus on originalism in the form of the *original intent of the framers*, whether specific intent or abstract intent.[14] This is distinct from the genre of originalism as *textualism* that claims that interpretation must be faithful to the original meaning of the language of legal provisions.[15] These parameters are set with the aim to focus the analysis within a dense area of jurisprudential theoretical debate and on the premise that intention of the framers is often asserted in Namibian case law, as will be seen below. I will independently consider textualism elaborately in the forthcoming section.

3.3 THE EMBRACE OF ORIGINAL INTENT BY NAMIBIAN COURTS

The Namibian Supreme Court has variously asserted the relevance of original intent in constitutional interpretation. Three principal decisions affirm this. In *Cultura 2000*, the issue was the constitutionality of a piece of legislation that was

12 See D Brink (2016) "Originalism and Constructive Interpretation" in Will Waluchow and Stefan Sciaraffa, *The Legacy of Ronald Dworkin* Oxford University Press: New York, 273.

13 Brink (Note 12 above) 288.

14 Dworkin (Note 11 above) 360.

15 Brink (Note above 12) 282; M Berman & K Toh (2013) "On What Distinguishes New Originalism from Old: A Jurisprudential Take" Vol. 82(2) *Fordham Law Review* 545; K Thomas (2011) *Selected Theories of Constitutional Interpretation* (Congressional Research Service February 15, 2011).

enacted to repudiate the actions of the pre-independence South West African administration to donate monies and property to an organisation established for the promotion and preservation of the cultures of persons of European descent. The Supreme Court expressly referred to and relied upon the original intention behind the founders' inclusion of Article 144 on international law in the Constitution.[16] Again, in the "Reverse Onus Case",[17] the Supreme Court was directly petitioned as a court of first and final instance by the Attorney General to determine whether certain provisions of the Criminal Procedure Act that had cast a reverse onus on an accused person were in conflict with the presumption of innocence, the privilege against self-incrimination, and fair trial rights in the Constitution. The Supreme Court stated that, "[u]ltimately the meaning and import of a particular provision of the Constitution must be ascertained with due regard to the express or implicit intention of the founders of the Constitution".[18]

Furthermore, in *Kashela,* concerning the fundamental right to property in Article 16 of the Constitution, Damaseb DCJ advanced: "[i]t could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts; for where there is a right, there must be a remedy to be fashioned by the court seized with the matter".[19] *Cultura 2000*, the Reverse Onus Case and *Kashela*[20] thus reveal that the Supreme Court holds the intention of the Constitution's founders as *relevant* to the interpretative enquiry. However, such an intention is *not determinative* in and of itself as shall be seen when considered against further interpretative approaches below.

What stands out from these decisions is that the Supreme Court appears to adopt an inductive method of inferring the original intention of the founders without offering precise support for its proposition. Arguably, the original intention of the founders who drafted the Constitution can principally be deduced from two sources: the drafting history of the Constitution which is reflected in the Minutes of the Constituent Assembly Debates[21] and the 1982 Constitutional Principles.[22]

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16 *Cultura 2000* (Note 3 above) 333. See also, N Ndeunyema (2020) "International Law in the Namibian Legal Order: A Constitutional Critique" Vol. 9(2) *Global Journal of Comparative Law* 271.

17 *Attorney-General of Namibia v Minister of Justice and Others* 2013 (3) NR 806 (SC) ("Reverse Onus Case").

18 Ibid 817.

19 *Agnes Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) para 70.

20 In addition, see *African Personnel Services v Government of the Republic of Namibia* 2009 (2) NR 596 (SC); *Hendricks and others v Attorney General, Namibia, and Others* 2002 NR 353 (HC), 358; *S v Van den Berg* 1995 NR 23 (NHC), 39H-J.

21 The Namibia Constitution's drafting history does not reveal a single dominant founding figure as George Washington for the US Constitution or B.R Ambedkar for the Indian Constitution.

22 UNSC Resolution 435 Annexure. *Principles for a Constituent Assembly and for the Constitution of an independent Namibia;* M Wiechers (1989/1990) "Namibia: The 1982 Constitutional Principles and their Legal Significance" Vol. 15 *South African Yearbook of International Law* 1.

However, scarcely does the Supreme Court have explicit recourse to these sources in drafting the Constitution.

3.4 ENGAGING THE JUSTIFICATIONS FOR ORIGINAL INTENT

Two principal reasons in defence of an original intent interpretation of a constitution can be identified.[23] First, the approach ensures *legitimacy* by allowing the law to reflect the original values that the drafters of a constitution had adopted. This is an argument put forward by one of originalism's main modern adherents, Antonin Scalia.[24] Original intent thus appeals to the *nature* and *purpose* of constitutions in democratic societies where, as the argument goes, constitutional human rights, in particular, should not aim to mimic contemporary values, which is a function deemed to be of electoral processes and the elected.[25]

The second advantage is that original intent can *avoid personal predilections* of judges from creeping into their judicial decision-making.[26] The judge's role is thus constrained to being "a matter of discovery rather than invention".[27] This circumvents what Scalia calls the "judicial personalisation of the law".[28] Thus, as Dworkin frames it, judges do not make substantive choices themselves but only enforce the choices made by a constitution's drafters.[29]

Original intent is, however, problematic as the overarching approach to interpreting the Namibian Constitution, which like its advantages, is non-exhaustively highlighted here. First, the advantage of legitimacy that original intent may bring is undercut by the fact that while the elected representatives of the people in the form of the members of the Constituent Assembly did indeed draft the Namibian Constitution, there was limited wider popular public participation in determining its substantive provisions.[30] For instance, it is a truism that human rights exist and are formulated for the benefit of *all* people. Yet, an originalist interpretation may effectively prioritise, hegemonise and staticise those views expressed by the

23 Discussion in S Fredman, *Comparative Human Rights* (2018); S Fredman (2016) "Living Trees of Deadwood: The Interpretive Challenges of the ECHR" in N Barber, R Ekins & P Yowell (ed) *Lord Sumption and the Limits of the Law* (1st ed) Hart Publishing: Oxford, 5.

24 A Scalia (1988-1989) "Originalism: The Lesser Evil" Vol. 57 *University of Cincinnati Law Review* 849, 852.

25 Ibid.

26 Compare *Van Straten v Bekker* (I 6056-2014) [2016] NAHCMD 243 (25 August 2016), the action of *contumelia* and loss of consortium had lost their lustre, as they are no longer in consonance with the constitutional values of privacy, dignity and equality.

27 A Kavanagh (2002) "The Idea of a Living Constitution" Vol. 16(1) *Canadian Journal of Law and Jurisprudence* 55-89.

28 Ibid.

29 R Dworkin (1985) *A Matter of Principle* Harvard University Press: Oxford, 34.

30 See, J Cottrell (2012) "Ensuring Equal Rights in Constitutions: Public Participation in Drafting Economic, Social and Cultural Rights" in J Heymann & A Cassola (eds) *Making Equal Rights Real* Cambridge University Press: Cambridge 51, 80-81.

drafters (and their technical advisors) in establishing the meaning of constitutional rights.

Further, the relatively "hasty" drafting process of the Namibian Constitution undermines the claim of the drafter's legitimacy as irreproachable. It is a matter of historical record that the Constituent Assembly first sat on 21 November 1989 and within three months agreed the text of the Constitution on 9 February 1990 without demur.[31] The Constitution subsequently came into force on the date of independence, 21 March 1990, as the supreme law of Namibia.[32] While the Constitution's adoption within such a comparatively short timeframe can be politically heralded as a triumph, it has (inadvertently or otherwise) resulted in limited debate and engagement with all of the provisions of the then draft Constitution.

Indicatively, a reading of the Minutes of the Constituent Assembly Debates reveals a thinness in content. The complete record of the Constituent Assembly Debates[33] is only two volumes that total 470 pages - yet with generous line spacing. Beyond the abolition of the death penalty, the Minutes of the Constituent Assembly Debates do not record any discussion on what was meant by 'life' or the reasons behind the laconic phraseology adopted in Article 6 of the Constitution for instance.[34] Comparatively, constituent assembly debates from countries such as India, Kenya and South Africa run into numerous volumes of thousands of pages; yet, even in these contexts, the courts have hesitated in attaching significant weight upon the views expressed therein.[35] Indeed, the Botswana legislature has even gone as far as proscribing the interpretative recourse to debates in the country's National Assembly.[36]

Secondly, in response to the justification for originalism as avoiding the 'personal predilections' of judges from informing their judicial decisions, this can be counteracted by the argument that the recourse to original intention is 'mischievous' as it can cover up the subjective decisions which judges inevitably make and yet may pretend that this has not occurred.[37] Furthermore, polyvocality in perspectives is revealed in the Constituent Assembly Debates which, by and large, reflect the comments of individuals or, at best, the collective position of a given political

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31 *Namibia Constituent Assembly Debates 21 November 1989 - 21 January 1990* Volume 1 and 2 (Namibia National Archives 1990) (hereinafter 'the Constituent Assembly Debates').

32 Article 1(6) of the Constitution.

33 The Constituent Assembly Debates are only available as hard copies at the National Archives of Namibia, Windhoek, although a digital version is now on record with this author.

34 However, the right to life's meaning may have been discussed by the Standing Committee that was mandated to produce a draft of the Constitution. The said Committee's deliberations were confidential and there is no record that can be relied upon.

35 See also *S v Makwanyane* 1995 (3) SA 391 (CC) para 18.

36 Section 24(1) of the Botswana Interpretation Act.

37 Fredman (Note above 23) citing Dworkin (Note above 29) 34.

formation that had participated in the drafting of the Constitution. Considering that there were numerous parties and positions represented in the Constituent Assembly, one ought to be abundantly cautious with the role that such views are to play and the weight to be attached thereto in determining the original intent of the framers.[38]

Thirdly, recourse to determining and applying the intention of the drafters gives rise to the so-phrased "dead hands of the past" concern.[39] The essence of this argument opposes an interpretation that is wedded to the views of people who have long departed and who lived in radically different societies and social environments. While the dead hands argument is most prominently asserted in comparative constitutional contexts such as the US, it is not necessarily fatal, so to speak, when applied to a Namibian context: our Constitution was drafted less than three decades ago. All of the founding drafters are alive or in living memory. This is unlike older constitutions such as the US where there is an entrenched pre-occupation with originalism - in both the textualist and framers' intent moulds - in constitutional interpretation. In the US, the "dead hands" that drafted the US Constitution were indeed sex, race and class homogenous, at the exclusion of women, racial minorities, the enslaved and the poor.[40]

Nevertheless, the core of the problem identified by the dead hands argument does not only apply to "old" constitutions as one should be mindful that the Namibian Constitution will not be "young" forever. This is well illustrated through the Canadian Charter of Fundamental Rights and Freedoms, a relatively recent document adopted in 1982. Yet, the Canadian Supreme Court has not held itself to be bound by the founders' original intention and has preferred a purposive approach to Canadian constitutional interpretation.[41] I will return to comprehensively consider purposivism later in this chapter.

At this stage of the analysis, it is of persuasive value to draw on the wisdom of the Kenyan Supreme Court in *Speaker of the Senate & another v Attorney-General*[42] which rejected a binding recourse to, and finality of, the original intention of the drafters of the Kenyan Constitution. It was clarified that, in interpreting the 2010 Kenyan Constitution, the Kenyan Supreme Court exercises its constitutional powers to 'provide high-yielding interpretive guidance on the Constitution', which must be done in a manner that advances the Kenyan Constitution's "purposes, gives effect to its intents, and illuminates its contents".[43] The Kenyan Supreme Court

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38 *Makwanyane* (Note above 35) para 18.

39 Kavanagh (Note 27 above) 291; M McConnell (1997) "Textualism and the Dead Hand of the Past" Vol. 66 *George Washington Law Review* 1127.

40 Fredman (Note 23 above).

41 S Beaulac (2017) "Constitutional Interpretation: On Issues of Ontology and of Interlegality" in P Oliver, P Macklem & N Des Rosiers (eds) *Oxford Handbook of the Canadian Constitution* Oxford University Press: Oxford 867.

42 *Speaker of the Senate & Another v Attorney-General & Others* [2013] eKLR para 156 (Herein after *Speaker of the Senate* case).

43 Ibid.

pointed out that it must also remain conscious that, "constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilise vagueness in phraseology and draftsmanship".[44] Therefore, the court's role is to "resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes".[45] The Kenyan Supreme Court further proceeded to state that:

> […] constitution-making does not end with its *promulgation;* it continues with its *interpretation*. It is the duty of the Court to illuminate legal penumbras that constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.[46]

Related to the "dead hands of the past" argument, even if one is to have recourse to the original intention of the drafters of the Namibian Constitution, the reality is that such intention may (i) not factually exist, or (ii) be ambiguous and indeterminate. In the Namibian context, this is further complicated by the reality that even where the drafting intention does exist, such is for the most part confidential and privileged, and thus not recorded anywhere.[47]

Again, I turn to Canada to best illustrate this problem. In *RE B.C Motor Vehicle Act*,[48] the Canadian Supreme Court was faced with the possibility of determining the intention behind the phrase 'principles of fundamental justice' in section 7 of the 1981 Canadian Charter of Rights and Freedoms, which states: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. One of the main sources relied upon to support the argument that 'fundamental justice' was simply synonymous with natural justice was evidence sourced from the Minutes of Procedure of the Special Joint Committee that was tasked with the Canadian Charter's drafting.[49] Although the Canadian Supreme Court considered this as evidence of the intent of the legislative bodies that adopted the Canadian Charter, it took the view that it would be 'erroneous to give these materials anything but

44 Ibid.
45 Ibid.
46 *Senate v Attorney-General* (Note 42 above) para 156 (emphasis in original).
47 Both the technical advisors and the Standing Committee of 21 Constituent Assembly Members tasked who prepared the draft of Constitution were bound by confidentiality as to their drafting deliberations. See *Constituent Assembly Debates* (Note 31 above) 158-60.
48 *RE B.C Motor Vehicle Act* [1985] 2 SCR 486 (Supreme Court of Canada) para 52.
49 Ibid para 53.

minimal weight'[50] given the unreliability of such speeches and statements. The Canadian Supreme Court also avoided an approach that would have the effect of rendering the Canadian Charter as 'frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs'.[51]

In this context, it is not a foregone conclusion that the founders of the Namibian Constitution, as wise and gallant as many of them were, had actually expressed an independent opinion or an intention behind *all* the issues addressed in the Constitution. Dworkin captures the essence of the 'frozen in time' concern by cautioning that interpreting a constitution from the perspective of historical intent as exhaustive 'is tantamount to denying that the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman's time, imagination, and interest stopped'.[52] Thus, Dworkin aptly concludes that '[t]he Constitution takes rights seriously; historicism does not'.[53]

3.5 TEXTUALISM

The textualist approach to constitutional interpretation is one that is based on the text of the Constitution. Although I consider textualism independently in this analysis, textualism is often conceptualised as a species of originalism such that one seeks to determine the original meaning (either the public meaning or the speaker's meaning) that the text of the provision under interpretation was accorded.[54] Fredman observes that textualism's closeness to originalism ensues because its rationale is often stated to be in originalist terms: the text is the surest guide to the intention of those who frame it.[55]

Textualism is predicated upon centring the meaning of the words or phrases that are used by the constitutional provision in question. Textualism requires a somewhat sequential engagement with the text of the Constitution, which, as a general methodology, is pithily captured by Calabresi and Prakash in the following four stages: (1) Consider the plain meaning of the words, while construing them holistically in light of the entire Constitution; (2) If the original meaning of the words remains ambiguous after consulting a dictionary/grammar book, consider next any widely read explanatory statements made about them in public contemporaneously with their ratification. These might shed light on the original meaning that the text had to the drafters; (3) If ambiguity persists, consider any privately made statements about

50 Ibid.
51 Ibid.
52 Dworkin *Law's Empire* (Note 11 above) 368-69, commenting in the context of historicism as the express historical intention of the framers. Compare the discussion in R Ekins (2013) *The Nature of Legislative Intent* Oxford University Press: Oxford 16 for a summation of Dworkin's scepticism to legislative intent.
53 Ibid.
54 Brink (Note 12 above) 288.
55 Fredman (Note 23 above).

the meaning of the text that were uttered or written prior to or contemporaneously with ratification into law. These statements might be relevant if, and only if, they reveal something about the original public meaning that the text had to the drafters; (4) If ambiguity still persists, consider lastly any post-enactment history or practice that might shed light on the original meaning the constitutional text had to those who wrote it into law. Such history is the least reliable source for recovering the original meaning of the law, but may in some instances help us to recover the original understanding of an otherwise unfathomable and obscure text. [56]

From the above, it is patent that the "plain meaning of words" would constitute the guiding light in interpretation as it is assumed that the framers must have intended words to have the plain meaning that words bear.[57] Textualism may arguably also permit the interpreter to go beyond some of the strictures of originalism as a textualist would not necessarily be concerned neither with the subjective intentions of the framers nor with the idiosyncratic use of language. Rather, they aim to understand how language is understood.[58] While it can be accepted that, to the extent that one *can* discern meaning from the text, one *should* give effect to it, meaning is not easily discernible from the text.

As noted earlier, there is some overlap between textualism and originalism, which is revealed in that various originalists are also co-identified as textualists, including Antonin Scalia.[59] As such, it is unsurprising that the shortcomings of the textual approach mirror those found in original intent. I will examine the most prominent drawbacks, although it is not within the province of this chapter to exhaustively consider same.[60]

Firstly, textualism, like original intent, may require judges to masquerade as historians; yet this too is not certain to provide a sufficiently determinate result.[61] Secondly, to establish the "plain meaning" of words, dictionaries are frequently used as interpretative resources. However, rarely do dictionaries provide us with a conclusive answer on the interpretation of a word, even less so for the often technical, legalistic and context-sensitive phrases used in constitutions. This is the inherent limitation in an interpretive recourse to dictionaries. They are difficult to effectively utilise without giving rise to the risk of judicial manipulation in light of the reality that dictionaries do not offer a single, true meaning of a word. Rather, they often offer multiple, sometimes obscure meanings that are intended to capture a

[56] S Calabresi and S Prakash (1994) "The President's Power to Execute the Laws" Vol.104(3) *Yale Law Journal* 541, 553 (internal footnotes omitted).

[57] Fredman, *Comparative Human Rights* (note 23). Note that Jeremy Waldron has a different account of textualism: J Waldron (2012) "Partly Laws Common to All Mankind" in *Foreign Law in American Courts* Yale University Press: London, 155.

[58] Fredman (Note 23 above).

[59] Calabresi & Prakash (Note 56 above) 983.

[60] See discussion in Fredman (Note 23 above).

[61] Ibid.

wide breadth of possible usages.[62] Thirdly, even if we were to seek to establish the plain meaning of the words that the framers intended, this is likely to be indeterminate from the historical sources of the Constitution - assuming and to the extent that the drafting history is available for consultation in the first place.

Turning to the case law, the Namibian Supreme Court has recognised the role of the Constitution's text in interpretation but has rejected the strict construal of words and phrases in the narrow and precise manner that some textualists advocate. While the Supreme Court has largely adopted a purposive approach - which is expanded upon below - it has not rendered the language that is used in a given text as irrelevant to the interpretative enquiry. The Supreme Court stated in the "Reverse Onus Case" that "in interpreting constitutional rights, close scrutiny should be given *to the language of the Constitution itself* in ascertaining the underlying meaning and purpose of the provision in question".[63] Further, it is arguable that the Namibian High Court in *Kauesa*[64] endorsed textualist considerations when it comes to reconciling the position stated by international law with the provisions of the Constitution. *Kauesa* concerned whether a provision in the Regulations to the Police Act that had prohibited police officers from commenting unfavourably against the government was a violation of the Constitution and the African Charter on Human and Peoples' Rights' free expression provisions.[65] *Kauesa* determined that an international law position will only be overridden where the Constitution's provisions are "equivocal or uncertain".[66]

3.6 PURPOSIVE OR "LIVING TREE" INTERPRETATION

3.6.1 A historical and theoretical account of purposivism

Purposive interpretation aims to identify the purposes, core values, and principles that a constitution seeks to achieve and give effect to them, protect them and promote them.[67] The process of interpretation is thus geared to unearthing the purpose of the provision and not merely the meaning of the words used to communicate such purpose.[68]

Purposivism is said to retain its epistemic origins in Canadian statutory interpretation, specifically in the 1930 case of *Edwards v Attorney General for Canada,*[69] widely

[62] For a critique of dictionaries in constitutional interpretation, see P Rubin (2010) "War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles" Vol. 60 *Duke Law Journal* 167.

[63] "Reverse Onus Case" 816-17 (emphasis added).

[64] *Kauesa v Minister of Home Affairs* 1994 NR (HC) 135.

[65] Article 21(1)(a) of the Constitution; Article 9 of the African Charter on Human and Peoples' Rights.

[66] *Kauesa* case (note 64 above) 141.

[67] Fredman (Note 23 above).

[68] A Barak & S Bashi (2007) *Purposive Interpretation in Law* Princeton University Press: New Jersey.

[69] *Edwards v Attorney-General for Canada* [1930] AC 124 (Judicial Committee of the Privy Council (Canada)) ('the Persons Case'),

known as "the Persons Case". Here, the dispute centred around whether the meaning of the word 'persons' in a statute was to be understood as only men at the exclusion of women, in the context of voting rights and women's eligibility to hold public office. In interpreting the legislation in question, the Privy Council rejected an originalist approach that would render the word 'persons' susceptible to a narrow and technical construction. Rather, the court determined that the relevant statute was a "living tree capable of growth and expansion within its natural limits".[70] It was thus held that there was no present reason to exclude women from the meaning of 'persons'. As such, purposivism is often metaphorised as 'living tree' interpretation. In this vein, the Constitutional Court of Uganda in *Tinyefuza v Attorney General* aptly captures the essence of a 'living' constitution which embraces purposivism in the context of fundamental rights thus:

> Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico-cultural values so as to extend the benefit of the same to the maximum possible.[71]

With "the Persons Case" establishing purposive interpretation in Canada, it has since been transposed into other jurisdictional contexts.[72] Indeed, since the advent of constitutional supremacy, purposivism has now been well entrenched in Namibian constitutional interpretation, in the process upending the previous tradition characterised as "extreme legal positivism"[73] that was rooted in parliamentary sovereignty[74] and that ultimately informed the embrace of a strict textualist approach to interpretation. As such, what follows is a critique of the Namibian jurisprudence which, per Amoo, adopts "a natural law cum realist or a purposive approach".[75]

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70 Ibid, 107.

71 *Tinyefuza v Attorney General* [1997] UGCC 3 (Constitutional Court of Uganda). See also M Ssenyonjo (1995) "The domestic protection and promotion of human rights under the 1995 Ugandan Constitution" Vol. 20(4) *Netherlands Quarterly of Human Rights* 445, 457.

72 B Miller (2013) "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" G Huscroft & B Miller *The Challenge of Originalism* Cambridge University Press: Cambridge.

73 S Schulz (2012) "*Indubio pro libertate*: The general freedom right and the Namibian Constitution" in A Bösl, N Horn and ADu Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* Macmillan Education Namibia: Windhoek 169, 174.

74 See also M Hinz "Justice: Beyond the limits of law and the Namibian Constitution" in Bösl, Horn and Du Pisani (Note above 73) 159.

75 S Amoo (2008) An introduction to Namibian law: Materials and cases Macmillan Education Namibia: Windhoek 41.

3.7 PURPOSIVE INTERPRETATION AS APPLIED BY NAMIBIAN COURTS

The High Court in *Acheson* seminally asserted that although the Constitution is enacted in the form of a statute, it is *sui generis*.[76] In *Acheson,* Mahomed J[77] had to reconcile the bail provisions of the Criminal Procedure Act, 1977 with the then newly entrenched right to personal liberty in Article 7 of the Constitution. Mahomed J, in a famous passage, recalled the nature of a constitution as not merely mechanically defining government and the relations between the government and the governed. Rather a constitution 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 over and permeate the processes of judicial interpretation and judicial discretion.[78]

Although decided by the High Court, *Acheson* is the pioneering decision that has set the tone for constitutional interpretation. The *Acheson* dictum has been ubiquitously quoted, endorsed and applied severally by the Supreme Court - perhaps most prominently in *Minister of Defence v Mwandinghi,*[79] where the Supreme Court had to decide on whether the post-independence Namibian Minister of Defence could be substituted for the pre-independence South African Minister of Defence. The factual context was a delictual claim for damages arising out of an injury caused to the respondent, Mr Mwandinghi, by South African forces operating in Namibia before independence. The Supreme Court declined to employ a narrow and mechanical interpretation of the phrase 'anything done' in Article 140(3) of the Constitution which would have limited the application of the provisions to lawful actions only. While approvingly citing the *Acheson* dictum, Mahomed JA elaborated upon the substance of purposivism in the following terms:

> 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

[76] *S v Acheson* 1991 NR 1 (HC) at 10.

[77] This section will reference the jurisprudence of Justice Ismail Mahomed at length given that his prominent role in the incipient stages of constitutional interpretation jurisprudence. Justice Mahomed served as a Namibian High Court Judge (Mahomed J), then as a Namibian Supreme Court Judge of Appeal (Mahomed JA) and finally as Namibian Chief Justice (Mahomed CJ) before retiring to join the South African Constitutional Court as Chief Justice.

[78] *Acheson* (note 76 above) para 10.

[79] *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) 69. See also *Minister of Defence v Mwandinghi* 1993 NR 263 (HC), 273; *Cultura 2000* (Note 16 above); *S v Van Wyk* 1993 NR 426 (SC) 456; *S v Kandovazu* 1998 NR 1 (SC), 3; *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC); *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC), 719.

> 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.[80]

Since the Constitution's adoption, Namibian courts have, by and large, followed this purposive approach to constitutional interpretation.[81] Moreover, the "organic instrument" nature of the Constitution that Mahomed CJ describes in *Cultura 2000*[82] justifies an analogising of the Constitution as a "living tree" that allows for interpretations to evolve with time.

In the "Reverse Onus Case", Shivute CJ approvingly cites the *dicta* in *Mwandinghi* and *Acheson* in asserting the two general principles on how the Constitution should be interpreted: the *first principle* is in a broad, liberal and purposive manner; where generous and purposive interpretations do not coincide, generous interpretation is to yield to purposive interpretation.[83] Shivute CJ identifies the *second principle* in the following terms:

> In interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[84]

This second principle thus demonstrates to us that while purposivism constitutes the *primary* approach to constitutional interpretation, the Supreme Court holds that textual considerations remain relevant as *secondary* recourse.[85] While Shivute CJ's dictum in the "Reverse Onus Case" is one of the more lucid accounts of the Supreme Court's approach to constitutional interpretation, there remains ambiguity as to how the different interpretative approaches are to be reconciled given the suggestion that purposive interpretation applies alongside original intent and textualism.

3.8 PURPOSIVISM AS VALUE JUDGEMENTS

An analysis of the Supreme Court's jurisprudence further evinces that, in adopting purposivism, a value-oriented approach that emphasises an interpretative

80 *Mwandinghi* (Note 79 above) at 69 (emphasis added); *Cultura 2000* (Note 3 above).

81 *Kauesa* (HC) (Note 64 above) 118; *Rally for Democracy and Progress v Electoral Commission of Namibia* 2013 (3) NR 664 (SC).

82 *Cultura 2000* (Note 3 above) 340.

83 *"Reverse Onus Case"* (note 17) at 816. While the Supreme Court does not expressly define the meaning of a 'generous' interpretation, we can glean from the Botswanan Court of Appeal, where generous construction means that one "must interpret the constitution in such a way as not to whittle down any of the rights of freedom unless by very clear and unambiguous words such interpretation is compelling". *Unity Dow v Attorney-General of Botswana* 1992 BLR 119 (CA), 165 (Aguda JA).

84 *"Reverse Onus Case"* (Note 17 above) at 817.

85 Ibid.

recourse to value judgements has been followed. These value judgements are required to be objectively articulated and identified.[86] Value judgements, however, raise various pertinent methodological and evidentiary questions which include:[87] 1) How are these values to be identified and what is their authoritative source? 2) How do judges overcome the inherent subjectivity in value judgement-making? And 3) What is the binding effect of these values? I will not attempt to address these questions exhaustively but will tackle some of the most prominent thematic concerns.

I will consider the two approaches to value identification that can be decerned from the Supreme Court's jurisprudence: (a) constitutionally expressed values and (b) values as identified by "national institutions". Both these approaches are however caught on the horns of a dilemma, as revealed below.

3.8.1 Purposivism through constitutional values

The first approach of identifying values from the Constitution[88] finds support in the *Corporal Punishment*[89] decision. However, using the Constitution's provisions as a reference point is insufficiently conclusive in identifying values: the possibilities thereunder are simply endless and indefinitive. Also, it can be seen that those very provisions in the Constitution that are often invoked for value identification (such as equality, dignity, non-discrimination, the rule of law etc.) are couched in inherently broad and vague language that would themselves require a judicial interpretation that has recourse to values[90] - in other words, a determination of the *values within the values.*

3.8.2 Purposivism through national institutions

The second approach would be to use "national institutions" to identify values. This was also the approach of the Supreme Court in *Corporal Punishment*[91] where Mahomed AJA offers national institutions as an "objective' source with due regard to the values of the 'civilised international community".[92] The claim here is that national institutions are an *objective* source for the determination of values. But this claim requires further interrogation. As Owen Fiss sets out, objectivity - in the legal

86 *In Re Ex parte Attorney-General: Corporal Punishment by Organs of State* 1991 NR 178 (SC), 188.

87 S Amoo (2010) "The Constitutional Jurisprudential Development in Namibia since 1985" in A Bosl (eds), *Human Rights and the Rule of Law in Namibia* Konrad Adenauer Stiftung: Windhoek 49.

88 Amoo (Note 87 above) 49. Amoo derives this approach from the former Namibian Chief Justice Johan Strydom in an extra-judicial address that Amoo cites.

89 *Corporal Punishment* (Note 86 above) 188, where the Supreme Court had to determine whether a particular form of corporal punishment which was administered by or on the authority of a state organ constituted in cruel or inhumane treatment which is prohibited under the right to dignity in Article 8 of the Constitution.

90 Amoo (Note 87 above) 50.

91 *Corporal Punishment* (Note 86 above).

92 Ibid, 188.

sense rather than the scientific sense - connotes standards and implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation.[93]

One can appreciate the attractiveness of asserting values through recourse to objective sources: courts must guard against the temptation of judges introducing their preferences or - to invoke US Chief Justice Warren Burger's famous phraseology - their "personal predilections" to inform their judicial choices in constitutional interpretation.[94] However, even while assuming that national institutions are indeed an objective source, the values, norms and aspirations that are asserted by national institutions may well be those of the majority but may equally run contrary to the values of the Constitution, which is the ultimate touchstone. A classic example is in the context of sexual minorities where the majority may be in favour of discrimination on the basis of 'sex', yet 'sex' is a protected category under the aegis of the Constitution,[95] given that 'sex' should be interpreted as including the protection of "sexual orientation".[96]

The quandary persists: what constitutes national institutions and how objective are these sources of values? One possible answer is that the appropriate national institution is Parliament, as the Supreme Court determined in *Namunjepo v Commanding Officer, Windhoek Prison* concerning the constitutionality of placing prisoners in chains: "Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people."[97]

The use of Parliament as a values benchmark may indeed be 'objectively' justified if we consider that Parliament is constituted of the National Assembly (96 of the 102 members with voting rights are periodically elected through party political lists)[98] and the National Council (all members are periodically elected as representatives from all the regions of Namibia through their respective regional councils).[99] As such, Parliament may be deemed as appropriate due to its representative nature and is thus the 'voice of the people'.

Nevertheless, recourse to Parliament for values determination remains problematic for various reasons. First, the *Namunjepo* guidance is inadequate as it is imprecise as to whether the contemporary values or norms of Namibian peoples are those

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93 O Fiss (1982) "Objectivity and Interpretations" Vol. 34 *Stanford Law Review* 739, 744.

94 *Furman v Georgia* 408 U.S. 238 (1972) (US Supreme Court), 376.

95 Article 10(2) of the Namibian Constitution; S Fredman, *Discrimination Law* (2nd edn, 2011) 118.

96 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC); *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* 2009 (2) NR 596 (SC); See S Amoo (Note 87 above) 49.

97 *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) 284.

98 Article 46(1)(a) of the Constitution.

99 Article 69 of the Constitution.

that have been articulated and enacted in the form of legislation, or whether they are those that constitute the expressed - verbal or written - opinions of parliamentarians in the form of parliamentary debates or even extra-parliamentary speeches etc. Indeed, politicians are not known to be non-capricious with the views they hold. Moreover, drawing on national institutions alone would fail to protect potentially silent majorities against an assertion of values by those minorities who may hold greater influence through the institutional offices they retain, for example.

Second, assuming it to be parliamentary debates drawn from Hansard for instance, it is often difficult, sometimes impossible, to discern what the singular view of Parliament is on a specific issue, given the reality that some parliamentarian voices may be more pronounced than others. Assuming that it is legislation, this is problematic as, in addition to the potential nebulosity of what the relevant values therein are, this approach runs the risk of subordinating the Constitution to the views expressed in legislation in determining values whereas constitutional supremacy prevails in Namibia.[100] In this vein, a departure from the constitutional values in the process of constitutional interpretation can be seen in *Mushwena*. Here, the Supreme Court's majority held that the High Court could exercise its criminal jurisdiction, notwithstanding the illegal refoulment of the accused who were the respondents from Namibia contrary to the specifications of the extradition agreements in force between Namibia, and Zambia and Botswana, respectively.[101] *Mushwena* was thus a departure from the Constitutional value of upholding the rule of law.[102]

Thirdly, if we are to have recourse to Parliament - whether through the views it expresses in legislation or through debates - this risks reducing the court's role to one of being a *norm-reflector* rather than *a norm-setter*, as Fredman has questioned.[103] The challenge with courts as norm-reflectors is that this runs the risk of displacing the court's role to a populist endeavour of what the majority deems appropriate at a given time - considering that views are inherently liable to change - which is alone insufficient to ascertain values that determine the existence of a human right or a violation thereof.

Parliament is not the only institution (national or otherwise) that the Supreme Court has identified to source values. In *Frank,*[104] O'Linn AJA went further in stating that those institutions that can provide evidence of values include: "Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news

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100 K Mundia (2014) *Ronald Dworkin and the Supreme Court of Namibia* (Unpublished PhD Thesis, University of Pretoria) 72.

101 *S v Mushwena* 2004 NR 276 (SC). See Mundia (Note 100 above).

102 See also *S v Likanyi* 2017(3) NR 771 (SC) where the Supreme Court, addressing the facts similar to those in *Mushwena* re-affirmed the constitutional commitment to the rule of law (Shivute CJ concurring at para 8).

103 Fredman (Note 23 above).

104 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC), which concerned an application for Namibian permanent residency by a foreign national who was in a lesbian relationship with a Namibian citizen.

media, trade unions, established Namibian churches and other relevant community-based organisations".[105] The use of this miscellany of institutional sources to determine values can also be criticised for inviting an unprincipled approach and risking the displacement of constitutional values such as human dignity and equality. This renders the *Frank* approach vulnerable to the criticism of reducing value judgement-making to an unsystematic determination of what is the 'national popular opinion'.

Even if we assume homogeneity in the public's perspective on a given issue, popular opinion is inherently vulnerable to the momentary whims and caprices of the public. The problematic nature of public opinion is appositely summed up when Chaskalson P cautioned in *Makwanyane* thus:[106]

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive there would be no need for constitutional adjudication.

Furthermore, it is not hard to imagine a lack of consensus between and even within the dense plurality of institutions that O'Linn AJA relies on to source values. For example, Namibian tribal authorities, churches and community-based organisations may likely assert values that are triametrically opposed. Arguably, the use of these multiple sources as evidence of values had led the Supreme Court to apply a restrictive and narrow interpretation to 'sex' in *Frank*.

In this context, Mundia, who has diligently studied the jurisprudence of the Supreme Court, has identified glaring inconsistencies in the application of purposive interpretation and, as a corollary, the values that have been judicially asserted and applied.[107] Mundia finds that the Supreme Court's record in particularly 'hard cases' such as *Frank* and *Mushwena* is thus wanting because of 'myopic and pedantic'[108] approaches to constitutional interpretation.

While engaging in a full-blown critique of the value judgements jurisprudence of the Supreme Court is beyond the remit of this chapter, it is sufficient to conclude that the use of institutions, whether national or otherwise, risks leading into the minefield of problems identified above.

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105 *Frank* (note 104) 137.

106 *S v Makwanyane* 1995 (3) SA 391 (CC) para 88.

107 Mundia (note 100).

108 K Mundia (2017) "A Constructive Interpretation of the Namibian Constitution: Transposing Dworkin to Namibia's Constitutional Jurisprudence" Vol. 31(1) *Southern African Public Law* 73, 81.

3.9 PURPOSIVISM CONCLUDED

To sum up, I have argued in this section that the Supreme Court has adopted a purposive approach to constitutional interpretation with principal recourse to value judgements. The first principle is for a broad, liberal and purposive reading, with the Constitution being likened to a living tree. The second principle requires scrutiny of the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question. However, the Supreme Court's approach to purposivism has not been consistent. The earlier critique has exposed various flaws. In particular, there remains ambiguity in determining which values and the source of the values to be engaged. As such, and without entirely rejecting the relevance of the objective sources cited in various Supreme Court decisions, I will venture to offer an approach to purposivism through an understanding of the Namibian Constitution as a transformative instrument.

3.10 INTERPRETING THE CONSTITUTION AS A *TRANSFORMATIVE* DOCUMENT

The notion of 'transformative constitutionalism' is a method through which to understand purposive constitutional interpretation. While constitutions drafted in the context and mould of most prominently the 1996 South African Constitution and the 2010 Kenyan Constitution[109] are widely characterised as transformative, I will substantiate my claim that the Namibian Constitution also falls within this cluster of constitutions. Pertinently, in subscribing to a transformative constitutionalism approach, I align with the essence of the constructive interpretation approach advanced by Dworkin:[110] transformative constitutionalism is one of the *plausible* methods to interpret the Namibian Constitution; but it is not the *only* method.

By way of epistemological background, the neologism 'transformative constitutionalism' first found substantive coinage in the American scholar Klare's seminal article in 1998 titled "Legal Culture and Transformative Constitutionalism".[111] The article was published against the backdrop of the 1996 South African Constitution and the early jurisprudence from the South African Constitutional Court. While transformative constitutionalism is rooted in the South African

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109 *Speaker of the Senate* (Note 42 above) para 51: "Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality,* devolution*, human rights, rule of law, freedom and democracy.*" (Emphasis in original).

110 Dworkin *Law's Empire* (Note 11 above) 52.

111 K Klare (1998) "Legal Culture and Transformative Constitutionalism" Vol. 14 *South African Journal of Human Rights* 146. See also the critique by Theunis Roux whose central argument is that Klare's article defines the project of transformative constitutionalism in too exclusive a fashion: Theunis Roux (2009) "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" Vol. 20(2) *Stellenbosch Law Review* 258.

experience, the historic social, economic, political and legal context of South Africa is one that is largely shared by Namibia, although there are significant differences in the respective constitutional arrangements.

The idea of transformative constitutionalism has been further carried forward in not only South Africa's jurisprudence[112] but also developed in scholarship, most notably by former Justices Langa[113] and Moseneke[114] in their extrajudicial writings.[115] Scholars Horn[116] and Mundia[117] as well as Justice Naomi Shivute[118] have also characterised Namibia's Constitution as a transformative document. Importantly, transformative constitutionalism is not restricted to post-authoritarian or African contexts; various scholars have persuasively argued for transformative constitutionalism's relevance, application and manifestation in the broader Global South contexts of Latin America[119] and even in the Global North.[120] This examination of transformative constitutionalism is thus not rooted exclusively in Karl Klare's account, which has been the subject of significant critique, but will draw on the strongest arguments that are appropriate for Namibia.

What transformative constitutions generally share is that they serve as a break from the past. In the context of the constitutions of Namibia and South Africa specifically, they present "framework[s] for a transformed society which can heal the scars of apartheid [and colonialism]" thereby being "expressly value-driven".[121] While one would rarely find an explicit description of the Constitution as 'transformative' within the case law, transformative constitutionalism is a question of substance rather than mere affirmation. The Constitution's transformative character is indeed evident

112 *Makwanyane* (Note 106 above) para 262: "What the [South African] Constitution expressly aspires to do is to provide a *transition* from these grossly unacceptable features of the past to a conspicuously contrasting [...] future". (Emphasis added); *Du Plessis & Others v De Klerk* 1996 (3) SA 850 (CC) para 157: "[The South African Constitution] is a document that seeks to *transform* the status quo ante into a new order". (Emphasis added).

113 P Langa (2006) "Transformative Constitutionalism" Vol. 17(3) *Stellenbosch Law Review* 351.

114 D Moseneke (2002) "Bram Fischer Memorial Lecture: Transformative Adjudication" Vol. 18 *South African Journal of Human Rights* 309.

115 See also sources cited in S Liebenberg (2010) *Socio-Economic Rights: Adjudication Under a Transformative Constitution* Juta: Cape Town, 25.

116 N Horn (2014) "Interpreting the Constitution: Is Transformative Constitutionalism a Bridge too far?" Vol. 2(1) *University of Namibia Law Review* 1.

117 Mundia (Note 100 above) 100.

118 N Shivute (2015) "Rendering a forum for Legal Discourse in an era of Transformative Constitutionalism" Vol. 2(2) *University of Namibia Law Review* 66.

119 A von Bogdandy, E Mac-Gregor, M Antoniazzi, F Piovesan, and X Soley (eds) (2017) *Transformative constitutionalism in Latin America: the emergence of a new* ius commune Oxford University Press: Oxford.

120 M Hailbronner (2017) "Transformative Constitutionalism: Not Only in the Global South" Vol. 65 *American Journal Comparative Law* 527. U Baxi (2013) "Preliminary Notes on Transformative Constitutionalism" in *Transformative constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* Pretoria University Law Press: Pretoria, 28.

121 Fredman (Note 23 above).

in the jurisprudence of Namibian courts, in particular, those early Supreme Court decisions on constitutional interpretation. Indicatively, in *Cultura 2000*, Mahomed CJ asserted that the Constitution "articulates a jurisprudential philosophy which, in express and ringing tones, repudiates the legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia".[122] Mahomed CJ affirmed earlier in *S v van Wyk* thus:

> Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding 'revulsion'' of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and protect the gains of our long struggle' against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity […] That ethos must "preside and permeate the processes of judicial interpretation and discretion" […][123]

It is in this context that a transformative constitution does not present itself as "timeless and metahistoric" or as being carried down and founded through the "single magic moment of 'social contract'".[124] Rather, it "evinces an understanding that legal and political institutions are chosen, not given, that democracy must be periodically reinvented, and that the Constitution itself is the contingent (even fragile) product of human agency".[125] Klare proceeds to capture the essence of a transformative constitution as a long-term project rooted in a constitution's enactment, its interpretation and enforcement, with due regard to the historical context and political developments.[126] What is to be 'transformed' is the country's political and social institutions and power relationships with the view to follow a democratic, participatory and egalitarian direction.[127] Klare states that:

> Transformative constitutionalism connotes an *enterprise of inducing large-scale social change* through nonviolent political processes grounded in law. […] a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word.[128]

122 *Cultura 2000* (Note 3 above) 332-33.
123 *S v van Wyk* 1993 NR 426 (SC), 456G-H. See also *Shaanika and others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC).
124 Klare (note 111) 155.
125 Fredman (Note 23 above).
126 Klare (Note 111 above) 150.
127 Ibid.
128 Ibid (emphasis added).

Klare further identifies the core ideals of transformation: a society that is a highly egalitarian, caring and multicultural community, and one that is governed through participatory, democratic processes in both the polity (public) and private spheres.[129]

Like Klare, I advance that transformative constitutionalism necessarily entails a transformation in two senses: in the *operative legal culture* with the aim to reflect new values expressed; and underpinned by the newly introduced constitutional democratic dispensation and the *socio-economic status quo* through distributive justice.[130] In expanding on transformative constitutionalism, Langa describes the idea of transformation as a change from 'a legal culture of authority to a culture of justification'.[131] This conceptualisation draws on what Etienne Mureinik seminally describes as a legal culture where –

> every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.[132]

In realising the culture of justification, the Constitution serves as the touchstone.[133] This shift in legal culture is one that Damaseb DCJ asserted in *Kashela* by stating that 'the Constitution represents a fundamental break with the past and infuses a culture of rationality and fairness in the manner the State relates to and deals with the citizens over whom it holds sway'.[134]

Klare holds transformative constitutionalism to be 'transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word'.[135] In contrast, Langa *does* invoke the language of 'revolution' by likening the transformation that is required of the South African Constitution to that of 'a social and an economic revolution'[136] and cites the prevailing unequal and insufficient access to housing, food, water,

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129 Klare (Note 111 above) 150 (emphasis added). Klare has been quoted with approval in the context of defining transformative constitutions by the Kenyan Supreme Court in *Speaker of the Senate and Another v Attorney General and Others* Advisory Opinion Reference No. 2 of 2013 [2013] eKLR para 52.

130 Of course, one must note that the South African Constitutional context within which Klare avers transformative constitutionalism is one where there is a strong, express commitment to social and economic justice through their inclusion as fundamental, enforceable rights, which are largely absent - at least expressly - from the Namibian Constitution.

131 Langa (Note 113 above) 353.

132 Etienne Mureinik (1994) "A Bridge to Where? Introducing the Interim Bill of Rights" Vol. 10(1) *South African Journal on Human Right*s 31, 32.

133 See *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) at 385I-J: "by the adoption of the Constitution of Namibia, we have been propelled from a culture of authority to a culture of justification".

134 *Kashela case* (Note 19 above) para 65.

135 Klare (Note 111 above) 150.

136 Langa (Note 113 above) 352.

healthcare and electricity in South Africa. Langa points to the need to level economic provision that was previously skewed by apartheid as a central tenant of transformative constitutionalism.[137]

The Kenyan Supreme Court has further clarified the pivotal role of a judiciary in "midwifing transformative constitutionalism".[138] Moreover, in a treatise dedicated to advocating for the Indian Constitution as a transformative constitution - as distinguished from a "conservative constitution" - Bhatia advances that transformative constitutionalism takes the text of the Constitution, its structure, and the historical moment of its framing seriously.[139] In the same breath, Bhatia points out, a constitution is "not *frozen* at the moment of framing. While taking text, structure, and history as crucial building blocks of constitutional meaning, it does not accord an overriding veto power to any of them".[140]

At the heart of the Constitution's Bill of Rights provisions is the creation of a strong nexus between the pursuits of social-economic equality and progression, catalysed by constitutional interpretations that enhance transformation in the substantive sense and not merely the formal sense. As such, a constitutional commitment to a socially and economically just society would imply that there is a need to restructure the underlying institutional arrangements that generate various forms of political, economic, social and cultural injustice.[141] Whether a transformative constitutionalism approach can truly remedy gross structural inequality and pervasive poverty has been the subject of rigorous debate.[142] Enriching and important as it may be, this debate is outside the purview of this chapter. Furthermore, at an institutional level at least, transformative constitutionalism is arguably consonant with what has been

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137 Langa (Note 113 above) 352. I recognise the body of predominantly South African literature rooted in jurisprudence and political theory that questions whether a constitution, and by extension the law, can bring about a truly transformed society (see for example: A Kok (2010) "Is Law Able to Transform Society" Vol. 127 *South African Law Journal* 58; J Modiri (2015) "Law's Poverty" Vol. 18 *Potchefstroom Electronic Law Journal* 223.) While these are interesting and meritorious critiques, I will not engage them in this chapter.

138 *Communications Commission of Kenya and others v Royal Media Services and others* [2014] eKLR para 377. W Mutunga (2015) "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions" Vol. 1 *Speculum Juris* 6.

139 *Transformative* constitutions can be contrasted with *conservative* constitutions; the Indian Constitution of 1950 has been characterised as such by some quarters as conservative, due to the *transfer* of power at the moment of Independence rather than the *transformation* of power. G Bhatia (2019) *The Transformative Constitution: A radical biography in nine Acts* Harper: India and sources cited therein; R West (1989/90) "Progressive and Conservative Constitutionalism" Vol. 88 *Michigan Law Review* 641.

140 Bhatia (Note 139 above) (emphasis in original).

141 Liebenberg (Note 115 above) 27.

142 One of the seminal critiques is offered by Sibanda, whose core thesis is that transformative constitutionalism as the preferred approach to reading and understanding the (South African) Constitution is inadequate to deliver poverty eradication. Sibanda argues that this is because of transformative constitutionalism's claim to post-liberalism yet it remains deeply embedded liberal discourses. S Sibanda (2011) "Not Fit for Purpose: Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty" Vol. 22(3) *Stellenbosch Law Review* 482.

conceptualised by Nick Barber as *positive* constitutionalism, distinguishable from the traditional *negative* dimensions of constitutionalism.[143]

In order for the Supreme Court to unlock the full potential of the Constitution in redressing the injustices of the past, addressing the chronic social and economic inequality that prevails and in creating an egalitarian outlook, it is argued that the decisions of the Supreme Court should both positively identify the Constitution as a transformative instrument and proactively apply interpretations that are informed by transformative constitutionalism.

3.11 CONCLUSION

This chapter has sought to "interpret the interpreter" by examining the approach that the Supreme Court has adopted in interpreting the Constitution over the last three decades - with a focus on its Bill of Rights jurisprudence. Given that independence in 1990 introduced a novel legal regime rooted in Constitutional supremacy after almost a century of race-based parliamentary sovereignty, the task of determining how to interpret the Constitution was inevitably a challenging one. The normative critiques offered in this chapter notwithstanding, the Supreme Court has offered a durable framework for constitutional interpretation especially given that the Constitution drafters omitted to incorporate provisions that would guide the interpreter.

After debating original intent and textualism, the determination has been made in this chapter that constitutional interpretation in Namibia is primarily guided by a purposivism, which at its core requires a broad, generous and purposive approach that is laden with values judgement-making. As such, one's application of purposive constitutional interpretation must be alive to this reality. In determining the Supreme Court's approach to purposivism, the shortcomings in the identification of values were exposed. To partially remedy these shortcomings, that the idea of transformative constitutionalism be applied to Namibian constitutionalism has been advanced, particularly given the unique utility of the concept in offering a judicial response to, and correction of, the socio-economic injustices and the pervasive inequalities that plague Namibian society.

143 N Barber (2015) "Constitutionalism: Negative and Positive" Vol. 38 *Dublin University Law Journal* 249.

CHAPTER 4

On the use and influence of comparative foreign case law in Namibia: Patterns, trends and practices of the Supreme Court

Kennedy Kariseb

4.1 INTRODUCTION

Comparative (foreign case) law[1] has for quite obvious reasons informed the jurisprudence of the Supreme Court of Namibia. This is no surprise given the fact that more and more consideration of foreign decisions is becoming standard practice for courts the world over, so much so that one can say that it has become an inherent part of judicial practice.[2] The determinants lending to this reality are not only obvious but equally kilometric. To elaborate with reference to Namibia, the mechanical and historical linkages between (Roman-Dutch) common law jurisdictions; the legal duty placed on the Supreme Court as the highest court that can make pronouncements on cases, especially cases of first impression; Namibia's constitutional values which resemble universal human rights principles; its history and birth out of the efforts of the international community; globalisation and the swift paradigm shift towards harmonisation of laws generally, all make a compelling case for reliance on foreign jurisprudence. It is also worth noting that reliance on foreign precedents has also been catalysed by cross-border disputes and in instances of conflict of laws.[3] Furthermore, our courts as part and parcel of a monist tradition,[4] are also required to look into the text of international instruments

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1 Comparative law as a subject and concept has attracted diverse meanings, but at a subminimum it concerns the study of legal systems. It is a method of study and research in which the legal principles and methods of different systems of law are compared. Thus, in its widest meaning comparative law includes a study of at least comparative legal history, comparative legal sociology and the study of foreign law. For purposes of this Chapter, comparative law is used as a reference to foreign case law and material. At times I loosely conflate and equate this reference with the term 'judicial cross fertilization'. For a more comprehensive analysis of the subject of comparative law see generally: R David & J Brierley (1985) *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3 ed) Free Press: New York, 1-584; K Zweigert & H Kötz (1998) *An Introduction to Comparative Law* (3 ed) Oxford University Press: Oxford, 1-744.

2 See generally, B Markesinis & J Fedtke (2006) *Judicial Recourse to Foreign Law: A new source of inspiration* Routledge-Cavendish Publishing: London, 1-409; T Groppi & M Pontoreau (2013) *The Use of Foreign Precedents by Constitutional Judges* Hart Publisher: Oxford, 1-431.

3 C Forsyth (1981) *Private International Law - The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* Juta: Cape Town, 1-504; See also K Balakrishnan (2010) "The Role of foreign precedents in a country's legal system" Vol. 22(1) *National Law School of India Review* 1.

4 O Tshosa (2010) "The status of International law in Namibian national law: A critical appraisal of the constitutional strategy" Vol. 2(1) *Namibia Law Journal* 3-30.

and their interpretations and rely on same in their dealings with international law, whether hard or soft. In those rare, but actual instances, our superior courts are necessarily implicated to cite and discuss alien laws and decisions.[5]

Notwithstanding this reality, there have been counter arguments for the relinquishing of foreign sources in our legal system. For instance, some have argued, rightly so, that since the attainment of independence in 1990, the Supreme Court of Namibia has engaged in the development of a home-grown jurisprudence, peculiar to "contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution".[6] Equally, the legislative arm of government has in the exercise of its law making function promulgated pieces of legislation to address the needs of the Namibian people, thus subsequently requiring the courts of Namibia to give life and meaning to these legal instruments. Accordingly, courts in Namibia, more so the Supreme Court, are necessitated to capture and develop an "autochthonous jurisprudence" in line with domestic circumstances, positionality and context. This will require a closer engagement with local jurisprudence as opposed to foreign authority. Furthermore, the fact that courts in Africa, Namibian courts being no exception, have often been criticised of "unjustifiably and/or erroneously relegating African people to western values" by relying on comparative law also advances the reservations to the use of comparative foreign case law.[7] These arguments, like the ones corroborating the use of comparative law as stated above, require closer reflection given the metamorphosis that law, legal practice and legal systems have undergone over the last few decades.

Although Namibian courts are said to have often utilised foreign case law, the frequency, scope and influence, if any, of such use remains an understudied area; a gap this Chapter contribution seeks to fill. To this end, this Chapter amongst others, seeks to locate the use and application of comparative case law in the jurisprudence of the Supreme Court as well as analyse how such comparative use of case law has informed the development of Namibia's legal system, more specially its jurisprudence. To this end, the Chapter aims to set out a thorough and compelling argument that the use, approval and application of foreign material, including foreign case law (and to a lesser extent the practice of making use of foreign judges), has positively advanced the jurisprudence of the Supreme Court, especially in line with the countries' developmental aspirations. For instance, and as will become more evident in this Chapter contribution, by often relying on

5 The recognition of international law as source of law in terms of Article 144 of the Namibian Constitution and the transitional provision in Article 140 of the Namibian Constitution can broadly also be interpreted as opening avenue for the incorporation of foreign law.

6 See generally, *Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) par 2. See similar arguments made by Geier J in *Westcoast Fishing Properties v Gendev Fish Processors Ltd & Another* 2013 (4) NR 1036 (HC)/A 228/2012 [2013] NAHCMD 185 (28 June 2013).

7 D Bilchitz, T Metz & O Oyowe (2017) *Jurisprudence in an African context* Oxford University Press: Cape Town, 4.

foreign judgments, the Supreme Court has been able to protect and promote the counter-majoritarian safeguards in our Constitution, more specially where these affect the most vulnerable in society. The court's liberating decisions in *Shaanika v The Windhoek City Police*,[8] *Sibonga v Chaka*,[9] and more recently in *Director-General of the Namibian Central Intelligence Service v Haufiku*,[10] are some, though not the only decisions of the Supreme Court, that are emblematic of the Court's positionality in the context of ever-increasing counter-majoritarianism.

This Chapter's contribution is divided into five parts. In addition to this introduction, the Chapter in section two outlines the trends and practices relating to the use of comparative foreign case law in the judicial practices of the Supreme Court. In the third part, the Chapter unravels some of the determinants that may account for the Courts increasing use of comparative foreign authorities. This part of the Chapter also considers possible contestations to the use of comparative foreign case law in the Courts practices. To illustrate the positive influence of comparative foreign case law, the fourth section of the Chapter analysis three Supreme Court decisions where comparative foreign jurisprudence was essential in safeguarding counter majoritarian values. The fifth section provides a terse conclusion.

4.2 THE INFLUENCE OF COMPARATIVE (FOREIGN CASE) LAW ON THE JURISPRUDENCE OF THE SUPREME COURT 1990-2016: TRENDS AND PRACTICES

In its close to three decades of existence, the Supreme Court of Namibia has looked to international as well as comparative sources as part of its judicial practice.[11] This of course has been necessitated by several factors as will become much clearer in the latter parts of this Chapter contribution. In principle, such comparative use of sources can be characterised as part of the Court's creative function, given the fact that there is no explicit legal basis either than Rule 19 of the Supreme Court Rules, for the reliance on foreign sources of law in Namibia, unless they form part of international law.[12] Moreover, such creative and dynamic use of comparative law

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8 (Unreported Case No: SA 35/ 2010) [2013] NASC 9 (15 July 2013).

9 (Unreported Case No: SA 77/2014) [2006] NASC 16 (19 August 2016).

10 (Unreported Case No: SA 33/2018) [2019] NASC 7 (12 April 2019). This part of the Chapter contribution is an abridged version of a brief case commentary formerly published as K Kariseb (2019) "Namibian Supreme Court finds that National Security Concerns do not Automatically Trump Free Speech" *Oxford Human Rights Blog* 1-3. <http://ohrh.law.ox.ac.uk/namibian-supreme-court-finds-that-national-security-concerns-do-not-automatically-trump-free-speech/>.

11 This includes, as the Chapter will show case law as well as references to academic scholarship.

12 Unless say for instance the South African Constitution which in section 39 (1) (c) recognizes foreign law as a source of law which courts may rely on, the Namibian Constitution does not have a similar provision. Thus, the use of foreign law in the practice of the superior courts of Namibia can be indirectly inferred by reference to Articles 144 and 140 of the Constitution as well as Rule 19 of the Supreme Court Rules.

by the Court may also serve as a response to the stringent *locus standi* rules that are embedded in our legal system.

The Supreme Court's use of comparative sources can be traced in almost all areas of law, whether public, private or commercial. But it has been more prevalent and emblematic in cases of a constitutional or human rights nature. This is no surprise if one considers the socio-economic hardships and conditions, including contemporary issues of a developmental nature, prevalent in both rural and peri-urban Namibia.[13] This reality necessarily implicates the Courts, more specially the Supreme Court to play a role in addressing some of the socio-economic challenges of society, particularly from a legal perspective.[14]

Mainly as a result of the historical and mechanical linkages between South Africa and Southern Rhodesia (now Zimbabwe), the superior Courts of Namibia have predominantly relied on jurisprudence from South African and Zimbabwean Courts. In addition to sharing a common history, these countries also share similarities in legal processes, governance and social stratification. More often there are exchanges in judges from these countries.[15] The comfort and ease of reference of each other's jurisprudence amongst courts from these countries is therefore not misplaced.

A diligent search in the *Namibian Law Reports* foreign case annotations ranging between 1990 to 2016,[16] shows that comparative sources from Australia, England, Canada and the United States of America have been extreme. From a total of 370 English foreign cases cited by the superior courts, at least 181 (49 percent) of these citations are made in the Supreme Court's decisions. Case references

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13 Despite its high income, Namibia has a poverty rate of 26.9 percent, an unemployment rate of 29.6 percent and an HIV prevalence rate of sixteen-point nine percent. The apparent imbalances between Namibia's high income and simultaneous extreme prevalence of poverty can be attributed to the enduring income inequalities. Globally, Namibia has the third highest levels of income inequality, according to the World Bank.

14 See generally, R Cranston (1979) "Courts and Social Reform" Vol. 5 *New Zealand Recent Law* 290-296; J Weinberg (1982) "The Courts as Social Reformers" Vol. 6(2) *Law and Human Behaviour* 97-105.

15 In practice, (retired) South African Constitutional Court Judges (i.e., Lordship Ismail Mohamed, Ladyship Yvonne Mokgoro, Ladyship Kate O'Reagan, and Ladyship Baaitse Elizabeth Nkabinde) are often recommended for judicial roles in Namibia, especially on the Supreme Court bench. Judges from other jurisdictions such as Zambia (Lordship Annel Shilungwe), Zimbabwe (Ladyship Mavis Gibson on the High Court, Lordship John Manyarara and Simpson Mtambanengwe), Botswana (Lordship Maruping Dibotelo) and Lesotho (Ladyship Nthomeng Majara on the high Court bench) have in the past been accredited. See generally on the use of expatriate judges in Namibia, N Tjombe (2008) "Appointing acting judges to the Namibian Bench: A useful system or a threat to the independence of the Judiciary" in N Horn & A Bosl *Independence of the Judiciary in Namibia* Mcmillan Education Namibia: Windhoek, 229-242.

16 Reliance on the Namibia Law Reports annotations serves as a limitation. For this reason, the reflection made in this Chapter is only a reference to reported cases, excluding the numerous unreported judgements that also make use of foreign case authorities. The Chapter should therefore be seen in this light and there indicative only and not a comprehensive analysis of the Supreme Court's use of foreign case law.

from Australia which amounts roughly in total to 46 include 28 (61 percent) annotations from the Supreme Court. A similar trend appears in those cases from the American systems (predominantly US and Canada). From the 101 cases relied on from Canadian Courts, the Supreme Court has made use of 59 such cases (58 percent) to inform its jurisprudence. As far as sources from the US legal systems are concerned, 96 citations are recorded of which 50 (52 percent) are made in the jurisprudence of the Supreme Court. Another country of note is New Zealand, of which the Supreme Court has referenced at least seven cases from its superior courts. But these are not the only comparative jurisprudence the Supreme Court relies on. In the past, the Supreme Court has relied on case law from countries such as the Bahamas,[17] India,[18] Gambia,[19] Hong Kong,[20] Jamaica,[21] Tasmania,[22] Ireland,[23] Malaysia,[24] Scotland,[25] and Zambia.[26] Latin American, Asian, Pacific Islands, Middle and Far Eastern courts have had a relatively minimalist impact on the jurisprudence of the Supreme Court.[27] The same can be said of African courts. Where reliance is made to African courts, it is to those in Southern Africa. Other than South Africa and Zimbabwe, the Supreme Court has occasionally borrowed from the jurisprudence of the English common law Zambian legal system.[28]

Although the jurisprudence from England, US, Canada and New Zealand are largely stranded in English common law, as opposed to Roman-Dutch common law and are not somewhat uniquely comparable with our legal system, our Courts' reference to them can be attributed to several factors. Firstly, English common law is not entirely a misnomer to our system. Some portions of our law developed out of English common law. This is particularly true and evident of our admiralty law, law of evidence and to some extent company law. Secondly, the English and American courts are relatively aged courts dating as far back to the 18th century.

17 Examples of cases cited include, *The Matter of a Special Reference from the Bahama Islands* (1893) AC 138.
18 Examples of cases cited include, *Union of India v Pratibha Bonnerjea* [1996] AIR SC 690; *Secretary of State in Council of India v Kamahee Boye Sahabe* (1859) 13 Mbo Pa CC 335; *Yasin v The Town Area Committee, & Ano* [1952] SCR 572 (AIR 1952 SC 115).
19 Examples of cases cited include, *Attorney-General of the Gambia v Jobe* [1984] AC 689 (PC) LRC Const 556.
20 Examples of cases cited include, *Attorney-General v Yeung & Another* [1987] LRC (Crim) 94; *R v Sin Yau Ming* [1992] 1 HKCLR 127 (CA).
21 Examples of cases cited include, *Bell v Director of Public Prosecutions* [1986] LRCCC Const 392 (PC); *R v Robinson* (163) (1985) AC.
22 Examples of cases cited include, *Risley v Gough* [1953] Tas SR 78.
23 Examples of cases cited include, *A-G v Gilliland* [1985] IR 643; *Heaney v Ireland* [1994] 3 IR 593*; The People (A-G) v* Gilliland [1985] IR 643.
24 Examples of cases cited include, *Malaysian Bar v Govt of Malaysia* (1988) LRC (Const) 428; *PP v Lin Chien Pang* [1993] 2 MLR 37.
25 Examples of cases cited include, *Singer Manufacturing Co., v Robinow* 1971 SC 11; *Attorney General v Lawrence* [1985] LRC Const 921 (St Chr & Nevis Ca).
26 See generally the *Chomba v The People* (1975) ZR 245; *Kalunga v The People* (1975) ZR 72 and *Mbewe v The People* (1977) ZR 41.
27 See generally Table 1.
28 The court has notably relied on the Zambian decisions in *Chomba v The People* (1975) ZR 245; *Kalunga v The People* (1975) ZR 72 and *Mbewe v The People* (1977) ZR 41.

This makes their jurisprudence extremely rich and diverse in substance having dealt with almost all imaginable legal questions. Added to this advantage is the fact that most legal practitioners from the global South often got legal training in these countries or training from academic scholars who got training in these countries. Upon return to their countries these legal practitioners, who for the most part became judges and senior legal practitioners in various bars, incorporated their legal training, including the case law and legal practices from these countries in their legal practice. The use of sources from English common law jurisdictions is therefore not inapt and surprising.

As stated earlier, whilst open to the comparable sources from developed States, the Supreme Court has been relatively timid in its use and reliance on sources from African States, with the exception of South Africa and Zimbabwe for the most part. The High Court has been more embracing of African case authorities compared to the Supreme Court.[29] Similarly, reliance on sources from regional or international tribunals in Africa remains limited in the judicial practice of the Supreme Court. In comparison, such African legal sources are more common and customary in the High Court.[30] For example, since its inception, the Supreme Court has till to date not engaged any jurisprudence from the African Committee on the Rights and Welfare of the Child (ACRWC) or the African Court on Human and People's Rights (ACtHPR). It has however in the past, although few in numbers, relied on sources originating from the Banjul based African Commission on Human and People's Rights (ACHPR).[31] The same can be said of the jurisprudence of the treaty bodies of the UN human rights system. In contrast, the European Court of Human Rights (ECHR) jurisprudence has received considerable engagement from the Supreme Court.[32] Moreover, unlike the High Court of Namibia,[33] the Supreme Court has also not relied on any jurisprudence from international courts and tribunals generally, though of late it approved a dicta from the Permanent Court of International Justice (PCIJ) in *S v Munuma & Others*.[34]

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29 The High Court has relied for instance relied on the cases such as *Attorney-General v Moagi* 1982 (2) BLR 124 (from Botswana); *Lesotho High Lands Development Authority v Sole* [1999] JOL 5662 (LesH) (from Lesotho); *Gule v Commissioner of Correctional Services* SZHC 2419/2004 (from eSwathini).

30 The exception is the Zimbabwean and South African States.

31 The Supreme Court has referred to the ACHPR's decisions in *Constitutional Rights Project, Civil Liberties Organisation & Media Rights Agenda v Nigeria* Communication No. 140/94 (1999) and *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication No 245 (2002).

32 From the 31 reported cases references in the Namibian Law Reports, 23 (74 percent) citations are made by the Supreme Court.

33 For example, the High Court has engaged at least two decisions from the International Court of Justice. See the decisions in Nottembohm case (*Liechtenstein v Guatemala*) [1995] ICJ 4 applied in *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) and the *Permanent Court of International Justice concerning certain German interests in Polish Upper* Silesia (1926) PCIJ Series A, No. 7 referenced in *Kessl v Ministry of Land Resettlement & Others and Two Similar cases*2008 (1) NR 167 (HC).

34 2016 (4) NR 954 (SC).

The limited use of foreign sources from African countries may raise questions about the value systems to which the Supreme Court ascribes. Some may either rightly or uncalculatedly misinterpreted the Courts' reluctance to use such sources as failing to indigenous practices and being indoctrinated to perceive what comes from the global North as the truism. However, the Courts' limited use of sources from the Global South, especially Africa should be viewed within a broader context. The Courts limited use of sources from African Courts, whether domestic or international, should not be misinterpreted as an evasion and undermining of African legal systems as some may want to argue. This is because the Courts reliance and dependence on foreign sources is reliant on a number of factors. One of them being the reliance lawyers make of these sources when engaging the bench. Judges are often bound by the papers before the Court and the sources referred and relied upon in those sources. Hence, the Courts use of comparative foreign cases should not be divorced from the overall role other key stakeholders, such as legal practitioners play in the use of such sources.

4.3 COMPARATIVE LAW IN THE NAMIBIAN LEGAL SYSTEM: STRANDS BETWEEN *CONTESTATION* AND *RESILIENCE*

In order to fully appreciate the place and scope of foreign case law in the jurisprudence of the Supreme Court, it may be necessary to briefly unravel some of the key determinants that may account for either the use or disuse of foreign case sources from a theoretical point of view. This may be necessary given the fact that unlike say international law, the Namibian Constitution is silent on the status of comparative law in our legal system. A peculiar consequence of this phenomenon is that it has raised more and more unsettled questions about the legitimacy of comparative foreign case law as a source of law in our legal system.

Over time, multiple explanations have emerged attempting to explicate reasons either supporting or rejecting the reliance on comparative foreign sources of law in our legal practice. Those who oppose, or at the subminimum support its limited use, argue that the expressive omission or reference to comparative law as a source of law in our Constitution or legislations is a clear indication that it was never contemplated as a source of law. In contrast, those who support such sources are predominantly informed by leftish thinking that presupposes that comparative law, despite its definite omission in the Constitution or any other law, is an implied source of our legal practice, because it is covered under common law through the principle of judicial precedent, or forms an inherent part of any civilised legal system.

What is clearly evident from the above basic altercations is that there remains uncertainty as to the role that comparative law, more especially, foreign comparative case law plays in our legal system. This uncertainty is even more fuelled by the fact that such authorities, though not expressly accorded status in our legal practice

continues to be accorded legitimate recognition by judges and practitioners of our superior courts. As a result, what we are left with is what one may term as an atrocious situation of being stranded between the forces of judicial nationalism and the demands of an ever-increasing trend geared towards the harmonisation of laws and legal practice the world over. Put differently, the treatment of comparative law, especially foreign case law, in our legal system depicts a legal culture of being stranded between resilience and contestation as far as the treatment of such law is concerned.

Despite theoretical contestations, in practice and as is illustrated in the previous section of this Chapter, the jurisprudence of the Supreme Court has revealed that comparative case law still informs and influences the bulk of the decisions of this Court. It may therefore be necessary, as a background analysis, to briefly unravel some of the determinants or reasons for such continued reliance on comparative foreign law by judges in the Supreme Court. Of equal importance is a brief discussion on some key determinants that account for the growing opposition towards such use of foreign comparative case law in order to depict and better comprehend the status, legitimacy and scope of these sources in our legal system. The analysis below endeavours to respond to these two considerations.

4.3.1 Determinants or explanations for the use of comparative case law in the practice of the Supreme Court

4.3.1.1 Historical linkages with South African (and other comparable) legal systems

For starters, most jurisdictions share not only a common political history canvassed in colonialism but also common legal heritages. This is particularly true of Southern Africa, which for the most part is rooted in a common law legal regime, whether rooted in an English, Roman, or Roman-Dutch legal legacy.[35] In terms of the provisions of the (South African) Supreme Court Act 59 of 1959, the judiciary of South West Africa (now Namibia) was merged with that of South Africa, resulting in the High Court of South West Africa becoming the South West Africa Provincial Division of the Supreme Court of South Africa. The natural effect of this merger was that the Appellate Division of the Supreme Court of South Africa maintained jurisdiction over the decisions and processes of the High Court of South West

[35] From the sixteen Southern African countries, at least eight are based on common law. Of these eight, six share a hybrid legal system premised in Roman-Dutch common law with occasional influences from English common law.especially its civil law and common law elements, also forms the basis of the laws of Botswana, Lesotho, Namibia, eSwathini and Zimbabwe, Roman-Dutch law was introduced during the process of colonisation. Basutoland (Lesotho) received the law of the Cape Colony in 1884, and Botswana and Zimbabwe received it in 1891. Swaziland received the law of the Transvaal Colony in 1904, and Namibia received the law of the Cape Province in 1920, after its conquest by South Africa. See generally HR Hahlo & E Kahn (1968) The South African Legal System and its Background Cambridge University Press: Cambridge, 108-120.

Africa/Namibia. Through practice, the decisions of the Supreme Court of South Africa were not only binding on the SWA Provincial Division but became accepted within the legal system of Namibia even after independence.[36] For the longest time, the decisions from the South African superior courts, especially its former Supreme Court of Appeal (and later Constitutional Court) became increasingly persuasive even after the severity of the two countries' legal systems. This is to some extent understandable, given the reality that Namibia's legal system is amongst the most embryonic in common law jurisdictions, both in terms of age and precedent. It is therefore not surprising that our superior courts have often sought recourse to its more advanced and established sister jurisdictions.

4.3.1.2 The influence of legal studies abroad

As a result of the history of colonialism on the continent, most legal scholars, though few in number, found themselves not only involved in liberation movements aimed at the liberation of their countries but also took up studies abroad, especially in Continental Europe and the Americas. With the attainment of flag independence, and consequently upon return, these scholars took up leading roles in their respective legal systems, transplanting the jurisprudence which they were taught while in exile locally in their systems. This transportation of jurisprudence not only anchored the furtherance and development of domestic legal systems but also ensured consistence in legal practice and systems. The challenge however, was that the legal traditions and jurisprudence of the global North became standardised, and the common law as received became the foundational basis of legal practice leading to the marginalisation and depreciation, if not, the distortion of indigenous customary laws and principles.[37]

With Namibia still under apartheid rule and with no formal legal education system in place at the time, legal aspirants had no option but to study abroad. Some studied in South African law schools, others in Zambia at the United Nations Institute for Namibia, with the vast majority going abroad to Europe and the Americas. The principles based in these systems were English informed. Scholars trained in these systems, upon their return to Namibia after independence, though they found themselves in a Roman-Dutch common law jurisdiction, did not entirely rid themselves of the case law and teachings obtained in these foreign jurisdictions. This reality has led to a culture of relying on sources other than those emanating locally or from Roman-Dutch jurisdictions. Accordingly, the use of comparative

[36] See generally, S Amoo (2008) "The structure of the Namibian judicial system and its relevance for an independent judiciary" in N Horn & A Bosl (Eds) *The Independence of the Judiciary in Namibia* Mcmillan Education Namibia: Windhoek, 69-95.

[37] This is catalyst by the fact that there is hierarchy of sources in Namibia, with the Namibian Constitution at the apex of these sources, followed by statutory law and the common law and customary law. See also section 6 (c) of the Law Reform and Development Commission Act 29 of 1991 (as amended), which among others seeks to integrate or harmonise customary law with the common and statutory law.

foreign case law became unavoidable and gradually began to penetrate the court system in Namibia.

4. 3.1.3 Domestic laws that resemble international instruments and the influence of human rights on domestic systems

Closely linked to these historical developments is the fact that most African States, including Namibia, adopted national Constitutions blended with a recognition of fundamental human rights and freedoms, including the basic tenets of constitutionalism.[38] These Constitutions were predominantly informed by international instruments such as the United Nations Charter, the Universal Declaration of Human Rights (UDHR) and other human rights instruments of the United Nations system.[39] In the case of Namibia, the international community, more particularly the United Nations and the Western Contact Group, had considerable input and stimulus, though lucid and limited, in the constitution-making process or at least in the period and events leading to this process. Ideally because states such as Namibia sculpted their Constitutions and laws based on the ideals and values captured in the UN systems and instruments and in later years the African Union (AU) instruments to some extent, it became pertinent that their norms be expanded along similar principles and values resulting in cross judicial fertilisation, where appropriate.

Furthermore, the increased interconnectedness of world matters and reliance of Sates on one another in terms of governance, democracy and human rights, there has been a rise in the need for legal systems to learn from each other and share experiences. So for instance, in one of its most earliest human rights decision in *Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State*,[40] where the question whether the imposition and infliction of corporal punishment by or on authority of any organ of State on different categories of people conflict with Article 8 of the Namibian Constitution, the Namibian Supreme Court relied extensively on international law and legal provisions from foreign jurisdictions in coming to the conclusion that such forms of punishment were degrading of human dignity. Interestingly, more recently where the same legal question arose before the Zimbabwean Constitutional Court,[41] reference was made to the Namibian decision, leading to the outlawing of corporal punishment in Zimbabwean schools, attesting to the fact that different courts are engaging in each other's jurisprudence.

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[38] In the case of Namibia, a specialized body, namely the Constituent Assembly was constituted with the sole mandate of adopting a sovereign Constitution.

[39] CL 'Hereux-Dube (2004) "Human Rights: A Worldwide Dialogue" in BN Kirpal (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* Oxford University Press: Oxford/India, 214-215.

[40] *Corporal Punishment by Organs of State case* (Note 6 above).

[41] *S v Chokuramba* (Unreported Case No: CCZ 29/15) [2019] ZWCC 10 (3 April 2019).

4. 3.1.4 Growth in international judicial and quasi-judicial mechanisms

At the continental level, Africa has series of judicial and quasi-judicial mechanisms that adjudicate on human rights matters on the continent. The Arusha based African Court on Human and People's Rights, the African Commission on Human and People's Rights, the African Committee on the Rights and Welfare of the Child, and until recently the Southern African Development Community (SADC) Tribunal all had a mandate to this effect. These tribunals and quasi-judicial bodies have crafted African jurisprudence on human rights and helped in solving some major African human rights cases at the continental level. Furthermore, national courts on the continent have started to look at the jurisprudence from these tribunals and other States alike, both near and far, due to the similarities and discernible differences in historical, economic and social experiences and key international instruments that inform their mandates.[42] The Namibian Supreme court has not been as robust and passionate in engaging the human rights jurisprudence of these African systems and mechanisms. However, gradually with time the jurisprudence of these mechanisms and bodies will become compelling given that Namibia has either ratified or acceded to several of the legal instruments of the AU; the corpus of instruments that forms the epicentre of these African judicial and quasi-judicial bodies. Judges and legal practitioners are increasingly becoming part of international fora and professional bodies where ideas about legal practice are exchanged and sought. These engagements largely influence how judges and legal practitioners engage foreign sources in their legal systems. Certainly, such determinants are also increasingly visible in Namibia with some judges and lawyers joining associations such as the African Judges and Jurist Forum, the International Commission of Jurists and the Judicial Institute for Africa.

4.3.1.5 Appointment of expatriate judges in domestic systems

Another explanation that may account for the growing use and reliance on foreign case law in domestic legal systems can also be traced to the practice of appointing expatriates as judges in local systems. For some reason, this practice has been so common in Southern Africa.[43] And whilst judges, whether local or expatriate, are required to apply and interpret the law of the country in which they are appointed, by necessary implication, expatriate judges purely on account of the fact that they are more familiar with the laws and practices of either their countries of origin or where they obtained their legal training, tend to be more oriented to, at times importing foreign legal material into domestic legal practice, especially where there seems

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42 C Fombad (2012) "Internationalisation of constitutional law and constitutionalism in Africa" Vol. 60(2) *American Journal of Comparative Law* 470.

43 As a practice in the much smaller legal systems, such as Namibia, Botswana, eSwathini, Zimbabwe and Lesotho, retired judges from foreign systems have been appointed as permanent judges in superior courts. Consequently, these judges rely on the jurisprudence they are most familiar with in the process of adjudication, which may include foreign case law.

to be a close resemblance in facts or law applicable to a particular case. This has happened more often than not in the practice of the Supreme Court of Namibia.

The decision in *Shaanika & Others v Windhoek City Municipality*, discussed elsewhere below in this Chapter contribution is an illustrious testament to this reality. O'Regan AJA (with Maritz JA and Mainga JA concurring), an expatriate judge who authored this judgment relied extensively on the jurisprudence of the South African Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another*,[44] and *Zondi v MEC for Traditional and Local Government Affairs*,[45] in holding that the eviction of squatters without a court order is unconstitutional.

O'Regan's decision in this judgment is not only worth appraisal but also not surprising. Her familiarity with the jurisprudence of the South African Constitutional Court; a court she has served for slightly over a decade had surely had an influence in the outcome of this decision. This is not the only decision where one can visibly observe the importation of foreign jurisprudence by expatriate judges in local cases. Whether such a practice is sound for the development of our local jurisprudence is an important question the academia, bench and bar will have to ponder on in the near future. Suffice to say that such a process of dialogue should not merely be discouraged because the judge is either a foreign national or has used foreign jurisprudence. It is a discussion that must be approached with caution and an open mind considering the safeguards of Rule 19 of the Supreme Court Rules and the overall material implications such 'importation' may have on the Namibian values and constitutional system.

4.3.2 Determinants or explanations against the use of comparative case law in the practice of the Supreme Court

4.3.2.1 Legal requirements in terms of Rule 19 of the Supreme Court Rules

While comparative law (and to a lesser extent international law) has always formed part of the practice and jurisprudence of the superior courts in Namibia, there has been renewed considerations and discussions on whether comparative law sources should find currency in our legal system. Part of this debate traces its prevalence in the civil rules of our superior courts; that is, in both the High Court and Supreme Court Rules of practice. To elaborate, Rule 19 of the Rules of the Supreme Court provides:[46]

> *Citation of foreign authority*
>
> 19.(1) Where, in his or her heads of argument or any other written submissions or oral submissions, an appellant or respondent or his or her

[44] 2000 (1) SA 409 (CC).

[45] 2005 (3) SA 589 (CC).

[46] See generally, Rules of the Supreme Court of Namibia.

legal practitioner relies on foreign authority in support of a proposition of law, he or she must -

(a) certify that he or she is unable, after diligent search, to find Namibian authority on the proposition of law under consideration;
(b) whether or not Namibian authority is available on the point, certify that he or she has satisfied himself or herself that there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the court of the proposition of law that the foreign authority is said to establish;
(c) indicate that he or she has considered the statutory context of the foreign judgment and is satisfied that it is comparable to Namibia's statutory context and the reason for his or her satisfaction; and
(d) state that the foreign authority represents the law on the point under consideration and why the foreign authority is relevant.

The rationale behind Rule 19 has not always been a clear one. However, one can cautiously construe that its aim is to ensure *particularity*; the fact that the Namibian legal practice should be guided by its '*own'* legal rules, principles and jurisprudence as developed over time. A closer reading of the rule clearly indicates that it does not oust the use of foreign legal authority. Such use is allowed if in the first instance such authority will establish a proposition of law not already covered by existing precedent and if relevance can be established. But such use of foreign law will only be accepted if it comes from a jurisdiction that is of comparable statutory (or generally legal) context. No wonder the Court has been more receptive of foreign sources from common law jurisdictions such as South Africa, Zimbabwe, England, the United States of America and Canada. In essence, Rule 19 should be viewed in a positive light. It does not seek to preclude the use of foreign authority, but rather only strives to limit such use to such extent that it is relevant and seeks to establish a point of law that the Courts need to take judicial notice of.

Although Rule 19 seeks an important purpose in our legal system, at times it has been interpreted, if not, viewed as a bar on the use of foreign law. Lawyers and to some extent legal academics have been restraint, perhaps rightly so, on a blatant use of foreign legal material. The consequences however, have been that lawyers and subsequently the Courts are now hardly engaging in the jurisprudence of sister legal systems, even less those of international courts and tribunals. This has resulted in an inclination by the Supreme Court to what one may term a "spirit of judicial nationalism"; that is a tendency geared towards either exclusive or deflated use of foreign authorities and content in the domestic legal process.[47]

This could be problematic. Firstly, the Namibian legal system is a relatively young one, both in terms of age and size. More importantly, it forms part of the common law legal tradition premised in Roman-Dutch legal ideology. Compared to sister

[47] K Kariseb (2016) "Westcoast Fishing Properties v Gendev Fish Processors Ltd & Another-A tenet of judicial nationalism?" Vol. 8(1) *Namibia Law Journal* 137-147.

jurisdictions blended in this legal heritage it is by far the youngest in terms of jurisprudence amongst the Roman-Dutch legal community. It has therefore much to learn in the cementing and development of its legal system. Without a doubt comparative legal analysis has a major role to play in this regard. It is therefore worrisome that the tacit possible limitations on the use of comparative law brought about by provisions such as Rule 19 may hammer the jurisprudential maturity of our legal system along with its common law sister legal systems. It may therefore be necessary that our courts, especially the Supreme Court, remain more expansive in the application of Rule 19. Rule 19 serves as one of many explanations that can be advanced as far as the growing limited use of foreign material is concerned in our legal system. But it is not the only one. Viewed from an academic perspective, other explanations that are relatively of a general application are often advanced. Three in particular stand out and are worth exploration.

4.3.2.2. Other generic theoretical explanations

There are other theoretical explanations often advanced to argue for the limitation of foreign case law in courts. The first reason often advanced finds grounding in the doctrine of 'separation of powers'; the second is based on the 'exceptionalism' thesis and the third and flimsier argument is based on the 'wide margin of appreciation argument'.[48] In addition to these considerations, legal measures have also been introduced to restrain excessive use of foreign material in the practice of the Supreme Court. It may be worth elaborating on each of these advances in order to objectively rationalise and appreciate the reasons why in its practice the superior courts, especially the Supreme Court, has begun to curtail its use of foreign material.

In terms of the 'separation of powers argument', two central concerns are raised. The first takes direct objection to the incorporation of foreign law, either through its use, application, approval and or adoption.[49] The second objection relates to the incorporation of international treaties and its subsequent use and application by the Courts.[50] At the heart of this resistance is the argument that such application and use of these materials go against the doctrine of separation of powers; that is the idea that "specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction".[51] So the argument goes that the incorporation of foreign material, whether case law or international instruments, in our legal system is the function of the legislature and not that of the judiciary.[52] Furthermore, foreign judges, like domestic judges, are

48 See generally, K Balakrishnan (2010) "The Role of foreign precedents in a country's legal system" Vol. 22(1) *National Law School of India Review* 5-7.

49 Ibid.

50 Ibid.

51 M Phineas (2012) "The doctrine of separation of powers: A South African perspective" Paper delivered at the Middle Temple South Africa Conference, September 2012. <https://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>

52 Balakrishnan (note 48 above) 7.

not only unelected but also unaccountable to the local electorate, thus reliance and use of their material in domestic courts undermines States' sovereignty, and goes against the separation of powers amongst State organs. To this end, judges are seen and expected not to incorporate legal principles which have origins elsewhere and most probably for a different audience and social fabric.[53]

The separate opinion of Justice Hans Bekker, raised in *Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State*, seems to seal the concerns that emanate from the 'separation of powers' argument, in that the court was of the opinion:

> [W]hilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America on the question whether corporal punishment is impairing the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhuman or degrading treatment, the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs, of the people of Namibia.

In other words, the decision which the Court had to make in the present case was based on a value judgment, which cannot be primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognisance of the social conditions, experiences and perceptions of the people of this country. This is all the more so as with the advent and emergence of an independent sovereign Namibia, freed from the social values, ideologies, perceptions and political and general beliefs held by the former colonial power, which imposed them on the Namibian people, but the Namibian people are now in the position to determine their own values free from such imposed foreign values by its former colonial rulers.

More along the lines of Justice Hans Bekker, Ghanaian comparative lawyer and professor, Samuel Kwesi Amoo also opined, perhaps rightly so, that:[54]

> Following the attainment of independence and sovereignty, Namibia has an independent judiciary with a Supreme Court as the highest Court of Appeal and therefore South African authorities only have persuasive effect on the Courts of Namibia. The judicial independence endowed on the Namibian judiciary has led to the development of home-grown jurisprudence by the superior courts of Namibia since independence. The foregoing notwithstanding, the Parliament of Namibia in the exercise of its sovereign legislative function has promulgated pieces of legislation to address the needs of the Namibian people and in the process some pieces

[53] Ibid.

[54] SK Amoo (2014) *Property Law in Namibia* Pretoria University Law Press: Pretoria, 8.

> of legislation promulgated by the erstwhile colonial regime have either been amended or repealed. The cumulative impact is that Namibian law has acquired a national character and identity which must be captured and given due recognition […]

The second criticism, closely associated with the one discussed above, labelled against the use of foreign law and material finds root in the idea of 'exceptionalism'. According to this school of thought, each nation-State is distinct and uniquely positioned amongst the community of nations. Adaptively, this argument holds that Namibia, like other States, is stranded with an exceptional historical, political and social past (with subsequent legal implications), that should be accurately captured and reflected in its post-independence progression.

Under South African apartheid rule, Namibia is said to have "embraced certain ideologies, values, and social conventions which were totally unacceptable to the Namibian people, and indeed to the rest of the world", and that therefore it became inevitable upon independence that "these ideologies, values and conventions would be discarded by the people and the government of a free and independent Namibia, in the light of their experiences under colonial rule".[55] Moreover, in order to achieve these 'new' ideologies and values, a transformative Constitution,[56] hailed by the international community,[57] for its commitment to the ideals of civil liberty, constitutionalism, and the rule of law amongst others was adopted. In this light, the framers of the Namibian Constitution are said to have architectured a Constitution, to borrow the words of one of its drafters, Theo-Ben Gurirab, that "represent a new vision, self-determination, and reconciliation" which is at once "our victory, shield and our guide for the future…"[58] The dependence on foreign legal material, though useful, so the argument goes, may therefore undermine these aspirations and vision, given the fact that such legal material may have been addressed for a different social community and polity.

A third, though malleable advance often made, may be characterised as the 'judicial discretion argument'. In terms of this argument the uncircumcised and objective reliance and use of foreign sources is said to lead to an expansion of an already seemingly expanded degree of judicial margin of discretion accorded judges and stakeholders of the judicial process. The fear is that judges and lawyers alike may use and rely on foreign sources of law in uncalculated and subjective

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55 *Corporal Punishment by Organs of State (*Note 6 above).

56 See generally K Klare (1998) "Legal Culture and Transformative Constitutionalism" Vol. 14(1) *South African Journal on Human Rights* 146-188.

57 See generally, E Schmidt-Jortzig (1991) "The Constitution of Namibia: An impressive example of a state emerging under close supervision and world scrutiny" Vol. 34 *German Yearbook of International Law* 341-251; O Ruppel & K Ruppel-Schlitchting (2011) "Legal and Judicial Pluralism in Namibia" Vol. 34 *Journal of Legal Pluralism* 37.

58 T Gurirab (2010) "The genesis of the Namibian Constitution: The international and regional setting" in A Bosl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia: A critical analysis after two decades* Mcmillan Education Namibia: Windhoek, 117.

ways leading to "cherry picking" of such material most likely in instances when they favour or advance their case or judgment as the case may be. Clearly such a practice would dilute the quality of legal practice and reduce the objective and much needed rigorous inquiry into sources relied on in legal processes. Moreover, it will detract from the established principle of *stare decisis*, which can lead not only to inconsistencies in our legal system and practice but also utter absurdities.

4.4 SELECTED ANALYSIS OF CASES OF THE SUPREME COURT OF A COUNTER MAJORITARIAN NATURE

Through its jurisprudence, and often times with the aid of foreign comparative and international sources, the Supreme Court of Namibia has been contributing to the socio-economic development of our country by providing considerate judicial attention to the status and well-being of the most vulnerable and marginalised people in society. This it often does by addressing some of the most perplexing jurisprudential questions before it, either through value-based judgments, that are dubbed in purposive interpretations aimed at expanding (rather than suppressing) human rights and freedoms, or, through judicial activism. To this end, and as will be evident from some of the case law discussed below, the Supreme Court of Namibia has delivered a considerable number of judgments that unravel compounded questions (of law and of social interest), which in one way or the other are fundamental to the country's national development agenda. In some of its leading judgments, the Supreme Court has confirmed amongst others, and rightly so, the prohibition of corporal punishment in both public and private schools (thus protecting the rights and interests of children);[59] ordered for a constitutionally determined relationship between the Attorney-General and Prosecutor-General, aimed at ensuring that there is an orderly co-existence between these two judicial offices (thus safeguarding the rule of law and constitutionalism);[60] the prohibition of State agents from unlawful eviction of settlers in squatter camps (thus protecting the rights and interests of landless masses);[61] ruled that third party claims on adultery are outdated (thus addressing gender implications on the institution of family);[62] as well as ordered that State security agents cannot blatantly rely on national security as a defence and means of (passively or actively) silencing the media (thus protecting the rights of the media and in the process cementing its role as an accountability mechanism).[63] While these are not the only prominent decisions of the Supreme Court, they are important decisions not only for the sustenance of the rule of law but also because of their deeply comparative nature, therefore making them worth consideration. More importantly, in one way or the

[59] See *Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State*.

[60] *Ex Parte: Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS).

[61] Note 8 above.

[62] Note 9 above.

[63] Note 10 above.

other, these decisions also bolster and illustrate the counter-majoritarian role of the Supreme Court in protecting the most vulnerable sectors of society and civil space.

4.4.1. The media and the comparative jurisprudence of the Supreme Court: Director-General of the Namibian Central Intelligence Service & Another v Haufiku & Others[64]

The case concerned the Namibian Central Intelligence Services' (NCIS) appeal against the High Court's refusal to grant an urgent interdict. The interdict was against a journalist who wanted to publish information relating to the alleged corrupt use of State resources to procure and use property. The NCIS claimed that the publication of the allegedly sensitive information would compromise the secrecy of the intelligence services' operations and national security generally. To make this argument, the NCIS relied on the Protection of Information Act 84 of 1982 (the PIA) read together with the provisions of the Namibia Central Intelligence Service Act 10 of 1997.

The respondents in the case argued that the publication was protected under the provisions of the Namibian Constitution, particularly Article 21(1)(a), which protected freedom of speech and the press. Furthermore, they argued that the information they intended to publish was lawfully obtained and was not sensitive information with the potential of compromising national security. Moreover, the respondents argued that the media had a legal obligation to expose corrupt activities, including those by the NCIS. The Supreme Court refused to grant an interdict as the NCIS had failed to place before the Court the precise nature and ambit of the security concerns they raised. The Court's decision to refuse such interdict was informed primarily by principles deduced from established foreign case law. Accordingly, the court considered the procedural requirements required for an interdict as settled in the customary cases of *Plascons-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[65] *Nienaber v Stukey*,[66]*Beukes Crous*,[67] and *Weinerlein v Goch Buildings Ltd*.[68] Though relatively based on comparative sources of law, predominantly from South Africa, the court's reluctance to engage close to 50 foreign cases cited by the appellants in this decision speaks volumes about the growing syndrome of judicial nationalism in our judiciary.

The *Haufiku* decision is of significance in light of the global increase in the suppression of the press largely as a result of populism. It cements the often-under-appreciated role of the press as a watchdog for good governance and in holding governments accountable for corruption. The decision rejects a lax abridging of the freedom of the press in the name of national security. Of importance is the fact that the outcome of this decision is based on comparative sources.

64 Ibid.
65 1984 (3) SA 623 (A).
66 1946 AD 1049.
67 1975 (4) SA 215 (NC).
68 1925 AD 282.

In a sense, this decision resembles, though not explicitly cited by the Court in its judgment, the US Supreme Court's 1971 decision in *New York Times Co. v United States*,[69] in that it does not invalidate the PIA a statue inherited from the apartheid administration. In the latter decision, the US Supreme Court, although upholding freedom of the press, failed to strike down the Espionage Act of 1917 or give the press unlimited freedom to publish classified documents. The PIA's primary purpose was to maintain the 'securocratic ethos' of racial oppression by the colonial-apartheid administration. The historical context of the PIA, which was to suppress and silence the black majority, made a compelling case for exacting judicial scrutiny. Such scrutiny would precipitate legislative reform to align the PIA with the demands of Namibia's post-colonial Constitution.

Another shortcoming in the case is the Court's failure to place the Constitution's core values at the centre of its reasoning. The case warranted a proper analysis of the relationship between the right to freedom of the press and the Constitution's core values. This was also a fitting case for the development of a substantive test for limiting fundamental rights and freedoms within the framework of the Constitution's rights limitations clause. Currently, it remains unclear how the state's security agencies should go about balancing competing rights and interests in performing their mandate. This is because the Court made its findings in a positivist manner – holding that the NCIS did not fulfil the requirements of an interdict – as opposed to a substantive constitutional rights limitations' analysis. In failing to provide clear guidance on how the NCIS should balance competing interests, the Court leaves open the possibility that the NCIS could use 'national security' in suppressing fundamental human rights and freedoms in future. *Haufiku* affirms an important principle – that the state cannot invoke national security interests to justify a blanket exemption from having to respect fundamental rights. However, it could have done more as it remains unclear how the balancing of national security interests and the fundamental rights in the Namibian Constitution should be done.

4.4.2. Morality, family and the comparative jurisprudence of the Supreme Court: *Sibonga v Chaka & Another*[70]

Morality is perhaps one of the most challenging possibilities in law; that is, according to naturalists who postulate that law and morality are intertwined. In practice, however, courts always seem to struggle in fairly balancing the scope of morality in societies. In its decision *in Sibonga v Chaka,* the Supreme Court had to address itself on the question of whether the delictual action of adultery is sustainable in law. This question was telling, more so in the context of the institution of marriage, which for quite obvious reasons has undergone so much transformation as explicated by external factors such as globalisation, populism and changing gender roles of women, men and children in society.

69 403 U.S 713 (1971).

70 (Unreported Case No: SA 77/2014) [2006] NASC 16 (19 August 2016).

This question arose after the plaintiff in this action instituted a divorce action against the first defendant in early 2011, after having committed adultery with the plaintiff's wife. The action was defended. On or around September 2012, the plaintiff amended his claim to join the second defendant and introduced a claim against him of committing adultery with his wife. In his particulars, the plaintiff claimed N$100 000 in damages against the second defendant. It was broken down as N$50 000 claimed for *contumelia* and N$50 000 for loss of 'consortium, society and services' of the first defendant. In its determination of whether the act of adultery is wrongful for the purposes of a delictual claim, the Court was guided by two primary foreign sources of law; the first being the South African Supreme Court of Appeal (SCA) decision in *RH v DE*,[71] and the Constitutional Court of South Africa's (CC) decision in *DE v RH*.[72]

The Court began its analysis from the common law premise that the determination of a delictual action would have to be determined by reference to its wrongfulness, which by necessary implications would also require an inquiry into questions of the legal convictions of the community and public policy. These in the view of the Court are, since independence, informed by constitutional values and the changing nature of the prevailing norms of society. According to the Court, an examination of the origin of the action of adultery and its development reveals that it is 'fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy…and that examination also demonstrates that the action has also lost its social and moral substratum and is no longer sustainable'.[73]

As stated earlier, in reaching this conclusion, the Court relied with ease on comparative foreign jurisprudence of both the SCA and Constitutional Court in *RH v DE* and in *DE v RH*, which referred to the changing societal attitude to adultery and children born of adulterous relationships in both South Africa and elsewhere.[74] In addition, the Courts in those decisions also referred to a comparative analysis of the jurisprudential positions in common law jurisdictions such as New Zealand, Australia, Scotland, most provinces of Canada and in most states of the United States of America.

The Court's decision, though commendable, raises more questions than answers, some of which have partly been settled by the Court in its judgment. These are among others, the value depreciating or expanding that should be made of the institution of family, and the impact of this decision on the possible condonation, if not, approval of adultery in institutions of marriage. These are important questions which when viewed broadly manifest the growing changes and orders in marriage, the institution of the family in society and generally questions of morality and the law.

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71 2014 (6) SA 436 (SCA).
72 2015 (5) SA 83 (CC).
73 (Note 69 above) 39.
74 *RH v DE* paras 27-28, *DE v RH* paras 23-44.

Marriage is an essential fabric of any society, including Namibia. In the case of Namibia, such importance can be traced to Article 14(3) of the Namibian Constitution which provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Notwithstanding this firm constitutional provision, the Supreme Court seems to suggest in its decision that delictual actions based on adultery do not strengthen the institution of marriage. In fact, in the Court's view, maintenance and cementing of the institution of marriage is dependent on the moral convictions and practices of the parties to such a marriage. In support of this proposition, the Court advances four primary arguments by approving and drawing reliance on the South African SCA jurisprudence in *RH v DE*:

(a) First of all, as was pointed out by the German Bundesgericht in the passage from the judgment (*JZ* 1973, 668) from which I have quoted earlier, although marriage is a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties; its essence . . . consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it. If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that.

(b) Grave doubts are expressed by many about the deterrent effect of the action. In most other countries it was concluded that the action (no longer) has any deterrent effect and I have no reason to think that the position in our society is all that different. Perhaps one reason is that adultery occurs in different circumstances. Every so often it happens without any premeditation, when deterrence hardly plays a role. At the other end of the scale, the adultery is sometimes carefully planned and the participants are confident that it will not be discovered. Moreover, romantic involvement between one of the spouses and a third party can be as devastating to the marital relationship as or even more so than sexual intercourse.

(c) If deterrence is the main purpose, one would have thought that this could better be achieved by retaining the imposition of criminal sanctions or by the grant of an interdict in favour of the innocent spouse against both the guilty spouse and the third party to prevent future acts of adultery. But, as we know, the crime of adultery had become abrogated through disuse exactly 100 years ago while an interdict against adultery has never been granted by our courts (see, for example, *Wassenaar v Jamesonsupra* 352H – 353H). Some of the reasons given in *Wassenaar* as to why an interdict would not be appropriate are quite enlightening and would apply equally to the appropriateness of a claim for damages. These include, firstly, that an interdict against the guilty spouse is not possible because he or she commits no delict. Secondly, that as against a third party, 'it interferes with, and restricts the rights and freedom that the third party ordinarily has of using

> and disposing of his body as he chooses; . . . it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses'. [At 353E.]
>
> (d) In addition, the deterrence argument seems to depart from the assumption that adultery is the cause of the breakdown of a marriage, while it is now widely recognised that the causes for the breakdown in marriages are far more complex. Quite frequently, adultery is found to be the result and not the cause of an unhappy marital relationship. Conversely stated, a marriage in which the spouses are living in harmony is hardly likely to be broken up by a third party.'

In light of the above, the Court opined that in the particular circumstances of Namibia, the delictual action of adultery is unsustainable in law more so because of its uneven (gendered) effects on the institution of marriage and its patriarchal origins. Accordingly, the Court held, rightly so:

> [W]hilst the changing societal norms are represented by a softening in the attitude towards adultery, the action is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association. Its patriarchal origin perpetuated in the form of the damages to be awarded is furthermore not compatible with our constitutional values of equality in marriage and human dignity.

That the Court came to such a conclusion is commendable, but not surprising. Since the early 2000s, the Courts have been observant of the ever changing and evolving attitudes and values underlying adultery. For instance, the High Court in *Van Wyk v Van Wyk*,[75] held:

> [I]t may well be that in this age, society views with less disapprobation than in the past the commission of adultery. There are also degrees of reprehensibility in the delict of violating the marital relationship ranging from the isolated chance encounter to the sustained continuing invasion of the sanctity of the marital relationship. It must however be remembered that marriage remains the cornerstone and the basic structure of our society. The law recognises this still today and the court must apply the law. One can also not ignore the possibility that a married person meets someone else, develops feelings for that person and falls out of love with his or her spouse without intending to.

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[75] [2013] NAHCMD 125.

Although the facts in the *Sibonga* decision are quite different, women for the most part have always been vulnerable in the institution of marriage. They are for historical reasons rooted in patriarchy as victims of adultery. This is not to say that women do not commit adultery. But for economic and psychological reasons, women who find themselves in marriages where the flavour and chemistry of marriage has eroded are compelled to remain in such matrimony. The invalidation of the delictual action of adultery opens avenues for the eventual removal of adultery as a ground for divorce in the near future, thus relaxing the requirements for women (and men) who sought to abandon their matrimony.

By reaching the conclusion it did in *Sibonga*, the Supreme Court, though indirectly, contributed not only to the evening of the roles of women and men in marriage by aligning them with contemporary realities and by considering the changing norms, values, practices and attitudes relating to marriage generally; adultery being one of them. Surely, this decision also opens the floodgates for further challenges on the institution of marriage such as equal rights to marriage for sexual minorities as well as actionable claims for persons in long term cohabitation relationships or partnerships, irrespective of the nature of those relationships. Whether the courts will be open to such developments will become clearer over time. Needless to say that through its comparative use of sources, as it did in this decision, the Namibian Supreme Court has developed Namibia's local jurisprudence by aligning it with contemporary trends and developments as unfolding in other comparable jurisdictions, thus becoming part of the continued efforts towards judicial harmonisation the world over.

4.4.3. Landlessness and the comparative jurisprudence of the *Supreme Court: Shaanika v Windhoek City Police*[76]

The 2013 Supreme Court decision in *Shaanika & others v Windhoek City Police & Others* is another notable decision that not only illustrates the receptive nature of the superior Courts of Namibia to the application of foreign material but also the value and influence of foreign judges in enriching the jurisprudence of a local court. By way of background, the *Shaanika* matter was an appeal petition before the Namibian Supreme Court in which the Applicant, Petrus Shaanika and ten others sought an order interdicting the Municipality of Windhoek and its agency the Windhoek City Police from demolishing their structures which they had erected on the Respondents' land without prior consent. The Appellants also sought for a declaration that subsections 4(1) and (3) of the Squatters Proclamation, Proclamation 21 of 1985 (the Proclamation) be declared unconstitutional and therefore invalid and of no force and effect. It was common cause amongst the parties that the land the Appellants had occupied belonged to the Respondent and that they had occupied such land without prior consent or authorisation from the Respondent.

76 (Unreported Case No: SA 35/2010) [2013] NASC 3 (15 July 2013).

In the High Court, it was found that the Applicants were lawfully evicted from the Respondent's land based of the fact that the occupation of the land was unlawful. The High Court based its discharge of the rule of the 'doctrine of unclean hands'. The Court found per Damaseb JP (as he then was) that the Appellants (the Applicants before it) had not come to court with clean hands, in that they admitted that they were living unlawfully on the Respondent's land. Aggrieved by the High Court's decision, the Appellants petitioned the Supreme Court for relief.

The question that arose before the Court was whether the High Court erred in refusing to consider the Appellants' application on the basis of the doctrine of unclean hands; and secondly whether sections 4(1) and/or 4(3) of the Squatters Proclamation, Proclamation 21 of 1985 was inconsistent with the Namibian Constitution. Upholding the Appellants' application, the Supreme Court, per O' Regan AJA (as she then was), ordered the Windhoek City Municipality not to demolish and/or remove any structure or building belonging to the Appellants without first obtaining an order of court. The Court's position was that an Applicant who had acted only unlawfully is not barred from seeking relief from a court; he or she has to have also acted dishonestly or fraudulently.

In this case, the Court was convinced that although the Appellants' occupation of the Respondent's land was illegal, it was necessarily not out of malice but rather out of desperate circumstances. To the Court, it was the effect of sections 4(1) and 4(3) of the Squatter Proclamation that detracted from the principle of the rule of law. The said impugned provisions had the effect, as the Court held, that a landowner may, without a prior order of court, and without notice to any occupants, demolish and remove any structures that have been erected on the land without the consent of the landowner. Section 4(1) also authorises local authorities, again without a prior order of court and without prior notice, to demolish and remove any structures erected on land without the prior approval of the local authority. The Court found this to be in conflict with Article 12 of the Namibian Constitution. The Court stated that the right of access to courts is an aspect of the rule of law, and the rule of law is one of the foundational values of a constitutional democracy. Interpreting Article 12 of the Namibian Constitution, the Court referred to the European Court of Human Rights' (ECHR) interpretation of Article 6(1) of the European Convention of Human Rights (ECHR), and argued that any limitation of the right of access to courts would in any case have to be consistent with the principle of proportionality as the ECHR had reasoned in respect of Article 6(1) of the ECHR. The Court further argued that, given the personal importance of homes, it was hard to imagine a more invasive action than the destruction of homes or removal of their contents, and that, in a city with a shortage of affordable housing and land, the risk of social conflict is particularly high. Given these implications, the Court held that it is essential to ensure that an independent and impartial tribunal finds an eviction to be lawful before any harmful action is taken.

The decision in the *Shaanika* judgment is another point in case that demonstrates the value of the application and use of foreign law. But its value can be drawn more on the fact that foreign judges with their vast judicial wisdom can enrich domestic legal systems. Although Judge O' Regan, the lead judge in this particular case, did not extensively reference South African case law that dealt with the matter before the Court, her input and insights from those jurisprudential developments in her own native country, to a considerable extent, influenced her judicial acumen and reasoning in this case.

Clearly as illustrated by some of the above jurisprudential developments, the Supreme Court of Namibia has a comprehensive and balanced track record in which it has gradually contributed to the national developmental architecture as it did in these cases by coming to the aid of landless people, invalidating a delictual action premised in patriarchy and thus cementing the principle of equality in marriage, particularly as it relates to and affects women, and the freedom of the press, an organ often curtailed by the government for unwarranted reasons.

4.5 CONCLUSION: WAY FORWARD?

The two-pronged question that remains to be answered is, whether courts, and in this particular instance the Supreme Court, should altogether do away with judicial cross-fertilisation or keep engaging in such processes.

It is quite evident from the advances and analysis made in this Chapter, that there are persuasive arguments on either side of the board. This makes the choice of either reinforcing or rejecting comparative foreign case law extremely difficult. Nevertheless, there are at least two possibilities to this challenge. The one position is based on a radical and confrontational approach that suggests that nothing good can come from foreign law given its formative colonial or alien roots. Such an exclusionary approach presupposes that foreign law is colonial in nature and is distinct from domestic (African) systems. Accordingly, its application would reinvent the wheels of colonialism, distort traditional African conceptions of law and depreciate peculiar municipal circumstances and context. As such, African courts, more especially Namibian courts, should exclusively rely on domestic legal case law and material in developing its jurisprudence as this will remedy the historical imbalances brought about by the colonial past.

In contrast, the more flexible and 'inclusive' approach, on the other hand, suggests that 'key currents of thought that have influence in [the] global discussions',[77] and local African thoughts are merged and equally represented. Such an approach recognises that domestic legal systems are part and parcel of a global community, let alone a global legal system, and that ideologies from the developed World and developing World need not always be divorced. In this regard, the postulation by

77 D Bilchitz, T Metz & O Oritsegbubemi (2017) *Jurisprudence in an African Context* Oxford University Press: South Africa, 5.

David Bilchitz, Thaddeus Metz and Oritsegbubemi Oyowe is not only correct but persuasive; namely that the 'impulse towards understanding ideas from beyond one's own immediate setting is not something human beings should seek to overcome, but instead should embrace'.[78]

For starters, and as suggested elsewhere in this Chapter, post-independence developments in most African States remain informed by the immediate past, a past that for the most part also has legal implications. Moreover, globalisation and the harmonisation of laws and legal practice the world over compels judges generally, and judiciaries in particular, to look beyond their borders for answers to perplexing and compounded legal questions. This is because domestic legal choices may have global repercussions on legal practice and systems generally. As such, the calculated incorporation of foreign law and material has become an essential element of any modernist judge and judicial system.

It is true as Balakrishnan has once rightly argued, and as captured in some of the arguments against comparative law as stated above, that 'socio-political conditions prevailing in different jurisdictions will pose legal problems particular to them but there is no reason why courts in such jurisdictions should not benefit from each other's experiences…'[79] As the comparative law jurist, Rudolf Schlesinger, once argued, "whoever seeks rationale solutions of perplexing social problems must recognise that there is much to be gained, not only by learning from the successes and failures of other systems, but also by a broader perspective which a comparative approach provides."[80] When one is confined to the study of one's own law within one's own country and, thus within one's own cultural environment, as Walter Kamba once rightly argued, there is a strong tendency to accept without question the various aspects (norms, concepts, and institutions) of one's own legal system.[81] In such instances, one is inclined to think that the solutions to one's own legal order are the only possible ones. This leads to an idealisation of one's own legal institutions and to treating them as inherent in the general nature of law.[82]

Given the above, a more nuanced and flexible approach is ideally what should be sought, one that does not reject foreign law merely on the basis of its alien character but that appreciates the use of such law to meet domestic needs and circumstances in appropriate instances, and where applicable. In my reflection on the status to be accorded to comparative law sources in our legal system, it is important that there is no misdirection as to the proper context of this debate. It would be misleading to reduce this debate, as some have attempted to do in the past, to an inquiry based on the divides and differences drawn between the

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78 Ibid, 5.

79 Balakrishnan (Note 48 above) 8.

80 R Schlenger (1971) "The Role of the Basic Course in the Teaching of Foreign and Comparative Law" Vol. 19 *American Journal of Comparative Law* 618.

81 W Kamba (1974) "Comparative Law: A Theoretical Framework" Vol. 23 *International and Comparative Law Journal* 491.

82 Ibid.

legal systems of the global North and the South or between leftish and right-wing thinking. Rather, the use and approval of foreign legal sources in domestic systems should be viewed as a positive engagement and penetration between different legal systems and practices finding themselves in a globalised world geared towards a New World Order. This does not however, mean that peculiarities and differences in the geopolitical context, political economies, legal and socio-economic fabric should be ignored. Rather the argument is that our practices in our Courts, more especially that of our Supreme Court, have much to gain from the global trends of judicial-cross fertilisation. Predominantly, and as held by our courts before, foreign sources of law would be for the most part, of mere persuasive value but there is in principle no reason why in some exceptional and distinct instances such sources cannot be of a binding nature.

CHAPTER 5

Law-making on the fault lines of Constitutional supremacy, separation of powers and democracy

Stefan Schulz and Ngutjiua Hijarunguru

5.1 INTRODUCTION

The Namibian Constituent Assembly adopted a Constitution, whose structure and content are commensurate with the aspirations expressed in the Preamble, namely:

- The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family; and
- A democratic society, where the government is responsible to freely elect representatives of the people, operating under a sovereign constitution and a free and independent judiciary.[1]

The individual entitlements which buttress the democratic state, named Fundamental Human Rights and Freedoms (hereafter FR & FF), emanate from the primordial concept of human dignity,[2] and they form together, Chapter 3 of the Constitution. Importantly so, these guarantees have been entrenched by virtue of Article 131.[3] According to the entrenchment clause, textual amendments of the Constitution which diminish or detract from the fundamental rights and freedoms are invalid. The purpose of this norm, also known as the eternity clause, is to preserve some foundational concepts in which the Namibian state, and society, anchors. Besides the FR & FF, the principles of state organisation, i.e., Democracy, Sovereignty of the Constitution, Separation of Powers, Rule of Law and Judicial Independence,[4] are hallmarks of the Constitution. These principles and the ways in which they are intricately linked to one another, are defined by the extent to which they have been textually incorporated into the Constitution and their location in the constitutional structure; in Chapter 9 (Administration of Justice), Article 78(1) vests the judicial authority in the Judiciary; Article 78(2) provides for the independence of the courts,

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1 The Namibian Constitution, Preamble.

2 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51/2008) [2009] NASC 17 at 33.

3 The Namibian Constitution, Article 131 Entrenchment of Fundamental Rights and Freedoms: No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

4 SK Amoo (2008) "The structure of the Namibian judicial system and its relevance for an independent judiciary" in N Horn & A Bösl (eds) *The Independence of the Judiciary in Namibia* Mcmillan Education: Windhoek, 69, 92.

and consequently, the Cabinet and the Legislature may not interfere in judicial functions.

Here, the Constitution follows the doctrine of separation of powers, which suggests that the principal institutions of state (executive, legislature and judiciary) ought to be divided in person (organs) and in function in order to safeguard liberties and guard against tyranny.[5] The separation of powers properly defined, should lead to a better system of checks and balances in a democratic system, where the "powers" are elected - checks and balances should work for the benefit of the people.[6]

Interestingly, little more than the FR & FF has been placed under the effect of entrenchment. Article 132(4) of the NC stipulates that to diminish or detract from the two thirds majority required to amend the constitution is not permissible. However, once such a majority has been found, there is no limit, other than derived from Article 131 of the NC in respect of FR & FF, which prevents the constitutional legislator[7] from imposing far-reaching changes. This is markedly different from the South African Constitution, where section 74(1) protects the "democratic state", and is deemed to encompass the sovereignty of the people. The Namibian Constitution is also much less protective than other constitutions which, beyond the protection of Human Dignity and Human Rights, establishes that certain fundamental principles can never be removed,[8] for example, Republic (as a form of government), the sovereignty of the people, democracy, rule of law (Rechtsstaat), separation of

5 MD Forkosch (1969) "The Separation of Powers" Vol. 41 *University of Colorado Law Review* 529, 531; OC Ruppel (2008) "The role of the executive in safeguarding the independence of the judiciary in Namibia" in N Horn & A Bösl (eds) *The Independence of the Judiciary in Namibia* Mcmillan Education, 207, 210.

6 Forkosch (Note 5 above) 529, 539; recently RG. Holcombe (2018) "Checks and Balances: Enforcing Constitutional Constraints" Vol. 6 *Economies* 57.

7 The nomenclature in this chapter follows the structure provided in French constitutional theory, and the conceptual distinction between the original constitutional power, in French the *pouvoir constituant originaire*, and the constituted constitutional power, in French the pouvoir *constituant derivé*, or *constitué* (for an exposition, see: A Viala (2014) "Limitation du pouvoir constituant, la vision du constitutionnaliste" 32 *Civitas Europa* 81 - 91). The difference is categorical in the sense that the original constitutional power is neither hetero-, nor auto-limited – the constitution is more a product of politics than law – whereas the constituted constitutional power is limited within the confines of the constitutional text. It derives its power entirely from the original constitutional power. Constitutionalists then use the term *legislateur constitutionnel*, English constitutional legislator, or pouvoir *constituant derivé*, to express the difference, and especially the limitation of the latter. In respect of the Namibian Constitution, the original constitutional power has been held by the Constituent Assembly before the coming into force on 21 March 1990 (see: N Horn (2010) "The forerunners of the Namibian Constitution" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia - A critical analysis after two decades* Mcmillan Education Namibia: Windhoek, 63 - 82). The terms original constitutional power and Constituent Assembly (hereafter used interchangeably), and constitutional legislator will be used in this text with the conceptual difference, as set out here above, in mind.

8 The constitutions of the Czech Republic, Germany, Turkey, Greece, Italy, Morocco, the Islamic Republic of Iran, the Federative Republic of Brazil and Norway contain such broader entrenchment clauses. The Constitution of India and the Constitution of

powers (as a guarantee for specific legislative, executive and judicial organs), and supremacy of the Constitution. After almost three decades into the Namibian Constitution, the above reflects the scholarly, and judicial understanding of the political system, which remains undisputed in principle.[9] Yet, the parsimoniousness of the entrenchment clauses (Articles 131 and 132(4) NC) may be a *lacuna*, an omission of the original constituent power, which in the ongoing political process gives regularly room for misgivings vis-à-vis the tension between judicial review as an aspect of the rule of law and democratic practice.

5.2. ARTICLE 81 NC: *CONTRADICTIO IN ADIECTO*[10] OR ANTI-THESIS OF THE INDEPENDENCE OF THE JUDICIARY?

The focal point for political aspirations to tip the balance in favour of the majority of the day is the wording of Article 81, which stipulates the following:

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

The first part of Article 81 is a codification of the *stare decisis* rule which provides that decisions of a higher court are absolutely binding on all lower courts. This has been underscored in *Schroeder and Another v Solomon and Others*,[11] where Mainga JA held that Article 81 “reaffirms the locality of this Court at the apex of the judicial authority, and the binding nature of its decisions on all the other courts and all persons.”[12] It also captures the notion of the separation of powers very well, as it presupposes that the Supreme Court ultimately finds the law (*ius*), which the Parliament passes (*lex*).

In this context, it is important to note that Article 79 sets out the court’s jurisdiction *ratione materiae*, which includes the “interpretation, implementation, and upholding of [the] Constitution.” The decisions of the Supreme Court have a binding effect until the conditions mentioned in Article 81 apply, namely: “contradicted by an Act of Parliament, lawfully enacted.” In the very literal sense of the word, “contradict”[13] means anything of the following: “deny the truth of (a statement) by asserting the

Colombia contain similar provisions, but like with the Namibian Constitution, it is still possible to change their basic structure.

9 *Pars pro toto*, see: MO Hinz, S K Amoo & David van Wyk (eds) (2000) *The Constitution at work - 10 years of Namibian nationhood* University of Namibia Press: Windhoek; A Bösl, N Horn & A Du Pisani (eds) (2010) *Constitutional Democracy in Namibia - A critical analysis after two decades* Mcmillan Education: Windhoek.

10 *Contradictio in adiecto* (Latin): “a contradiction between parts of an argument”.

11 *Schroeder v Solomon* (SCA 1/2007) [2010] NASC 11.

12 SCA 1/2007) [2010] NASC 11 at 15; see also *Likanyi v S* (SCR 2 / 2016) [2017].

13 See for instance: Contradict in Merriam-Webster.com. (n.d.) <https://www.merriam-webster.com/dictionary/contradict>.

opposite", "challenge, oppose, argue against, go against, be at variance with", in essence and for the purposes of this discussion, the constitutional text.

On this score, the question lingers whether Article 81 ought to be construed as a highly relevant instrument at the disposal of the legislature to effectively control the judiciary. As a matter of fact, political ambition may feel encouraged by some incidental, but not at all unequivocal remarks, which can be found for example, in *Chairperson of the Immigration Selection Board v Frank and Another.*[14] In this case, the court mooted the potential ambiguities of Articles 78(1) and (2) when viewed in light of Article 81. O'Linn AJA, who wrote the majority decision for the court, held that "[t]his means, so it would appear, that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament…"[15]. The court concluded by saying that "[a]lthough there [is] no doubt of the power of the High Court and the Supreme Court to declare any statute, or part thereof, unconstitutional in terms of Article 5, it seems that Parliament has the *last say*."[16]

The events unfolding after the passing of the judgements in the cases *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*[17] and *De Wilde v Minister of Home Affairs*,[18] respectively, speak volumes. In the first case, the Supreme Court struck down section 128 of the Labour Act, a section which outlawed the practice of labour brokering, as unjustifiably limiting Article 21(1)(j) of the Constitution[19] - members of the executive have openly expressed their dismay with the court's ruling.[20]

In the *De Wilde* case, the Supreme Court made a ruling on the meaning of the term 'ordinarily resident' in Article 4(1). That article provides that a child born in Namibia to non-Namibian citizens will be a Namibian citizen by birth if the child's father or mother is ordinarily resident in Namibia at the time of the birth - with a few narrow exceptions, such as children born to diplomats of other countries who are stationed in Namibia. The Supreme Court held that the phrase "ordinarily resident" had a meaning distinct from "permanent residence". In respect of the question whether a person is ordinarily resident for the purposes of Namibian citizenship,

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14 Chairperson of the Immigration Selection Board v Frank (SA8/99) [2001] NASC 1.

15 Ibid.

16 *Chairperson of the Immigration Selection Board v Frank* (SA8/99) [2001] NASC 1, emphasis added; O'Linn AJA refers here also to the court in the case *Namunjepo and Others v The State (June 1998, unreported)*, highlighting that 'Parliament is one of the most important institutions to express the present-day values of the Namibian people.'

17 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (SA 51/2008) NASC.

18 De Wilde v Minister of Home Affairs (SA 48/2014) [2016] NASC 12.

19 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (SA 51/2008) NASC, para.118.

20 S Immanuel & W Menges (2016) "Govt defies Supreme Court" The Namibian 27 July 2016. <https://www.namibian.com.na/153650/archive-read/Govt-defies-Supreme-Court>.

the Supreme Court identified three primordial considerations, namely whether the person concerned normally lives in Namibia and is not merely visiting; whether the person has no immediate intention of permanent departure; and whether facts capable of objective proof support that person's intention to make Namibia his or her habitual home.[21] In the case before it, the Court concluded that the parents, Mr de Wilde and Ms van den Meij, were ordinarily resident at the time of the birth of their elder child, meaning that he was entitled under the Constitution to Namibian citizenship by birth.

The reception of the Supreme Court's decision was mixed, and shortly after the judgement, the Minister of Home Affairs and Immigration introduced the Namibian Citizenship Amendment Bill[22] into the National Assembly. With the new section (1 A) of the Bill, the government aimed effectively to reverse the Supreme Court's interpretation of the Constitution in respect of the meaning of "ordinarily resident" in relation to the acquisition of Namibian citizenship, which henceforth should have taken the meaning of "permanent resident".[23] The Bill also stated, explicitly referring to Article 81, that "no rights may arise as a result of the decision of the Supreme Court of Namibia prior to the commencement of this Act in which the Supreme Court concluded that it was not the intention of Parliament to define the term 'ordinarily resident' to mean 'permanently resident' for the purposes of the acquisition of citizenship [by] birth after the date of Independence in terms of article 4(1)(d) of the Namibian Constitution". [24]

The Bill explicitly negated the Supreme Court's judgment, and it passed, nonetheless at the National Assembly. At the National Council, it was referred to a Select Committee for public consultation on its constitutionality. After considering an array of critical views provided by the Ombudsman, the Legal Assistance Centre, and the Law Society of Namibia,[25] the Select Committee reached consensus that the Citizenship Amendment Bill did not meet the constitutional requirements and thus could not be passed. The Bill was referred back to the National Assembly for reconsideration. In October 2016, the Bill was withdrawn from the National Assembly and referred back to Cabinet for further consultation.

21 *De Wilde v Minister of Home Affairs* (SA 48/2014) [2016] NASC 12 para 70.

22 Namibian Citizenship Amendment Bill, 2016 [B.11 – 2016].

23 Ibid, see section 1A (2) "The term "ordinarily resident", in relation to the acquisition of Namibian citizenship by birth by reason of being born in Namibia after the date of Independence by a father and mother who is not a Namibian citizen, excludes parents on employment permits, study permits, visitor's entry permits and those parents who are refugees at the time of birth of the child."

24 Ibid, see sub-section (3) "Pursuant to Article 81 of the Namibian Constitution - (a) no rights may arise as a result of the decision of the Supreme Court of Namibia prior to the commencement of this Act in which the Supreme Court concluded that it was not the intention of Parliament to define the term 'ordinarily resident' to mean 'permanently resident' for the purposes of the acquisition of citizenship birth after the date of Independence in terms of Article 4(1)(d) of the Namibian Constitution…"

25 Office of the Ombudsman of Namibia *Annual Report* (2016) 17. <https://www.ombudsman.org.na/sdm_downloads/annual-report-2016/>.

5.3 CONSTITUTIONAL SUPREMACY: LAWFULNESS ON THE FACE OF IT AND DEEP DOWN

In the *De Wilde* matter, as discussed above, the Namibian Government was confronted with harsh critique from within legal circles.[26] After the Bill was halted in the National Council,[27] the National Assembly abstained from pushing the Bill through (as to the procedure, see Article 75(5)(b)). Parliament did not invoke its powers as a constitutional legislator. This is of interest because the legislator is not out of line when changing the Constitution, but always within the remits of Article 132. Article 4 forms part of Chapter 2 of the Constitution, which does not fall in the protective ambit of Article 132. Cladded with the requisite majority, and so acting as a constitutional legislator, it is the prerogative of Parliament to amend the Constitution.[28] However, in this case, Parliament intended to rely on a literal, or better narrow reading of Article 81. If Parliament had insisted on enacting the Namibian Citizenship Amendment Bill 2016, this would have created a situation similar to the High Court of Parliament Act (HCPA) episode in South Africa before the constitutional era.[29] Attempts by the government to unhinge constitutional doctrines which are well rooted in all modern politico-legal systems gives rise to the question whether the wording of Article 81 poses an interpretative conundrum.[30]

According to Bangamwago, there shall be a tension between judicial review and democratic theory, "which cannot be ignored because the Namibian Constitution recognises both democracy and the rule of law."[31] In terms of the so-called counter-

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26 T Hancox & D Hubbard (2016) "A Constitutional Crisis" *The Namibian* 25 July 2016. <https://www.lac.org.na/news/inthenews/archive/2016/news-20160725.html>.

27 W Menges (2016) "NC rejects citizenship bill" The Namibian 4 August 2016. <https://www.namibian.com.na/154023/archive-read/NC-rejects-citizenship-bill>; the Attorney General reportedly advised Parliament to enter the route of changing the Constitution, a recommendation eventually dismissed in view of the specific reading of Article 81.

28 W Menges (2016) "Lawyers raise alarm over citizenship bill" The Namibian 29 July 2016. <https://www.namibian.com.na/153817/archive-read/Lawyers-raise-alarm-over-citizenship-bill>.

29 In May 1952 the South African Parliament, passed the Separate Representation of Voter's Act (46 of 1951) with the aim to disenfranchise non-white voters. The Act passed with simple majority, instead of the required two-thirds majority of both houses of Parliament. This engendered a constitutional crisis, and a dispute between Parliament and the judiciary, over the power of Parliament to amend an entrenched clause in the South Africa Act (the constitution) and the power of the Appellate Division of the Supreme Court to overturn the amendment as unconstitutional. The crisis ended when the government broke the deadlock by inflating the Senate and adding National Party sympathisers to the Appellate Division. Another challenge to invalidate the amended legislation failed in the case of *Collins v Minister of the Interior*; for details, see EN Griswold (1953) "The Demise of the High Court of Parliament in South Africa" Vol. 66 *Harvard Law Review* 864-872; for documentary and archival information: <https://omalley.nelsonmandela.org/omalley/index>.

30 F-X Bangamwago (2010) "Constitutional supremacy or parliamentary sovereignty through the back doors: Understanding Article 81 of the Namibian Constitution" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia – A critical analysis after two decades* Mcmillan Education: Windhoek, 251, 253.

31 Ibid 253.

majoritarian dilemma, the concept of judicial review counteracts the fundamental principle of democracy because it bestows upon unelected officials (judges) the power to strike down the acts of elected officials.[32] He averred that by the ordinary meaning of the words, the scope and content of Article 81 are hinged on the binding nature of Supreme Court rulings and opined that Article 81 left the question open about the "legal framework in which Parliament has to operate when contradicting Supreme Court decisions."[33]

Addressing these concerns, we will deal hereafter first with the meaning of Article 81 from a literal perspective of interpretation, which as we shall demonstrate does not lead anywhere beyond the confirmation of the apex rule of the Supreme Court. Secondly, we will discuss Article 81 from a purposive approach to interpretation. Here we take a realistic view on legal, and constitutional construction. Thirdly, we will consider the merits which can be found in the structure of the Namibian Constitution, which is commensurate with Dworkin's distinction between questions of principle and questions of policy.[34]

5.3.1. Lawfulness on the face of it: Article 81 from a literal perspective

The direction given by Article 81 is rather straightforward in that it concretises the manner in which such contradiction may be carried out, namely as "Act of Parliament lawfully enacted". The idea that Article 81 could be equivocal is only tenable if one is ready to ignore the context, and to allow the interpreter to fill the gap between the norm and the text by attaching any meaning to it. The engagement with a realistic view on law and legal cognition[35] should stir the mind of any interpreter, and create discomfort among proponents of literal interpretation. This perspective argues that there is a difference between the norm text, and the norm, and that the normative meaning which the literal exegete is 'finding' in the text is the result of an imputation.[36] In other words, the view posits that the concept literal interpretation is impossible, or better, a fiction. But even if one wanted to stay within the then illusionary remits of literal interpretation and use the plain meaning of the words, "Act of Parliament" would remain meaningless if not read in conjunction with the

32 Ibid, 253; this position is mostly shared by US scholars; Shapiro argues that judicial review and democracy are simply not compatible, and for him the important question is: "How do they get away with it?"; see M Shapiro (2019) "Judicial Power and Democracy" in C Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge, 21 - 35, 21; also: RA Posner (1983) "The Meaning of Judicial Self-Restraint" Vol. 59 *Indiana Law Journal* 1, 1 - 24; and TW Merrill (2005) "Originalism, Stare Decisis and the Promotion of Judicial Restraint" *Constitutional Commentary*, <https://scholarship.law.umn.edu/concomm/1092>.

33 Bangamwago (Note 30 above) 251, 253.

34 R Dworkin (1978) *Taking Rights Seriously* Havard University Press: Cambridge, 90.

35 R Guastini (2015) "A realistic view on law and legal cognition" (PAGE), *Revus* [Online], 27 DOI:10.4000/revus.3304, provides the analytical framework here.

36 Ibid.

remainder of the constitutional text.[37] In doing so, the interpreter quickly stumbles over Chapter 7, Article 44ff, and Article 63(1), which reads that the legislator: "shall have the power, subject to this Constitution, to make and repeal laws". There can also be no doubt about the meaning of the adverb + adjective "lawfully enacted". It simply means subject to the Constitution. For those who are looking for an avenue to construe Article 81 as an antithesis to the separation of powers, it could appear for a moment, that "lawfully enacted" refers to no more than procedural validity/ correctness, as required by Article 67, for simple majority legislation. However, this is not the "plain" meaning of the terms. Lawful means "legal", and enacted could mean "make law", but also "put into practice" (as an idea or suggestion). And the selection of any one of the alternatives requires extra-textual knowledge, which is not available at this stage of interpretation. Obviously, an interpreter approaching the text on the assumption of constitutional supremacy would ascribe a different meaning compared with one who assumed parliamentary sovereignty. But also, in the literal approach, systematic considerations become relevant, if the primary rule of interpretation would lead to absurd results.[38] Without going through a full declension of the literal approach here, neither the technical meaning of "legal" nor reference to the secondary aids to interpretation, i.e. the headings of chapters and sections of the Constitution would save the day for the interpreter. The indexicality of language[39] catches up with the interpreter, even if he/she sought direction from the "headings to chapters and sections" of the constitution. The terms used in the constitution are simply too conceptual and therefore, referring to secondary aids opens the question of the context of contexts.

The construction of meaning requires an argumentative rational discourse. From here it should be rather impossible to think that a constitutional text, which provides for a sophisticated system of balance of powers, and which categorises requirements for procedural validity as a function of the matter under consideration (see only: Article 131, and Article 132), should make space for an understanding which turns the system upside down.[40] The Supreme Court clearly underscored

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37 Act of Parliament is not defined in the Constitution. The term gains meaning in connection with Article 56, which indicates that a "bill passed by Parliament […] acquire[s] the status of an Act of Parliament", but the term bill is equally not defined in the Constitution; to understand the Constitution requires knowledge acquired outside the Constitution. For a recent discussion of the limits of literal meaning to legal meaning, see: B Flanagan (2010) "Revisiting the Contribution of Literal Meaning to Legal Meaning" Vol. 30 *Oxford Journal of Legal Studies* 255, 269.

38 Flanagan (Note 37 above) 255, 269.

39 S Schulz (2000) "Legal Interpretation and the Namibian Constitution" in MO Hinz, SK Amoo & D van Wyk (eds) *The Constitution at work - 10 years of Namibian nationhood* University of Namibia Press: Windhoek, 190, 200.

40 M Wiechers (2010) "The Namibian Constitution: Reconciling legality and legitimacy" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia – A critical analysis after two decades* Mcmillan Education: Windhoek, 45, 53; highlights the hypothetical question whether adopting the constitution was more an act of "balancing of outside interests than an expression of the constitutive expectations of the people in the territory" – concerns, as he surmised, belied by the fact that the Constituent Assembly not only at its first meeting on 21 November 1989, unanimously adopted the

this understanding in *Africa Personnel Services (Pty) Ltd*.[41] Here the court dismissed the respondent's position that the legislator could, by means of ordinary legislation, ultimately circumscribe a fundamental freedom and thereby exempt an activity from the protective range of that freedom:

> [I]n establishing the actual boundaries within which the fundamental freedoms may be enjoyed, Sub-Articles (1) and (2) of Article 21 must be read together: the norm as qualified by the exception; the fundamental freedom as circumscribed by the law only in so far as the latter imposes restrictions which are constitutionally permissible […] If certain economic activities are proscribed by legislation lawfully enacted, i.e. enacted in accordance with the Constitution, those activities may no longer be exercised as contemplated by Sub-Article (2) […]
>
> We interpose here to note that, when we refer to legislation enacted "in accordance with the Constitution" and so much of the common law "as does not conflict with the Constitution", we also include, particularly in the context of this case, reference to constitutionally permissible limitations allowed by Article 21(2) […] Impermissible restrictions contained in legislation cannot be considered as "legislation lawfully enacted" […] If the limitation of a fundamental freedom by "the law of Namibia" is unconstitutional, the scope of the fundamental freedom is not circumscribed by it.[42]

Here above we have seen that the literal perspective is futile. The concept of literal interpretation, especially in the constitutional domain, appears impossible. It is a fiction which applies to the extent that the interpreter does not experience a dissonance created on the basis of his or her own context of relevance. Leaving the literal perspective behind, we want to address hereafter the different legislative domains which have been created with the Constitution before we attend to our understanding of lawfulness from a purposive perspective.

5.3.2 *Ratione materiae*: A typology of legislative domains

A distinction otherwise is in order: Supreme Court decisions may bear on any normative matter (*ratione materiae*), at whatever level of legal hierarchy, irrespective of whether this is constitutional, entrenched or not, or sub-constitutional. To the extent that the matter is squarely sub-constitutional, the "contradiction" of a Supreme Court decision by an Act of Parliament is entirely benign. The focus at this level could be any decision upon appeal emanating from the High Court (Article

1982 Constitutional Principles as a "framework to draw up a constitution for South West Africa", but also by the unanimous adoption of the Namibian Constitution.

41 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* (SA 51/2008) [2009] NASC 17.

42 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51/2008) [2009] NASC 17 at 50 and 51 respectively.

79(2)).[43] However, even the constitutional matter is not necessarily immune; in fact, it should not be immune, against contradiction *de lege ferenda*: Constitutionalism, entirely besides the contemporary features like democracy and the separation of powers (compare below: Lawfulness deep down), provides for heightened stability at a basic level with a positive effect on the predictability of the law. However, for the constitution to be able to continuously play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, and "in the articulation of the values bonding its peoples",[44] we find wired into the text the possibility of amendments to match changing times and circumstances. The heightened protection of part of the constitutional norm text through entrenchment clauses such as Article 131 and Article 132 ensures that some foundational principles and values are not at the disposition of the constitutional legislator.

The eternity clause in Article 131 suggests both a formal and a substantial hierarchy of constitutional norms and concepts, with different requirements for amendment. At the apex of constitutional norms – on formal grounds – we find the very Article 131 of the Constitution, together with the FR & FF of Chapter 3. The entire set of norms enjoys the consequences of entrenchment. Article 131 without FR & FF remains empty and without Article 131, the FR & FF lack the protection against constitutional amendments. At the same level, we find Article 132(4) which entrenches the two third majority required for constitutional amendments. However, there is also a hierarchy of substance, which refers to the second type of legal reasons – which stands besides formal reasons – and which often lie behind the latter. In the ambit of the Constitution, an example of the first type is when considering what rule should be formulated to ensure that a specific concept governs a specific situation, for instance "liberty", "justice", or "democracy", to mention a few. Considering the limits and obstacles for constitutional amendment, viz. Article 131 and Article 132, one needs to weigh up, not only a variety of arguments bearing on the desirability of the rightness of these rules, but any substance brought under the constitutional text. Owing to the intended effect of Article 132, the constituent power - from the onset - intertwined reasons of form with reasons of substance. Whereas the former, typically invoked in contract law, connotes a requirement for writing, sealing, or perhaps for registration or attestation of some kind, and in constitutional drafting this translates immediately into the decision of the original constitutional power, (a) whether or not to formulate normative substance into constitutional text, and (b) whether this text should be buttressed beyond the standard requirements for amendment of ordinary constitutional text (Article 132), viz. "entrenched".

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43 An example in point, albeit contra-factual: If the Supreme Court had rejected the appeal in *Gaingob v S* (SA 07/2008 and SA08/2008) in respect of long fixed terms of imprisonment of 67 and 64 years, and the legislator had then amended section 276 of the Criminal Procedure Act, 51 of 1977, by placing a limit of 25 years of imprisonment upon the period of duration of a sentence, this would have constituted a contradiction in terms of Article 81 and importantly so, without constituting or presenting a problem or difficulty.

44 *S v Acheson* 1991 (2) SA 805 at 813 B – C.

From here derives a typology of legislative domains (Table 1) which indicates the respective requirements for any normative text as a function of the proposed legal principle. Importantly so, the second part of Article 81 has a crucial role to play in the process of interpretation, which ties in with the typology mentioned above. This role comes to the fore if one asks the question pertaining to how to understand the binding force of Supreme Court decisions without the part "or it is contradicted by an Act of Parliament lawfully enacted." Then another converse uncertainty would have to be overcome by constitutional interpretation. Without this direction, which is also a confirmation of the separation of powers, the law as per judgments of the Supreme Court would stifle any law reform in response, irrespective of the legislative domain it invokes, and domains 2 and 3 (Table 1) would be become paralysed.

Table 1: Typology of legislative domains (Namibia)[45]

#	Name of the Domain	Norm-making Power	Legal Matter / Legal Outcome	Legal Procedure
1	Constitution	Constituent power	Any matters / Any outcomes	Not regulated in / outside the ambit of the Constitution: Direct participation or representation of citizens; unanimity principle
2	Constitutional Amendments	Constituted constituent power	Any matters / outcomes, provided norms do not diminish or detract from the fundamental rights and freedoms contained and defined in Chapter 3, or otherwise entrenched by virtue of Articles. 131 and 132 (4) NC, also known as "eternity clause"	Procedure in terms of Article 132 NC: qualified two third majority
3	Sub-constitutional / Ordinary Legislation	Parliament	Any matters / Any outcomes not in violation of any constitutional substance	Procedure in terms of Article 44 NC etc.: simple majority

5.3.3 Lawfulness deep down: Article 81 from a purposive perspective

Here above we have shown that Article 81 establishes the apex role of the court and the preservation of the *stare decisis* rule. For Article 81 to be taken as the paramount source to shape the architecture and normative mechanics between separation of powers, constitutional supremacy, parliamentary sovereignty, and

45 Table 1 visualises the different legislative domains with commensurate requirements for procedure; the table provides thus an apercu of the discussion in this chapter.

judicial independence, specifically to tip the balance in favour of the legislator, it would have to be constitutive of these concepts, and their interrelations. This hypothesis, however, does not find support with a realistic view on constitutional law.

On the way to the formation of constitutional law, we distinguish three moments, (a) the Constitution as a set of normative texts, (b) the Constitution as a set of norms, or better: normative meanings, and (c) the Constitution as a set of norms actually in force.[46] The genesis of the constitutional law passes these three stages, and only at the deepest level, the Constitution refers to the norms actually applied in the past, and with some probability predictable to be applied in the future.

As a normative text or normative formulation, the Constitution needs to be given meaning. But it may be a naïve position, rejected by interpretive realism, to assume that interpretation can ever be a matter of cognition, or description. Against the indeterminacy of the legal text, and this applies especially to constitutional texts, here the "gap between norm and case is usually broader than with ordinary law,"[47] the law-applying agencies (we will come back to the concept later) select from among different competing meanings (N^1 - N^x). In doing so, they carry out a set of interconnected intellectual operations, typically required in the construction of constitutional meaning, for example, (a) closure of normative gaps, (b) creation of normative hierarchies, (c) specification of rules and principles, (d) balancing of principles, and (e) extraction of unexpressed, or implicit, norms and construction[48] of the commensurate normative meaning; we are dealing thus with an act of ascription. Contemporary legal scholarship and jurisprudence take the post-structural finding that language is a non-linear system of differences, and that meaning is always constructed, deferred, or between the words, as its point of departure.[49] Drawing from philosophic hermeneutics[50] on the one hand, and deconstruction[51] on the other hand, purpose, values, and contexts[52] are the beacons during the interpretive venture.

This is the prevailing position of the Supreme Court. The obvious starting point for determining the meaning of the Constitution is the text itself, which shall be given

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46 Guastini (Note 35 above).

47 D Grimm (2019) "What exactly is political about adjudication?" in Christine Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge, 307, 314.

48 Guastini (Note 35 above).

49 In more detail, see Schulz (Note 39 above) 191-215.

50 HG Gaddamer (1979) *Truth and Method* (2 ed) Continuum: New York, 261.

51 Schulz (Note 39 above) 190, 200.

52 The Namibian Supreme court has continuously underlined these aspects, e.g. *Minister of Defence v Mwandinghi* (SA 5/91) [1991] NASC 5; *Namunjepo v Commanding Officer Windhoek Prison* (SA 3/98) [1999] NASC 3; *Africa Personnel Services (Pty) Ltd v Shipunda and Others* (LCA 38/2011, LC 57/2011) NALC 29.

"as far as its language permits"[53] the "widest possible meaning".[54] On this basis, the court proceeds to engage with the various above-mentioned concepts in the construction of the Constitution, and we take note of the often cited[55] judgement in *Republic of Namibia v Cultura 2000*:

> 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.[56]

Purposive and generous heuristics, and context, the latter refers to the context in a narrow sense, thus includes the textual context, or better the set of norm texts in their setting in the document (also called systematic interpretation), but also in a wider sense, the historical context, comprised of the political history and the drafting history, are fused to produce the set of normative meanings.[57]

As mentioned before, Article 81 sits in Chapter 9 (Administration of Justice) of the Constitution and stipulates the principle which guarantees certainty and stability of the law, i.e. the *stare decisis* rule. The textual incorporation of constitutional supremacy, parliamentary sovereignty, and judicial independence has however occurred elsewhere. Textual anchors for Constitutional Supremacy can be found in the Preamble: "…adopt this Constitution as the fundamental law", and also in Article 1 (6): "This Constitution shall be the Supreme Law of Namibia." The separation of powers, and the concept of democracy, are likewise inscribed in the text of Article 1, namely sub-Article 2 and 3, which read, "2. All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State," and, "3. The main organs of the State shall be the Executive, the Legislature and the Judiciary." Judicial Independence is made explicit in Article 78 (2) and (3): "The Courts shall be independent and subject only to this Constitution and the law.", and "[n]o member of the Cabinet or the Legislature or any other

53 *Chairperson of the Immigration Selection Board v Frank* (SA8/99) [2001] NASC 1.

54 *Namunjepo and Others v Commanding Officer Windhoek Prison* (SA 3/98) [1999] NASC 3.

55 *Chairperson of the Immigration Selection Board v Frank* (SA8/99) [2001] NASC 1.

56 *Government of the Republic of Namibia v Cultura* 2000 (1994 (1) SA 407; another often quoted judgment is the very early judgment in *S v Acheson* 1991 (2) SA 805 at 813 B - C: "The Constitution is not simply a statute which mechanically defines the structures of 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 and permeate the processes of judicial interpretation and judicial discretion."

57 I Currie & J de Waal (2005) *The Bill of Rights Handbook* (5 ed) Juta: Cape Town, 153-158.

person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law."

In terms of structure and content, all the above ring the bell of one of the earliest and clearest statements of the separation of powers given by Montesquieu in 1748[58] who opined that (a) when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, (b) there is no liberty if the power of judging is not separated from the legislative and executive, and (c) there would be an end to everything, if the same man or the same body were to exercise those three powers. According to this concept, none of the three branches may exercise the power of the other, nor should any person be a member of any two of the branches. Instead, the independent action of the separate institutions should create a system of checks and balances between them.

The meaning that the constitutional text itself acquires, in respect of the functional interrelation of the before mentioned concepts, as well as their substance, is a question of imputation. The process takes recourse to the understanding produced throughout the historical-political process in which the making and remaking of a constitution is embedded. Text and structure of the constitution are crystallisations in this process, and the reader of the document, aiming at understanding, must refer to the process, and to the extent that there is judicial authority, specifically to this authority. It is the politico-philosophical discourse outside the formulation of the constitution as well as the lived experience of the people, which provides the canvass from which initial values and founding principles have been taken. Figuratively speaking, the text of the Constitution sits on the bedrock of such values and principles, and its substance and structure impregnates the terms espoused by the drafters of the constitution.

The political history of the Namibian people provides then for the wider context which is reflected, for instance, in the Preamble. Here, the Constitution refers amongst others to the denial of a sovereign constitution and a free and independent judiciary under colonialism, racism and apartheid. In view of the HCPA-saga (above) and similar accounts, it would not make sense if the adoption of this constitution by the Constituent Assembly meant anything else than acceptance of constitutionalism. This includes acceptance of the notion that not even a majority government has business amending or destroying the above-mentioned essential features. Among

58 The immediate appeal of the work by Montesquieu (Charles de Secondat, Baron de Montesquieu, *1689-1755*) *The Spirit of the Laws* (French: *De l'esprit des lois)*, first published in 1748, and influence outside France, can be gleaned from the fact that it was rapidly translated into other languages (English in 1750 by Thomas Nugent), as well as the addition of the work in 1751 to the *Index Librorum Prohibitorum* ("List of Prohibited Books") by the Roman Catholic Church.

these features we also find the FR & FF, judicial review as a function to preserve these individual rights, as well as other limitations on government power.

5.3.4 The counter-majoritarian challenge

Judicial review has been challenged on the grounds of the so-called counter-majoritarian dilemma. Bangamwabo writes that the concept of judicial review counteracts the fundamental principle of democracy because it bestows upon unelected officials (judges) the power to strike down the acts of elected officials.[59] Shapiro argues that judicial review and democracy are simply not compatible, and for him the important question is: "How do they get away with it?"[60] Those are weighty arguments, but we surmise that a look at the structure of the Constitution from a perspective of interpretive realism provides arguments for the discourse in support of judicial review.

At the point of inception of the law (*lex constitutionalis*) we find the Constituent Assembly. However, since the law depends on the combination of the formulation of the constitutional text, and its interpretation, the text crafted by the Constituent Assembly is only the first element. Importantly so, it is not this original constituent power anymore which determines the constitution in force thereafter. Upon adoption of the Constitution, the legislator contributes to its interpretation and construction. In a functional sequence, together with the Supreme Court and other constituted democratic institutions, the legislator entertains the discourse about the Constitution in force. Government (executive) and legislature form part of the law-applying agents, and as such they are bound to consider the acceptable meaning of the Constitution. Yet, there is a difference in perspective.

5.3.4.1 A change of perspective: From formulation of text to construction of meaning

The Constituent Assembly formulated and adopted the constitutional text against the background of its members' presuppositions in respect of the possible different competing interpretations *in abstracto*. We hold that the unanimous adoption of the text is the outcome of an extensive explicative discourse (reasoning),[61]

59 Bangamwago (Note 30 above) 251, 253.

60 MM Shapiro (2019) "Judicial Power and Democracy" in Christine Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge, 21, 21; also: RA Posner (1983) "The Meaning of Judicial Self-Restraint" Vol. 59 *Indiana Law Journal* 1; T W Merrill, (2005) "Originalism, Stare Decisis and the Promotion of Judicial Restraint" *Constitutional Commentary* <https://scholarship.law.umn.edu/concomm/1092>.

61 T-B Gurirab (2010) "The Genesis of the Namibian Constitution: The international and regional setting" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia – A critical analysis after two decades* Mcmillan Education Namibia: Windhoek, 109 – 117. See also D Mudge "The art of compromise: Constitution making in Namibia" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia – A critical analysis after two decades* Mcmillan Education Namibia: Windhoek, 119 - 145.

"making explicit what is necessarily implicit in human practice."[62] In contrast, the construction of the meaning of the Constitution by legislature and executive is fact oriented and bears on the constitutional law. These law-applying agents adopt and execute, respectively, laws and policies against the backdrop of a fact-oriented interpretation of the Constitution *in concreto* and their main focus is the promotion of day-to-day politics, which limits the juristic discourse[63] by screening out the influence of competing political interests on the understanding of the constitutional text.[64]

Whereas these limitations are implicit in the democratic process, the very meaning of democracy narrows down and turns into the majority rule (Article 67) - a simple decision-making tool. It is obvious that the democratic legitimation of the construction of the constitution which is implicit in law making, or application of the law by the executive, is much limited in comparison with the legitimation which lies in formulating the norm text by the Constituent Assembly. It is here where the argument anchors that whereas democracies are built upon the majority-principle "no constitutional democracy can be purely majoritarian."[65] Borrowing from Alexy,[66] we hold that constitutionalism even beyond the entrenchment of fundamental rights, is an expression of mistrust in the democratic process, and that the decision to protect the constitution is too important, and "cannot be left to simple parliamentary majorities."[67]

5.3.4.2 The norm text in the perspective of the Supreme Court

In this context, we want to recall that the court has no mandate to promote politics, that is, majorities of the day, but it has to give effect to the eternal values arising from what we would call the deep structure of the Constitutional text.[68] The above

[62] R Alexy (2006) "Discourse Theory and Fundamental Rights" in AJ Menendez & OE Eriksen (eds) *Arguing Fundamental Rights* Oxford University Press: Oxford, 1, 18.

[63] The narrow frame informed the politics and interest of the day shines through in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* Case No SA 51/2008 at 33: In order to fend off the appeal, the respondents argue that the freedom to carry on any trade or business should be restricted to natural persons, without considering the further consequences on the legal order beyond the case.

[64] The contexts in which this happens here and there is certainly different, but Namibia can draw conclusions from a world reality which is characterised by rising populism with growing segments of the population repudiating the principles of constitutional democracy, and populist leaders securing power through control of the judiciary and the media; see: JW Müller (2018) "Homo Orbánicus" review of P Lendvai Orbán: Hungary's Strongman Oxford University Press, 2018:Oxford in *The New York Review of Books*, April 5, 2018 <https://www.nybooks.com/articles/2018/04/05/homo-orbanicus-hungary/>.

[65] M Roesenfeld (2019) "Judicial Politics versus Ordinary Politics – Is the Constitutional Judge caught in the middle?" in C Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge, 36, 36.

[66] R Alexy (2006) "Discourse Theory and Fundamental Rights" in AJ Menendez & OE Eriksen (eds) *Arguing Fundamental Rights* Springer: Berlin, 1, 17-18.

[67] Ibid 18

[68] The court in *Africa Personnel Services (Pty) Ltd* makes implicit reference to this deep structure as it embraces the statement that the purpose of the right or freedom

implies an important distinction, which mirrors Dworkin's position[69] that judicial vindication of fundamental rights is a matter of principle, whereas determinations left to ordinary politics is a question of policy. Admittedly, although the distinction cogently differentiates the domain of judicial politics from the domain of ordinary politics, there is an overlap, and many intrinsic questions remain, especially the question whether a subject in question (e.g. labour hire, nationality, but also healthcare, etc.) is more likely to be more legitimately be dealt with within the realm of judicial politics or within that of ordinary politics. But before rejecting judicial review on that account, consideration should be had that the process of adjudication is by no means arbitrary: In filling the space of indeterminacy, the judge works in an area that is circumscribed by legal doctrine and legal precedents, and he/she applies proven and shared legal methods. The idea that the rogue judge, who cares little about the law and follows his or her own preference or material interest, may be beyond credibility. The juristic discourse which is always required from the highest court serves as a not so subtle reminder of the values the people have meant to enshrine in the constitutional formulations, values which transcend the virtues which lie in the interest of any political majority of the day. The binding rules of apex courts on constitutional matters are part of a dialogue, and on the fault line between judicial politics and ordinary politics courts, all players must recognise the need for continuous reflection on the relation of concrete policies to the "values inherent in the constitutional agreement the society has accepted."[70]

In view of the above, it may thus be said that there is indeed no counter-majoritarian dilemma, because the question whether the legislator may contradict the Supreme Court in the constitutional domain, invokes the principle of separation of powers only to the extent that the Supreme Court through its judgments in constitutional matters transacts the Supremacy of the Constitution.

5.4 RECOMMENDATIONS

In the wake of an exegetic effort, the question is, "What is the takeaway?" The most salient points may have been made above in passing, namely first that "no constitutional democracy can be purely majoritarian,"[71] and second that the protection of the Constitution "cannot be left to simple parliamentary majorities."[72]

The first statement can be best appreciated if one considers the background of political philosophy regarding the normative entanglement between the entrenchment of constitutional rights, here FR & FR, and the majority rule. Rousseau surmised in his oeuvre *Du Contrat Social* (Engl. The Social Contract):

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in question is to be sought by reference to the character and larger objects of the Constitution itself; it is held that these are the values articulated in the Preamble.

69 Dworkin (Note 34 above) 90.

70 D Robertson (2010) *The Judge as Political Theorist: Contemporary Constitutional Review* Princeton University Press: Oxford, 7.

71 Roesenfeld (Note 65 above) 36, 36.

72 Alexy (Note 66 above) 1, 17.

> Were there a people of gods, their government would be democratic. So perfect a government is not for men. Were there a people of gods, their government would be democratic. So perfect a government is not for men.[73]

From there emanates the practical necessity to deviate from unanimity as the democratic ideal-type of the *volonté générale*. As a consequence, Rousseau suggests the relaxation of the unanimity requirement in favour of differently qualified majorities in relation to the comparative importance of an issue at hand, and the urgency of decision-making.[74] He writes:

> There are two general rules that may serve to regulate this relation. First, the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity. Secondly, the more the matter in hand calls for speed, the smaller the prescribed difference in the numbers of votes may be allowed to become: where an instant decision has to be reached, a majority of one vote should be enough. The first of these two rules seem more in harmony with the laws, and the second with practical affairs. In any case, it is the combination of them that gives the best proportions for determining the majority necessary.[75]

With this in mind, it can be said that the majority rule, whether in the form of simple or qualified majority, is only a pragmatic approximation to democracy, and, over and above that, there are not three, but four distinguishable domains of power, namely legislative, executive, judicative, and constitutional. Whereas, the first three in the list are subject to the Constitution, the fourth stands outside of it, and is not governed by its rules. From here the first recommendation (R1), which is directed at the Parliament, may read accordingly:

> R1: In a constituted democracy, Parliament must not only be mindful of the limitation of its powers vis-à-vis executive and judiciary, but also in respect of constitutional power. This mindfulness should be of assistance in Parliament's continuous endeavor not to overstep its legislative domain and so not act as, or better usurp, constituent power.

The second statement, that the protection of the Constitution cannot be left to parliamentary majorities, invokes Montesquieu's dictum (above) that 'there is no liberty if the power of judging is not separated from the legislative and executive.' Compliant with this, the Constitution has vested the power to decide on constitutional matters in the Supreme Court, which Dworkin delineates by virtue of the distinction between the domain of judicial politics and the domain of ordinary politics. And this

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[73] JJ Rousseau (1762) *The Social Contract, Book III, para 4 Democracy*; translation by GDH Cole, <https://www.marxists.org/reference/subject/economics/rousseau/social-contract/>.

[74] Schulz (Note 39 above) 169-190, 185.

[75] Rousseau (Note 73 above).

bears the second recommendation (R2), which is directed at the Supreme Court in constitutional matters:

> R2: Although it is emphatically the province of the Supreme Court to say what the constitutional law is, when dealing with the delineation of legislative from constitutional power, the court itself must apply restraint and avoid construction of constitutional rules which lie outside the constitution.

Rounding up the recommendations, we underline that this discourse suggests a perspective on constitutionalism, which transcends the technical aspects of separation of powers and the mechanics of power control. State organs, like the judiciary, and the legislative have different functions which serve the same ultimate purpose, namely the preservation of the Constitution. In a narrow sense, this may go along with constitutionalism, which Fellman[76] holds is the concept of "limited government under a higher law",[77] and which binds the "government to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community."[78]

However, in a constituted democracy like Namibia, which entrenches FR & FF, and so establishes a hierarchy of constitutional norms, constitutionalism shall mean even more than respect for FR & FF, or the Supreme Constitution. It must comprise of the respect for the supremacy of the constituent power, (only) epitomised in the Namibian Constitution, which however (other than being an expression of) is not identical with the *pouvoir constituant originaire*. This original constituting power is the democratic power of unanimity, held only by the people outside the ramifications of a constitutional text. If the legislator and judiciary kept this in mind, they might preserve the humbleness, the awe, and the reverence for this true democratic power, and apply the judicial-restraint on the one hand, and the legislators' restraint on the other hand, which is needed to delineate continuously their respective domains.

5.5 CONCLUSION

In conclusion, there is no room for any unfettered legislative authority shooting from the hip whenever dissatisfied with the constitutional law constructed by the Supreme Court. As we have laid out above, otherwise the court's judicial review powers would become meaningless; the rule of law would be reduced to a lofty ideal and parliamentary sovereignty reintroduced through the backdoor. There is however, also no room for an apex court to overstep the boundaries between judicial politics, and ordinary politics. The 'last say', which in constitutionalism is

76 D Fellman (1973-1974) "Constitutionalism" in PP Wiener (ed) *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* (1st ed) Scribner: New York, 485-492.

77 Ibid 485.

78 Ibid 485; see also: D Fellman (1975) "The Separation of Powers and the Judiciary" *The Review of Politics* Vol.37 *Cambridge University Press*, 357-376.

ironically always also the first say, has been reserved for the *original constitutional power*, in French constitutionalism: *pouvoir constituant originaire* – the only true constitutional power. But this power does not vest in ordinary Parliament, nor in its capacity as constitutional legislator.

CHAPTER 6

Making dignity supreme: The Namibian Supreme Court's dignity jurisprudence since independence

Dunia Prince Zongwe and Bernhard Tjatjara

6.1 INTRODUCTION

Laurie Ackermann, a former judge of the Constitutional Court of South Africa, affirmed that dignity is the highest value.[1] Yet the claim that dignity represents the supreme value in a constitutional order sounds like a tautology, an unnecessary repetition. At its core, dignity already refers to the highest, supreme value.[2] How high can one then elevate the highest value?

In the Namibian context, neither the High Court nor the Supreme Court have ever explicitly proclaimed dignity the 'supreme' value. Similarly, though it is itself supreme,[3] the Constitution of Namibia does not expressly say that dignity ranks above any other value or human right.

Nonetheless, Ismail Mahomed, before he became Chief Justice of Namibia (and later Chief Justice of South Africa), interpreted the Namibian Constitution in the *Corporal Punishment* case to mean that, alongside liberty and the rule of law, dignity forms the basis of Namibia as a democratic state.[4] Thus, the learned judge of the Namibian Supreme Court raised the status of dignity to new heights, but he still fell short of making it supreme.

Despite the prominence of dignity in Namibia's legal system, few articles have scrutinised this human right. Naldi devoted a small section of her book *Constitutional Rights in Namibia* to dignity.[5] However, apart from the short size of its section on dignity, the book mainly focused on drawing parallels between the dignity provision in the Namibian Constitution (i.e., Article 8) and similar or corresponding provisions

1 L Ackermann (2012) *Human Dignity: Lodestar for Equality in South Africa* Juta: Cape Town, 5 (writing that "the concept, value, and right of 'dignity' (in the sense of human worth)" plays a "pre-eminent" role, in many different ways, in the 1996 South African Constitution and the 1993 Interim Constitution).

2 See O Sensen (2011) *Kant on Human Dignity* De Gruyter: Boston, 4 (remarking that dignity is not supposed to be just any value, but a special kind of value that justifies the duty of human beings to respect other human beings and that trumps any other considerations); R Andorno (2014) "Human dignity and human rights" in H Ten Have & B Gordijn (eds) *Handbook of Global Bioethics* Springer: Dordrecht.

3 Constitution of the Republic of Namibia art 1(6). Hereinafter referred to as "Namibian Constitution".

4 *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 178 (Hereinafter referred to as *Corporal Punishment* case).

5 G Naldi (1995) *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* Juta: Kenwyn, 44-51.

in international human rights law. At least one other article dealt with human dignity, but only as far as it pertains to the protection of people against torture.[6]

Ackermann went on to say that, thanks to its pre-eminent place in the South African Constitution, dignity continues to warrant ongoing reflection on its meaning, influence and importance.[7] The same applies to Namibia. Indeed, dignity has gained importance in philosophy, politics, law and everyday life. It represents a central value in the Universal Declaration of Human Rights (UDHR),[8] which inspired the Namibian Constitution,[9] and in other international human rights instruments. In fact, violations of dignity, together with discrimination in the apartheid system, triggered off the struggle for liberation in Namibia.[10]

Yet, round the globe, thinkers have written very little on human dignity.[11] This means that judges and legal practitioners seeking to define human dignity would barely find anything to rely on for that purpose.

We attribute the dearth of publications on human dignity to two widespread myths, of which people seem generally unaware. First, most people see 'dignity' as self-explanatory and too obvious to warrant any definition or discussion. This attitude may explain why judges in Namibia have never attempted to describe this concept. Second, the advent of human rights since World War II ended, gave rise to the language that presented the right to dignity as universal, which in turn led many to believe that the word 'dignity' conveys the same meaning across the world. In this chapter, we debunk these two myths by demonstrating that defining 'dignity' proves difficult[12] and that people envision different things when they invoke the right to human dignity.

On the main, however, we aim to review how the Supreme Court of Namibia has developed the dignity jurisprudence since independence. Here, we use the term 'jurisprudence' in its two senses: as the philosophical study of law and as the accumulated body of court decisions on a distinct aspect of the law. In short, we look at how the Supreme Court elaborated on the dignity concept, both philosophically and practically.

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6 F Nghiishililwa (2002) 'The constitutional prohibition on torture' in MO Hinz, SK Amoo & D Van Wyk (eds) *The Constitution at Work: 10 Years of Namibian Nationhood* University of South Africa: Pretoria.

7 Ackermann (Note 1 above) 5.

8 Ibid 4.

9 Namibian Constitution preamble.

10 See O'Linn's note in *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) 153 (holding that the violation of the dignity of the person and discrimination, endemic in the apartheid's oppressive system, constituted the root causes of the liberation struggle) (Hereinafter *Kauesa* HC case).

11 See G Kateb *Human Dignity* (2011) Harvard University Press: Cambridge, 1 (stating that not much has been said about what human dignity is and why it matters for people to claim rights).

12 Ibid ix.

Accordingly, we have arranged this chapter into five sections. First, we look at the language of rights in general and, more specifically, how the language of the right to dignity features in the Namibian Constitution and constitutionalism. Next, we specifically unpack the idea of human dignity, highlighting that judges in Namibia have not yet defined dignity and that they unwittingly use a largely Western concept, at the expense of conceptions of dignity rooted in traditional African values. We then move on to underline the special significance of human dignity in Namibia's socio-economic context.

In the fourth part, from *Ex parte: Attorney-General in Re: Corporal Punishment*[13] through *Namunjepo*[14] to *Gaingob,*[15] we critique the Supreme Court's human dignity jurisprudence. We also sum up the changes that jurisprudence brought about. And, in the final section, we reflect on the overall trajectory of that case law and put forth suggestions on how the apex court can further build that jurisprudence going forward.

6.2. DIGNITY: ARTICULATION AND IMPACT

6.2.1 The language of rights

The language of rights typically channels demands made by individuals that the state and other individuals respect their dignity. The language of rights wields great power. It enables individuals to formulate their grievances in terms officially or generally accepted, in order to better negotiate with the state.[16] It empowers them to express claims, political or otherwise. Especially when expressed as human rights, those claims constitute a socially constructed language structure that frames social action.[17] Thus, in *Daniel,*[18] the convicted persons used the right to dignity to convince the Supreme Court to declare as unconstitutional the minimum sentences required by the Stock Theft Act[19]. Had the convicted persons claimed that the sentences inflicted too much hardship on them instead of pleading that the sentences stripped them of their dignity, their claim would not have persuaded the Supreme Court as much.

13 *Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC).

14 *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) (Hereinafter *Namunjepo* case).

15 *S v Gaingob and Others* 2018 (1) NR 211 (SC) 212 (Hereinafter *Gaingob* case).

16 See EJ Perry (2009) "China since Tiananmen: A new rights consciousness?" Vol. 20 *Journal of Democracy* 17 (interpreting the increasing number of popular protests in China as reflecting an older "rules consciousness", in which savvy protestors frame their complaints in officially-approved terms in order to negotiate better bargains with the authoritarian Chinese state).

17 See D O'Byrne (2012) "On the sociology of human rights: Theorising the language-structure of rights" Vol. 46 *Sociology* 829.

18 *Prosecutor-General v Daniel and Others* 2017 (3) NR 837 (SC) (Hereinafter *Daniel* case).

19 Stock Theft Act 12 of 1990 ss 14(1)*(a)(ii)* and 14(1)*(b).*

Tani notes, however, that the language of rights often arises as a danger. More specifically, she observes that, when "benefits" from government assistance become "rights", the state loses flexibility in choosing how to use taxpayers' money, and taxpayers suffer as a consequence.[20] The language of rights can thus tie the hands of the government when it tries to execute the mandate it received from the electorate and taxpayers. On the other hand, people also invoke human dignity to vindicate certain rights.[21] Put another way, while people can deploy the language of rights to strengthen their demand that others respect their dignity, they can also brandish their human dignity to insist that they have certain rights. To illustrate, an individual can request that others respect his/her dignity because the Namibian Constitution protects it as a human right; moreover, he/she can pray a court to recognise that he/she has a right to health or food because, as a human being, he/she possesses dignity.

6.2.2 Human dignity in the Constitution

Unlike its South African counterpart, the Namibian Constitution has not expressly based the state on human dignity. While the South African Constitution expressly proclaims that South Africa is "founded on… *human dignity*, the achievement of equality, and the advancement of rights and freedoms",[22] the Namibian Constitution declares that Namibia is "founded upon the principles of democracy, the rule of law and justice for all".[23]

However, Mahomed AJA, as he then was, held in the *Corporal Punishment* case that the Namibian Constitution "expresses the commitment of the Namibian people to the creation of a democratic society based on respect for *human dignity,* protection of liberty and the rule of law."[24] The judge did not spell out how he arrived at such an interpretation. We can only speculate, from the humiliations and indignities that Mahomed lived through during the apartheid days,[25] that this experience maybe coloured his outlook on dignity.

In any event, in the text of the Namibian Constitution, as amended, the word 'dignity' appears 14 times, but only 6 times in the sense of 'human dignity'.[26] Likewise, the

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20 KM Tani (2012) "Welfare and rights before the movement: Rights a language of the state" Vol. 122 *Yale Law Journal* 314 at 381.

21 Kateb (Note 11 above) xii and 1.

22 Constitution of the Republic of South Africa, 1996, section 1(a) (Hereinafter referred to as "South African Constitution"). [Emphasis added].

23 Namibian Constitution article 1(1).

24 *Corporal Punishment* case (Note 4 above) 178.

25 See D Beresford (2000) "Chief Justice Mahomed" *The Guardian* (21 June 2000) <https://www.theguardian.com/news/2000/jun/21/guardianobituaries.davidberesford> (explaining how Ismail Mahomed overcame the humiliations of apartheid before he rose to the position of Chief Justice of South Africa).

26 Twice in the Preamble, three times in Article 8 in the Bill of Rights, and once in Article 98 (Principles of economic order). This excludes the Constitution's table of contents, which mentions the word 'dignity' once.

text of the South African Constitution mentions the word 'dignity' 14 times, but it means 'human dignity' only in 9 instances.[27]

Article 8 of the Namibian Constitution provides specifically for the right to human dignity:

(1) The dignity of all persons shall be inviolable.
(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Other provisions of the Namibian Constitution protect the right to human dignity. Thus, in the Preamble, the people of Namibia recognise that, "the *inherent dignity* and […] the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace".[28] They also desire, through the Constitution, to "promote amongst all of us the dignity of the individual […]" The Constitution defines the economic order of Namibia as based on "the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians."[29]

6.2.3 The legacy of Chief Justice Mahomed: articulating dignity

Since independence in March 1990, judges in Namibia have articulated the right to dignity enshrined in the Constitution. The Namibian Constitution itself contains provisions on how persons charged with the responsibility to implement the Constitution should go about it. First, the Constitution entrenches the right to dignity[30] and forbids anyone from derogating from that right.[31] However, despite Mahomed's ruling that the state's obligation to respect human dignity is "absolute and unqualified",[32] the Supreme Court has not yet definitively said whether the government or Parliament can nonetheless limit the right to dignity. But dignity may serve to limit other rights. In *Kauesa,* O'Linn remarked (in that matter's High Court decision) that the rights to dignity and equality as well as the common law relating to *injuria* and defamation restrict freedom of expression.[33]

27 Once in the very first section of the Constitution and 8 times in the Bill of Rights (including thrice in section 10 - the section on human dignity). This excludes the Constitution's index, which mentions the word 'dignity' once.
28 Emphasis added.
29 Namibian Constitution article 98.
30 Namibian Constitution article 131.
31 Namibian Constitution article 24(3). See also *S v Likuwa* 1999 NR 151 (HC) (holding unanimously that no one can derogate from the right to dignity).
32 *Corporal Punishment* case (Note 4 above) 187.
33 *Kauesa* HC case (Note 10 above) 116, 119-120, 122, 135 and 158.

Judges have thus developed the right to dignity, as protected in Article 8 of the Constitution. And hardly any judge influenced the dignity jurisprudence in Namibia as much as Ismail Mahomed. The celebrated judge shaped that jurisprudence remarkably through two leading cases, namely *Corporal Punishment*[34] and *Tcoeib.*[35] However, as we show in this chapter, although later cases built on Mahomed's legacy, some judges criticised it. We also expose a number of major cracks in the dignity jurisprudence developed by Mahomed, for example, the absence of any definition of dignity while fellow judges later rejected Mahomed's perspective that dignity is an unqualified, absolute right.

6.2.4 Impact of the language of rights

When an individual, a public body or the state couches dignity as a human right, it dramatically strengthens a dignity-based claim that the claimant could have otherwise formulated as a moral or political duty but with less force. Runswick-Cole & Hodge contended that, in the United Kingdom, the phrase 'educational rights' ought to replace the phrase 'special education needs', recognising the power of rights language in affecting the lives of children with special educational needs.[36]
The language of rights enshrined in the Namibian Constitution has tangibly impacted welfare in Namibia. It also permeates in the development discourse, except that, like many scholars will tell, it is not realistic to believe that language alone will achieve much in terms of attaining development goals. Those scholars would rather deploy theories and policies based on such belief systems as neoclassical economics,[37] Keynesianism,[38] Marxism,[39] or theories expounding the developmental state.[40]

34 *Corporal Punishment* case (Note 4 above).

35 *S v Tcoeib* 1999 NR 24 (SC) (Hereinafter *Tcoeib* case).

36 K Runswick-Cole & N Hodge (2009) "Needs or rights? A challenge to the discourse of special education" Vol. 36 *British Journal of Special Education* 198.

37 Neoclassical economics views development as mostly depending on policies favouring the (free) market. See eg BA Balassa (1961) *The Theory of Economic Integration* Routledge: Oxford (presenting a unified theory of economic integration based on neoclassical economics and highlighting how this integration positively impacts growth and development).

38 'Keynesian economics' refers to the theories developed by British economist John Maynard Keynes. Though he preferred capitalist systems over non-capitalist ones, Keynes nonetheless believed, unlike neoclassical economists, that the state has a major role to play in the economy and development. For Keynesian economists, growth and development arise from monetary policies (set by the central bank) and fiscal policies (set by the finance ministry) alongside policies that promote the free market.

39 Unlike neoclassical and Keynesian economists, Marxists oppose capitalist systems. Based on the ideas of Karl Mark, this theory insists that the state, and not the market, should mostly organize how people and institutions should distribute and use scarce resources. Marxists advise governments to focus on class structures and tensions between owners of capital and the working class if they wish to bring about socio-economic development.

40 Developmental state theories promote a highly effective state, often an authoritarian one, that works closely with the private sector but that keeps a safe distance from it to avoid capture by private interests at odds with national development goals. See eg G Kanyenze, H Jauch, D Kanengoni, M Madzwamuse & D Muchena (eds) (2017) *Towards Democratic Developmental States in Southern Africa* Weaver Press: Harare

Nevertheless, the respect of the Namibian government for the judiciary has meant that the state willingly deployed its machinery to give effect to the decisions of the Namibian judiciary. As a result, the Namibian judiciary has become one of the most effective in Southern Africa[41] in applying the law and enforcing rights, including dignity. No wonder the Supreme Court of Namibia was mentioned by name in the World Press Freedom Index 2019 report that placed Namibia as the country with the greatest media freedom in Africa.[42]

The language of rights in Namibia has proven that the right to dignity is not just ink on paper. The Namibian judiciary has since independence rendered decisions that had a clear impact on the lives of Namibians and that achieved development goals in terms of self-esteem. In particular, the Supreme Court realised the right to human dignity, as provided for in Article 8 of the Namibian Constitution, in several landmark decisions. Thus, decisions of the Supreme Court have affected the scope of press freedom, the rights of accused persons, and dignity, among others.

6.3 INTERPRETING HUMAN DIGNITY

Even if it impacted society profoundly and positively, the right to human dignity remains obscure. The institutionalised language of human rights does, in fact, over-simplify complex issues.[43] And, as we show in this chapter, the Supreme Court and the High Court in Namibia have not clarified the core content of the right to dignity. Instead, these higher courts have assumed that content and acted as

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(exploring the concept of the 'democratic developmental state' and applying it to countries in Southern Africa).

41 See P Von Doepp (2008) "Politics and judicial decision-making in Namibia: Separate or connected realms?" Institute for Public Policy Research Briefing Paper No. 39. See also the World Economic Forum (WEF) Global Competitiveness Index for the year 2016, which ranked judicial independence in Namibia (at 5.18 out of 7) higher than the world median (about 3.80 out of 7) and higher than judicial independence in Botswana (4.66 out of 7), Malawi (4.14), Zambia (3.97) and Zimbabwe (2.92). That year, South Africa scored 5.82 out of 7, higher than Namibia.

42 See Reporters without Borders "Namibia" <https://rsf.org/en/namibia>, (ranking Namibia at 23 out of 180 countries). Reporters Without Borders explicitly referred to *Director-General of the Namibian Central Intelligence Service & Another v Haufiku: Mathias & Another* (SA 33/2018) [2019] NASC 7, where the Supreme Court of Namibia rejected the appeal by the Namibian Central Intelligence Service (NCIS), which sought to prevent a local newspaper from publishing information about alleged corruption in the NCIS. In rejecting the NCIS's appeal, the court observed that the government did not produce evidence to show that publishing that information would breach any law or that the newspaper obtained that information illegally. The court ruled that the notion that renders courts powerless once the executive invokes secrecy and national security, without making a case for protecting secret governmental information, does not align with the values of an open and democratic society based on the rule of law.

43 See eg J Pirjola (2009) "European asylum policy - inclusions and exclusions under the surface of universal human rights language" Vol. 11 *European Journal of Migration and Law* 347 (arguing European Union member states should not try to hide the development of the European asylum system behind the obscurity of institutionalised rights language, but view the system as resulting from different or conflicting priorities and power struggles).

though the only things they needed to shed light on concerned the myriad *practical applications* of the right to dignity.

In other words, the courts focused on *interpreting* human dignity as it variously manifests in practice (for example, corporal punishment and freedom of speech) and omitted to distill the essence of that right. This omission severely weakens Namibia's dignity jurisprudence. Contrary to declarations in international legal instruments that the right to dignity is universal, Western notions have swayed interpretations of that right, as expressed in those instruments and Article 8 of the Namibian Constitution.[44] And, even within Western notions of human dignity, which sometimes reveal moral or Christian undertones, lawyers disagree over the basic content of the right. As a consequence of that omission, the implied understanding of the right to dignity in Namibia mirrors Western perspectives at the expense of African conceptions of dignity.

6.3.1 Dignity as a concept

6.3.1.1. The (lack of) definition

As shown above, the Namibian Constitution refers to human dignity several times, but nowhere does it say what that phrase exactly means. In fact, Namibian courts, including the Supreme Court, have been referring to "human dignity" without ever pausing to reflect on what that concept precisely entails. The *Corporal Punishment* case epitomises this very well. Although Mahomed AJA dissected the text of Article 8 of the Constitution, he did not unpack the concept of human dignity. He dissected the text of Article 8(2)(b) into seven different conditions that it protects people from, namely torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment, and degrading punishment.[45]

In other words, Mahomed analysed *the wording of the right to dignity*, but did not examine the essential content of the concept of dignity. Strydom CJ sought to define the adjectives 'inhuman' and 'degrading' in the text of Article 8(2)(b). Drawing from the *Oxford English Dictionary,* he ruled that 'inhuman' means "destitute of natural kindness or pity; brutal; unfeeling; cruel; savage; barbarous" and 'degrading' means "to bring into dishonour or contempt; to lower in character or quality; to debase".[46] All the same, Strydom CJ did not succeed in conveying any complete idea of dignity.

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44 Ackermann (Note 1 above) 4 (quoting with approval Yehoshua Arieli who claimed that the notion of 'the inherent dignity of man' used in the Universal Declaration of Human Rights is inspired by the World Wars, including the Holocaust, as well as the threat of a world dominated by a ruthless leader who rejected "the fundamental principles and norms of spiritual and moral heritage of the West").

45 *Corporal Punishment* case (Note 4 above) 277.

46 *Namunjepo* case (Note 14 above) 282. See also *S v Vries* 1998 NR 244 (HC) 257, where O'Linn defined 'inhuman' and 'degrading' in the exact same terms and used the same dictionary, but he differed from Strydom by adding court cases to support his definitions (Hereinafter *Vries* case).

In 1994, O'Linn, then a High Court judge, defined dignity in *Kauesa* as "the quality of being worthy or honourable".[47] But O'Linn's definition failed in at least three respects. On the one hand, the learned judge took his definition from *The Shorter Oxford English Dictionary,* which does not qualify as a dictionary that experts should rely on as reference for authoritative definition, nor does it count among the editions of the highly credible *Oxford English Dictionary* series that experts and lexicographers trust.[48] People use *The Shorter Oxford English Dictionary* appropriately only when they use it for quick reference.

On the other hand, even if O'Linn had used the *English Dictionary* itself, as opposed to *The Shorter Oxford English Dictionary,* his definition would still have failed to decipher the exact meaning of 'dignity'. Stamper, a lexicographer, stresses that dictionaries only provide 'lexical' definitions, which merely communicate meanings widely shared by people in particular settings over a long time period.[49] Though lawyers routinely use dictionaries to interpret or clarify the meaning of words, dictionaries do not offer 'real' meanings.[50] Philosophers and theologians do offer such 'real' definitions when they attempt to describe the 'essential nature' of things, such as 'love' and 'truth'.[51] And, only 'real' definitions can unravel the content of 'dignity'.

Thirdly, the Supreme Court reversed O'Linn's judgment in *Kauesa.*[52] Though the Supreme Court did not expressly reject the part of the judgment that defined dignity, the present status of O'Linn's definition has nonetheless become all the more uncertain.

One could surmise that judges in Namibia purposely refrained from defining dignity because they know that no consensus exists about that concept. In the absence of consensus, maybe they have wisely chosen to develop the concept of dignity progressively. Nevertheless, this approach can only cure the Supreme Court's jurisprudence of its lack of thick dignity concept if the judges have indeed been developing the concept. This chapter demonstrates that neither the Supreme Court nor the High Court have begun such gradual process of fleshing out the concept of 'dignity'.

Some jurists may come back to us with the following rejoinder: Have judges in Namibia not taken 'judicial notice' of apartheid when articulating the right to dignity?

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47 *Kauesa* HC case (Note 10 above) 119.

48 By contrast, see *Namunjepo* case 282 (Note 14 above), where Strydom CJ used the *Oxford English Dictionary,* on which experts and lexicographers more than the *Shorter English The Shorter Oxford Dictionary,* to define the adjectives 'inhuman' and 'degrading'.

49 K Stamper (2017) *Word by Word: The Secret Life of Dictionaries* Pantheon Books: New York, 94-96.

50 Ibid, 95.

51 Ibid, 94.

52 *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) (Hereinafter *Kauesa* SC case).

Put simply, perhaps judges have not defined 'dignity' because every Black person knew what it felt like to be treated like an animal or a thing. They did not need to verbalise that feeling; they could tell when someone affronted their 'dignity' whenever they saw such affronts. Seen from this angle, people and judges gained and sharpened their sense of dignity as they reacted against the daily and constant brutality of apartheid and its enforcers. Their sense of dignity emerged as a cry or a call that authorities treat them like humans, not like beasts or commodities.

We do not deny that people and judges can 'intuit' the true meaning of dignity, but intuitive grasps constitute the very reason why people have wrongly assumed that they all understand the same concept of dignity when, in reality, they have unknowingly endorsed a Western version of the concept. Judges should not depend on intuition and unstated premises; they must flesh out the concept of dignity. Without a thick concept of dignity, the Court will fail to design a principled strategy for determining when the Constitution permits certain invasions of dignity and when it does not.

In fact, even if the Supreme Court had ventured any definition of dignity, it would have likely failed to render a meaning that lawyers would have widely accepted. As Kateb points out, the very idea of dignity is difficult.[53] Although people have started to use the term frequently in the aftermath of World War II, defining dignity has proven as hard and elusive to pin down as striving to hold water with one's bare hands.

The question as to what constitutes dignity has led to intense debates. Legal minds, such as Ackerman, underlined that dignity is a right on its own.[54] Others maintained that dignity does not exist as a stand-alone right. Yet others equated it to equality.

6.3.1.2 How dignity relates to equality

One way in which dignity relates to equality lies in the position that all human beings have in common a fundamental dignity. This position implies that *all* human beings, without exception, have full moral worth and it refutes the view that *only some* human beings, because they possess certain characteristics in addition to their humanity (for example, their ability for self-consciousness or rational deliberation) enjoy such worth.[55] In particular, this position holds that people who may have lost their ability for self-consciousness - say, as a result of disease or disability - nevertheless have dignity in a fundamental sense and deserve that the state or other people respect and protect that dignity.

53 Kateb (Note 11 above) ix.
54 Ackermann (Note 1 above).
55 P Lee & RP George (2008) "The nature and basis of human dignity" Vol. 21 *Ratio Juris* 173. See also O'Linn's dictum in *Kauesa* HC case 136 (remarking that the right to dignity and the right to equality in the Namibian Constitution go hand in hand).

6.4 CORE CONTENT

Over and above the general realisation that all human beings are *equal* in fundamental dignity, Lee and George say that there exists three ways in which all human beings enjoy a special type of dignity.[56] That *special* dignity imposes obligations on everybody (1) not to kill human beings, (2) to consider their well-being when anyone acts, and (3) to treat them as anyone would have human beings treat him or her.[57]

The key question boils down to whether human beings all share a common 'value' - a value that justifies the duty of human beings to respect other human beings - and, if so, what qualifies as such value. Some would argue that dignity serves as such value. But, Emmanuel Kant apparently wondered whether a value (even dignity itself) can at all justify the duty to respect others or moral requirements because, if anyone uses that value to ground the duty, he would still have to identify that value through the five senses and explain why people should follow it.[58]

At heart, dignity denotes the worth of human beings, their elevated rank, or their special place in nature.[59] Leaning on the concept associated with dignity in the German constitution and the Afrikaans version of the South African Constitution, Ackermann defines 'dignity' as translating the idea of "inherent human worth".[60] And, inspired by Kant, Ackermann distinguishes 'worth' from 'price' because, unlike a price, people cannot replace it by a thing or measure it: Human worth is infinite.[61] In *Daniel,* Shivute CJ affirmed, in finding that some draconian stock theft provisions breached the right to dignity, that the Constitution and the values underpinning it do not warm to the idea of "afford[ing] property greater and more aggressive protection than that afforded to human life."[62]

Specifically, Ackermann draws on Dürig's work to define 'dignity' as comprising certain qualities and functions. Dignity comprises the qualities that involve those aspects of the human personality that flow from human intellectual and moral capacity.[63] Those qualities set human beings apart from the impersonality of nature.[64] Dignity also comprises certain functions, enabled by the above-mentioned qualities that human beings perform, such as exercising one's own judgment, having self-awareness and a sense of self-worth, and exercising self-determination.[65]

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56 Lee & George (Note 55 above).
57 Ibid.
58 Sensen (Note 2 above) 4.
59 See Kateb (Note 11 above) ix.
60 Ackermann (Note 1 above) 4.
61 Ibid.
62 *Daniel* case (Note 18 above) 852.
63 Ackerman (Note 1 above) 86-87.
64 Ibid.
65 Ibid.

Ackermann's definition suffers from some defects. First, it relays a Western conception of 'dignity', influenced by the German scholars, Kant and Dürig. Secondly and related to the preceding point, Ackermann's definition lacks the communal aspects that characterise traditional African conceptions of dignity.

6.4.1 Values and value judgments

One enduring aspect of Mahomed's legacy consisted in firmly anchoring the interpretation of the Namibian Constitution on values. In particular, in *Corporal Punishment,* he famously stated that:[66]

> The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court. It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share.

The special significance of this statement is that it did not only guide the interpretation of the right to dignity in Article 8 of the Constitution; this statement matters because *it framed the interpretation of the Namibian Constitution in general*.

By clearly saying that the construction of the Constitution calls for a value judgment, Mahomed marked a historical departure from the older constitutional dispensation whereby Parliament (and through its legislation) as well as legal positivism reigned supreme. Instead, he moved Namibia's new constitutional theory to the natural-law camp.

This value-laden perspective presents interpreters with the possibility of Namibianising dignity. Noticing that the so-called 'universal' notion of dignity carries Western values, we proceed from the premise that what dignity means varies from one polity and from one context to the next. For example, some society in Africa may condone virginity testing whereas others will reject this practice as demeaning. In much the same way, some African society may embrace the lesbian, gay, bisexual, transgender and queer (LGBTQ) movement while most other communities will condemn it. Mahomed's ruling that interpreting dignity calls for a value judgment sourced from the "contemporary norms, aspirations, expectations and sensitivities of the Namibian people" allows interpreters to contextualise what dignity connotes.

However, this value-laden approach to constitutional interpretation lends itself to abuse. To begin with, how does an interpreter objectively identify the value judgment

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66 *Corporal Punishment* case (Note 4 above) 188.

Mahomed speaks about? Should he or she conduct surveys or opinion polls to ascertain the "contemporary norms, aspirations, expectations and sensitivities of the Namibian people"? O'Linn in *Vries*[67] and Strydom in *Namunjepo*[68] both propose this sort of inquiry. The value-laden approach to constitutional interpretation enables a judge to make moral and political choices, and disguise them as a value judgment determined objectively.

6.5 SCOPE OF THE CONCEPT

In the absence of a generally accepted understanding of 'human dignity', scientists and law academics will find it very hard to demarcate with sharp edges how far the concept applies. Nonetheless, scholars and lawyers apply the concept of human dignity to many fields of life and scientific endeavour, including religion,[69] education,[70] forensic science,[71] health,[72] medicine and bioethics,[73] and human trafficking.[74]

By contrast, in the jurisprudence of higher courts in Namibia, dignity has only featured in a very narrow range of cases, dealing with corporal punishment, prison conditions and sentencing. These few practical contexts have provided a woefully incomplete picture of the right to human dignity, without ever touching the crux of that right. Thus, in *Tcoeib,* Mahomed CJ held that dignity includes "the right not to live in despair and helplessness and without any hope of release, regardless of the

67 *Vries* case (Note 46 above) 260.

68 *Namunjepo* case (Note 14 above) 280.

69 For example, G Hughes (2011) "The concept of dignity in the Universal Declaration of Human Rights" Vol. 39 *Journal of Religious Ethics* 1 (arguing that, though aware of the Christian anthropology informing the modern concept of human dignity, the framers of the Universal Declaration of Human Rights affirmed an *inherent human dignity* and eschewed any reference to religion or metaphysics so that all nations could accept the Declaration); and D Luban (2009) "Human dignity, humiliation, and torture" Vol. 19 *Kennedy Institute of Ethics Journal* 211 (examining the central importance of human dignity, understood as the duty not to humiliate people, in traditional Jewish ethics).

70 For example, BA Reardon (1995) *Educating for Human Dignity: Learning About Rights and Responsibilities* University of Pennysylvania Press: Philadelphia.

71 For example, T Ward & K Syversen (2009) "Human dignity and vulnerable agency: An ethical framework for forensic practice" Vol. 14 *Aggression and Violent Behavior* 94.

72 For example, RR Parse (2010) "Human dignity: A humanbecoming ethical phenomenon" Vol. 23 *Nursing Science Quarterly* 257; W Tadd, L Vanlaere & C Gastmans (2010) "Clarifying the concept of human dignity in the care of the elderly" Vol. 17 *Ethical Perspectives* 253; and BB Jacobs (2000) "Respect for human rights in nursing: Philosophical and practical perspectives" Vol. 32 *Canadian Journal of Research* 15.

73 For example, Y Ergas (2013) "Babies without borders: Human rights, human dignity, and the regulation of international commercial surrogacy" Vol. 27 *Emory International Law Review* 117; DP Sulmasy (2013) "The varieties of human dignity: A logical and conceptual analysis" Vol. 16 *Medicine, Health Care and Philosophy* 937; M Rothhaar (2010) "Human dignity and human rights in bioethics: The Kantian approach" Vol. 13 *Medicine, Health Care and Philosophy* 251; and Andorno (Note 2 above) 223.

74 S Hamdy (2012) *Our Bodies Belong to God: Organ Transplants, Islam, and the Struggle for Human Dignity in Egypt* University of California Press: Berkeley.

circumstances".[75] This holding says hardly anything about what dignity basically means.

The Supreme Court has not yet stretched the concept of human dignity to other areas of national life, including socio-economic rights. One may argue that this restricted approach reflects the residual role of human dignity: Dignity applies when many of the more specific rights in the Bill of Rights do not.[76]

6.5.1 Origins and character of the right to dignity

a) Roots of the concept

Scholars often credit German philosopher Emmanuel Kant with formulating the contemporary concept of human dignity.[77] However, Sensen very much doubts that Kant himself shared the contemporary dignity concept attributed to him.[78] Kant finds the meaning of human dignity or worth in the uniquely human capacity on earth to act morally.[79]

Dignity also originates in humanity. In fact, scholars have argued that dignity underpins human rights.[80] In other words, dignity constitutes the basis of what it means to be human. If people lose their sense of dignity, they have to a great extent been reduced to a level of sub-humanity.

c) A Western concept

The concept generally presented as the universal right to human dignity is characterised by Kantian thought and individualism. The Western, if not Kantian, character of the concept appears from Article 8 of the Namibian Constitution insofar as it emphasises dignity as an absolute value (the expression in Article 8 that "dignity… shall be inviolable") and as grounding the duty of human beings to respect other human beings (the instances in Article 8 referring to "respect for human dignity")[81]. The same holds for the international legal instruments that inspired the drafting of Article 8 of the Namibian Constitution.

The Western character of the concept also appears from mainstream writings on the topic. Thus, Kateb describes dignity with the following thoughts:[82] "I have a life to live; it is my life and no one else's; it is my only life, let me live it. I exist and no

[75] *Tcoeib* case (Note 35 above) 33.
[76] I Currie & J de Waal (2005) *The Bill of Rights Handbook* 5 ed Juta: Cape Town, 275.
[77] Sensen (Note 2 above) 1.
[78] Ibid.
[79] Kateb (Note 11 above) 13.
[80] See eg JJ Shestack (1998) "The philosophic foundations of human rights" Vol. 20 *Human Rights Quarterly* 201; and L Valentini (2017) "Dignity and human rights: A reconceptualisation" Vol. 37 *Oxford Journal of Legal Studies* 862 (observing that people often regard human rights as entitlements that humans have by virtue of their inherent dignity).
[81] The heading of article 8 and article 8(2)*(a).*
[82] Kateb (Note 11 above) 18-19.

one can take my place; I exist and though I do not owe my existence to fate or other superhuman necessity, I am not nothing."

This conception of dignity typifies Western thought as it views the dignity of self as opposing that of others. Such conception cannot accommodate the African philosophy of Ubuntu which conceives the dignity of self through that of others.

6.6 Dignity and the foundations of the human rights philosophy

a) The basis of the human rights philosophy

Many perceive dignity to ground the entire human rights philosophy. The international community largely sees dignity as justifying human rights. The United Nations (UN) has adopted international legal instruments that portray human dignity as the source of human rights. For instance, the UN International Covenant on Civil and Political Rights (ICCPR) recognises that the "equal and inalienable rights of all members of the human family" "derive from the inherent dignity of the human person".[83]

However, Schroeder asserts that human dignity should remain separate from human rights.[84] She observes that, because people challenge the concept of human dignity more than they dispute the human rights movement, those who propound universal human rights will fare better by mounting other frameworks to justify human rights rather than dignity.[85]

b) The supremacy of dignity

On the view of dignity as the foundation of human rights, one should respect a person because that person has dignity.[86] Kant argued the other way round: People have an importance and a dignity because others should respect them.[87] Nonetheless, Namibian higher courts appear to have taken the former position – that one should respect others because they have dignity.

The view that dignity founds human rights usually hails dignity as the supreme, highest value. At the same time, not all jurists accept that human rights stem from dignity. Other theorists have contended that human rights rest on several other grounds, including religion, autonomy, the state, utility, equality, (in)justice, or culture.[88] In this chapter, even though we take stock of how high the Supreme

83 United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, preamble.

84 D Schroeder (2012) "Human rights and human dignity: An appeal to separate the conjoined twins" Vol. 15 *Ethical Theory and Moral Practice* 323.

85 Ibid.

86 Sensen (Note 2 above) 1.

87 Ibid 1-2.

88 See Shestack (Note 80 above) (outlining the different foundations of human rights in philosophy and morality).

Court has uplifted the right to dignity, we do not suggest that lawmakers in Namibia cannot choose another value - say autonomy, justice or culture - as supreme. The Namibian people should have the last word in ranking the values that shape their society.

Like we mentioned above, the Namibian Constitution does not expressly elevate the status of dignity as the supreme value. The South African Constitution ranks dignity, at least, equally with equality and freedom, as evidenced by several references of it to the dignity, equality, and freedom.[89] This position contrasts with the German Basic Law, Germany's federal constitution. Article 1 of the German Basic Law makes dignity the foundation of basic human rights.[90]

6.7 The international legal aspects of dignity

With wording partly inspired by the Universal Declaration of Human Rights[91] and the ICCPR,[92] Article 8 of the Namibian Constitution borrowed a great deal from international law. The interpretation of the right to human dignity afforded Namibian courts with one of their earliest opportunities to apply international law. In *Corporal Punishment*, the Supreme Court interpreted Article 8 as involving a value judgment identified and articulated objectively by considering the norms of Namibians and "the values of the civilised international community (of which Namibia is a part) which Namibians share."[93]

Interestingly, the Supreme Court resorted to international law without expressly referring to Article 144 of the Constitution, which provides for the application of international law in Namibia. Did the court use international law as a source of Namibian law or as a source of meaning to interpret the Constitution? Zongwe wrote that the absence of any reference to Article144 may be blamed on the youth of the Supreme Court and the judges' relative unfamiliarity with the provisions of the Constitution at the time they handed down that 1991 judgment.[94] Yet the possibility remains that the judges left out Article 144 deliberately because they

89 Currie & de Waal (Note 76 above) 272.

90 See especially Basic Law for the Federal Republic of Germany article 1(3) (Hereinafter German Basic Law). See also O'Linn's dictum in *Kauesa* HC case 131 (holding that the German Basic Law places the inviolability of a person's dignity in an even stronger position than the Namibian Constitution).

91 Universal Declaration of Human Rights preamble (recognising, like the preamble to the Namibian Constitution, that "the inherent dignity… is the foundation of freedom, justice and peace"), article 1, and article 5 (providing, like article 8(2)(b) of the Namibian Constitution, that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

92 International Covenant on Civil and Political Rights preamble (recognising, like the preamble to the Namibian Constitution, that "the inherent dignity… is the foundation of freedom, justice and peace"), article 7, and article 10 (providing, like article 8(2)(b) of the Namibian Constitution, that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

93 *Corporal Punishment* case (Note 4 above) 188.

94 DP (2019) Zongwe *International Law in Namibia* Langaa: Bameda 90-91.

were not directly applying any rules of public international law as such but using them to enlighten the meaning of a provision in the national constitution.[95]

Thus, in Namibia, particularly, cases such as *Corporal Punishment* and *Kauesa*[96] exemplify the judges' understanding of international law as a legal-reasoning tool to make sense of domestic statutes.[97]

6.8 An African conception of dignity

By replicating the wording and the understanding of human dignity as formulated in international legal instruments, the Supreme Court has embraced a Western conception of human dignity at the expense of a more autochthonous conception. The Supreme Court and higher courts in Namibia have not injected in their dignity jurisprudence traditional or modern African conceptions of justice. Metz contends that an African conception of dignity could hold that what makes human nature special and inviolable is the capacity of human beings for harmonious relationships.[98] Ndeunyema urges Namibian lawmakers to orient sentencing practices towards African values premised on Ubuntu,[99] which emphasises communality, restoration of offenders, and a criminal justice system centred on victims.[100] But, unlike their South African counterparts,[101] Namibian courts have not evolved any notion of Ubuntu, although African countries seem to apparently share the kernel of that notion.

The Supreme Court has not invoked Ubuntu in any of the cases that involved dignity, like *Corporal Punishment*[102] and *Gaingob.*[103] It ignored Ubuntu in dignity cases, even though Article 66 of the Namibian Constitution recognises the validity of customary laws, which embody the ethos of Ubuntu.

One could counter that the value-laden perspectives on constitutional interpretation in Namibia leaves the door open to traditional conceptions of dignity by requiring judges to consider "the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution". Presumably, Namibian values, traditional and contemporary, carry the human-ness and humane-ness with which they imbue Ubuntu and its idea of human dignity. Still, these perspectives have not gone beyond judicial

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95 Ibid, 31.
96 *Kauesa* HC (Note 10 above).
97 See Zongwe (Note 94 above) 15, 30-33 and 90-91.
98 T Metz (2010) "Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights" Vol. 9 *Journal of Human Rights* 81.
99 N Ndeunyema (2019) "Reforming the purposes of sentencing to affirm African values in Namibia" Vol. 63 *Journal of African Law* 330.
100 Ibid, 355.
101 See eg *S v Makwanyane and Another* 1995 (3) SA 391 paras 223-260 (Langa), para 263 (Mahomed), paras 306-312 (Mokgoro), and para 374 (Sachs).
102 *Corporal Punishment* case (Note 4 above).
103 *Gaingob* case (Note 15 above).

pronouncements to include surveys and opinion polls of the Namibian people, nor have they incorporated customary laws or the Namibian strands of the Ubuntu philosophy.

The communitarian outlook on dignity in African customary laws does not exempt Ubuntu from reproach. The communal aspects of Ubuntu may subsume the individual and her rights under the community in ways that conflict with other human rights. In particular, scholars have observed that certain traditional practices in Namibia have stripped women of their dignity.[104] Nevertheless, the Constitution mandates judges and legislators to reject customary practices that violate human rights.[105]

Some people may object that measuring customary practices against human rights standards revive, in disguised form, the repugnancy clauses of the colonial era that subjected the customary laws of the indigenous peoples to the 'civilized' norms of the European settlers. However, the scholars mentioned above indicate that uneasiness about certain cultural practices, such as wife cleansing or discrimination against children with albinism, come from within Namibia and not from values imposed by outside forces. This sort of internal tension opens up fruitful avenues for re-conceiving dignity in Namibia.

6.9 Human dignity, socio-economic rights, and development in Namibia

The courts have used the concept of dignity in an individualistic sense, though multiplied by the number of all group members, which has led the courts to neglect socio-economic rights and third-generation rights in interpreting human dignity.
Apart from being one of the philosophical bases of the human rights philosophy, human dignity has also a role to play in development discourse. Indeed, however one may define dignity, one of the key elements of dignity is self-esteem or self-respect. This self-esteem appears to figure in every concept of development.[106] This realisation implies that a detached, fair-minded third-party observer cannot say with confidence that a group of people have developed when their sense of dignity or self-esteem have been collapsing.

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104 See eg RN Ntinda (2009) "Customary practices and children with albinism in Namibia: A constitutional challenge" in OC Ruppel (ed) *Children's Rights in Namibia* Mcmillan Education Namibia: Windhoek, 243; V de Klerk (2008) "Women's Action for Development: 15 years of experience with customary practice in rural Namibia" in OC Ruppel (ed) *Women and Custom in Namibia: Cultural Practice Versus Gender Equality?* Konrad Adenauer Stiftung: Windhoek, 33, 34 and 39-40 (explaining how women in Namibia have defended cultural practices to their own detriment because they have been indoctrinated over generations and how those practices have stripped women of their dignity).

105 Namibian Constitution 66(1).

106 MP Todaro and SC Smith (2015) *Economic Development* (12 ed) Pearson: Harlow, 22-23; D Goulet (1971) *The Cruel Choice: A New Concept in the Theory of Development* Atheneum Press: New York, 87-94.

Inevitably, this poverty has lowered the sense of dignity of countless Namibians. And the decisions dealing with issues such as the rights of prisoners bear out this reality. While prisoners do not end up in jail necessarily because they are poor, poverty and lack of economic opportunities have pushed many of them in a life of crime. As noted by Smuts in *Gaingob*, the three of the four accused persons had previous convictions, no employment, and little to no formal education.[107]

6.9.1 Economic development in Namibia

Nakuta asks the pertinent question: "Is it reasonable and justifiable that, in an open and democratic society based on *human dignity* and freedom, a large majority of the population still lives in abject poverty alongside extremes of wealth?"[108] This question clearly links human dignity and economic development. The link between the two also appears from statements like the one made by Zephania Kameeta, a well-known political and religious leader, who claimed that the basic income grant (BIG) – a proposal to extend an income grant to poor Namibians – "frees people to become active and proud members of this society" by "restoring the human dignity of people".[109]

Although ranked as a middle-income upper-level economy and a country with one of the best governance scores in Africa, Namibia nonetheless battles with high levels of poverty. Actually, President Hage Geingob himself lamented that Namibia's classification as a middle-income economy, masks huge income inequalities, mostly inherited from the apartheid system.[110] Together with South Africa and Brazil, Namibia belongs to the group of countries with the greatest income inequality in the world.

107 *Gaingob* case (Note 15 above) 214.

108 J Nakuta (2009) "The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations" in N Horn & A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2 ed) Mcmillan Education Namibia: Windhoek, 89, 90.

109 Z Kameeta (2009) "Foreword" in C Haarmann & D Haarmann (eds) *Making the Difference! The BIG in Namibia* Basic Income Grant Pilot Project Assessment Report, April 2009, Windhoek, Namibia: Desk for Social Development.

110 See H Geingob (2015) "Statement by His Excellency Dr Hage G Geingob, President of the Republic of Namibia" (Third International Conference on Financing for Development, Addis Ababa, 13 July 2015 available at <https://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/2015/07/Namibia.pdf>. In that address, President Geingob said: "What has proven to be a burden to our economic development is the classification of Namibia as a so-called upper middle-income country. This flawed definition and the calculation thereof, simply takes the GDP of a country and divides it by the population of the country. Because Namibia has a small population, this approach results in a higher per capita income without considering how that income is distributed, and without considering the structural imbalances of our economy, especially income distribution. This is an unfair definition, which deprives Namibia from accessing concessional funding which the country needs to pursue its developmental objectives." See also "Geingob not happy with Namibia's middle-income status" *The Namibian* 30 September 2013 <https://www.namibian.com.na/index.php?id=114655&page=archive-read> (reporting that Geingob, then Prime Minister of Namibia, expressed similar dissatisfaction with the country's classification as an upper middle-income country).

Wealth and huge swathes of the economy are still concentrated in the hands of historically privileged Namibians, i.e., White Namibians.[111] To this day, the vast majority of Namibians live in poverty, although the government has been reducing this inequality rate since independence.[112] Unfortunately, the recession in which the country has slipped in 2016 is reversing the gains made since independence and threatens to push more Namibians into poverty.

This bleak picture of poverty in Namibia should galvanize people into reading human dignity into Article 98 of the Constitution. Notwithstanding its nature as non-binding principles of economic policy,[113] this provision strongly encourages the Namibian government to grow the economy "with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians."[114] It should also urge judges to infuse human dignity into their interpretation of socio-economic rights.

6.9.2 Socio-economic rights

Chaskalson, while he served as President of the South African Constitutional Court, described socio-economic rights as "rooted in respect for human dignity" because dignity cannot exist in a life lived without access to housing, health care, food, water or appropriate assistance for those unable to support themselves.[115] In Namibia, Nakuta wrote along the same lines. He said that interpreting civil and political rights, such as the right to life and human dignity, may enable the interpreters to protect socio-economic rights through the Constitution.[116]

Chaskalson also maintained that dignity must "find its place in the constitutional order", nowhere more apparently than in applying the social and economic rights entrenched in the Constitution.[117] Unlike the South African Constitution, however, the Namibian Constitution does not generally entrench socio-economic rights.

Other factors stop people from freely exercising socio-economic rights in Namibia. These include the way the Constitution couches these rights and the dominant perception that courts cannot enforce those rights under the Constitution.[118] Hence,

111 See H Jauch & E Tjirera (2017) "The need for a developmental state intervention in Namibia" in Kanyenze *et al* (Note 40 above) 135, 140-141.

112 See L Nashuuta (2018) "Inequality in Namibia a ticking bomb" *New Era* 20 March 2018 <https://neweralive.na/posts/inequality-in-namibia-a-ticking-bomb>.

113 Namibian Constitution article 101 (providing that "[t]he principles of state policy contained in [Chapter 11, including article 98] shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them").

114 Namibian Constitution article 98.

115 A Chaskalson (2000) "Human dignity as a foundational value of our constitutional order" Vol. 16 *South African Journal on Human Rights* 193, 204.

116 Nakuta (Note 108 above) 98.

117 Chaskalson (Note 115 above) 204.

118 Nakuta (Note 108 above) 89.

Nakuta suggests that lawyers and other interpreters expand civil and political rights in the Constitution, for instance dignity, as a way to overcome these obstacles and make socio-economic rights justiciable.[119]

6.10 The Supreme Court's dignity jurisprudence

6.10.1 The landmark cases since independence

Since independence, the Namibian Supreme Court has shaped the rights of citizens and residents in a series of epoch-making judgments, such as *Corporal Punishment* and the decision fixing the relationship between the Attorney-General and the Prosecutor-General.[120] In this section, we narrow these Supreme Court judgments down to those involving human dignity.

a) Corporal punishment[121]

The seminal case on the meaning and content of Article 8 is *Corporal Punishment*. The Attorney-General approached the Supreme Court to decide whether corporal punishment imposed by organs of state following the then existing code in the Ministry of Education conformed to Article 8 of the Namibian Constitution. The Supreme Court answered that such corporal punishment impinges on the right to dignity.[122]

Mahomed held that the State's obligation is absolute and unqualified.[123] He then devised the widely-acclaimed value-judgment method: The question as to whether a particular form of punishment violates the right to dignity in Article 8 involves a value judgment by the court.[124] He added that the courts must determine these value judgments objectively, considering the norms, aspirations, and sensitivities of the Namibian people.[125]

Mahomed however cautioned:

> This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman, or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

In the years after *Corporal Punishment,* judges found this precedent wanting in certain aspects. The judgment in *Corporal Punishment* did not dwell on the corporal punishment inflicted in terms of native law and customary law, as this became

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[119] Ibid, 98.

[120] *Ex Parte: Attorney-General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC).

[121] *Corporal Punishment* case (Note 4 above).

[122] Ibid, 197.

[123] Ibid, 187.

[124] Ibid, 188.

[125] Ibid.

evident later in *S v Sipula*.[126] In that review case, O' Linn J raised the question whether corporal punishment imposed in terms of native law and customary law differed from the corporal punishment by organs of state that the Supreme Court outlawed in *Corporal Punishment* and, if not, whether the term 'organs of state' encompasses tribal institutions.[127] O'Linn felt that by implication the judgment in *Corporal Punishment* applies to tribal institutions.[128] *Sipula* shows that *Corporal Punishment* only focused on the constitutionality of corporal punishment in government schools, but omitted to ponder and left open the issue of corporal punishment in private schools.

Corporal Punishment set the tone for determining whether a punishment constitutes cruel, inhuman or degrading treatment, but it did not set a litmus test for concluding whether a given punishment amounts to cruel, inhuman or degrading treatment. As we mentioned earlier in this chapter, it was not until *Namumjepo*[129] in the late 1990s that the Supreme Court (through Strydom CJ) provided a touchstone for 'inhuman' and 'degrading' treatments.

b) Freedom of speech not freedom to defame[130]

Regulation 58(32) under the Police Act 19 of 1990 made it an offence for a member of the Namibian Police to comment "unfavourably and in public upon the administration of the [Namibian Police] or any other Government department". On 22 December 1990, Kauesa, a warrant officer in the Namibian Police, criticized the command structure of the Namibian Police publicly during a panel discussion held under the aegis of the national state-owned broadcaster. Thereafter, Kauesa was charged with contravening Regulation 58(32).

Before the date set for hearing the charges, Kauesa challenged the constitutionality of Regulation 58(32) with regards to Article 21(1)*(a)* of the Namibian Constitution, which protects freedom of speech and expression. The High Court dismissed Kauesa's contention that the regulation breached Article 21 of the Constitution. The court held that the regulation reasonably restricted the exercise of Article 21 and that democratic societies and the interest of national security and of public order required such 'necessary' restrictions.[131] Kauesa then appealed to the Supreme Court against the High Court's judgment. In quashing the High Court's decision, the Supreme Court declared that Regulation 58(32) flouted Article 21 of the Constitution because it was overbroad in the range of unfavourable comments that it prohibited.[132]

126 *S v Sipula* 1994 NR 41 (HC) (Hereinafter *Sipula* case).
127 Ibid, 45-48.
128 Ibid, 50.
129 *Namunjepo* (Note 14 above).
130 *Kauesa* SC case (Note 52 above).
131 *Kauesa* HC case (Note 10 above).
132 *Kauesa* SC case (Note 52 above) 197.

Although the Supreme Court overruled it, the High Court delved into the question of dignity more deeply than the Supreme Court. Actually, the Supreme Court's ruling overlooked the question. It did not define 'dignity' or resolve the debate over dignity as an absolute right.

c) Life imprisonment[133]

The High Court sentenced the accused to life imprisonment for murder. In doing so, the judge recommended that the appellant ought not to be released on parole or probation before a minimum of 18 years lapsed. The accused appealed to the Supreme Court against the sentence. He argued that the sentence contravened his constitutional right to dignity. The Supreme Court accepted this argument.

In *Tcoeib,* Chief Justice Mahomed corrected Levy J in *Tjijo,* who had equated life imprisonment with the death penalty.[134] Levy held that life imprisonment is "a sentence of death", based on his view that the abolition of the death penalty in Article 6 categorically prohibits life imprisonment.[135] Specifically, he viewed Article 6 of the Constitution, which abolished the death penalty, as meaning that, through Article 6, the Namibian people have protected and entrenched the inalienable rights to life and dignity.[136] Mahomed rightly disagreed with Levy because life imprisonment sharply differs from the death penalty because, unlike the death penalty, it does not terminate the life of the prisoner, though it invades his liberty.[137]

Mahomed nonetheless acknowledged that a sentence that compels a prisoner to spend the rest of his or her natural life in jail, divorced from family and friends in conditions of deliberate austerity and deprivation, is "a punishment of distressing severity".[138] Such punishment despairs of an offender and induces in him or her such despair and helplessness.[139] Mahomed asserted that this "culture of mutually sustaining despair" goes against the "deeply humane values" articulated in the Preamble and the text of the Namibian Constitution – values that call on the organs of society to "reform and rehabilitate" prisoners and induce in them a "consciousness of their dignity, a belief in their worthiness and hope in their future".[140]

While Mahomed refused to equate life sentence with the death penalty, he laid down a test to determine when a life sentence offends the Constitution. He

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133 *Tcoeib* case (Note 35 above).

134 *S v Tjijo* 4 September 1991 (unreported but partially reproduced in *S v Tcoeib* 1999 NR 24 (SC)).

135 *Tcoeib* case 35.

136 Ibid.

137 Ibid, 31. See also page 38, where Mahomed held that, while imprisonment impacts a prisoner's dignity, this impact inheres in all imprisonment. More importantly, he pointed out that "[w]hat the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed the conviction of a person *per se.*"

138 Ibid 31-32.

139 Ibid 32.

140 Ibid 32-33.

established the principle that a sentence of life violates a prisoner's dignity if it amounts to "an order throwing the prisoner into a cell for the rest of the prisoner's life as if he was a 'thing' instead of a person" without any continuing duty to respect "his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances".[141] In short, a life sentence comports with Article 8 if it is "demonstrably justified".[142] Mahomed added that hope of release, inherent in the statutory mechanisms, affords prison authorities and the offender himself an opportunity to rehabilitate the offender, reconstruct his own potential and personality, and retain and enhance his dignity, thereby enriching his prospects of being released.[143]

Mahomed greatly contributed to developing the dignity jurisprudence by formulating the 'demonstrably justified' test. We can restate that test as follows: Life imprisonment invades dignity, but Article 8 of Namibian Constitution allows a judge or magistrate to invade a person's dignity by sentencing him or her to life in prison if such imprisonment is "demonstrably justified" in the circumstances.

d) Prisoners chained with iron like hobbled animals[144]

Four prisoners awaiting trial escaped from prison on 11 August 1997. They were recaptured a few days later and put in chains. A fifth prisoner received the same treatment even though he had not escaped from prison.

The five prisoners applied to the Supreme Court for an order removing the chains placed on them and an order declaring that the practice of chaining prisoners as violating Article 8 of the Namibian Constitution. Strydom CJ concluded that the practice did infringe the prisoners' rights to dignity. He reasoned that:[145]

> Whatever the circumstances, the practice to use chains and leg-irons on human beings is a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stay. It is furthermore still a strong reminder of days gone by when people of this continent were carted away in bondage to be sold as chattels. To be continuously in chains or leg-irons and not to be able to properly clean oneself and the clothes one is wearing sets one apart from other fellow beings and is in itself a humiliating and undignified experience.

This position echoes Ackermann's insight that human beings possess certain qualities that set them apart from the impersonality of nature and that enable them

[141] Ibid 33. See also page 34. See further *Namunjepo* case (note 14 above) 278 and 285 (quoting Mahomed's principle with approval).
[142] *Tcoeib* case (Note 35 above) 33. See also page 32.
[143] *Tcoeib* case (Note 35 above) 34.
[144] *Namunjepo* case (Note 14 above).
[145] Ibid 286.

to perform certain functions such as having self-awareness and a sense of self-worth.[146]

The Supreme Court acknowledged that a judicial consensus exists that uses value judgments, based on the current values of the Namibian people, to determine whether a person has infringed Article 8(2)(b).[147] After reviewing cases dealing with the constitutionality of sentences, Strydom distinguished between instances where a party alleges infringement of Article 8 based on the constitutionality of mandatory sentences and instances where a party alleges infringement based on the type of sentence, such as corporal punishment and life imprisonment.[148] In the former instances, the courts apply the proportionality test as a yardstick; in the latter instances, the test does not always suffice to determine the current values of the Namibian people.[149] In the latter instances, the court must ascertain Namibian values as expressed in the Constitution and other institutions of the people; and if necessary they may also resort to some other form of inquiry, as suggested by O'Linn in *Vries*[150] and by Strydom in *Namunjepo*.[151]

e) Dignity a choice between autonomy and family[152]

Of all the Supreme Court cases on dignity, *ES v AC* best illustrates how an African conception of dignity sharply differs from the Western, individualistic one. In *ES v AC,* the Supreme Court confronted the question whether to force a Jehovah's Witness to have blood transfusion in order to save her life. ES, the appellant, had given birth by caesarean section. An emergency arose and, after a hysterectomy (i.e., removal of a woman's uterus), ES lost a lot of blood. Her physician thought that she would not survive unless she received blood transfusion, which she declined owing to her religious beliefs as a Jehovah's Witness.

Mr AC, ES's brother, applied to the High Court for an order appointing him as curator to ES's person so that he could authorise the blood transfusion. ES opposed AC's application. The court dismissed ES's counter-application. The judge felt that because her brain lacked oxygen, she might have lost the ability to think clearly and, thus, to make a sound judgment about whether to accept or refuse the blood transfusion. The hospital proceeded to discharge ES before she could receive any blood transfusion - an event that should have normally rendered any litigation moot.

ES appealed to the Supreme Court against the High Court's decision. The Supreme Court acknowledged that the matter might have become moot, all the same the

146 Ackermann (note 1 above) 86-87.
147 *Namunjepo* case (Note 14 above) 260.
148 Ibid 280.
149 Ibid.
150 *Vries* case (Note 46 above) 258-260. See also Berker CJ's concurring opinion in *Corporal Punishment* case (Note 4 above) 197-198 (holding that courts must identify the generally held norms, moral standards and aspirations of Namibians by conducting an inquiry into those norms).
151 *Namunjepo* case (Note 14 above) 280.
152 *ES v AC* 2015 (4) NR 921 (SC) (Hereinafter *ES* case).

facts of the matter concerned "some of the most essential human rights issues likely to arise in litigation".[153] Shivute CJ specified that those "essential human rights issues" relate to the right to bodily autonomy, the right to freely practise one's religion, the freedom from discrimination, relationships within families, and the obligations of medical practitioners.[154] For those reasons, the Chief Justice considered that the matter warranted the Supreme Court's attention.[155] Reasoning from the premise that "moral autonomy is of central importance the protection of human dignity and liberty in free and open democracies such as ours", Shivute CJ ruled in favour of ES.[156]

Whereas the majority (i.e., Shivute CJ and O'Regan AJA) sided with ES, Mainga JA dissented. This split also mirrors the chasm between the Western and the African conceptions of dignity. While the majority judgment stayed true to the word and the Kantian philosophy behind Article 8 of the Namibian Constitution, it offended the communal spirit of Ubuntu. The majority stressed autonomy whereas the dissenter underscored family. Indeed, Shivute CJ said that patient autonomy embodies protection of liberty (Article 7 of the Constitution) and respect for human dignity (Article 8).[157] Patient autonomy, the judge continued, entails that doctors and judges respect a patient's decision to refuse a medical procedure so long as the patient has a sound mind and understands what her decision implies.[158]

By contrast, Mainga JA declared from the outset that he cannot support the majority in holding that the right of parents to refuse a blood transfusion in a life-threatening situation supersedes the rights of their children to be raised by their parents.[159] In like manner, a judge guided by Ubuntu would have prioritised family over autonomy. Except that, instead of highlighting the rights of a patient's children alone, as Mainga JA did, an Ubuntu-inspired judge would have also considered the rights of the patient's brothers and sisters, and even the interests of the patient's extended family.

f) Minimum sentences out of balance[160]

The Prosecutor-General appealed against a declaratory order that struck down certain provisions of the Stock Theft Act 12 of 1990 as unconstitutional.[161] The convicted persons successfully argued that the minimum sentences required by the Stock Theft Act violated the Constitution and that the discretion the Act accords to courts to depart from the minimum sentence does not cure the disproportionate nature of the minimum sentences.

153 Ibid 931.
154 Ibid.
155 Ibid.
156 Ibid 940.
157 Ibid 933.
158 Ibid.
159 Ibid 941.
160 *Daniel* case (Note 18 above).
161 Ibid 840.

Section 14(1)(a) of the Stock Theft Act prescribed minimum sentence of 20 years for first offenders if the value of stolen stock exceeds N$500. Shivute CJ noted that the section failed to distinguish between the isolated cases where the accused stole a sheep, on the one hand, and the cases where an organised gang of cattle rustlers stole a herd of cattle.[162] In both cases, the section imposed the same minimum sentence of 20 years as long as the value of the stock exceeds N$500. The Chief Justice also found that, in similar fashion, section 14(1)(b) did not distinguish between less and more serious offences when it obliged judges to mete out a minimum sentence of 30 years for all repeat offenders.[163]

Shivute CJ observed that the legislature bound judges to impose "grossly disproportionate" sentences, especially in cases with no compelling circumstances but where the crime nevertheless does not warrant such severe sentences.[164] The crime did not correlate to the sentence, particularly the value of the stock.[165] The judge concluded that those disproportionate and severe sentences amount to cruel, degrading and inhuman treatment.[166] Thus, the disputed sections of the Stock Theft Act breached Article 8(2)(b) of the Constitution and abridged the rights conferred on individuals by Article 8(1).[167]

Interestingly, in upholding the appeal, the Supreme Court disregarded the manner in which it tested the constitutionality of sentences in *Corporal Punishment, Tcoeib,* and *Namunjepo.* Unlike those cases, *Daniel* did not relate to the length of sentences, whether in the form of life imprisonment (i.e., *Tcoeib*) or excessively long sentences (i.e., *Gaingob*). Rather, it tackled the issue of whether the harshness of a sentence fitted the severity of the crime.

g) Excessively long sentences[168]

Four men broke into an isolated farm house in Okahandja and provoked the dogs to bark in order to lure Mr and Mrs Adrian, a couple in their late 70s, out of their locked bedroom.[169] Once out of the room, Mr Adrian was overcome, gagged, tied up, and beaten up with droppers while Mrs Adrien was also knocked out, gagged, then squeezed into a cupboard. Mr and Mrs Adrien died from the assault.

On 8 February 2002, the High Court convicted the four men of housebreaking, robbery, and murder. Noting that Zedikias Gaingob, Erenstein Haufiku, Nicodemus Uri-Khob, and Salmon Kheibeb were "dangerous" and "deserve to be removed from society for a reasonable time period," the judge sentenced the four men to

162 Ibid 849.
163 Ibid.
164 Ibid 851.
165 Ibid.
166 Ibid.
167 Ibid 851-852.
168 *Gaingob* case (Note 15 above). We further analysed this case in DP Zongwe & B Tjatjara (2018) "Strange maths behind the ruling on very long sentences" *The Namibian* 20 November 2018.
169 The summary of this case partly draws from Zongwe & Tjatjara (Note 168 above).

30 years in prison for the murder of each victim. Overall, Uri-Khob got an effective prison term of 64 years and Gaingob, Haufiku, and Kheibeb an effective term of 67 years.

The four prisoners appealed to the Supreme Court against their convictions and their sentences. The court had to decide whether the 'inordinately' long sentences meted out to the prisoners in the High Court trampled on the prisoners' right to dignity, as protected by Article 8.

In finding that the sentences hurt the prisoners' dignity, Smuts reasoned, like Mahomed in *Tcoeib,* that sentences that do not offer any reasonable hope that prison authorities may release a prisoner within that prisoner's natural life violate his right to dignity. That entire finding turned on provisions in the Correctional Service Act and the regulations made under it that a prisoner must serve 25 years or two-thirds of his sentence before the Correctional Service can consider him for release on parole or probation. Relying on those provisions, Smuts computed that 37 and a half years represent the harshest punishment permissible under the Namibian Constitution because the only way for a prisoner to qualify for parole after 25 years of prison occurs when his sentence does not exceed 37 and a half years. Smuts JA wrote that the hope of release inherent in statutory mechanisms determines whether life imprisonment encroaches on the right to dignity.[170]

The Supreme Court miscalculated the provision that allows the Correctional Service to consider prisoners for release after they have served two-thirds of their jail term. After serving two-thirds of their sentence (i.e., a duration shorter than 25 years), the Service would consider Gaingob for release from prison at 80 years old, Haufiku at 69, Uri-Khob at 77, and Kheibeb at 66. Human beings can naturally live beyond 90 years old, though the life expectancy of most people does not last that long. The High Court sentences would have therefore not deprived the four prisoners of any reasonable hope that the Service could release them within their 'natural' lives. Smuts, who wrote the unanimous judgment, got it wrong when he concluded that the impugned sentences offered the prisoners no hope of release within their natural life.

In *Gaingob,* the Supreme Court distanced itself from *Corporal Punishment* and *Namundjebo*. The court only referred to the *Tcoeib* case and did not address questions as to how the courts should interpret Article 8, whether the right to dignity is absolute, or how to apply the value-judgment method and the considerations that go into it.

170 See *Gaingob* case (Note 15 above) 223 and 226-227.

6.11 Review of the dignity jurisprudence

a) What the Supreme Court accomplished in 30 years

So, what has the Supreme Court achieved in 30 years when it comes to human dignity? First of all, the Court has affirmed that the right to human dignity is alive. This, it showed through decisions like *Corporal Punishment*. The *Corporal Punishment* case, which prohibited corporal punishment in public schools, had a wider impact as another decision extended that prohibition to private schools. In 2016, the High Court in *Van Zyl* ruled out corporal punishment in private schools.[171] Though evidence exists that some schools continue to inflict corporal punishment, it is now a well-established principle that schools can no longer discipline pupils through corporal punishment. In doing so, the Supreme Court changed the common law, which permitted teachers to step in the shoes of parents in allowing them to inflict corporal punishment on pupils. Likewise, in criminal law, teachers may no longer raise the common-law reasonable-chastisement principle as a defence against assault accusations.

Dignity has also featured prominently in cases dealing with prisoners' rights. Thus, in *Gaingob*, the court relied on dignity to proclaim the principle enounced in *Tcoeib* in 1999 that a jail term that leaves no reasonable prospect of being released on parole offends against the right to dignity. Though *Gaingob* erred in the manner in which it applied it, the principle has nonetheless become entrenched in Namibian human rights law.

b) The absolute or relative nature of the right to dignity

The dignity jurisprudence in Namibia comes short in several respects. To begin with, the Supreme Court seemingly contradicted itself on whether the state could limit the right to dignity. In *Corporal Punishment*, Mahomed affirmed that the state's obligation to respect human dignity is "absolute and unqualified".[172] Yet the same Mahomed later admitted that imprisonment impacts a prisoner's dignity, that this impact inheres in all imprisonment, and that "[w]hat the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed the conviction of a person *per se*."[173] Here, Mahomed seems to say that the state may restrict the right to dignity when the restriction basically emanates from the very fact of imprisonment.

On the surface, the right to dignity does not appear absolute, as the Constitution explicitly allows the state and Parliament to limit the right to dignity by legislation provided such legislation applies generally and specifies the extent to which

171 *Van Zyl v The State* (CA 25-2014) [2016] NAHCMD 246.

172 *Corporal Punishment* case (Note 4 above) 187. See also *Vries* case (Note 46 above) 247 (ruling that the prohibitions against the punishment mentioned in Article 8(2)*(b)* are absolute).

173 *Tcoeib* case (Note 35 above) 38. See also *Vries* case (Note 46 above) 278, where O'Linn dissented from the majority judgment by Frank when he affirmed that the right to dignity in Article 8 is, unlike what Frank held, not absolute.

it limits that right.[174] O'Linn in *Kauesa* (High Court) observes that the Namibian Constitution, like the German Basic Law, does not expressly qualify the right to dignity.[175] Still, in a subsequent High Court case, O'Linn stressed that Mahomed's perspective in *Corporal Punishment* (that the state cannot limit the right to dignity) does not say what content and meaning the interpreters of Article 8 should give to its terms.[176] For him, lawyers must first ascertain the essential content and meaning of a fundamental right before they can apply it to a given case[177] or limit its application.[178]

In *Namunjepo,* Strydom CJ tried to reconcile the opposite views of judges on the absolute or relative nature of the dignity. He stated that:[179]

> [a]lthough, at first blush, it seems that the judges are not agreed as to the issue of whether art 8(2)(b) is absolute or not, a reading of the cases shows that all the Judges applied the current values test. That, in my opinion, presupposes that such exercise is undertaken to give content and meaning to the words used in the article. Once this is done there is no basis on which legislation which is in conflict therewith can be found to be constitutional and in that sense all agreed that the article is absolute.

However, Strydom's compromise does not resolve the absolute-relative dignity dispute because judges and lawyers do not agree about how to determine the current values of Namibians, such that, under Strydom's compromise, judges would never reach the stage where 'they all agree that Article 8 is absolute'.

We believe that the right to dignity, properly construed, empowers the state to shrink it in the right circumstances. In particular, the Constitution permits judges to invade a person's dignity when they convict him or sentence him to a jail term. Like Mahomed himself acknowledged, the Constitution permits invasions of the right to dignity when they inhere in the very fact of conviction or imprisonment. The dignity-as-absolute perspective in *Corporal Punishment* would normally bind all other courts by virtue of Article 81 of the Namibian Constitution. But O'Linn doubted that the Supreme Court carried forward that perspective.[180] We find that the qualified approach to the nature of dignity in *Tcoeib* conforms to Article 22 on the limitation of rights. We further rely on Article 81 of the Constitution to claim that the "demonstrably-justified" test that Mahomed introduced in *Tcoeib* 'reversed' his earlier dignity-as-absolute stance because the Supreme Court decided *Tcoeib* after the *Corporal Punishment* case.

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174 See Namibian Constitution article 22.
175 *Kauesa* HC case (Note 10 above) 131 and 138.
176 *Vries* case (Note 46 above) 257.
177 Ibid.
178 Ibid 258.
179 *Namunjepo* case (Note 14 above) 280-281.
180 *Vries* case (Note 46 above) 259-260. On page 260, O'Linn remarked that nowhere in *Tcoeib* does the court apply the test and approach it adopted in *Corporal Punishment.*

c) Where to find Namibian values and what they entail

After Mahomed formulated the value-judgment test in *Corporal Punishment* in 1991, judges started to question the test. They did not dispute that interpreting the Constitution should imply a value judgment; rather they were divided on the methods they should employ to ascertain Namibian values.

Going further than the *Ex Parte Attorney - General* case and *S v Tcoeib* case, the Supreme Court in *Namunjepo* clarified the constraints on the value judgment test. The court felt that, in determining the contemporary aspirations, norms and experiences and sensitivities, ideals and aspirations of the people at a given time, the courts are constrained by the words used in the Constitution, which they cannot totally disregard.[181] But judges should give those words the widest possible meaning so as to protect the greatest number of rights.[182] The courts are further restrained by the very aspirations expressed by the Constitution.[183]

As we explained above when we summarised *Namunjepo*, in cases where either party disputes the constitutionality of a certain type of sentences such as life imprisonment, judges must turn over in their mind the values of the Namibian people.[184] The court will then have to determine such values as expressed in the Constitution and other institutions of the people; and if necessary they may also resort to some other form of inquiry.[185]

Regrettably, the value-judgment method does not involve the participation of actual people. Instead, judges say what they personally think that the Namibian people would want to read in Article 8 and the Constitution. In *Vries,* O'Linn noted that the value-judgment test, as applied by Mahomed in *Tcoeib,* only looked at the values written in the Constitution and their impact on dignity, and ignored the essential part played by other institutions and interested parties.[186] The test, as applied in *Tcoeib,* denied representatives of other institutions and other interested parties any opportunity to express themselves on life imprisonment and did not further enumerate the aspirations, norms, expectations and sensitivities of the Namibian people.[187] In other words, *Tcoeib* has narrowed the value-judgment test with regard to Article 8.

d) Other major shortcomings

A few other major shortcomings deserve mentioning. To start with, the Supreme Court has not defined the concept of human dignity. Also, even if it draws on the contemporary norms, aspirations, expectations and the sensitivities of the Namibian people, the constitutional interpretation of dignity has not yet called on traditional

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181 *Namunjepo* case (Note 14 above) 283.
182 Ibid.
183 Ibid.
184 Ibid 280.
185 Ibid.
186 *Vries* case (Note 46 above) 260.
187 Ibid.

notions of dignity, as embodied by Ubuntu and customary laws. Ndeunyema enthused that, "[h]aving freed herself from the yoke of colonialism and the corollary of the super-imposition of external values, it is crucial that Namibia re-invigorates African values as embodied in *Ubuntu.*"[188] Last but not least, Namibia's dignity jurisprudence shows that the Supreme Court does not yet included socio-economic rights in its understanding of human dignity.

6.12 CONCLUSION

The right to human dignity has had a tangible impact on development in Namibia, and this chapter sought to measure the scale of this transformation by reviewing the Supreme Court's jurisprudence relating to that right since independence. The review reveals a clear commitment from the country's highest court to implement the right to dignity and human rights in general. In other words, the Court has emphasized the transformative role of the Namibian Constitution, as enshrined in the clear mandate it gives lawmakers to redress the injustices of the past and the one it gives to courts to implement the laws, the Constitution, and human rights, including dignity.

Going forward, the judges of the Supreme Court should address five issues we identified in this chapter. First, they will need to define and articulate the concept of human dignity, especially because scholars use the same (and supposedly universal) phrase when they mostly apply a Western conception. Judges face a doctrinal conundrum: If the courts cannot define 'human dignity', how can they tell whether a person has violated that right? While the Supreme Court's jurisprudence has not yet defined dignity authoritatively, the subject of dignity represents too vast a field for a research piece of this format to exhaust it or suggest a definition for Namibia in adequate detail.

Secondly, the Court must use its authority to quell the controversy concerning the absolute or relative nature of the right to dignity. Furthermore, the Court should think of extending its dignity jurisprudence beyond the areas of criminal, penal, carceral and medical[189] contexts where the Court has confined it so far.

Fourth, the Supreme Court will need to infuse the dignity jurisprudence with more traditional African images of justice, especially those flowing from the philosophy of Ubuntu. Crucially, the apex court could interpret the right to human dignity so as to read into it socio-economic rights, more generally by emphasizing various aspects of economic deprivation when interpreting the Constitution. Unless it can do that, the Supreme Court cannot ensure that dignity commences or continues its reign as the supreme leader of Namibia's human rights regime.

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188 Ndeunyema (note 99 above) 355.

189 *ES v AC* case (note 152 above).

CHAPTER 7

The jurisprudential and constitutional paradigm of the decisions of the Namibian superior courts since independence

Samuel Kwesi Amoo

7.1 INTRODUCTION

There are inherent difficulties in defining and delimiting the nature and province of jurisprudence because of the broad spectrum of the subject matter. Modern jurisprudence covers such a wide scope as the social sciences and philosophy; it digs into the historical past and attempts to create the symmetry of a systematic understanding of the conflicting legal systems. In spite of these inherent difficulties, attempts have been made to define and determine the boundaries of jurisprudence, with writers on jurisprudence being placed in the position to determine the boundaries of the jurisprudence and the methods it should employ, from their divergent perceptions based on idiosyncrasies, ideological, political and moral persuasions.

As Freeman[1] puts it, every jurist has his own notion of the subject-matter and proper limits of jurisprudence and his approach is not only governed by his allegiances, or those of his society but also by what is commonly referred to as his ideology. No doubt such ideological factors are frequently implicit rather than openly avowed; thus, Holmes's description of them as "inarticulate major premises". Holmes' development of the concept of the inarticulate premise was premised on his analysis of the *rationes decidendi* of the decisions of the Courts and how the concept contributes to the debate on the nature and the premise of the law. This equally applies to the analysis of the decisions of the superior courts of Namibia since independence

Freeman, in his advocacy of the holistic approach to the study of jurisprudence under the title "The Relevance of Jurisprudence" states as follows:

> Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law. A proper discussion of questions such as these involves understanding and use of philosophical and sociological theories and findings in their application to law. A study of jurisprudence should encourage the student to question assumptions and to develop a wider understanding of the nature and working of law.

1 MDA Freeman (2001) *Lloyd's Introduction to Jurisprudence Sweet* & Maxwell: London, 1.

> Questions of theory constantly spring up in legal practice, though they may not be given very sophisticated answers[2]

Jurisprudential theories on the nature and function of law almost invariably deal with the relationship between theories of law and the legal process. In other words, hypotheses on law are meant to be utilised as tools to analyse law towards better understanding of the law and the legal system. The task of unravelling and understanding the nature of law is an enterprise that encompasses the application of legal theories to the entire legal process including the promulgation of the law.

In the context of the Namibian constitutional development, one can discuss the jurisprudence evolving from the decisions of the Namibian Courts, during the pre- and post-apartheid era within the context and perspectives of relevant theories of law (For example, natural law and analytical positivism).

In the context of legal theories, analytical positivism can certainly be discussed as the underlying principle of the literal rule of interpretation where the Courts treat fidelity to legislative enactment as the overriding value. With respect to the constitutional history and development of South Africa, as an example, it has been pointed out that the South African legal system was constrained before the promulgation of that country's new Constitution by the jurisprudence and principles of legislative supremacy and analytical positivism[3]. Dugard asserts that an empirical study of the legal process in South Africa leads to the conclusion that "judges adopt(ed) a neutral, non-activist position in their approach to human rights issues and that a form of positivism may account for this phenomenon".[4] This position was confirmed by Corbett, the then Chief Justice of South Africa, in his presentation to the Truth and Reconciliation Commission in these words:

> There are, and in the past always have been, constraints upon the exercise of judicial power. A judge is not always at liberty to do what he thinks is the best or most fair or expedient. He is required to dispense justice in accordance with the law. In the ideal situation law and justice coincide, but this need not necessarily be so, especially where the law consists of legislation. These truths are reflected in the oath which a judge is required to take upon assuming office. Prior to the coming into effect of the Interim Constitution, Act 200 of 1993, the oath prescribed was by s.10 (2) (a) of the Supreme Court Act 59 of 1959 and it required the judge to swear to [...] "administer justice to all persons alike without fear, favour or prejudice,

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2 Ibid, 2-5.

3 J Dugard (1971) "*The Judicial Process, Positivism and Civil Liberty*" Vol. 88 *South African Law Journal* 181-200; and J Dugard (1981) "*Some Realism about The Judicial Process And Positivism - A Reply*" Vol. 98 *South African Law Journal* 372-387.

4 J Dugard (1981) "*Some Realism about The Judicial Process And Positivism - A Reply*" 98 *South African Law Journal* 372-387, 373.

> and […] in accordance with the law and customs of the Republic of South Africa".[5]

This apologia was re-echoed in the submission of Justice G. Friedman as follows:

> By virtue of the oath which the judges were required to take, they had no option but to apply the laws of apartheid whether that was anathema to them or not. The only latitude they had was to ameliorate the harshness of these laws if they found them to be ambiguous[6].

It has been argued therefore, that the decisions of the Superior Courts of South Africa involving legislation dealing with state security, interracial marriages and legislation *sui generis,* created a particular type of jurisprudence with an epistemological paradigm towards denial of civil liberties and a departure from liberal principles and presumptions of common law that constitute the cornerstone of Roman Dutch law as developed by the South African courts[7]. Dugard asserts that:

> […] [p]ositivism has not served South Africa well as a guide to legal thinking. It has prevented judges from fully perceiving that the judicial function is essentially an exercise in choice in the penumbral area of legal uncertainty, and it has discouraged lawyers from playing a more active role in the protection of those principles which make up the country's legal heritage.[8]

Prior to the coming into effect of the Namibian Independence Constitution, the Namibian judiciary comprised South African-appointed judges applying South African law with the constraints imposed by reliance on the jurisprudence of legislative supremacy and analytical positivism.

However, with the enactment of Proclamation R. 101 of 1985 by the South African Government, the Namibian legal system assumed a dimension that engendered an important differentiation and digression, both in principle and practice, from the South African legal system. The Proclamation provided for a Bill of Rights[9] against which the Namibian Courts could test and review the validity of certain laws and

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5 MM Corbett (1998) "*Presentation to the Truth and Reconciliation Commission"* Vol. 115 *South African Law Journal* 17-20, 18.

6 G Friedman (1998) *Submission to the Truth and Reconciliation Commission on the Role of the Judiciary* Vol. 115 *South African Law Journal* 56-63, 59.

7 J Dugard (1981) "*Some Realism About The Judicial Process And Positivism - A Reply,"* Vol. 98 *South African Law Journal* 372-387.

8 J Dugard (1978) *Human Rights and the South African Legal Order* Princeton University Press: New Jersey, 397.

9 These rights included protection against execution without due process (art. 1); liberty, security of person and privacy (article 2); equality before the law (article 3); fair trial (article 4); freedom of expression (article 5) peaceful assembly (article 6); freedom of association (article 7); participation in political activity (article 8); freedom of culture, language, tradition and religion (article 9); freedom of movement and residence (article 10); and ownership of property (article 11).

administrative decisions and actions. In this regard, reference should be made to the observations of Eric C. Bjornlund when he wrote:

> Cases in South West Africa Supreme Court between 1985 and 1990 seem especially significant because of the vigor with which the South African appointed Namibian judges expressed civil liberties principles regardless of whether the holdings were explicitly based on the constitutional text […] To the extent that the South African Appellate Division prevented the Namibian judges from giving effect to the Bill of Rights through judicial review, those judges often used grounds other than the Bill of Rights to emasculate repressive legislation and in the process created a bully pulpit to take the place of genuine judicial review. These cases suggest that Namibian judges believed that courts are empowered to promote the rule of law, and the Bill of Rights only strengthened their resolve.[10]

This phenomenon was explained by Justice Bryan O'Linn as follows:

> […] the (Namibian) Courts functioned in a legal system where Parliament was supreme, not the Constitution and that notwithstanding the considerable constraints of security legislation and the effects of racist indoctrination of society, the courts generally allowed considerable freedom of expression and the opportunity to place both sides on the table in accordance with long established legal procedures.[11]

After the attainment of independence and sovereignty, Namibia adopted a Constitution with an entrenched Bill of Rights and a provision that elevates the Constitution as the supreme law of Namibia[12]. This effectively replaced the doctrine of legislative sovereignty, which from the history of the legal systems of both South Africa and Namibia, was equated with legislative supremacy, with that of constitutional supremacy, which has provided the Namibian judiciary with a constitutional leverage to promote the principles of the rule of law and constitutionalism and protect and advance the fundamental rights of the individual. This exercise has involved the interpretation of the Constitution and the Namibian Courts since independence have adopted a values-oriented approach to the interpretation of the Constitution and have thereby developed a jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people. GJC Strydom, the Chief Justice of the Republic of Namibia, in his address to the judicial officers at the first Retreat of the Office of the Attorney-General at Swakopmund 20-22 November 2002, stated:

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10 C Eric Bjornlund (1990) "The Devil's Work? Judicial Review under a Bill of Rights in South Africa and Namibia" Vol. 26 *Stanford Journal of International Law* 391-433, 429.

11 B O'Linn (2003) *Namibia: The Sacred Trust of Civilisation Ideal and Reality* Gamsberg Macmillan: Windhoek, 179.

12 Article 1(6) of the Constitution of Namibia provides that this Constitution shall be the Supreme Law of Namibia.

> (I)t is trite that ordinary presumptions of interpretation will not independently suffice in interpreting such a document (constitution) and that our Courts must develop guidelines to give full effect to the purport and aim of our Constitution. The Constitution remains the Supreme Law of Namibia from which all laws flow and against which all laws can be tested […] in interpreting the Constitution, particularly Chapter 3, the Courts are often called upon to exercise a value judgment. It was this exercise that led the Court in the Corporal Punishment[13] decision to encompass both aspects of constitutional interpretation and judicial independence.[14]

Chapter 3 of the Namibian Constitution provides for the fundamental human rights and freedoms, which are entrenched. The Constitution, however, draws a distinction between rights and freedoms and with regards to the latter, Article 21(2)[15] for example, provides that they, "shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

These limitations together with the general nature of the provisions of a constitution, *prima facie,* require the exercise of the constitutional jurisdiction of the courts in interpreting the grey or penumbral areas of the Constitution so as to, for example, what constitutes decency or morality. The Namibian Courts have since independence been called upon to interpret similar provisions of the Constitution and as mentioned earlier have adopted what may be termed, to borrow John Dugard's expression, a natural law -cum -realist or a purposive approach and have developed a particular jurisprudence based on the values of the Namibian people. These cases include the interpretation of the constitutionality of legislative provisions or practices relating to corporal punishment,[16] the restraining of prisoners by chaining them to each other by means of metal chains,[17] homosexual relationships,[18] property rights,[19] freedom of testation,[20] medical practitioners'

13 1991 (3) SA 76 (NmS).

14 The address was entitled, *Namibia's Constitutional Jurisprudence-The First Twelve Years.*

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

16 See *Ex Parte Attorney-General, Namibia: in re Corporal Punishment 1991 (3) SA 76 (NmS)*

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

18 See *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another,* 2001 NR 107 (SC).

19 *Gunther Kessl & Others v Ministry of Lands and Resettlement* 2008 1NR 167 (HC); *Agnes Kahimbi Kashela v Katima Mulilo Town Council* Case No: SA 15/2017

20 *Mwoombola v The Master of the High Court* (HC-MD-CIV-MOTGEN-2017/00299) [2018] NAHCMD 103 (20 April 2018).

code of ethics and informed consent,[21] the right to dignity[22] etc. In the address mentioned above, Justice Strydom stated:

> […] in the two *Mwandingi* cases the High and Supreme Courts of Namibia accepted the principle that a Constitution, and more particularly one containing a Bill of Rights, calls for an interpretation different from that which courts traditionally apply to ordinary legislation. Dealing with instances where the courts were required to make value judgments the corporal punishment case authoritatively laid down that a court, in coming to its conclusion, should objectively articulate and identify the contemporary norms, aspirations and expectations of the Namibian people and should have regard to the merging consensus of values in the civilized international community. These cases set the tone for Namibian Courts and the way it was required of them to interpret the constitution.

In the case of *Minster of Defence v Mwandingi*[23] the Namibian Supreme Court approved the *dictum* in *S v. Acheson*[24] that, "(t)he 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 tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion".

In the case of *Government of the Republic of Namibia & Another v Cultura 2000*,[25] the late Mahommed CJ, reiterated this approach to the interpretation of the Constitution as follows:

> 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.

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21 *LM1, M1, NH v The Government of the Republic of Namibia* 11603/2008 CASE NO: I 3518/2008 CASE NO: I 3007/2008 [HC].

22 *Mwoombola* case (Note 20 above).

23 1992 (2) SA 355 (NmSC).

24 1991 NR 1 (HC) at 10 AB.

25 I993 NR 328 (SC) at 340 B-D; 1994 (1) SA 407 NmSC, at 418 F-G. See also *Minister of Defence, Namibia v Mwandingi,* 1993 NR 63 (SC) at 68-71 (1992 (2) SA 355 (NmS) at 361-3); *S v Acheson,* 1991 NR 1 (HC) at 10A-C at 10 A-C (1991 (2) SA 805 (Nm)) at 813 A-C).

One could perhaps refer to the views of Mr Justice Strydom on the question of the ascertainment of the norms and aspirations of the people of Namibia as an initial point of reference. In the same address[26] he stated:

> […] to determine the contemporary norms, aspirations and expectations of the Namibian people is a most important requirement when it comes to the interpretation of the Constitution and how it should be applied. What those norms and aspirations are is not always easy to determine and the parameters thereof is always not limitless. When the Constitution says that there shall be no discrimination on the grounds of sex, even if there is a majority who may be in favor of such discrimination it cannot change the express prohibition against discrimination, set out in the Constitution. Many of the norms and aspirations of the people are contained in the Constitution itself. Discrimination on the basis of certain stereotypes is rooted out. The dignity of all persons is guaranteed by the Constitution. The theme against the violation of a person's dignity starts with the preamble of the Constitution and can be traced to many of the provisions of Chapter 3 and other provisions of the Constitution. These and other provisions should constantly be in the mind of the judge called upon to interpret the Constitution.

The matter relating to the identification and ascertainment of the norms and values of the Namibian people, unfortunately, does not rest there. It is trite that Constitutional provisions and legislation *sui generis* are couched in a language that is often broad and vague and therefore, will require judicial interpretation. The Constitution may be the reference point to identify these norms and values but as Justice Strydom correctly pointed out the parameters of determining them are limitless.

The Late Mahomed in deciding whether corporal punishment authorised by law can properly be said to be inhuman or degrading and therefore whether it was inconsistent with Article 8 of the Constitution[27] in the case of *Ex Parte Attorney General, Namibia: in re Corporal Punishment* used the national institutions as sources of identification of norms and values of the society and therefore added another dimension to the jurisprudence. He stated:

> (T)he questions as to whether a particular form of punishment authorized by the law can be said to be inhuman or degrading, involves the exercise

[26] See footnote 14 supra.

[27] Article 8 of the Constitution of Namibia provides as follows;
(1) The dignity of all persons shall be inviolable.
(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

> of value judgment by the Court. It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.[28]

One can discern from some relatively recent cases of the Superior Courts of Namibia that the value centred approach continues to be the underlying jurisprudential and constitutional paradigm of their decisions. The selected cases discussed hereunder involve property rights, medical practitioners' code of ethics and informed consent to the administration of blood transfusion, the right to dignity, the sustainability of the common law delict of adultery and freedom of testation.

The areas of the law discussed in these cases involve rights, the origins and development of which are steeped in the writings of the Church Fathers, such as St Augustine and St Thomas Aquinas and the natural law philosophers of the Age of Enlightenment such as John Locke Montesquieu and Jean-Jacques Rousseau on the nature and content of natural law.

7.2 PROPERTY RIGHTS

The decisions of the Superior courts of Namibia on property rights have been based on both the substantive rights to property derived from moral principles and the protection of the right to property premised on the compliance of the moral procedural principles of reciprocity[29] formulated in the principles of natural justice.
Under the Namibian Constitution, the exercise of the power given to the State to expropriate private property is subjected to the provisions of article 18 of the Constitution, which demand the application of the principles of natural justice.
The State's power to expropriate agricultural land which is exercised by the Minister under the Agricultural (Commercial) Land Reform Act[30] to advance the Government's land reform and poverty alleviation programme, was considered by the court in the *Gunther Kessl v Ministry of Lands and Resettlement and Others*[31] case, which was described as a "test case" by Muller J.

28 1991 (3) SA 76 (NmS) at 91 DF.
29 LL Fuller (1940) *The Law in Quest of Itself* Beacon Press: Boston. See also LL Fuller (1969) *The Morality of the Law* Yale University Press: New Haven.
30 Act 6 of 1995.
31 2008(1) NR 167(HC).

In this case, the applicants applied for an order to review and set aside the decision of the Ministry of Lands and Resettlement to expropriate certain farms belonging to the applicants in the Otjozondjupa Region of the Republic of Namibia. The applicants initially conceded that the Government of the Republic of Namibia has the right to expropriate farms under certain conditions and therefore only two main issues needed to be considered by the court. Firstly, the question whether the *audi alteram partem* principle was relevant in expropriation cases such as those before the court and, secondly, whether the procedure that had been followed in all these three cases before the court was in conformity with the law.

Since the Act, in principle imposes restrictions on the constitutional right of ownership, the court reiterated the principle that an act or statute that provides for actions that may infringe fundamental rights should be interpreted restrictively in such a manner as to place the least possible burden on subjects or to restrict their rights as little as possible. The rights of the public should be properly balanced against those of subjects by adhering to the requirement of "public interest" in article 16(2) and the provisions of section 14 of the Act.

On the issue of the relevance of the *audi alteram partem* principle in expropriation cases such as those under consideration, the court held that article 16(2) is not a self-contained or "walled-in" provision, excluding the application of the *audi alteram partem*[32] principle which was therefore held to be applicable. In the context of the Act the exercise of the powers of expropriation granted to the Minister was therefore subject to the provisions of article 18 of the Namibian Constitution and the common law grounds for review of administrative discretion.[33] In terms of the said article, the Minister may only act within the limits of his/her statutory discretion and should apply his/her mind to the requirements of the enabling Act. In order to expropriate land, it must be done within the provisions of the Act and involves a double-barrel process, namely, firstly, in terms of section 14 and then, in terms of section 20. This provision is peremptory and must be complied with *before* the Minister takes a decision. Furthermore, the court held that under the provisions of section 20(6) the Commission is obliged to consider the interests of the persons employed and lawfully residing on the land and the families of such person's residing with them. This factor becomes a variable in the determination of what constitutes public interest.[34] The subjection of the exercise of the mandate of the Executive branch of Government to the imperatives of Article 18 of the Namibian Constitution demonstrates the importance the Superior Courts of Namibia attach to the moral principles of reciprocity.

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32 The decision in *West Air Aviation and Others v Airports Company Limited and Another* 2001 NR 256 (HC) in respect of applicability of the *audi alteram partem* principle was confirmed.

33 *Immigration Selection Board v Frank 2001 NR 107 (SC).*

34 See Aonin *Fishing (Pty) v Ministry of Fisheries and Marine Resources* 1998 NR 47.

One area of land reform that has remained contentious since independence has been the nature of land rights over communal land. The Communal Land Reform Act[35] was promulgated *inter alia* to address the status of customary tenure over communal lands and specifically ancestral land rights. The Act vests ownership of communal land[36] in the State and creates generic rights of use[37] in favour of occupiers of communal land. It also addresses the issue of the recognition of PTO's created before independence. However, the issue of the legal status and recognition of customary land rights granted before independence is not clearly addressed by the Act and therefore required judicial interpretation by the Courts.

This was the cardinal issue brought before the Superior courts of Namibia for determination and was addressed on appeal by the Supreme Court of Namibia in the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*.[38] In that case, the late father of Agnes Kahimbi Kashela, the appellant, was allocated a piece of land in 1985 in the then Caprivi Region (now the Zambezi Region) by the Mafwe Traditional Authority (MTA) on communal land. Following independence on 21 March 1990, all communal lands in Namibia became the property of the State of Namibia by virtue of Art 124 read with Schedule 5(1) of the Namibian Constitution but, in terms of Schedule 5(3) of the Constitution, subject to, amongst other, the 'rights', 'obligations' and 'trusts' existing on or over that land.

Appellant's father was still alive at the time of independence and continued to live without interference on the land in dispute allocated to him by the MTA with his family, including the appellant.

In 1995, the Government of Namibia, which by a certificate of State title owned the communal land of which the land in dispute was part, transferred a surveyed portion of it to the newly created Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act 23 of 1992. The appellant's father was still alive then and continued to live on the land as aforesaid. He died in 2001 with the appellant as only surviving heir who continued to live on the land - according to her as 'heir' to the land in terms of Mafwe customary law.

Whilst the appellant was living on the land in dispute, KTC as the newly registered title holder of the land, rented out certain portions of the land. The appellant issued summons in the High Court claiming that KTC was unjustly enriched by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, KTC unlawfully 'expropriated' her land 'without just compensation' 'at market value'. The appellant relied for those allegations on Art 16(1) of the Constitution which guarantees property rights and Art 16(2) which provides that property may only be expropriated upon payment of just compensation. She also relied on s 16(2) of the

35 Act 5 of 2002.
36 Section 17.
37 Section 19.
38 Case No: SA 15/2017.

Communal Land Reform Act 5 of 2002 which states that land may not be removed from a communal land area without just compensation to the persons affected.

The appellant therefore claimed as damages the rental amounts received by KTC as claim one and under claim two the amount for which the lands were offered for sale as being reasonable compensation for the 'expropriation'.

KTC pleaded that the appellant was not entitled to the relief sought because at independence and also upon transfer of the land to KTC, the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. KTC, having become the absolute owner of the land, could deal with it as owner without any encumbrance thereon (without any claims on it).

The High Court agreed with KTC and dismissed the appellant's claim with costs, holding in the main that in terms of s 15(2) of the Communal Land Reform Act the land in dispute ceased to be communal land and that no communal land right claimed by the appellant could exist therein. The High Court also held that if the appellant had any right to compensation it would be enforceable only against the Government of Namibia and not KTC and that, in any event, such a claim was prescribed.

On appeal it was held *inter alia* that Schedule 5(3)[39] of the Constitution creates *sui generis* right in favour of the appellant and those similarly situated over communal lands succeeded to by the Government of Namibia and such right continued to exist even when transferred to a local authority such as KTC.

The court found that the appellant had acquired and held a customary land tenure right and the state's succession to the communal land did not extinguish communal land tenure but the state simply held the land in trust for the affected communities.

The court established that the Constitution guaranteed the enforcement of customary land rights. The court therefore, concluded that the appellant had an exclusive right to the use and occupation of the land in dispute; and that the right

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[39] Schedule 5 provides as follows:
(1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.
(2) For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.

attached to the land even after its proclamation as town land. Accordingly, they court upheld the appeal with costs in favour of the appellant.

The Court held further that such right did not need to be registered in terms of s 16 of the Deeds Registries Act 47 of 1937 to be enforceable and that a right created by Schedule 5(3) of the Constitution did not necessarily have to be vindicated in terms of Article 16(2) of the Namibian Constitution because the framers of the Constitution must have intended a remedy to be fashioned by the courts to give effect to the right created by the schedule. In other words, where there is a right, there must be a remedy.

The analytical positivist approach underlying the decision of the High Court does not take recognisance of the element of the moral consideration embodied in the natural law-cum realist approach or the purposive approach to the interpretation of the Constitution adopted by the Superior Courts of Namibia after independence, which philosophical approach could be argued formed the basis of the decision of the Supreme Court. The imperatives of the value-oriented approach require an interpretation that recognizes and protects the moral right to property embodied in the values and the ethos of the Namibian Constitution.

7.3 THE RIGHT TO FREEDOM TO PRACTISE ONE'S RELIGION AND SECULAR RATIONALITY

The definition of the moral content of natural law by philosophers of natural law have metaphysical, religious, rational and ethical dimensions. The case discussed hereunder involves the pitting of the right to practise one's religion against what may be regarded as secular principles of rationality and ethics.

In the case of L *M 1 MI NH and The Government of the Republic of Namibia,*[40] the plaintiffs instituted actions against the defendant for damages which arose from what they had alleged in their respective pleadings to be an unlawful sterilisation performed on them without their consent by medical practitioners in the employ of the State at State Hospitals, and alternatively on the grounds of a breach of a duty of care that these medical practitioners owed to each of the plaintiffs. The plaintiffs alleged that the sterilisations had been done as part of a wrongful practice of discrimination against them based on their HIV status and that it amounted to a breach of their basic human rights as guaranteed by the provisions of the Constitution of the Republic of Namibia.

Mrs Efigenia Semente, in particular, according to the evidence of the Medical Doctor, needed a blood transfusion to survive after a caesarean section to deliver her baby after an operation to remove her uterus. However, she refused the blood transfusion on grounds of her religious beliefs because she was a card carrying

[40] 1603/2008 Case NO: I 3518/2008 Case NO: I 3007/2008 [HC].

Jehovah's Witness and respect of her human rights as the administering of blood transfusion would constitute a violation of her human rights guaranteed by the Namibian Constitution, particularly the right to freedom to practise her religion guaranteed under Article 21(1) (c) and protection of her personal liberty also referred to as 'individual autonomy'[41] or freedom of 'personal autonomy'[42] under Articles 7 and 8 and 21(1)(c) of the Namibian Constitution.

Parker AJ. in the determination of the issue as to whether the defendant had obtained not only the plaintiff's written consent but the plaintiff's informed consent prior to the respective sterilisation procedures performed on them, stated that the cardinal principle relating to the exercise of an individual's freedom of autonomy depends on whether such individual is competent to exercise such freedom, in other words, whether such individual is *compos merit*. Therefore, the exercise of Mrs Semente's freedom of individual autonomy depended upon whether she was competent to exercise such freedom. The Court cited Geoffrey Robertson QC's[43] exposition on the subject as follows:

> As a Canadian court pointed out, in stopping a hospital from transfusing blood to save the life of a card-carrying Jehovah's Witness: "At issue here is the freedom of the patient as an individual to exercise her right to refuse treatment and accept the consequences of her own decision. Competent adults are generally at liberty to refuse medical treatment even at the risk of death. The right to determine what shall be done with one's own body is a fundamental right in our society.

This statement was approved by the English Court of Appeal in Re T[44] where it was held that although prima facie every adult has the right and capacity to decide whether he/she would accept medical treatment, even if a refusal might risk permanent injury to their health or even lead to premature death, and regardless of whether the reasons for the refusal were rational or irrational, unknown or even non-existent, if an adult patient did not have the capacity at the time of the purported refusal and continued not to have that capacity, or if his capacity to make a decision had been overborne by others, it was the duty of the doctors to treat him in whatever way they considered, in the exercise of their clinical judgment, to be in his best interests.

Parker AJ observed that the golden thread that runs through the Canadian case and Re T is that it draws distinction between the right to choose and the actual

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41 M Janis, R Kay & A Bradley (1996) *European Human Rights Law* Oxford University Press: Oxford, 268.

42 SA Strauss (1989) Doctors Patient and the Law at 31-32, referring to John Stuart Mill's famous essay On Liberty (1859), Cambridge University Press edition, 13.

43 G Robertson (1993) *Freedom, the Individual and the Law* Penguin: United Kingdom (7th ed) 459.

44 (1992) 4 All ER 649(CA).

exercise of the right and that the right to decide one's own fate presupposes a capacity to do so,[45] in other words the individual must be compos mentis.

Upon the authorities referred to, Parker AJ consequently held that in the case of Mrs Semente, as a result of massive bleeding following upon the Caesarean operation and the subsequent removal of her uterus coupled with her low blood count, she was not compos mentis and therefore was not competent to exercise her freedom to refuse blood transfusion upon the basis of her freedom of individual autonomy. The hospital therefore was authorised and directed to render appropriate medical treatment or medical procedures to Efigenia Semente, and such medical treatment or procedure should include a blood transfusion.

In terms of legal theories, this judgement may be said to have been based on ethical and secular principles of ethics and rationality and not necessarily by principles of ethics and rationality dictated by religious imperatives of morality and consequently demonstrates that rational, ethical and moral considerations are not solely defined in terms of religion, which is an important element of classical natural law's exposition on what constitutes the 'ought'.

7.4 THE TRADITIONAL CONCEPT OF THE SANCTITY OF MARRIAGE AND THE COMMON LAW DELICT OF ADULTERY

In *James Sibongo v Lister Lutombi Chaka & Another,*[46] the Supreme Court of Namibia had to pronounce itself on the continued existence and sustainability of the common law delict of adultery in contemporary jurisprudence. The court addressed the issue by reviewing precedents from foreign jurisdictions namely South Africa[47] and Canada.[48]

In addressing the issue, the Court firstly had to determine its jurisdiction to develop the common law and in doing so referred to the Constitutional Court of South Africa in the case of *DE v RH*[49] where the court in its judgement acknowledged that while the major engine for law reform lies with legislature, the courts are nevertheless obliged on occasion to develop the common law in an incremental and confirmed ways as to promote the spirit, purport and objectives of the Bill of Rights.[50]

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45 (per Lord Donaldson of Lymington MR in Re T at 661f-g).

46 SA 77/2014.

47 (SCA) in *RH v DE* 2014 (6) SA 436 (SCA); *DE v RH* 2015 (5) SA 83 (CC). *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) (1996 (5) BCLR 658; [1996] ZACC 10) para 61; *Carmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22 para 36). *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4) para 122

48 *R v Salituro* [1991]3SCR 654.

49 2015 (5) SA 83 (CC) para 4.

50 Section 39(2) of the South African Constitution.

Furthermore, that this jurisdictional fact empowers the court to adapt the common law to reflect the changing social, moral and economic fabric of society; and that the court cannot perpetuate legal rules that have lost their social substratum.[51] In the context of the determination of wrongfulness which is an essential element of delictual liability in our law, both under the lex Aquilia and the actio injuria rum, the boni mores of society or the legal convictions of the community which constitute expressions of considerations of legal and public policy, are of particular significance in determining wrongfulness.

The Court held that even though there is no express provision in the Namibian Constitution along the lines of section 39(2) of the South African Constitution, there is a clear implication to that effect and that the starting premise is however that it is in any event well established that it has always been open to the courts to develop the common law.

This principle of the jurisdiction of the court to develop the common law was followed in the *Namibian case of Moolman & another v Jeandre Development CC*[52] by the Supreme Court of Namibia following the South African Constitutional Court authority where it held that public policy, embodying the legal convictions of the community, is to be determined with reference to the values and norms embodied in the Namibian Constitution. Public policy also informs the element of wrongfulness in delictual liability. This was also acknowledged by this court in the context of the Aquilian action[53] and affirmed jurisdiction of the court to develop the common and the based on public policy to determine the sustainability of common law action.

After a detailed analysis of the origin and development of the action in common law the court was able to decide as to whether on public policy a claim founded on adultery should still form part of our common law and be sustained.

The court found that in the light of the changing mores of our society, the delictual action based on adultery of the innocent spouse has become outdated, abolished in most common law jurisdictions and concluded that it can no longer be sustained and that the time for its abolition has come.

Public policy dictated that the act of adultery by a third party lacks wrongfulness for the purpose of a delictual claim of contumelia and loss of consortium and further that it seems mistaken to assess marital fidelity in terms of money.

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51 See, for example, *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) (1996 (5) BCLR 658; [1996] ZACC 10) para 61; *Carmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22 para 36)

52 Case No SA 50/2013.

53 See also *Barkhuizen v Napier* 2007(5) SA 323 (CC) paras 28-29; *Brisley v Drotsky* 2000(4) SA 1 (SCA) paras 92-94 (per Cameron JA concurring). *DE v RH* para 17; *Le Roux v Dey* 2011(3) SA 274 (CC) paras 120–122. *Van Straten* paras 84-85.

Furthermore, the court established that an examination of the origin of the action and its development reveals that it is fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy and that the action has also lost its social and moral substratum and is no longer sustainable. The court also found that the action no longer has any deterrent effect and that the deterrence argument seems to depart from the assumption that adultery is the cause of the breakdown of a marriage, while it is now widely recognised that causes for the breakdown in marriages are far more complex.

The court also stated that the test for determining contumelia is objective and is viewed against the prevailing norms of society and the legal convictions of the community informed by our constitutional values and that it is no longer reasonable to impose delictual liability for a claim founded on adultery. The court explained that the changing societal norms are represented by a softening in the attitude towards adultery and that the action is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association. The court held in conclusion that the act of adultery by a third party lacks wrongfulness for the purposes of a delictual claim of contumelia and loss of consortium and that public policy dictates it is no longer reasonable to attach delictual liability to it.

The court however, reiterated that this holding does not detract from the fact that marriage remains the cornerstone and the basic structure of our society and that the law still recognises it since the right to marry and found a family is one of the foundational values entrenched under Article 14(3) of the Namibian Constitution. Article 14(3) of the Constitution further states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. However, the parties to the marriage equally bear the burden of maintaining the integrity of institution by obeying the legal and moral duties that come with the creation of the union and consequently If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that.

In the context of natural law and traditional Christian concepts on the sanctity of marriage, the ‘ought’ that determines the content of the moral and legal principles on adultery is embodied in one of ten commandments, ‘Thou shall not commit adultery’. This commandment is meant to promote the real value of marriage and family, the value of mutual self-giving love and children’s need for trust and stability.

This decision therefore changes the parameters of the moral principles of the traditional Christian and natural law principles on the sanctity of marriage and its maintenance by recognizing that in terms of our prevailing constitutional values, it is no longer reasonable to impose delictual liability for a claim founded on adultery.

7.5 FREEDOM OF TESTATION

Freedom of testation is a fundamental right incorporated in legislative enactments and constitutions of various jurisdictions. The relevant laws provide for both the substantive law and the procedural regulations governing the execution of a valid will. Often times the probate courts of various jurisdictions, including Namibia, have had to adjudicate on the validity of wills in instances where there has been non-compliance with the procedural requirements. As the cases discussed hereunder indicate, courts have differed in their interpretations and applications of the law: some courts have, in adherence to analytical positivism, interpreted the laws strictly whereas others have departed from the strict and literal interpretation and application of the positive law and have based their interpretation on principles of equity, morality or the moral imperatives of the constitution, which is the jurisprudential stance the naturalists advocate.

In the Ethiopian case of *In the Matter of the Estate of; Setrak Avakian*[54]*,* Chake Avakian, the widow of Setrak Avakian, the deceased and testator, petitioned the High Court for probate of a will made by the deceased appointing her, the petitioner, as his legatee by universal title.

The father of the deceased, Artin Avakian, filed in Court his declaration of opposition to the will, on the grounds that it was of no effect by the reason of not fulfilling the requirements of law as to form.

The will was made in English and in an Amharic version, both contained on a single sheet of paper. The contents of the will were in both original and typewritten versions. The date of their signing by the deceased was in both versions filled in handwriting. Both versions bore signatures to the will in witness of its signing in their presence by the deceased after its having been read over. One of the witnesses to the will was also given custody of originals; there was no dispute as to the fact.

The first question was whether or not the will could have effect, as a public will according to Article 881 of the Civil Code. The Court held that the will was not valid because it had been read prior to signing by the deceased in the presence of only three witnesses, while the law demanded four witnesses. The Court held as follows:

> This may seem a strange, and in the circumstances unsatisfactory result, since there can be no serious doubt about the deceased's intention to appoint his wife as his legatee by universal title, and that he may have died in the belief that she would succeed to all his properties. But the rules relating to the form of wills have been given in order to ensure that effect is given only to the indubitable intention of the testator to designate another or

[54] Megabit 23,1955 E.C. (April 1, 1963 G.C.); (High Court).

> other successors to his estate than those who would otherwise have been his rightful heirs at law. Such rules must be strict, and the Court cannot, even in circumstances as the present ones, or in any circumstances, ignore them or allow any latitude in their observance.

The widow appealed the judgment of the High Court to the Supreme Imperial Court of Ethiopia,[55] and the sole question for the determination of the Court was whether or not those three witnesses were sufficient to validate the will.

The court held that in order to decide on such very delicate cases, a court should not be blinded by the question of form; it should go a little further and find out the presumed intention of the testator, from surrounding circumstances, especially in cases of doubt or uncertainty. Not only one article of Code should bind a court, but the whole situation should be looked upon generally.
The Court reasoned as follows:

> It is more the intention of the testator than form of the will that is the real aim of the legislator... Coming now to Article 881 of the Civil Code, which provides for four witnesses, and looking at the will, subject matter of this appeal, we have to go far beyond the articles referred to by both parties and try to find out the real intention of the testator, in view of the doubt that arises.

The Court found that the indubitable intention of the testator was definitely to appoint his appellant widow as his sole legatee by universal title, to succeed to all his properties and consequently that the Court should not blind itself with the question of form, especially when the form has all been complied with. An absence of one witness, when three are present and reliable, was of no importance.

Under the circumstances and in view of the explanation, the Supreme Court allowed the appeal and quashed the judgment of the High Court and declared the will of the late Setrak Avakian appointing his wife Mrs Chake Avakian as his sole heiress, as valid.

In the Namibian case of *Mwoombola vs The Master of the High Court*[56], the applicants, the only biological children and living heirs of the late Nuugwedha, the testatrix, brought an action before the Court for a declaration that the last will and testament of their late was valid. The respondent was the master of the High Court of Namibia.

The events preceding the signing of the will by the deceased are undisputed. During 2016, the late Linea Peneyambeko Kandalindishiwo Nuugwedha, was diagnosed with Stage 4 Cancer. As a result of her diagnosis, she became very sick

55 *Chake Avakian v Mr Artin Avakian Tekemt* 13, 1956 E.C. (OCTOBER 24, 1963 G.C.
56 (HC-MD-CIV-MOTGEN-2017/00299) [2018] NAHCMD 103 (20 April 2018).

and weak. She was hospitalised and when it became apparent that she might not recover from her ailment she gave instructions for her last Will and Testament to be prepared and drafted. Her last Will and Testament was, as per her instructions and wishes, prepared, drafted and presented to her, for her signature.

The court found that at the time when the draft Will and Testament had been presented to her for her signature, the late Nuugwedha' s health had deteriorated to such an extent that she only had enough energy to initial the first three pages of the Will and Testament and to sign on the last page. The witnesses who had witnessed the execution of the will similarly only initialled the first three pages and signed the last page of the will.

In accordance with the Wills Act 7 of 1953, the last Will and Testament was lodged with the Master but was rejected and the reason provided by the Master for the rejection of the Will was that 'only the last page of the Will was signed by the testator and witnesses, and the rest were only initialled, i.e., for non-compliance with procedural requirements.

The applicants were aggrieved by the decision of the Master to reject their late mother's last Will and Testament and desirous to honour their mother's last wishes, approached the High Court seeking an order that the testamentary document executed by the late Linea Peneyambeko Nuugwedha be declared to have been intended by the deceased to be her last Will and that the respondent be directed to accept the aforementioned testamentary document as a Will for purposes of the Administration of Estates Act 66 of 1965.

The Master opposed the application launched by the applicants on the grounds that the document purporting to be a will, was not a valid will, as the document was not in compliance with the formalities required for the execution of a valid will in terms of s 2 of the Wills Act.[57]

[57] Section 2(1)(a) of the Wills Act, 1953 provides as follows - '2 Formalities required in the execution of a will: (1) Subject to the provisions of sections three and three bis - (a) no will executed on or after the first day of January, 1954, shall be valid unless - (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person and by such witnesses anywhere on the page; and (v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a magistrate, justice of the peace, commissioner of oaths or notary public certifies at the end thereof that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and if the will consists of more than one page, each page other than the page on which it ends, is also signed, anywhere on the page, by the magistrate, justice of the peace, commissioner of oaths or notary public who so certifies.'

The Judge delved into the development of the 1953 Wills Act and reviewed some relevant case law[58] on the validity of defectively executed wills because of non-compliance with procedural requirements to adjudicate the matter with the guidance of comparative jurisprudence on the matter.

In his judgment, Ueitele J indicated that the issue confronting the court had arisen at a different historical period in the constitutional development of Namibia where Namibia as a Nation became a constitutional state and where constitutional supremacy has replaced parliamentary supremacy or sovereignty. It was therefore no longer appropriate for courts to simply defer to what parliament or the legislature enacts, but to go further and ask the question whether the statutory provisions, in question, promote the spirit of the Constitution and whether the strict application of the statutory provision will or will not amount to the violation or negation of a fundamental human right and, as encouraged by Lord Atkins, courts should discard precedents which hamper the delivery of justice when these ghosts of the past stand in the path of justice clinking their medieval chains; thus the proper course for the judge is to pass through them undeterred.

The court reasoned that virtually the entire law of wills derives from the premise that a person has the fundamental right to dispose of his or her property as they please in death as in life. And furthermore, that the rules governing testamentary capacity and the construction of wills must, therefore, not result in interfering with or depriving a testator or testatrix of his or her freedom of testation. He remarked that what is peculiar about the interpretation of wills in some judicial pronouncements is not the prominence of the formalities, but the judicial insistence that any defect regardless of how minute, in complying with the statutory requirements for validity, inevitably voids the will. He observed however, that in other areas of the law where legislation imposes formal requirements, the courts have taken a purposive approach to formal defects. Based on the aforementioned reasons, Ueitele J held that the will of the testatrix was valid, embodying her indubitable intention on the distribution of her estate.

The cases discussed above indicate two different approaches to the interpretation of the procedural requirement and the result of non-compliance with procedural formalities. These two different approaches may be termed the strict, traditional approach that renders the will invalid on grounds of non-compliance with formalities and the value-oriented liberal approach premised on the indubitable intention of the testator or the testatrix, as the case may be. In terms of legal theories, the former

58 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), *Namibia Grape Growers and Exporters v Minister of Mines & Energy* 2002 NR 328, *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 and *Independence Catering (Pty) Ltd and Others v Minister of Defence and Others* 2014 (4) NR 1085 (HC). 4; *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC); *Marley v Rawlings*, [2014] UKSC 2, [2014] 2 WLR 213, [2014] WTLR 299, 16 ITELR 642, [2014] 1 All ER 807, [2014] WLR(D) 18, [2014] Fam Law 466, UKSC 2012/0057

approach is consistent with the dictates of analytical positivism whereas the latter approach, which is premised on moral and equitable considerations is consistent with the precepts of natural law.

7.6 CONCLUSION

Jurisprudential theories on the nature and function of law almost invariably deal with the relationship between theories of law and the legal process. In other words, hypotheses on law are meant to be utilised as tools to analyse law towards better understanding of the law and the legal system. The task of unravelling and understanding the nature of law is an enterprise that encompasses the application of legal theories to the entire legal process including the judicial process and the promulgation of the law,

Judicial decisions and judgments are not determined by only a strict interpretation of application of the positive law but are also influenced by factors outside the law including ideological factors which are frequently implicit rather than openly avowed; a phenomenon descried by Justice Oliver Wendell Holmes as ‘inarticulate major premises’.

The jurisprudence of the Superior Courts of Namibia has been greatly influenced by both the pre- and post-independence historical and constitutional development of Namibia. The pre-independence jurisprudence of both the South African and Namibian superior courts especially on issues relating to human rights was greatly determined by adherence to the dictates of parliamentary supremacy and analytical positivism.

However, with the attainment of independence and the promulgation of a Constitution with a Bill of rights, the exercise of judicial mandate of the Superior courts is fettered by the imperatives of the Namibian constitution, the supreme law and not by the strictures of parliamentary sovereignty or supremacy. Consequently, the Namibian Courts since independence, have adopted a values-oriented approach to the interpretation of the Constitution and have thereby developed a jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people, to borrow John Dugard’s expression, a natural law-cum-realist or a purposive approach. However, as implicit from the address of Chief Justice GJC Strydom in his address to the judicial officers at the first Retreat of the Office of the Attorney-General, the invocation of the constitutional imperatives to articulate ‘major premises’ is not a mandate for unbridled liberalism.

CHAPTER 8

Not all 'hope is lost': Understanding the effect of the Gaingob judgment on the Trial Court's sentencing discretion

Lotta N. Ambunda-Nashilundo and Gita K. Keshava

8.1 INTRODUCTION

The administration of justice demands of a trial court to not only determine criminal responsibility and liability, but also to impose an appropriate punishment on an offender.[1] A court's power to impose punishment may be prescribed by legislation or be determinable from by common law precedents.[2] Where the legislature has dictated the appropriate sentence to be imposed, the trial courts enjoy no discretion in formulating an appropriate sentence and must administer the sentence as prescribed.[3] Where the law does not provide guidelines for the imposition of punishment, sentencing courts have wide discretionary powers in imposing appropriate sentences according to the circumstances of each case. This discretion ought to be exercised reasonably, properly and judicially, as opposed to being exercised arbitrarily.[4]

8.2 GENERAL OVERVIEW OF SENTENCING IN NAMIBIA

The Namibian penal code, the *Criminal Procedure Act* 51 of 1977 (CPA), provides in section 276 various sentences that a trial court may impose, subject to any other law or common law creating the offence or prescribing a specific penalty. These sentences include a period of imprisonment, periodical imprisonment, declaration as a habitual criminal, committal to any institution established by law, and/or a fine.[5] Determining an appropriate punishment is sorely in the courts' discretion. The development of jurisprudence has fashioned various considerations to aid the Courts in imposing an appropriate sentence. Primary considerations such as, (1) the personal circumstances of the offender; (2) the seriousness of the crime, and

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1 CR Snyman (2014) *Criminal Law* LexisNexis: Durban, 10.

2 PM Bekker (2007) *Criminal Procedure Handbook* (8th ed) Juta: Cape Town, 280.

3 Article 1(1) of the Constitution states that Namibia is a State founded on principles of rule of law and justice for all.

4 Bekker (Note 2 above) 280. See also, *S v van Wyk* 1993 NR 426 (SC) at 447G; *S v Shikunga and Another* 1997 NR 156 (SC) 486b-f.

5 *Criminal Procedure Act* 51 of 1977 (CPA), section 276(1)(a). Section 276 (1)(a) makes mention of the death penalty which has been declared unconstitutional by Article 6 of the Constitution of Namibia, 1990, and in terms of subsection (g) whipping has also been declared unconstitutional in *Ex Parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC).

(3) the interest of Society [6] are established factors to consider, with the aim of emphasising on the objectives of sentencing, namely retribution, incapacitation, prevention, deterrence, and rehabilitation.[7]

Snyman argues that the weight given to each factor depends on the circumstances of the country at that time, indicating that in a society with high statistics of domestic violence cases, more weight will attach to the interests of society and the crime in aggravation.[8] It is against this backdrop that courts have been warned to be aware of the sentences considered "socially appropriate or desirable." [9] The Supreme Court held in *S v Schiefer* that it is trite that a court may, depending on the circumstances, afford more weight to a specific factor.[10] Similarly, in giving effect to the aims of punishment, a court may be justified to emphasise one aim at the expense of others, albeit not totally ignoring or disregarding other factors.[11] Ultimately, any sentence is restricted by principles of proportionality, fairness, and justice.

The interest of society has over the years been emphasised more compared to other factors due to an increase in crime rates. Unlawful homicides purposely inflicted as a result of domestic disputes, interpersonal violence, violent conflicts over land resources, intergang violence over turf or control, and predatory violence and killing by armed groups topped the list of prevalent crimes in various countries. Namibia is no exception to the rise of murder crimes in the country.[12] South Africa has recorded a steady increase in crimes such as murder, rape and robbery for the last decade.[13] The Institute for Security Studies (ISS) said in response to the latest crime statistics released by the South African Police Service (SAPS), that South Africa has for the past seven years recorded a 35% increase in murder crimes.[14] It is reported that increased government spending on policing and harsher sentences for offenders have not reduced violence and that violence prevention programmes, police reform and a stronger prosecuting authority are amongst other considerations to improve public safety.

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6 *S v Zinn* 1969 (2) SA 537 (A) at 540F-G.

7 Pre-constitutionalism: *R v Swanepoel* 1945 AD 444; *S v Khumalo* 1984 (3) SA 327 (A); post-constitutionalism: *S v Tcoeib* 1992 NR 198 (HC); *Daniel v Attorney-General* 2011 (1) NR 330 (HC); *Kamahere and Others v Government of the Republic of Namibia and Others* 2016 (4) NR 919 (SC); *S v Gaingob* 2018 (1) NR 211 (SC).

8 Snyman (Note 1 above) 20. *See also*, arguments by the Prosecutor in *S v Schiefer* 2017 (4) NR 1073 (SC) para 15.

9 *S v Xaba* 2005 (1) SACR 435 (SCA) at para 11. See recent unreported high Court Judgment of *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paras 6-7.

10 *Schiefer* case (Note 8 above) 1081H-I para 31.

11 Ibid, para 39.

12 <https://www.macrotrends.net/countries/NAM/namibia/crime-rate-statistics>.

13 <https://www.bbc.com/news/world-africa-49673944>.

14 Institute for Security Studies (2019) "Policing alone cannot solve South Africa's violence. Press release of 12 September 2019. <https://issafrica.org/about-us/press-releases/policing-alone-cannot-solve-south-africas-violence>.

In an attempt to curb an increase in stock theft crimes, Parliament for example, prescribed heavy minimum sentences in terms of section 14(1) of the Stock Theft Act, 12 of 1990 to be imposed in cases where an accused is convicted of stock theft. Section 14(1)(a) prescribed the minimum sentences for first time offenders. For purposes of sentencing, the section distinguishes between the offenders on the basis of the value of the stock involved e.g. if it is less than N$500, the minimum sentence is two years' imprisonment and if it is more than N$500, the minimum sentence was 20 years' imprisonment. Section 14(1)(*b*) prescribed a minimum sentence of 30 years' imprisonment for any second or subsequent conviction of stock theft.[15] The constitutionality of section 14(1) of the Act was challenged in the High Court and the Court struck the prescribed minimum sentence. The Supreme Court firmed the striking and deletion of any reference to such minimum sentences on the basis that it was grossly disproportionate to the severity of the offence for which it is imposed and therefore contrary to Article 8 of the Namibian constitution.[16]

Other legislative interventions include the provisions of the Combating of Domestic Violence Act 4 of 2003[17], which criminalises domestic violence within a domestic setting.

Interesting enough in this Act is the provision of section 25(2), which states that the complainant or the complainant's next of kin has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation. The provisions of section 3 of the Combating of Rape Act 8 of 2000 prescribed minimum sentences for first time offenders convicted of rape and more stringent minimum sentences in subsequent convictions. A court is only allowed to deviate from imposing the prescribed sentence if it is convinced that there are substantial and compelling circumstances.[18]

As another attempt to curb an increase in crime rates, the Namibian Courts have over the years adopted an approach to severely punish perpetrators of serious crimes such as murder from a domestic setting, robbery and rape. For example, in *S v Neidel*, the second accused was convicted of 8 counts of murder (45 years on each count) for the brutal and gruesome murders at "Kareeboomvloer" and was sentenced to terms of imprisonment totalling 395 years of which 105 years had to be served.[19] Other cases in which the court imposed long sentences include, *inter alia*:

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15 Section 14 of the Stock Theft Act 12 of 1990.

16 *Attorney-General and Others v Danie*l 2011 (1) NR 330 (HC) para 40-46.

17 In terms of section 21(2), Any person found guilty of a domestic violence offence is liable on conviction to the penalties ordinarily applicable to the offence in question.

18 Section 3(1)(b)(iii) indicate that on a subsequent rape conviction where the complainant suffered has suffered grievous bodily or mental harm as a result of the rape, the minimum prescribed sentence is 45 years.

19 *S v Neidel* (CC 21/2006) [2011] NAHC 347 (21 November 2011), para 25.

- *S v Schiefer* in which the accused was sentenced to an effective term of 48 years;[20]
- *S v Nanub* in which the accused was sentenced to 38 years imprisonment;[21]
- *S v Kangandjera* in which the accused was sentenced to an effective period of 45 years imprisonment;[22]

The Namibian High Court has, over the years, followed precedent in imposing cumulatively heavy sentences following convictions in crimes such as murder, rape, and robbery with aggravating circumstances. The myth surrounding the imposition of lengthy sentences was recently reiterated in *S v Mbemukenga* as follows:

> [16] With regard to the interests of society, it should be understood that, society expects that convicted persons should be sentenced accordingly. Murder and robbery cases on our court roll are a daily occurrence. Courts retain a duty to protect society, and when called upon to do so, in serious cases, the community should not be disappointed by the imposition of lenient sentences. Lest the community take the law into their own hands, a situation we cannot afford to have. To the contrary, a message should be sent out to the accused and prospective offenders that killing someone is forbidden and robbery does not pay.
>
> [17] It is only after paying for his deeds through appropriate punishment, that an accused can be said to be reformed and accepted back into society. It is sentences that are not laughable which society will appreciate to be commensurate to the offences convicted of.

The rationale behind the imposition of long sentences is therefore maintained to emphasise the need to protect society from the evil deeds of criminals.[23] Although the length of determinate imprisonment must always be stipulated by the court, it is often limited in some way at the outset, either because of the status of the court involved or because of the nature of the crime.[24] Beyond that, the court has a wide discretion in determining the duration of the imprisonment. The seriousness of the crime is generally the most important indicator of the type and duration of the sentence. This implies that the more serious the offence, the longer the period of imprisonment.[25] If the crime itself is not that serious but imprisonment is justified because of the repeated commission of the crime, the period imposed would be reasonable in relation to the seriousness of the offence.[26] Where a court imposes sentences consisting of imprisonment for various convictions, the

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20 *S v Schiefer* (CC 17/2008) [2013] NAHCMD 299 (24 October 2013), para 11.
21 *S v Nanub* (CC 4/2014) [2017] NAHCMD 22 (01 February 2017), para 8.
22 *S v Kangandjera* (CC 2/2012) [2016] NAHCMD 254 (8 September 2016) para 12.
23 *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paras 16-17.
24 For example, section 89 of the Magistrates Courts Act 32 of 1944 states that the Magistrates court, other than the regional court shall have jurisdiction over all offences except treason, murder and rape.
25 *S v Holder* 1979 (2) SA 70 (A).
26 *S v Baartman* 1997 (1) SACR 304 (E) at 305c, g-h.

penal code indicates that the sentences run consecutively, unless the sentencing court specifically directs that such punishment shall run concurrently.[27] It is the consecutive serving of sentences that leads to an offender being incarcerated for a long period of time.

More often than not, the need to impose lengthy sentences is based on the seriousness of the offence and the interests of society which require deterrent treatment of the offender.[28] The courts have also emphasised the need to protect the society from the offender for as long as it is justified in the circumstances of the case.[29] Pre-independence, the death penalty was imposed as an appropriate sentence in serious crimes until it was abolished by Article 6 of the Namibian Constitution. Since then, as set out in the case of S v *Tcoeib*[30], life imprisonment became the most severe sentence that a court may impose.

Section 276(1) of the Criminal Procedure Act provides that it is competent for a Court of law to impose a sentence of imprisonment upon a person convicted of an offence but it does not place any limit on the period of imprisonment which can be imposed.[31] There is no provision in the Criminal Procedure Act which obliges a Court to impose a mandatory sentence of life imprisonment in respect of any particular offence. The sentence of life imprisonment is thus a discretionary sentence in Namibia, available for a Court to impose should such Court believe that the particular circumstances of a particular case warrants the imposition of such a sentence.[32]

The principles as stated in *S v Sparks and Another*,[33] that punishment must fit the criminal, the crime, be fair to society, and be blended with a measure of mercy according to the circumstances has been well adopted by the Namibian Courts.[34] This is referred to as the individualisation of punishment which justifies the retention of a sentencing discretion in order for the courts to be able to adopt sentences befitting the circumstances of the case.[35] It is through this process that sentencing precedents are developed to maintain consistency and uniformity in sentencing.[36]

In light of Article 6 of the Namibian Constitution abolishing the imposition of the death penalty and in order to ensure that the offenders are removed from society,

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27 Criminal Procedure Act 51 of 1977, section 280(2).
28 *Neidel* case (Note 19 above) para 2.
29 *S v Nicodemus* (CC 15/2017) [2019] NAHCMD 296 (20 August 2019) para 12.
30 *S v Tcoeib* 1999 NR 24 (SC).
31 Ibid 28C-D.
32 Ibid 28F-G.
33 *S v Sparks and Another* 1972 (3) SA 396 (AD) 410H.
34 Principles adopted from *S v Rabie* 1975 (4) SA 855 (A) at 862, approved in *S v Ndamwoongela* 2018 (2) NR 422 (HC).
35 Bekker (Note 2 above) 280.
36 *S v Van Wyk* (SA 94/2011) [2012] NASC 23 (15 November 2012) para 19 (unreported), citing the decision of *The State v Gerry Wilson Munyama* (SA 47/2011) [2011] NASC 13 (9 December 2011), para 12 (unreported).

the courts impose lengthy sentences or life imprisonment to deter the offender or other aspirant offenders from reoffending[37] in serious cases such as murder, especially if committed in a domestic setup. To date, there is no evidence or statistical proof that long sentences has reduces crime in Namibia.

Despite the above measures, there are however, no reports that the imposition of long sentences has reduced crime in Namibia. If at all, these inordinately long sentences and heavy minimum prescribed sentences[38] were challenged in *The State v Gaingob and others*[39] as constituting cruel, inhuman or degrading treatment or punishment in conflict with Article 8 of the Namibian Constitution. In this regard, the warning in *S v Mokgiba*[40] is worth repeating:

> Imposing heavier sentences and dealing with every offender in the same way will not cure the crime problem. Inappropriately severe sentences are a greater evil than sentences that are too light. They cause resentment and a loss of respect for the courts, the government and the criminal-justice system as a whole. Finally, they are inherently unjust and out of kilter with the norms of a civilised legal system and with the Constitution.

This approach is plausible within our constitutional dispensation and as will be seen below, the courts have heeded to these warnings through the various sentences imposed on accused persons.

8.3 SENTENCING AS A METHOD OF PROVIDING JUSTICE

There are broadly two theories with respect to punishment: the retributive or moral theory and the utilitarian theory.[41] Punishment based on the retributive or moral theory takes the position that retribution is the primary basis to punish or sentence individuals for certain conduct committed. The position is based on the idea that society is safer and more cohesive when it is collectively able to repudiate certain conduct it collectively considers sufficiently egregious to community cohesiveness that it warrants repudiation.[42] Punishment based on the utilitarian approach takes the position that the purpose of sentences is to minimize harm to others and maximize the utility of society. Rather than focusing on the moral accountability of the offender, the utilitarian position considers the effect of a particular sentence on

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37 *See, for example*, *S v Nicodemus* (note 29 above) para 13; See also, generally, *S v Britz* (CC 02/2017) [2017] NAHCMD 340 (29 November 2017); *S v Dausab* (CC 32/2009) [2019] NAHCMD 188 (14 June 2019).

38 *Daniel v Attorney-General and others; Peter v Attorney-General and Others* 2011 (1) NR 330 (HC).

39 *State v Gaingob* 2018 (1) NR 211(SC).

40 *S v Mokgiba* 1999 (1) SACR 534 (O) at 553g-ff.

41 CC Ruby, GJ Chan, NR Hasan & A Enenajor (2017) *Theories of Punishment* (9th ed) Chapter 1(B), para 1.4.

42 Ibid, paras 1.5-1.7.

the offender themselves and whether such a sentence will protect the public in the best possible manner.[43]

Imprisonment, as a form of punishment, falls within these broad theories of punishment. Nevertheless, there are many criticisms of imprisonment as successfully accomplishing the goals of either the retributive or the utilitarian theories.

For instance, the use of imprisonment in the utilitarian theory can be challenged due to the limited deterrent effects that imprisonment has on a number of segments of population, due to a number or combination of potential factors, including socio-economic status, lack of future opportunities, mental or physical health, or age, to name but a few. The lack of deterrent effect is exacerbated as the sentence increases and the chances of parole and reintegration into society become less of a reality. Similarly, given the fact that the underlying causes of criminal behaviour have been linked to a number of systemic factors, including socio-economic status, access to education, food, shelter, mental and physical healthcare, spending a large amount of available resources on facilities to incarcerate individuals can be challenged on the basis that it is not actually maximising the utility of society. Arguably, it is rather decreasing available public funds, while also decreasing the available workforce. The criticism is based on the fact that sentences do not address the core issue of the crime.

The use of imprisonment in the retributive theory can also be challenged given the fact that imprisonment is sometimes imposed on certain classes of individuals more frequently than others. If prosecuting, and therefore convicting and sentencing is not imposed equally amongst the population, the retributive weight of sentencing is decreased.

Last, either theory can be criticised on the basis that they seek to focus on the offender, either their conduct or their potential to harm another, rather than focusing on the community or victims that remain as a result of the offence.

8.4 THE CONSTITUTIONALITY OF INORDINATELY LONG SENTENCES: *THE STATE V GAINGOB AND OTHERS*

8. 4.1 Facts

In *State v Gaingob and others,* the appellants brutally tortured and murdered a couple on a deserted farm in the district of Okahandja and ran off with money, food and a vehicle. On February 9, 2002, the appellants were indicted to the High Court, tried and convicted on two counts of murder, one count of housebreaking with intent to rob and robbery with aggravating circumstances, and two counts of

43 Ibid, para 1.8-1.11.

housebreaking with intent to steal and theft. At the time of sentencing, the appellants were 36, 25, 35, and 22 years old. Although the prosecution sought a sentence of 50 years for each count of murder, the first, second, and fourth appellants were cumulatively sentenced to effective terms of 67 years imprisonment, while the third appellant was sentenced to 64 years imprisonment.[44] The High Court justified the long sentences on the basis of protecting society and removing these dangerous criminals from society for a reasonable time period.[45]

Leave to appeal was refused by the High Court on 16 October 2003 but the Chief Justice allowed the petition, only in respect of the sentences on housebreaking. On 15 July 2015, the Supreme Court, differently constituted, granted leave to both appellants to appeal against the cumulative effect of the sentences passed by the High Court. The Supreme Court requested arguments on whether it would be consistent with the Constitution for courts to impose a period of imprisonment as a sentence which would exceed the life expectancy of an accused.[46] On 11 April 2016, the Attorney-General was invited to intervene and to place evidence, if any, before court on the constitutional question and to make submissions on the hearing of the appeal.[47] Both the appellants and respondent were also given an opportunity to respond to the evidence and written submissions by the Attorney-General.

8.4.2 Submissions on appeal

The Attorney-General submitted that although punishment by courts is aimed at deterrence, prevention and rehabilitation, any punishment or term of imprisonment which is so long as to remove 'all hope of release of an offender' severely encroaches on the right to dignity and therefore contrary to the values and aspirations of the Namibian Constitution.[48] The A-G relied on the statutory mechanism in terms of which offenders are given a 'hope' of being released.[49] The Attorney-General referenced the provisions of section 115 of the Correctional Service Act, 9 of 2012, which is applicable to the accused persons in question. It reads:

> Release on full parole or probation of offenders serving imprisonment of twenty years or more for scheduled crimes or offences
>
> 115. (1) Notwithstanding the provisions of this Act, no offender who has been sentenced to a term of imprisonment of twenty years or more for any of the scheduled crimes or offences is eligible for release on full parole or

44 *Gaingob* case (Note 39 above) paras 11-12.
45 Ibid para 11.
46 Ibid para 15.
47 By virtue of his functions in terms of Article 78 of the Constitution.
48 *Gaingob* case (Note 39 above) paras 17-18.
49 Either on remission of sentence,release on day parole and release on full parole or probation embodied in part XIII of the Correctional Service Act which had come into force on 1 January 2012.

> probation, unless he or she has served, in a correctional facility, two thirds of his or her term of imprisonment [...]

This is the section applicable to the appellants since the High Court imposed a determined period of imprisonment on each of the appellant. In terms of the Act, the National Release Board is responsible for the release of offenders after the serving of two thirds of their terms of imprisonment. If the Board is satisfied that the offender will not re-offend or would not pose any undue risks to society, it would recommend a release on parole or probation in a report to the Commissioner-General who would refer the report to the Minister responsible for correctional service, who subsequently may then authorise the release of the offender on parole or probation. In interpreting this section, the Attorney-General submitted that the serving of the two thirds largely depends on the number of years imposed and the possibility of being released at that stage. Accordingly, a long period of sentences leads to the serving of two thirds of such period to be beyond the life expectancy of the offender, which, accordingly, not only takes away the hope of being released but leaves the offender with 'death' as the only hope of leaving the correctional facility. It is this abrogation of any possibility of leaving that the Attorney-General submitted is unconstitutional.

The Attorney-General also noted the unfairness in treatment between offenders sentenced to more than 20 years and those sentenced to life imprisonment, which is the harshest sentence that a court may impose. The differential treatment is contained in section 117 of the Correctional Service Act, which reads:

> Release of offenders sentenced to life imprisonment
>
> 117. (1) An offender who has been sentenced to life imprisonment can be released from the correctional facility only on such conditions as to full parole or probation.
>
> 117. (2) Notwithstanding subsection (1), no offender who has been sentenced to life imprisonment is eligible to be released on full parole or probation, unless he or she has served the minimum prescribed term of imprisonment […]

This section should accordingly be read together with regulation 281 of the regulations to the Correctional Service Act, which reads:[50]

> Release on full parole or probation of offenders sentenced to life imprisonment

[50] Published in Government Notice 330 of 2013.

> 281. (1) Subject to sub-regulation (2), an offender who has been sentenced to life imprisonment is eligible to be considered for release on full parole or probation pursuant to section 117 of the Act after serving at least 25 years in a correctional facility without committing and being convicted of any crime or offence during that period.

The Attorney-General submitted that offenders sentenced to life imprisonment get the 'hope of release' from section 117 and regulation 281. This means that offenders sentenced to life imprisonment are eligible for consideration for release on parole by the National Release Board earlier.[51] Once again, the board is precluded from recommending the release on parole unless the offender has served at least 25 years and only if it is satisfied that an offender's release meets the further requirements specified. If so satisfied, the board would submit a report to the Commissioner-General recommending release on parole or probation. The latter would submit the report and his or her comments to the Minister, who must forward the report together with his or her comments to the President, who may authorise an offender's release on parole or probation for life, unless the President determines otherwise.

It must be clarified that being sentenced to life imprisonment does not guarantee a release on parole after 25 years because the Board still needs to be additionally satisfied that, (i) 'there is a reasonable probability that such offender will abstain from crime and is likely to lead a useful, responsible and industrious life; (ii) such offender has displayed a meritorious conduct during such minimum term of imprisonment and no longer has a tendency to engage in crime; and (iii) the release of the offender will contribute to reintegration of the offender into society as a law abiding citizen; or (iv) it is desirable for any other reason to release such offender on full parole.'[52] Even if the Board does not authorise the release of an offender, the hope is still maintained in terms of section 118 which allows the officer in charge to recommend for review an offender who is again eligible for release after fulfilment of any condition imposed by either the President, the Minister, the Commissioner General or the Board.[53]

Offenders such as the appellants, would only be released after serving two thirds of their sentence as required by section 115 of the Act. With the ruling of *Tchoeib*, offenders sentenced to life imprisonment are in a favourable and hopeful position because of section 117 of the Act which allows offenders to be considered for parole after serving 25 years. The Attorney-General therefore submitted that the differential treatment is unjustified and unwarranted in light of Article 10 of the Constitution.

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51 Established in terms of section 104 of the Correctional Service Act.

52 Section 117(2)(a).

53 Section 118.

From a practical perspective, the first, second and fourth appellants would only become eligible for consideration for parole after serving 44 years and 6 months imprisonment.[54] In the case of the third appellant, he would qualify for consideration for parole after serving 42 and a half years.[55] The Attorney General, together with the appellants, therefore took the stance that long sentences which take away the hope of ever being released, are unconstitutional, and contrary to the values and aspirations embodied in the Namibian Constitution.[56]

The Deputy Commissioner-General of the Namibian Correctional Services (NCS), Anna-Rosa Katjivena, also made an affidavit emphasising that long sentences would be contrary to the objective of the Correctional Service, which is to rehabilitate offenders with the hope of turning them into productive and law-abiding citizens despite their criminal history. Accordingly, it is this hope of release that enables the process of rehabilitation to yield fruitful results as an offender without hope of release will not likely participate in programs that are designed to rehabilitate him/her.[57] The Deputy Commissioner General further pointed to the court that long custodial sentences put an unnecessary financial burden on the resources of the State as offenders who could contribute positively towards nation building are not able to do so because of their sentences.[58]

The Prosecution took no issue with the sentences imposed by the High Court. Counsel for the Prosecution conceded that a sentence which removes all hope of the prospect of release would not be appropriate, but not necessarily unconstitutional. It was argued that due to the seriousness of the offences and the fact that three of the four appellants were repeat offenders, the court a quo exercised its sentencing discretion judicially.

8.4.3 Supreme Court's reasoning and decision

The Court recognised the respect for inherent dignity and of the equal and inalienable rights of all humans which are indispensable for reasons of freedom, justice and peace as stipulated in the Namibian Constitution.[59] The court justified the legal position as enunciated in *Tchoieb* that life imprisonment is the most severe and onerous sentence to be imposed upon offenders because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so

54 First appellant would be 80 years; second appellant would be 69 years old and fourth appellant would be 65 years old.

55 Third defendant would be expected to be 79 years old.

56 *Gaingob* case (Note 39 above) para 22.

57 Ibid, 217A-C para 23.

58 The Commissioner-General of the NCS also addressed a letter to the Government Attorney, which was, by agreement placed before court in which it was stated that long sentences creates a barrier to the achievement of the goals of the service.

59 *Gaingob* case (Note 39 above) 221.

monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence. [60]

What the court, however, did not justify are sentences deliberately incarcerating a citizen for the rest of his or her natural life, which severely impacts upon much of what is central to the enjoyment of life itself in any civilised community. Accordingly, a long sentence cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life, regardless of any circumstances which might subsequently arise.[61] The court notes that such treatment severely impacts on the enjoyment of the constitutional rights and effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he/she was a thing instead of a person without any continuing duty to respect his dignity. [62]

The untenability of these sentences was mirrored by the Court in paragraph 48:

> To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears [...] to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past. Those values require the organs of that society continuously and consistently to care for the condition of its prisoners, to seek to manifest concern for, to reform and rehabilitate those prisoners during incarceration and concomitantly to induce in them a consciousness of their dignity, a belief in their worthiness and hope in their future.' [63]

The court emphasised that the statutory mechanism, i.e. section 117 read with regulation 281 which creates the hope of being released on parole after serving 25 years, makes life imprisonment an appropriate sentence which is constitutional and does not infringe on the offender's right to dignity as protected under Article 8.[64] On the contrary, serving a sentence in terms of section 115 of the Act vitiates

60 *Gaingob* case (Note 39 above) 221J-222A.
61 Ibid para 47.
62 *Tcoeib* case (Note 7 above) 33E - F.
63 Ibid 32G - 33B.
64 The court relied on the decision from various jurisdictions: the European Court of Human Rights (ECtHR) decision of *Kafkaris v Cyprus* ECtHR (app 21906/04) 12 February 2008 [GC] wherein the Grand Chamber of the ECtHR held that a life sentence was not irreducible by reason of the opportunities both in law and in fact for the consideration of release; The Constitutional Court of Zimbabwe in *Makoni v Commissioner of Prisons* Const application No CCZ 48/15; Judgment CCZ 8/16 on

the element of hope with the serving of two-thirds of the sentence that may exceed the life expectancy of an offender.[65] From a detailed comparative examination of various common law jurisdictions, the Court extracted the principle that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.[66]

The court concluded that the absence of a realistic hope of release for those sentenced to effectively long terms of imprisonments, which may be aimed at circumventing the statutory mechanism and which threatens the hope of release, offends against the right to human dignity and protection from cruel, inhuman and degrading punishment as guaranteed by Article 8 of the Constitution. The court noted that the sentences imposed are in effect far more severe than life sentences because the appellants must wait almost 20 years more than those sentenced to life imprisonment to become eligible for parole under section 115.[67] The court held that it appears that the sentences were imposed to circumvent the relevant parole provisions determined as appropriate by the legislature. In this regard, the court pointed out that where trial courts impose excessively long sentences to circumvent the right of that hope of release represented by their eligibility for parole (and the proper application of the criteria embodied in the applicable sections), the resultant sentences will infringe offenders' Article 8 - right to dignity. Accordingly, by removing an offender's realistic hope of release, the statutory purpose of rehabilitation trenchantly stressed in the Act, is fundamentally undermined.

The appeal succeeded and the sentences in respect of the murder convictions were set aside and replaced with life imprisonment. The court noted however that the crimes committed by the appellants were brutal and vicious in the extreme and perpetuated with premeditation, justifying that they should be permanently removed from society.[68]

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13 July 2016 unanimously struck down a system of life imprisonment without parole as violating the right to dignity and amounting to inhuman and degrading treatment in breach of that country's Constitution.

65 The court approved the same position.

66 *Vinter and Others v The United Kingdom* [2013] ECHR 645.

67 *Gaingob* case (Note 39 above) para 70.

68 Ibid para 76.

8.5 A COMPERATIVE ANALYSIS

8.5.1 The Canadian position on inordinate long sentences

In Canada, criminal law is within the jurisdiction of the federal government, and as such, applies throughout the country regardless of provincial boundaries.[69] The Canadian *Criminal Code* 34 of 1985 imposes mandatory life sentences for those convicted of high treason, first-degree murder, and second-degree murder.[70] In addition, there are offences in which the maximum possible sentence is life, generally relating to dangerous offenders or those convicted of other serious offences.

The Canadian Criminal Code permits indeterminate sentences where an offender is designated as dangerous and there is no lesser measure that will adequately protect the public.[71] This method limits the application of indeterminate sentences to a small number of individuals where it is truly necessary. This provision was challenged in *R v Boutilier* as infringing sections 7 and 12 of the Canadian Charter of Rights and Freedoms, namely the rights to life, liberty, and security of the person, and to be free from cruel or unusual treatment or punishment.[72] The majority of the Supreme Court of Canada held that section 753(1) was not overbroad under section 7 of the Charter as the Criminal Code requires sentencing judges to conduct a prospective assessment in determining dangerousness.

In addition, the Court held that section 753(4.1) was not grossly disproportionate, or contrary to section 12 of the Charter of Rights and Freedoms, as the section did not impose a mandatory sentence, but provided guidelines for exercising sentencing discretion in addition to general principles of sentencing provided by the Criminal Code. The court further pointed out that there were other sentencing options available for dangerous offenders should a judge determine that the requirements in section 753(4.1) were not met and an indeterminate sentence was not appropriate.

The ability for an offender to be eligible for parole is determined by two factors: the offender's conviction and, if available to the court, the court's decision on parole eligibility based on "the circumstances of the commission of the offence and the character and circumstances of the offender and the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires."[73] For some offences, such as first degree murder, parole ineligibility is set by the Canadian *Criminal Code*.[74] For sentences of imprisonment for two or more years on a conviction for an offence set out in Section I or II of the *Corrections*

69 The Canadian *Constitution Act*, 1867, sections 91-95.
70 The Canadian *Criminal Code* R.S.C., 1985, c. C-46, section 235.
71 Ibid s 753(1), (4.1).
72 *R v Boutilier* 2017 SCC 64 (Supreme Court of Canada).
73 The Canadian *Criminal Code,* (Note 70 above), section 743.6(1).
74 The Canadian *Criminal Code,* (Note 70 above), section 745(a).

and Conditional Release Act[75] that was prosecuted by way of indictment, such as sexual exploitation, the period of parole ineligibility is determined by the court.[76] Previously, there was a process of judicial review which permitted an offender who has served at least fifteen years of a life sentence, to apply for a reduction in the number of years they were ineligible for parole.[77] However, this is no longer available for offences committed after December 2, 2011, due to legislation that was passed repealing what was termed the "Faint Hope Clause" which was found to be "harsher" on offenders.[78] A person sentenced for an indeterminate period as provided by section 753(4.1) of the Criminal Code must be reviewed after seven years "from the day on which [they] were taken into custody and not later than every two years after the previous review" to determine if they should be granted parole.[79]

As of December 2, 2011, a court, in circumstances of multiple murders, can order consecutive periods of parole ineligibility.[80] Section 718.2(c) provides that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh". However, in *R v Baumgartner*,[81] the accused was convicted of one count of first-degree murder and two counts of second-degree murder and sentenced to life imprisonment. The sentence included no chance of parole for forty years which was comprised of twenty-five years for the conviction of first-degree murder as statutorily mandated, and fifteen years for the two convictions of second-degree murder.[82] As the perpetrator was 21 years old at the time of conviction, he would only be able to apply for parole at age 61. Furthermore, in *R v Bourque*[83], the court convicted a 24-year-old man to three counts of first-degree murder and two counts of attempted murder. Accordingly, he was sentenced to life imprisonment with ineligibility for parole for 75 years, cumulatively calculated by the 25 years for each of the counts of first-degree murder. The effect of this sentence was that he would be ineligible for parole until 99 years old.

There are two other possibilities for those sentenced to long periods of parole ineligibility to obtain parole. First, section 121(1) of the *Corrections and Conditional Release Act 1992* provides for parole by exception. Under this section, an offender may apply for parole despite the fact that they are not yet eligible for parole as provided in their sentence. Parole by exception can be granted if the offender making the application is 'terminally ill'; is physically or mentally ill to such an extent that continued confinement would likely lead them to 'suffer serious damage'; if 'continued confinement would constitute an excessive hardship that was not

75 The Canadian *Corrections and Conditional Release Act,* 1992, Schedules I and II>

76 The Canadian *Criminal Code,* (Note 70 above), sections 153(1.1), 743.6(1).

77 Ibid section 745.01(1).

78 R Christmas (2013) *Canadian Policing in the 21st Century: A Frontline Officer on Challenges and Changes* McGillQueen's University Press: Montreal.

79 The Canadian *Criminal Code,* section 761(1).

80 *Ibid,* section 745.51(1).

81 *R v Baumgartner* 2013 ABQB 761 (Alberta Court of Queen's Bench).

82 *Ibid.*

83 *R v Bourque* 2014 NBQB 237 (New Brunswick Court of Queen's Bench).

reasonably foreseeable at the time the offender was sentenced' or if they are 'the subject of an order of surrender under the *Extradition Act* and [will] be detained until surrendered.'[84] If the offender is 'serving a life sentence imposed as a minimum punishment or commuted from a sentence of death', parole by exception can only be granted if the offender is terminally ill.[85]

Second, if an offender is serving a life or indeterminate sentence, and is not eligible for parole under ss 102 or 121 of the *Corrections and Conditional Release* Act, the Governor in Council may grant them a conditional pardon.[86] This power, also known as the Royal Prerogative of Mercy, is discretionary and vested in the monarch but exercised by the Governor in Council.[87] Practically, the Parole Board of Canada exercises powers under the Royal Prerogative of Mercy. In doing so, it considers the following: (1) "clear and strong evidence of injustice or undue hardship"; (2) individual assessment on the merits of each case; (3) exhaustion of "all other avenues available under the Criminal Code, or other pertinent legislation"; (4) strong and specific "grounds to recommend action that would interfere with a court's decision"; (5) "considerations of justice, humanity and compassion [that] override the normal administration of justice"; and (6) that the decision does not "increase the penalty for the applicant."[88]

Similar to Namibian judges, Canadian judges are constrained by the Canadian Charter of Rights and Freedoms. The Charter includes the right to 'life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'[89] and the right 'not to be subjected to any cruel and unusual treatment or punishment'. [90] It should be noted that the Canadian Charter does not have a right to dignity. All the rights and freedoms in the Charter can only be subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[91]

When considering whether the Canadian *Criminal Code* and the *Canadian Charter of Rights and Freedoms* adequately constrains a judge's discretion in sentencing, consideration must be had to the actual realities of challenging orders for sentencing. When offenders are made to bring contested court applications, and potentially appeals to challenge a sentence imposed on them on the basis of an infringement of their rights contained in the *Canadian Charter of Rights and Freedoms,* this burden often inhibits individuals from exercising their constitutional rights, and therefore the fulfilment of constitutional rights generally. When considering the time

84 Corrections and Conditional Release Act, section 121(1) (a)-(d).
85 Ibid section 121(2)(a).
86 Canadian Criminal Code (Note 70 above) section 748(1)-(2).
87 Ibid.
88 Ibid.
89 The Canadian Constitution Act, 1982, Part 1: The *Canadian Charter of Rights and Freedoms*, section 7.
90 Ibid section 12.
91 Ibid section 1.

and legal costs that are required to bring such a challenge, principles restraining the discretion of sentencing judges may, in fact, be more of a constraint on the offender. While this is an issue with all constitutional rights and structures, it raises the question as to whether judicial discretion should be even further constrained to limit the circumstances in which such a challenge would be necessary. While these issues arise within the context of rights provided by the *Canadian Charter of Rights and Freedoms,* these concerns equally apply to any discretion given to Namibian judges in sentencing and questioning the practical utility of any constraints imposed on that discretion.

8.5.2 The American position on inordinate long sentences

The status of sentencing in the United States of America could be characterised as involving greater judicial discretion as compared to Canada (described above) and Norway (described below). In essence, the federal penal regime for sentencing is based on a guideline system created by the United States Sentencing Commission. Judges are required to consider the sentencing guidelines or ranges when sentencing in federal felony cases and certain misdemeanour cases.[92] Judges are required to determine the "offence level" and the "criminal history score" and to use this information in the context of a Sentencing Table to determine the appropriate range of sentences. In order to determine the "offence level", judges must first determine the base offence level which is done by reference to the crime. Next, the judge must consider it within the context of the offender's "real offence conduct". The "criminal history score" is determined based on prior criminal convictions and a numeric system to determine this score.[93] As is evident, there are a number of ways that lengthy sentences can be imposed on offenders based on this system of judicial discretion with minimal guidelines.

The main restriction on the sentencing discretion of federal judges is the Eighth Amendment to the US Constitution which provides as follows:[94] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

While judicial interpretation of the Eighth Amendment has limited judicial sentencing discretion, issues arise where there are differing or conflicting court decisions from appellate courts. For instance, in *Solen v Helm,* the Supreme Court determined that a life sentence without parole violated the principle of proportionality, as protected by the Eighth Amendment. The Court rejected the concept that only the

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92 United States Sentencing Commission (2015) "Life Sentences in The Federal System" (Report, February 2015) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-andsurveys/ miscellaneous/20150226_Life_Sentences.pdf>.

93 United States Sentencing Commission (2012) "2012 Guidelines Manual" (Report, 2012) <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manualpdf/2012_Guidelines_Manual_Full.pdf>.

94 United States of America Constitution, Eighth Amendment.

death penalty was subject to such a principle and developed a test to determine if a government action violates the Eighth Amendment.[95] However, in *Harmelin v Michigan*, the Supreme Court upheld life sentences without parole for cocaine possession as provided by legislation on the basis that they did not violate the Eighth Amendment.[96] The court was divided on the content of the proportionality test in the context of the Eighth Amendment.

In addition, and as discussed below, the issue remains that reliance on an appellate system to enforce rights and limit sentencing discretion seeks to reserve such enforcement of rights to the few that are able to bring such appeals. For the many others, they are left with a potential right, but no real method of enforcing their rights due to financial, health, socio-economic, and other barriers that exist.

8.5.3 The Norwegian position on inordinate long sentences

In contrast to the position in the United States of America, Norway stands out as severely limiting both judicial discretion in sentencing and possible length of sentences. The Norwegian Penal Code provides that when a judge is determining the length of sentence, it should not normally exceed 15 years, and may not exceed 21 years.[97]

While judges have the discretion to extend the fixed term of a sentence up to five years at a time, this can only be done on application by the prosecuting authority which must be made more than three months before the expiry of the sentence. [98] In addition, prior to pronouncing a sentence of preventive detention or imprisonment, the Norwegian Penal Code provides that a "social inquiry" (as translated) must be carried out on the person charged.[99] While it is unclear what this entails, it is clear that such an inquiry allows for the personal circumstances of the offender to be obtained prior to sentencing and prior to incarceration. This is more likely to ensure that an appropriate and befitting sentence is imposed on the offender and any support that may be required to effectively rehabilitate and reintegrate an offender into society.

The comparative analysis indicates a determined avenue/guideline within which courts exercise their sentencing discretion. In the absence of such guidelines in Namibia, the effect of the *Gaingob* judgment on the court's sentencing discretion is necessary.

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95 *Solem v Helm* [1983] US Supreme Court, 82-492 US 277.
96 *Harmelin v Michigan* [1991] US Supreme Court, 89-7272 US 957.
97 Norwegian Penal Code, section 39(e). Note: This description is based on a non-official translation of the Penal Code.
98 Ibid, section 39(e).
99 Ibid, section 39(d).

8.6 POST - EFFECT OF THE DECISION ON *GAINGOB*

8.6.1 Sentencing discretion

Section 276 of the Namibian Criminal Procedure Act places a discretion on the sentencing court to impose imprisonment without placing a limit on the period imposed. A superior court would not interfere with a discretionary order unless it is found to have been exercised arbitrarily or unreasonably.[100] The *Gaingob* judgment is not aimed at interfering with such discretion, but merely serves to guide the courts when exercising their sentencing discretion. The court cautions sentencing courts to take cognisance of the right to humanity and dignity of every individual and the fact that sentences which potentially remove an offender's realistic hope of ever being released undermine the statutory purpose of rehabilitation and societal integration as an important consideration. To date, numerous court decisions have aligned to impose life imprisonment rather than long periods of sentences. [101]

From a comparative analysis, the Canadian, American and Norwegian Criminal Codes provide sentencing principles that constrain judges' discretion in sentencing. Such an approach may not necessarily be welcomed within our jurisdiction as this may mirror a limitation on the courts' discretionary powers that are most fundamental for the proper functioning of the courts. Sentencing guidelines also tend to ignore the principle of individualisation which considers circumstances of each case. In the exercise of the discretion, courts would have to consider factors such as affording proportionality to the 'gravity of the offence and the degree of responsibility of the offender'[102]; consideration of mitigating and aggravating factors to reduce or increase the sentence; that like sentences must be imposed on like offenders for like offences[103]; that consecutive sentences must not be unduly long or harsh[104]; 'an offender should not be deprived of their liberty, if less restrictive sanctions may be appropriate'[105]; and 'all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community'.[106]

While the Canadian Supreme Court has not yet released a decision with the legal analysis and effect of *Gaingob,* the recent decision in *Gaingob* provides an interesting comparative analysis. Since the Canadian Charter of Rights and Freedoms does not have a codification of the right to dignity, this analysis may be slightly limited in assisting such a finding in Canada. Nevertheless, the Supreme

100 *S v Shikunga and Another* 1997 NR 156 (SC), cited in *Schiefer* case (Note above 8) para 20.
101 See latest unreported decision of *S v David* (CC 11/2018) [2020] NAHCNLD 82 (6 July 2020).
102 *Canadian Criminal Code* (Note 70 above) section 718.1.
103 Ibid, section 718.2(b).
104 Ibid, section 718.2(c).
105 Ibid, section 718.2(d).
106 Ibid, section 718.2(e).

Court of Namibia also relied upon rights such as the right not to be subjected to cruel, inhuman or degrading treatment or punishment. This part of the judgment may provide Canadian lawyers with comparative jurisprudence on which to build a similar argument. For the time being, the principles of sentencing, methods of early application for parole eligibility, and the Charter of Rights and Freedoms provide some level of protection from excessive sentencing. Given the ability in the Criminal Code to order consecutive sentences, the possible effects of *Gaingob* are much wider reaching than only within the Namibian borders. The countries with similar rights structures and the court's reliance on multiple rights in *Gaingob* provide a solid foundation for use across the ocean.

8.6.2 Constitutionality of Section 115 and 117 Correctional Service Act

The court observed at paragraphs 58 and 72 of the *Gaingob* judgment that the appellants are clearly treated differently from the offenders sentenced to life imprisonment. This means that the appellants have to wait 20 years more than those sentenced to life imprisonment to become eligible for parole. The glaring unfair treatment in the two sections is of concern and a possible amendment in this regard is highly recommended in order to afford the same equal benefit and privilege to offenders sentenced to life imprisonment or to a determined period. However, this question was not placed before the Supreme Court. No constitutional invalidity of either section was sought nor made by the Court in terms of Article 25 of the Constitution and the two sections are still in force.

8.6.3 Effect on offenders

A delegation consisting of Supreme Court and High Court Judges as well as the Chief Magistrates visited the various correctional facilities as required by section 122 of the Act and reported their observations to the Commissioner-General as the head of the Correctional Facilities. The majority of the complaints received from inmates relate to, (a) the long sentences imposed and the procedure to be followed to have them set aside; and (b) the wrong computation of prison terms by the prison authorities which results in offenders due for release being unlawfully detained at the facilities.

Furthermore, it became evident that several offenders lost hope in even participating in rehabilitation programmes because of the view that there is no chance of being reintegrated back into society, hence no need to be rehabilitated.[107] In interpreting section 12 of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court held that 'it is not the detention itself but its indeterminate quality that harbours the potential for cruel and unusual punishment', emphasising the devastating effects 'of an indeterminate sentence on a dangerous offender.'[108] The

[107] Prison Report submitted to the Chief Justice.
[108] *R v Lyons*, [1987] 2 S.C.R. 309 para 46.

court specifically stated that an analysis under section 12 of the Charter 'must concern itself, first and foremost, with the way in which the effects of punishment are likely to be experienced'.[109] This necessarily includes parole eligibility as it is one of the main factors practically affecting the offender.

This is the very concern that the Court raised as undermining the very purpose of the *Correctional Service Act* and should be avoided. With the result that long sentences may potentially be unconstitutional, it is hoped that it will instil a sense of hope in offenders in one day being reintegrated back into society.

8.6.4 Effect on the administration and resources

The correctional service was recently transformed from the old system of prisons with the aim of concentrating more on the rehabilitation of offenders. With regards to the imposition of long sentences which vitiate hope, it was submitted that this decapitates the ability of offenders to fully participate in rehabilitation programmes and is thus not assisting the correctional service in achieving its objective. The Commissioner General of the Namibian Correctional Services has also identified that long sentences are handicapping the full achievement of the goals of the service. He opined that sentences should leave an offender with the hope of one day being released, presumably to successfully re-integrate back into society and use the skills obtained through various rehabilitation programmes.[110]

The effect of the *Gaingob* judgment also did not spare the resources of the High and Supreme Court. The flood gates were opened and accused persons who were sentenced to long terms of imprisonment are now bringing applications for leave to appeal to the Supreme Court. The approach adopted by the courts recently is to set these applications down for leave to Appeal in cases where such an application was already not refused. In the later instance, an accused would have a right to petition the Chief Justice for leave to appeal against the sentences imposed. The common grounds of appeal visible from the applications is the declaration of unconstitutionality of long sentences and constitutional equality in the treatment of offenders. The High Court has therefore begun to align itself to allow leave to appeal to the Supreme Court on sentences imposed before the judgment of *Gaingob* on strong grounds of prospects that the Supreme Court would come to a different conclusion. [111]

8.7 RECOMMENDATION

It would be helpful in order to ensure that the offenders serving unconstitutionally long sentences are brought before court sooner than later, for the court to consider

109 Ibid para 48.
110 *Gaingob* case (Note 39 above) para 24.
111 One such decision is *S v Swartz* (CC 48/2007) [2019] NAHCMD 400 (09 October 2019), para 12.

appointing legal practitioners to act Amicus curiae in such applications and Appeals to the Supreme Court. This will ensure that the offenders who may not have the luxury of a legal practitioner of their own are assisted and advised accordingly. The Directorate of Legal Aid would also play a significant role is assigning its resources to any offenders who may seek legal aid to pursue such an application for leave to appeal or a petition to the Supreme Court and eventually to be assisted in prosecuting the appeal against sentence.

8.8 CONCLUSION

The *Gaingob* judgment has been viewed as placing a cap on the sentencing discretion of the court when it comes to imposing a consecutive sentence term. The Supreme Court, however, developed a sentencing guideline when it comes to serious crimes such as murder and robbery and this should not be seen as a limit on the judges' sentencing discretion. Precedents from the Supreme Court are binding on all courts, unless reversed by the court itself.[112] Life imprisonment is therefore the preferred sentence where the circumstances of the case would justify the removal of the offender from society for a considerable time[113] because society legitimately needs to be protected against the risk of a repetition of such conduct or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation.[114] In setting aside and substituting the sentences with life imprisonment, the Supreme Court created a more visible hope to the offenders of being released in terms of section 115. At the same time, the *Gaingob* judgment is a testimony of the harmonious operation between two branches of government both aimed at protecting the rights of offenders and enabling the smooth operations of the correctional service as a rehabilitating institution.

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112 The Constitution of Namibia, 1990, article 81.

113 The Supreme Court relied in *S v Bull; S v Charvulla* 2001 (2) SACR 681 (SCA) 693j-694a, confirmed in *S v Nkosi* 2003 (1) SACR 91 (SCA) para 7.

114 *Tcoeib* case (Note 7 above) 32B-C. The court also adopted the approach in *S v Siluale en Andere* 1999 (2) SACR 102 (SCA).

CHAPTER 9

The role of the Supreme Court of Namibia in demystifying transnational corporations' accountability for international crimes

Masake Pilisano

9.1 INTRODUCTION

The Namibian Supreme Court is the highest court in Namibia, thus, it has jurisdiction to adjudicate on any issue in Namibia, including matters that concern transnational corporations. This chapter analyses the role of the Namibian Supreme Court in holding transnational corporations accountable for the commission of crimes. The premise of the analysis stems from a distinct theoretical framework, namely: adjudication over international crimes with the objective to put an end to impunity for transnational body corporates who are responsible for international crimes such as crimes against humanity, war crimes, acts of terror, to mention a few. To achieve this primary objective, the chapter, first, attempts to analyse the concept of international crimes. Here, the two positions are juxtaposed, that is, the concept of international crimes as understood in the context of the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute) on one end, and on the other end, international crimes as understood from the criminal justice perspective. In addition, the chapter unpacks the concept of transnational corporation with the object to delineate the same from other juristic entities such as domestic corporations without international or transnational characteristics.

In the second place, the chapter analyses the Namibian legal framework. The objective here is to evaluate whether the current Namibian legal framework sufficiently supports the Supreme Court's role in holding transnational corporations accountable for the commission of crimes or otherwise. Third, the chapter endeavours to examine the Supreme Court's jurisdiction over these transnational corporations, alternatively, the Supreme Court's extraterritoriality scheme. Fourth, the chapter undertakes a comparative study with selected jurisdictions such as the Netherlands's and the United States of America's (USA) approaches to transnational corporate accountability for international crimes. The USA is selected based on its active practice of extraterritoriality through the Alien Tort Act, whereas the Netherlands is selected based on its advanced, and peculiar legal framework on corporate criminal liability for international crimes and an example in point is the successful prosecution of Mr Guus Kouwenhoven, as director for a company which was indicted for international crimes that were committed in Liberia. The detailed analysis of the case is discussed below. It suffices to state that these approaches are used as persuasive reagent for demystifying the accountability of transnational body corporates for international crimes. Fifth, the chapter concludes by drawing

lessons from legal literature and practices observed from other jurisdictions to enhance the Supreme Court's role in demystifying transnational body corporates' accountability.

9.2 CONTEXTUAL MEANING OF INTERNATIONAL CRIME

The concept of international crime is a subject of much debate world-wide. It is observed from a plethora of legal literature[1] that the definition of international crime is far from being settled – it is complexly contentious. The importance of defining what an international crime is, in this chapter, cannot be overstated:[2] and this includes the provision for a common understanding and interpretation of international crime and the usage thereof.[3] For instance, the term or phrase international crime, is capable of procuring contrasting connotations or meanings at a given time and situation. Considering this above underpinning, the conceptual and textual meaning of international crimes is unpacked below.

Einarsen interchangeably uses the concept of '*international crime'* with '*universal crime*'[4] and posits that:

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1 PH Masake (2019) "A critical consideration of the exclusion of corporate criminal liability for the atrocity crimes under the Rome Statute of the International Criminal Court" LLD Dissertation, Stellenbosch University, Available at <https://scholar.google.com/scholar?hl=en&as_sdt=0% 2C5&q= A+critical+consideration+of+the+exclusion+corporate+criminal+liability+for+atrocity+ crimes+ under+the+ICC&btnG=>; MC Bassiouni (2008) "International Crimes: The Ratione Materiae of International Criminal Law" in: M Cherif Bassiouni (ed.), *International Criminal Law Vol. I: Sources, Subjects and Contents* (3rd ed) Martinus Nijhoff Publishers: Leiden, 129; A Cassese (2003) *International Criminal Law* Oxford University Press: Oxford, 23; G Werle (2005) *Principles of International Criminal Law* TMC Asser Press: The Hague, 29; GL Croxatto (2016) "The crime of aggression in International Criminal Law: Challenges in jurisprudence and doctrine" Vol. 12(1) *Justicia Juris* ISSN 1692-8571, <http://www.scielo.org.co/scielo.php?pid=S1692-85712016000100001&script=sci_arttext&tlng=en>.

2 F Macagno (2010) "Definitions in law" *Bulletin Suisse de Linguistique Appliquée* 2: 199-217 at 200 posits that "definitions are not simply propositions, but the propositional contents of speech acts. For instance, some definitions are used to describe the meaning of a term (''murder is the unlawful killing of one human by another, especially with premeditated malice''), while others impose or establish a new meaning. A clear example can be found in contracts, where the parties establish new meanings for specific terms used in their agreements."

3 JW Van Mil & M Herman (2016) "Terminology, the Importance of Defining" Vol. 38(3) *International Journal of Clinical Pharmacy* 709-713 at 710.

4 T Einarsen (2013) "New frontiers of international criminal law: Towards a concept of universal crimes" Vol. 1(1) *Bergen Journal of Criminal Law and Criminal Justice*, 1-21 at 11 observes that "the term 'universal crimes' applies to conduct which (1) manifestly violates a fundamental universal value or interest, provided that the offence is (2) universally regarded as punishable due to its inherent gravity, (3) recognised as a matter of serious concern to the international community as a whole, and (4) proscribed by binding rules of international law, and provided that (5) criminal liability and prosecution is not dependent upon the consent of a concerned state (the territorial state where the crime was committed or the national state of an alleged perpetrator or victim)."

> International crimes, which may also be referred to as 'universal crimes' because of their inherent gravity and violation of universal values and interests […].[5]

It is common knowledge that there are as many definitions of what international crimes are as there are opinions or propositions of legal scholars and practitioners. To buttress this argument, for example: Werle posits that 'crimes under international law are all crimes that involve direct individual criminal responsibility under international law'.[6] However, O'Keefe opines that 'no common understanding, let alone common definition of international crime exist'.[7] Similar to O'Keefe's proposition, Bassiouni argues that 'scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law'.[8] On this score, this chapter does not pretend to bring consensus as to what constitutes international crimes. Rather, it adopts the obvious – yet purposively – and the commonly accepted diatomic approach to defining an international crime. In this manner, two propositions are juxtaposed, that is: the concept of international crimes as understood in the context of the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute) – the narrow definition, on one end, and on the other end, international crimes as understood from the criminal justice[9] perspective, loosely known as, *transnational crimes* – the broader definition.[10] These two propositions are analysed below.

9.2.1 International crimes in the context of international criminal justice

From the Namibian Supreme Court decisions, the full definition of what constitutes transnational crime is yet to be known. However, inference on what constitutes a

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5 Ibid 2.

6 G Werle (2005) *Principles of International Criminal Law* TMC Asser Press. See also KJ Heller (2017) "What is an International Crime? A revisionist History" Vol. 58(2) *Harvard International Law Journal*, 353 354.

7 R O'Keefe (2015) *International Criminal Law* Oxford University Press: Oxford, 47.

8 Bissiouni (Note 1 above) 142.

9 K Daly (2017) "Criminal justice system: Aims and process" in D Palmer, W de Lint & D Dalton (eds) *Crime and justice: A guide to criminology* (5th ed) Thomson Reuters/ Lawbook Company: Pyrmont, NSW, 110 describe criminal justice as follows: "We often hear reference to the *criminal justice system*, but it is not a system at all. Rather, it is a convenient arrangement of a number of state-run bureaucratic institutions that deal with offending and offenders. These institutions have an *investigative arm* (police and prosecution authorities, together with specialist investigative agencies), *adjudicative* arm (the criminal courts), and *correctional arm* (prisons, community corrections, and probation and parole services)."

10 A Fichtelberg (2008) *Crimes without borders: An introduction to International Criminal Justice* Pearson: New York, 6 identifies two categories of international crimes: a) those which fall within the jurisdiction of the International Criminal Court 'often branded as core crimes', and b) transnational crimes – "which are offences that have a substantial effect across national borders." The latter category transcends any local or national government.

transnational crime could be deduced from *S v Postrick Mwinga.*[11] In this matter, the facts were that the deceased was shot at from the Namibian side, whereas, the bullet struct and killed the deceased on the Zambian side of the border.[12] Here the Supreme Court of Namibia was of the view that a transnational crime includes a crime which commences in one jurisdiction and is completed in another jurisdiction. Other views as construed in the context of criminal justice, transnational crimes encapsulate and refer, as Duhaime descriptively puts it, to:

> Crimes which affect the peace or safety of more than one state or which are so reprehensible in nature as to justify the intervention of international agencies in the investigation and prosecution thereof.[13]

Some scholars define international crimes with reference to '*all acts which the international criminal law deems universally criminal'.*[14] Dugard classifies international crimes into two categories, namely: (a) international crimes proscribed by the customary international law, and (b) those proscribed by international treaties. The latter category includes, *inter alia*, crimes such as genocide,[15] apartheid,[16] torture,[17] hijacking,[18] and international terrorism.[19] To a large extent, the international treaties that proscribe international crimes influenced scholars to attempt to draw a bucket list of international crimes, limiting it to crimes which were specifically proscribed by the treaties and excluding crimes which were not proscribed by international treaties.[20] Fichtelberg defines international crimes with reference to 'those crimes that violate international criminal law and are punished by international courts and tribunals.'[21] Fichtelberg further opines that the concept of *international crime* is purely a creature of international criminal law.

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11 Case No. SA 1/95 Appeal Judgment of the Namibian Supreme Court delivered on 11/10/1995.

12 Ibid 167H.

13 Duhaime Law Dictionary (2019) available at <http://www.duhaime.org/LegalDictionary/I/InternationalCrime.aspx> accessed on 05 September 2019.

14 Heller (Note 6 above) 354.

15 International Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

16 International Convention on the Suppression and Punishment of the Crime of Apartheid adopted by the General Assembly of the United Nations on 30 November 1973.

17 International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. adopted by the General Assembly of the United Nations on 10 December 1984.

18 International Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague, on 16 December 1970.

19 International Convention for the Suppression of the Financing of Terrorism, 9 December 1999.

20 I Marchuk (2014) *The fundamental concept of crime in international criminal law: A comparative law analysis* Springer: Heidelberg 71.

21 Fichtelberg (Note 10 above) 6.

It is not surprising that some scholars, given the contrasting opinions on the definition, argue that there is no universally accepted definition of what constitutes an international crime.[22] For instance, Bassiouni argues that:

> [t]he writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law.[23]

It is without difficulties to agree with Bassiouni's position that any attempt that is aimed at defining international crime, is often than not, met with challenges of delimiting the contour for purposes of obtaining a standardised definition.[24] These, challenges bring to the fore a series of technical questions that need to be resolved. The concerns that may ensue from the quoted descriptive definitions of what constitutes international crime include for instance: What type of conduct amounts to international crime? What distinguishes international crimes from other crimes – criteria that should be used? Should there be a bucket list of what constitutes international crimes? These questions are amongst other questions which one can pose regarding the discourse.

9.2.2 International crimes in the context of Rome Statute

There is a proposition that the narrow definition of international crimes, in contrast to the wider definition stated above, defines international crimes with reference to the specific crimes enumerated in the Rome Statute.[25] Understood in the context of the Rome Statute, international crimes are grazed as international *core crimes* – which are construed as the most serious crimes of concern to the international community.[26] The Rome Statute recognises and at the same time limits the jurisdiction of the International Criminal Court (ICC) to have jurisdiction over four types of crimes, namely:[27]

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes; and
(d) The crime of aggression.

The fact that the Rome Statute recognises only four types of crimes as crimes that can be punished by the ICC to the exclusion of all other crimes which would have been included in terms of the wider definition attracted critics from the proponents of the wider definition of international crimes. The critics, *inter alia*, include that the

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22 Heller (Note 6 above) 354.
23 Bassiouni (Note 1 above) 142.
24 Bassiouni (Note 1 above) 142.
25 Werle (Note 6 above) 26.
26 MM DeGuzman (2013) "The international criminal court's gravity jurisprudence at Ten" Vol. 12(3) *Washington University Global Studies Law Review* 475 -486 at 475.
27 Article 5 of the Rome Statute of the International Criminal Court.

definition excludes several important crimes that have an international character, citing for instance: drug trafficking, piracy, terrorism and trafficking in persons, just to mention a few.[28]

It is worth noting that from the date on which the Rome Statute came into operation, the Namibian Supreme Court did not adjudicate over international crimes, for the Supreme Court to pronounce itself on the definition. Thus, the narrow definition of international crimes as is prescribed by the Rome Statute, it is argued, may be subsumed by the Namibian Supreme Court by virtue of article 144 of the Namibian Constitution which enjoins international law as forming part of the Namibian domestic laws. A detailed discussion on the implications wrought by article 144 of the Namibia Constitution is provided below, under the section that deals with the Namibian legal framework.

9.3 TRANSNATIONAL CORPORATION: WHAT IT IS?

The concept of transnational corporations, though it is distinguishable, is often conveniently and interchangeably used to entail multinational corporations or global corporations.[29] Understood in this context, transnational corporations refer to business entities or companies that operate in more than one territorial jurisdiction of a given state. In terms of the Companies Act 28 of 2004, the term *'company'* means a "[c]ompany incorporated for gain or not for gain as contemplated under chapter 4 of this Act and includes any body which, immediately before the commencement of this Act, was a company in terms of the repealed Act."[30] Further, the Companies Act of 2004 defines an *external company* as:

> A company or other association of persons, incorporated outside Namibia, which has a place of business in Namibia, or which was an external company in terms of the repealed Act.[31]

It is important to observe here that the concept of external company is understood to include transnational corporations. There is scholarly agreement that transnational companies indeed have investments in various other countries[32] – they could either

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28 Fichtelberg (Note 10 above) 6.

29 M Kordos & S Vojtovic (2016) "Transnational corporations in the global world economic environment" Vol. 230 *Procedia - Social and Behavioral Sciences*, 150 - 158 at 151; The United Nations Organisation on Trade and Development (UNCTAD) conference held in (2016) described "*Transnational corporations*' as "legal entities or entities without legal personality consisting of parent companies and their foreign affiliates." Kordos & Vojtovic (2016) defined the parent company as "an enterprise that controls assets of other entities in countries other than the mother country, usually by owning a capital stake. Foreign affiliate is a legal entity or entity without legal personality in which an investor as a resident in other economy holds a share that allows a long-term interest in managing of this company."

30 Section 1 of the Namibian Companies Act 28 of 2004.

31 Section 1 of the Namibian Companies Act 28 of 2004.

32 O Tahirli (2017) "Transnational companies: Definition, specification and advantages" Vol. 33 *İstanbul Aydın Üniversitesi Dergisi* 79-92 at 80.

deal in the same or different products or services in such different countries without any further adaptation. In terms of their characteristics, transnational corporations are more difficultly structured organisations with a more complex inner system.[33]

The structural complexity is exacerbated by the fact that instead of directly opening certain branches in one country by themselves, they may opt to invest into the companies that open those branches/entities, whilst retaining the ruling power to each of the branches.[34] Kordos and Vojtovic argue that transnational corporations are capable of directly affecting new trends in international business, global competitiveness on international markets as well as economies of states or nations.[35] However, as Kemp et al. observe, the activities committed by transnational corporations may not be purely innocent, rather, they may be construed as criminal conduct or wrongful to give rise to delictual claims.[36]

9.4 HISTORICAL AND DOCTRINAL DEVELOPMENT OF TRANSNATIONAL CORPORATE LIABILITY

The doctrinal development of corporate accountability owes its origins to the principle of vicarious liability founded on master and servant relationship.[37] Literature suggests that the vicarious liability was conceived by courts, when interpreting as to whether a servant's conduct could be imputed on the master.[38] In this form, vicarious liability has been applied in some countries to hold corporations liable for the conduct committed by servants of the corporations.[39] It must be qualified here, in contrast to the vicarious liability applied model, that other countries apply principles such as aggregation,[40] directing mind,[41] and corporate culture (policy) to hold corporations criminally liable.[42]

33 F Ahen (2019) "Globalisolationism and its Implications for TNCs' Global Responsibility" Vol. 4 *Humanistic Management Journal* 33-55 at 34.

34 D Weissbrodt (2014) "Human Rights Standards Concerning Transnational Corporations and Other Business Entities" Vol.23 *Minnesota Journal of International Law* 135 - 171 at 136.

35 Kordos & S Vojtovic (Note 29 above) 151.

36 G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg (2012) *Criminal Law in South Africa* Oxford University Press: Southern Africa, 215; B Fisse & J Braithwaite (1993) *Corporations, Crime and Accountability* Cambridge University Press: Sydney, 19.

37 Masake (note 1 above) 38.

38 J Bernard (1984) "The historical development of corporate criminal liability" Vol. 22(1) *Criminology* 3 at 4.

39 Ibid

40 United States of America applies vicarious liability, aggregation and moving towards corporate culture.

41 United Kingdom.

42 Sweden.

The principle of corporate criminal liability is recognised in some countries such as Namibia,[43] South Africa,[44] the United Kingdom,[45] and Sweden[46] just to mention a few. In contradistinction, some countries such as Germany[47] and Italy[48] do not recognise the concept of corporate criminal liability. Strictly stating, under these countries, a juristic person is construed as a fictitious person without a soul to damn.[49] Consequently, corporations are deemed not to be capable of performing an act - however, directors of such corporations may be imposed with administrative fine for the wrongful conduct committed and performed whilst in position of authority, such as fraud, money laundering, illicit trade, to mention a few.

The recognition and application of the principle of corporate criminal liability faces several challenges, *inter alia*, that: it is not widely practiced in order to propel or elevate it to a customary international law status. In addition, in the countries in which it is recognised, it is not consistently applied.[50] For instance, corporate liability is varyingly founded on aggregation or vicarious liability or corporate culture or a combination of these models, etcetera.[51] Furthermore, the principle is not recognised under the purview of the Rome Statute of the ICC. It is important to note here that at international criminal law level and specifically under the Rome Statute of the ICC, there were proposals to include a corporate scheme. However, these proposals were met with resistance for various reasons, not limited to lack of time, application of complementarity rule, inconsistence in the application of the principle of corporate criminal liability, to mention a few.[52]

Suffice to state here that notwithstanding the current challenges that the principle of corporate criminal accountability is not recognised at international law, it continues to break the non-recognition barriers at domestic level. The reason for this fast trekking recognition is owed to the fact that transnational corporations enjoy rights and privileges under international law and with no obligations whatsoever. Furthermore, corporations hold economic power to an extent that they can influence and direct the political will of countries, especially, countries with relatively poor economies and governance.

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43 Namibia applies vicarious liability model.

44 South Africa applies vicarious model.

45 United Kingdom applies the Will Theory model and moving towards corporate culture.

46 Sweden applies the corporate fines model.

47 Germany applies the administrative fines model.

48 Italy applies administrative fines model.

49 Masake (Note 1 above) 53-59.

50 Masake (Note 1 above) 61.

51 Namibia and South Africa apply vicarious liability, where as USA apply the aggregation, and the UK moving towards corporate culture.

52 For a detailed discussion on the exclusion reasons, see, Masake (Note 1 above) 64-140 citing reasons ranging from time constraints, complementarity issues, etc.

9.5 LEGAL FRAMEWORK ON TRANSNATIONAL CORPORATE ACCOUNTABILITY

The legal framework that provides for transnational corporations' accountability from the perspective of the Namibian jurisprudence, which is unpacked below, includes: The Namibian Constitution, Companies Act 28 of 2004 as amended ("Companies Act"), Criminal Procedure Act 57 of 1977 as amended ("Criminal Procedure Act"), International Cooperation in Criminal Matters Act 9 of 2000, Prevention of Organised Crime Act ("POCA") and the Rome Statute of the ICC, to mention but a few.

There are several legal instruments which are at the disposal of the Supreme Court and which form part of the legal framework on the accountability of transnational corporations, thus, the instruments discussed below are not exhaustive. First, the Namibian Constitution[53], as the supreme law, recognises the Supreme Court as the apex court in Namibia[54] and it enjoins international law to apply in Namibia without first domesticating such international law and international criminal law is not an exception.[55] It provides for various criminal law principles, *inter alia*, as is contemplated in article 12, subject to these principles' applicability, as it is canvassed in article 5 thereof. For instance, the principles of fair trial apply to both a natural and juristic person. It is submitted here that the Namibian jurisprudence construes transnational corporation as subject of the Namibian law.

Secondly, the Companies Act provides for the definition of a company and the definition includes "external companies" which could be construed to entail "transnational corporations" as was elucidated above. More significantly, the fact that the Companies Act recognises transnational corporations, it obviates the enjoinment of, or it subjects the transnational corporations to the corporate criminal scheme contemplated in terms of section 332 of the Criminal Procedure Act. Furthermore, it regulates the conduct of companies and it criminalises certain company conduct. An example here is various criminal offences in respect of external companies or transnational corporations contemplated in terms of section 339 which state that:

> (1) Any company incorporated outside Namibia which establishes a place of business in Namibia without complying with section 328(1), and every director, officer or agent of that company, commits an offence […],
> (2) Every external company which and every director or officer of that company who fails to comply with section 331, 332, 333, 334, 335, 336 or 337 commits an offence […].[56]

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[53] Article 1(6) of the Namibian Constitution.
[54] Article 79 and 81 of the Namibian Constitution.
[55] Article 144 of the Namibian Constitution.
[56] Section 339 of the Namibian Companies Act 28 of 2004.

In the Namibian context, a transnational corporation may be held liable through the conduct of its servant. Otherwise stated, the conduct of the servant of a company may be imputed on the company, provided that the requisite requirements for liability are satisfied. In this manner, the corporate liability scheme predicates the guilty finding of a director of a company and thereafter the company assumes liability through the dynamics of vicarious liability. A detailed analysis on the dynamics of the doctrine of vicarious liability is elucidated below. In terms of the Companies Act, directors may, *inter alia*, be held liable for fraudulent business conduct, for recklessly carrying on business[57] and so forth. These offences, prescribed in the Companies Act, may be brought against any person who had knowledge of the commission of the crime or was knowingly a party to the carrying on of the business in a fraudulent or reckless manner.[58] In a case where the prosecutor general declines to prosecute, a private prosecution may be instituted.[59]

Third, the Criminal Procedure Act provides for the prosecution of corporations as well as members of the associations. It follows that the legal position is that body corporations, either domestic or transnational corporations, are subject to both civil and criminal liability in Namibia. This domestic legal position can sharply be contrasted with the practice at international criminal law, whereas the latter does not recognise the criminal liability of transnational corporations. The exclusion of criminal liability of transnational corporations from the purview and scrutiny of international criminal law is a subject of much debate as is demonstrated below. However, in the present, the instructive provision on corporate criminal liability states as follows:

> (1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -
>
> (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
>
> (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have

57 The Namibian Companies Act 28 of 2004 section 430(1) state that "if it appears, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in that manner, is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

58 Section 430(4) of the Companies Act 28 of 2004.

59 Section 432(1) of the Companies Act 28 of 2004.

> been an omission (and with the same intent, if any) on the part of that corporate body.[60]

For the transnational corporation to be held criminally liable through the doctrine of vicarious liability, there are certain requirements that need to be satisfied. The law on the doctrine of vicarious liability with its constituent requirements has been settled. In *Crown Security CC v Johannes Hermanus August Gabrielsen*[61] the Supreme Court of Namibia stated that the requirements of vicarious liability, include that: the act or omission should be committed by an employee, servant or director of the corporation;[62] the employee was in course or scope of employment;[63] the servant or director was furthering the interests of the corporation;[64] and that there should have been a close connection between the conduct of the servant or director to the interest of the corporation.[65] It is interesting that in any prosecution proceedings against a corporation, a director or servant of that corporation is cited as a representative of that corporate body. The implication here, *inter alia*, is that the person cited in representative capacity, as the offender, is dealt with as if such person was the person accused of having committed the offence in question.[66]If the person who represents the corporation pleads guilty, such a plea is subject to confirmation by the corporation.[67] Furthermore, that's where a conviction is sought - such conviction is levelled against the corporation and not the representative. [68] However, there is an exception to this rule, namely that nothing prevents the court to hold a natural person liable together with the corporation for the crime committed.[69]

Fourth, there is the International Cooperation in Criminal Matters Act 9 of 2000 (ICCM Act). This legislation from the Namibian perspective is worth noting when a discussion on transnational corporate liability is held. This is because the absence of the ICCM Act exacerbates the commission of the transnational crimes. The opinion here is that transnational corporations which commit transnational crimes depend heavily upon the barriers of sovereignty. To buttress this opinion, Kamal argues that:

> [o]rganizations which orchestrate transnational crimes, and which then disperse and conceal the proceeds of their illicit activities the world over

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60 Section 332(1) of the Namibian Criminal Procedure Act 57 of 1977.
61 Case No: SA 40/2013 Supreme Court decision delivered on 8 July 2015.
62 Ibid 12.
63 Ibid 13; See, *Estate van der Byl v Swanepoel* 1927 AD 141.
64 Note 61 above para 14.
65 Note 62 above para 15.
66 Section 332(2)(c) of the Namibian Criminal Procedure Act 57 of 1977.
67 Section 332(2)(a) of the Namibian Criminal Procedure Act 57 of 1977.
68 Section 332(2)(a) of the Criminal Procedure Act 57 of 1977.
69 Section 332(2)(d) of the Criminal Procedure Act 57 of 1977 which provides that "*the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).*"

> have no regard for national borders. They are positioned to take advantage of the differences between legal systems, the clash of bureaucracies, the protection of sovereignty, and, at many times, the complete incapacity of nations to work together to overcome their differences.[70]

To effectively counter the clash of bureaucracies such as those identified by Kamal above, countries began to enter into bilateral or multilateral agreements to enhance cooperation in criminal matters. In the Namibian context, the ICCM Act plays an important role in rendering effective cooperation in criminal matters. The premise for this proposition is that the ICCM Act provides for various mechanisms, *inter alia*, ranging from regulating: (a) how evidence may be obtained from other jurisdictions and vice versa[71]; (b) the procedural and substantive law on the execution of sentences from other jurisdictions – the recognition of judgments from other jurisdictions;[72] (c) as well as laying down the procedure on confiscation and transfer of the proceeds of crimes[73], to state a few. The importance of these mechanisms cannot be overstated when a prosecution is mounted against transnational corporations. For example, it provides for an effective and efficient cross border criminal justice in relation to transnational crimes, *inter alia*: terrorism, trafficking and smuggling in persons, illicit drug trafficking, illicit arms trafficking and money laundering.

9.6 THE SUPREME COURT'S JURISDICTION OVER INTERNATIONAL CRIMES

9.6.1 General analysis on jurisdiction

The jurisdiction of the Supreme Court of Namibia over international crimes which are committed in the territory of the Republic of Namibia, at first sight, looks obvious and at most given. However, when discussing the criminal liability of transnational corporations for transnational crimes, the first glance disappears and reality sinks as one realises that the Supreme Court's jurisdiction may not be as obvious as

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70 B Kamal (nd) "International cooperation: mutual legal assistance and extradition" at page 82, available at <https://www.unafei.or.jp/publications/pdf/GG6/05-4_Malaysia.pdf>.

71 See, sections 2 to 12 of the International Cooperation in Criminal Matters Act 9 of 2000.

72 See, sections 13 to 18 of the International Cooperation in Criminal Matters Act 9 of 2000.

73 See, See, sections 19 to 26 of the International Cooperation in Criminal Matters Act 9 of 2000; See also, the Long Title of the Prevention of Organised Crime Act 29 of 2004 which amends ICCM Act and provide for "the measures to combat organised crime, money laundering and criminal gangs relating to racketeering activities; to provide for prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activities; to provide for the forfeiture of assets that have been used to commit an offence or assets that are the proceeds of unlawful activities; to provide for the establishment of a Criminal Assets Recovery Fund and a Criminal Assets Recovery Committee; to prohibit the smuggling of migrants and trafficking in persons."

was first perceived. The complexity here is increased by the fact that international private law mis-cross with international public law. Mills argues that in fact there is no mis-cross but rather, one may alternate the other.[74]

A quick observation here is that in relation to civil law - parties may, contractually, opt a forum which may have jurisdiction over an issue. In contrast, as Dugard observes, in criminal law, a country may be barred 'from applying its criminal law to persons, property or events in other countries'[75] - this is known as the territoriality principle. On jurisdiction, the *Lotus Case*[76] is instructive and it expounded as follows:

a) A state may not exercise its power in any form in the territory of another state, unless there is a permissive rule to the contrary.[77]
b) International law does not prohibit a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad. States have a wide measure of discretion to extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, which is only limited in certain cases by prohibitive rules.[78]
c) The territoriality of criminal law, therefore, is not an absolute principle of international law.[79]

From the *Lotus Case,* the general position is that the jurisdiction of domestic courts over criminal law is limited to the territory of the state. However, there are exceptions to the general rule, namely, where there is a permissive rule and without a prohibitive rule, a domestic court may exercise its jurisdiction over persons, property and events that occasioned in other territories. The question of jurisdiction has been long settled in Namibia - in the case of *S v Postrik Mwinga*[80] the Supreme Court held that:

> In my view, Namibian Courts faced with an 'International Law friendly' Constitution (Art 144) and with its already 'extensive' jurisdiction in common law, should not base its jurisdiction on 'definitional obsessions and technical formulations' but should stay in step with the other common law Commonwealth countries such as England and Canada. Thus, in order to determine whether the High Court has jurisdiction in a trans-national crime or offence all that is necessary is that a significant portion

74 A Mills (2018) "Connecting Private and Public International Law" in D French; K McCall-Smith & V Ruiz Abou-Nigm (eds) *Linkages and Boundaries in Private and Public International Law* Hart Publishing: Oxford 1, 2.
75 J Dugard (2011) *International Law: A South African Perspective* Juta: Cape Town, 147.
76 1927 PCIJ Reports, Series A no 10.
77 Ibid para 18-19.
78 Ibid para 19.
79 Note 76 above para 20.
80 Note 11 above.

> of the activities constituting that offence took place in Namibia and that no reasonable objection thereto can be raised in international comity. In casu a significant portion of such activities did indeed take place in Namibia. As Mr Maritz pointed out, at least the actus reus took place in Namibia. This was sufficient for the court a quo to assume jurisdiction.[81]

It therefore follows that, in regard to *jurisdiction over international crime*, the Namibian courts will assume jurisdiction over an international crime, if and when such a transnational crime was, (a) committed (commenced and completed) in Namibia, (b) it commenced in Namibia but completed elsewhere - through *subjective territoriality*, or (c) commenced elsewhere and completed in Namibia - through *objective territoriality*.[82]

9.6.2 Active and passive personality principles

The question of jurisdiction is not limited to the crime committed but it also extends to persons (nationals) – perpetrators or victims. Regarding *jurisdiction over persons*, there are several theoretical underpinnings that may be taken into consideration. These theories include 'active nationality' or 'passive personality' theory. Active nationality jurisdiction may be relied upon when a national, for example of Namibia, commits a crime against a foreign national in a foreign country. This form of jurisdiction has been criticised. In *S v Mharapara* the court stated:

> There is no rule of international law directing or obliging states to exercise criminal jurisdiction over their nationals for offences committed abroad. International law merely permits every state to apply its jurisdiction against its own citizens even when they are situated outside its boundaries […][83]

The passive personality principle entails that a state may exercise jurisdiction over persons who commit an offence in a foreign country where such an offence harms one of its nationals. The object of asserting jurisdiction based on passive personality is to protect the interests of citizens of the state. McCarthy argues that the passive personality principle is based on the duty of a state to protect its nationals in foreign country.[84] The country asserting jurisdiction is not necessarily concerned with the territory or place where the crime was committed, rather, it is concerned with the effects of the crime which is harmful to its nationals.[85] The passive personality principle has to a large extent been influenced by the political

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81 Ibid 171-2.

82 Dugard (note 75 above) 150 argue that 'the objective territoriality is found to be in the effects principle according to which the state in which the effect or impact of the crime is felt may exercise jurisdiction.'

83 1986(1) SA 556 (ZS) at 559E-G.

84 J G McCarthy (199) "The Passive Personality Principle and Its Use in Combatting International Terrorism" Vol. 13(3) *Fordham International Law Journal* 298 - 327 301.

85 Ibid 302

will to combat international terrorism.[86] In this manner, its origin is tainted with obscurity and controversies.

9.6.3 Extraterritoriality jurisdiction

The principle of extraterritoriality entails that a state may assert its jurisdiction by applying and enforcing its national laws on a person or event that occurred in a foreign state.[87] The state traverses across national boundaries to enforce its own law, rather than raising universal jurisdiction and applying international principles, for instance, international treaties or customary international law.[88] Curran argues that the rationale against the extraterritorial application of law arises from the tenet that respect for the equal sovereignty of all nations requires interdiction against the extraterritorial application of the laws of any one nation.[89]

The orthodox international law perceived that national law is territorial and has no legal effect beyond its geographical borders, and that States violate international law if and when they exercise extraterritorial jurisdiction over foreign conduct that does not affect matters in their territory.[90] This international law position was confirmed by the Supreme Court of Namibia in *Munuma v State*[91] and consequently was followed in *Likanyi v State*.[92] In these cases, the fugitives were abducted from Botswana by the Namibian Police Force (the receiving state), with the help or involvement of the law enforcement agents from Botswana without following the tenets of the extradition laws.[93] The accused raised a defence of lack of jurisdiction, that the Namibian courts lacked jurisdiction to prosecute and punish the accused. The legal question was whether the Namibian courts had jurisdiction to prosecute and punish an accused who was abducted from other countries. The Supreme Court of Namibia found that:

> [T]he court must decline jurisdiction in respect of a fugitive who was abducted with the involvement of agents of the receiving state. The same result will follow where agents of the receiving state connive with those of the refuge state to circumvent extradition laws to bring the fugitive before the courts of the receiving state. The exercise of coercive power such as an arrest by agents of the receiving state in the country of refuge is an act of international delinquency.

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86 Ibid.

87 K Zaluchi (2015) "Extraterritorial Jurisdiction in International Law" Vol. 17(4-5) *International Community Law Review* 403-412.

88 Ibid 410.

89 VG Curran (2013) "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v Royal Dutch Petroleum Co" Vol. 28(1) *Maryland Journal of International Law* 76-89 at 77.

90 Ibid.

91 Case No: SA 37/2015, Supreme Court Appeal Judgment delivered on 22 August 2016.

92 (SCR-2-2016) [2017] NASC, Supreme Court Appeal Judgment delivered on 4 August 2017.

93 Ibid para 69.

> International law does not countenance violation by one state of the territorial sovereignty of another. It is a violation of international law for a state to carry out an act of sovereignty such as an arrest in another state's territory. It does not matter that such an act is sanctioned by the country on whose sovereign domain the coercive act of arrest is being carried out because that is contrary to international law.[94]

The question remains to be answered as to whether the decline in asserting extraterritorial jurisdiction as demonstrated in *Likanyi,* and *Munuma* cases above will in the future survive the universality principle which is advocated by the Rome Statute of the ICC. Here it should be recalled that the Rome Statute of the ICC forms part of the Namibian legal system.

9.6.4 Universal jurisdiction

Universal jurisdiction allows states or international institutions (tribunals) to assert criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the country asserting jurisdiction. Under universal jurisdiction the state asserting its jurisdiction, depending on the legal system, may apply the domestic laws and international laws. Fundamentally, there are two theories that influence the reception and application of international law in national law, namely the monist and dualist theories. The monist theory treats national and international law as constituting a single legal system, whereas the dualist theory considers national and international law as separate legal systems.[95] The process of incorporation (monism) entails that the international rule is integrated in the national legal order so that the judiciary can directly apply that rule and this is the Namibian legal position as undergirded by article 144 of the Namibian Constitution.

It is argued here that considering that crimes prosecuted under universal jurisdiction are construed as crimes that affect the entirety of the international community, most serious and the fact that Namibia subscribes to a monist approach - much remains to be seen in as far as the exercise of extraterritorial jurisdiction concerned. The concept of universal jurisdiction is therefore closely linked to the idea that some international norms are *erga omnes*, or owed to the entire world community, as well as the concept of *jus cogens* – that certain international law obligations are binding on all states.

9.6.5 Inherent jurisdiction over crimes

The concept of inherent jurisdiction is a constitutional prerogative conferred on the Supreme Court.[96] It traces its origins from the English common law that a superior

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[94] Note 91 above paras 21-22*;* Note 92 above para 72.
[95] Dugard (note 75 above) 42.
[96] Article 78(4) of the Namibian Constitution.

court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. Inherent jurisdiction expounded by the Supreme Court in *Likanyi v S* refers to the Supreme Court's power to regulate its own procedures including drawing rules for its conduct in cases where there are no rules, or where the rules are not adequate to procure justice. The Supreme Court stated:

> Having concluded that the Supreme Court may […] relax the operation of res judicata in a criminal case in order to give a litigant an effective remedy, it must follow that in the absence of a specific procedure on how that power is to be exercised, the Supreme Court is competent in the exercise of its inherent jurisdiction to determine a procedure as to how that is to be done. It is important to reiterate that it is a power that will be exercised only exceptionally and not as of right.[97]

If this is a possibility, and under exceptional cases, for example, grave violations of human rights, then, what are the prospects that the Supreme Court will revisit its anti-extraterritorial approach? Inherent jurisdiction is an important tool for the Supreme Court, however, the question that remains is whether this jurisdiction could cover cases other than formulating rules for the conduct of the court? Alternatively, could this form of jurisdiction empower the Supreme Court to develop its rules and procedures on the prosecution and punishment of transnational corporations for international crimes? The object being to effectuate the direct prosecution of international crimes or direct application of international law in domestic courts, for instance, crime of aggression or war crimes.

9.7 PROSECUTING TRANSNATIONAL CORPORATIONS FOR INTERNATIONAL CRIMES

It is evident from the legal framework above that from the Namibian perspective, transnational corporations are subject of the law and may sue or be sued respectively. The approaches that may be adopted for purposes of prosecuting transnational corporations may vary and may, as circumstance may require, be subject to the complementarity principle – in case of *core crimes*. The approaches that may be adopted, *inter alia*, are prosecution based on national law, international customary law, grave breaches, international treaties and the Rome Statute of the ICC. These approaches are discussed below.

9.7.1 THE EFFECTS OF THE COMPLEMENTARITY PRINCIPLE

Theoretically stating, there are two methods that may be adopted in defining international crimes, which definitions may have influence on prosecuting transnational corporations, as was stated above, namely: prosecution of

[97] Note 92 above *Likanyi v S* Case No: SCR 2/2016, Supreme Court of Namibia decision delivered on 7 August 2017, at para 57.

international crimes based on the broader definition or on the narrower definition. If prosecution is based on the broader definition of international crimes, then the complementarity rule is excluded. However, if the prosecution relates to core crimes (narrower definition) which are contemplated in the Rome Statute of the ICC, then the complementarity rule (primacy rule) comes into play. The primacy rule entails that domestic courts have the primary jurisdiction over crimes which are proscribed by the Rome Statute of the ICC.[98] Furthermore, in the event where the domestic courts are unwilling or genuinely unable to investigate or prosecute, then the ICC assumes jurisdiction thereof. The Rome Statute of the ICC provides for the primacy rule as follows:

> […] recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[99]

Furthermore:

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be <u>complementary to national criminal jurisdictions</u>. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[100] (Underlining emphasis).

The legal implication of these provisions, among others, includes that where a country is seized with an international crime which is proscribed by the Rome Statute of the ICC, such a country may prosecute.[101] The failure to prosecute may give rise to admissibility issues. The issue of admissibility of the international crime before the ICC was determined in *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.[102] The court determined that for a matter to be inadmissible before the ICC, domestic investigation must demonstrate that it covered the same individual and the same act. Furthermore, that mere preparation or undertaking to investigate in future is not enough for a successful claim of inadmissibility before the ICC.

The admissibility issues traverse beyond a defect in national laws. In other words, could a defence or plea of defective national law be sustained under circumstances where a state fails in its primacy obligation? or fails in its obligation to implement the Rome Statute of the ICC? Conversely, can a state raise a defect in national law as defence for failing to cooperate with the ICC? As was pointed out above the primacy

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98 J Kyriakakis (2008) "Corporations and the International Criminal Court: The complementarity objection stripped bare" Vol. 19 *Criminal Law Forum* 115 120.

99 Para 6 of the Preamble of the Rome Statute of the ICC.

100 Article 1 of the Rome Statute of the ICC.

101 Kyriakakis (note 98 above) 121.

102 ICC-01/09-02/11 O A, para 36 Pre-Trial Chamber II, Judgment 30 May 2011.

rule, read *in tandem* with the state's obligation to cooperate with the ICC,[103]entails that domestic courts assume primacy in the investigation and prosecution of core crimes and not otherwise. Considered holistically, the gist of these provisions is to ensure that the state parties are afforded primacy jurisdiction over core crimes and positive obligations to implement the Rome Statute of the ICC by putting in place measures which are necessary in order to fulfil the state's obligations.

Therefore, a defect in national law may lead to propositions, among others: first in the event where a domestic rule conflict with a customary international rule, in most jurisdictions, the customary international rule prevails.[104] Secondly, it is the general rule of international law that the *jus cogens* nature of core crimes dictates their direct application to domestic jurisdictions and as a result states are obliged to cooperate and implement the Rome Statute. The legal question on defect in national law was adjudicated on in *Prosecutor v Tihofil Blaskic*[105] in which the court held that:

> […] there exists in international law, a universally recognised principle whereby a gap or deficiency in municipal law or any lack of the necessary national legislation, does not relieve states and other international subjects (juristic persons) from their international obligation.[106]

In the Namibian context, it is apparent that admissibility issues at the instance of a defect in the Namibian laws may not necessarily be problematic in as far as prosecuting and punishing transnational corporations is concerned. The premise for this averment includes that where the Namibian laws fail to provide for a specific issue, the Namibian courts may with ease resort to or apply an international rule to cure the defect. This proposition is supported by article 144 of the Namibian Constitution[107] which procures international law to form part of the Namibian legal system, thereby affording courts an opportunity to interpret and apply international law directly. The effect of article 144 of the Namibian Constitution is settled[108] - here

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103 Article 88 of the Rome Statute of the ICC.

104 Article 144 of the Namibian Constitution; Section 39(1)(b) of 1996 South African Constitution.

105 IT-95-14-T Judgment of 3 April 1996 Decision on the motion of the defence filed pursuant to Rule 64 of the rules of procedure and evidence.

106 Note 105 above para 7.

107 Article 144 of the Namibian Constitution provides "unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

108 *Thudinyane v Edward* (SA 17/2005) [2012] NASC 22 Supreme Court decision delivered on 12 October 2012 at para 16 deliberated on the applicability of the *United Nations Convention on the Rights of the Child,* the Supreme Court of Namibia's view was that "[…] counsel for parties were *ad idem* and submitted as follows regarding the applicability of the Convention to Namibia: Article 63(2)*(e)* of the Namibian Constitution provides that the power to agree to the ratification or accession to international agreements which have been negotiated and signed by the President of Namibia or his delegate vests in the National Assembly. The Convention was signed by Namibia on 26 September 1990 and ratified on 30 September 1990. Accordingly, and in conformity

the Supreme Court of Namibia in *Government of the Republic of Namibia v Cultura 2000*[109] stated that:

> Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community by providing that unless the Constitution otherwise stipulated, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.[110]

In this manner it is argued that the Namibian courts, whereas the Supreme Court of Namibia is not an exception, by virtue of the Namibian legal system (which is internationally friendly) are theoretically more prone to cooperate in areas such as prosecuting or extraditing transnational corporations responsible for international crimes.

9.7.2 Prosecution based on national law

It was demonstrated under the legal framework discussion above that there is a plethora of domestic laws that regulate transnational corporations. Thus, domestically, the Namibian laws recognise transnational corporations as subject of national laws - both the common law and legislations. In the same breath, these transnational corporations may be criminally prosecuted if they commit crimes.[111] The fact that the Namibian legal system recognises and provides for corporate accountability and for enforcement mechanisms entails that the Namibian courts may be guided by domestic laws in prosecuting and punishing transnational corporations.

It is important here to note that prosecuting and punishing transnational corporations for international crimes based on national law would entail to circumvent courts exercising extraterritorial jurisdiction to prosecute international crimes as ordinary crimes.[112] This is because some of the international crimes are foreign to national laws. For example, *a war crime* which is proscribed by the Rome Statute[113] is not expressly provided for in any of the Namibian national legislations. Thus, if the Namibian courts intend to prosecute *war crimes* without basing its prosecution on international law, it would mean that the acts of war crimes may be required to be taken in their ordinary meaning. An example in point here is that in 1999, a rebel group attacked various protected installations and unarmed civilian populations in the former Caprivi region, now Zambezi.

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with Article 144 of the Namibian Constitution, the Convention became part of Namibian law."

109 1993 NR 328 (SC).

110 Ibid 334.

111 Section 332 of Criminal Procedure Act 57 of 1977.

112 WN Ferdinandusse (2006) *Direct application of international criminal law in national courts* TMC Asser Press: The Hague18.

113 Article 8 of the Rome Statute of the ICC.

The gravity of the attack squarely constitutes war crimes committed in the context of peace time, alternatively, grave breaches where there is armed conflict of non-international in nature. However, these acts were reduced to crimes such as treason, sedition and public violence, entailing specific acts of murder, discharge of weapons in public, malicious damage to properties, etcetera. There is scholarly agreement that it is possible to prosecute international crimes based on national laws, however, the consequence of reducing the gravity of these international crimes to fit the domestic crime definitions may lead to failure of justice.[114]

9.7.3 Prosecution based on customary international law

Customary international law, often referred to as the common law of the international community refers to the philosophical idea that the unwritten or uncodified law that has been in practice for a long period of time is a binding law.[115] In this context, customary international law is a system of law deduced from the state practices (settled practices), states obligation to enforce (*opinio juris*), and state declarations (resolutions of political organs).[116] Customary international law is recognised as a source of international law[117] and it is by extension a source of law in Namibia as it is incorporated by article 144 of the Namibian Constitution.

It follows that customary international law obligates or creates an obligation requiring Namibia to protect human rights and punish all persons who are responsible for grave violation of human rights, this is an international obligation (*erga omnes*) - and this is based on the *jus cogens* characteristic of human rights. The point here is that *jus cogens* designates peremptory norms (crimes against humanity, war crimes, genocide etcetera) from which no derogation may be permitted by way of agreements, premised on the fundamental values which these norms uphold. These *jus cogens* norms permit no derogation: as such, the grave violation of human rights by transnational corporations is not an exception and – the commission of international crimes by corporations cannot be excused. Therefore, it is argued that premised on this assumption, there exists a compelling proposition that the issue of liability of corporations may be resolved by the application of the customary international law by the domestic courts.

The other significant issue to raise here is that if a domestic court prosecutes a transnational corporation for an international crime based on the customary international law, the defect on domestic law may not hinder courts to prosecute. Further to that, from the Namibian context, three streams may be feasible: a) treat the customary international law as contemplated in article 144 and directly subject transnational corporations to the Namibian legal framework; or b) receive the

114 Masake (Note 1 above) 18.
115 See, *North Sea Continental Shelf Case* 1969 ICJ Reports; *Asylum Case* 1950 ICJ Reports.
116 Dugard (note 75 above) 29.
117 Article 38(1)(b) of the International Court of Justice.

customary international law as forming part of the Namibian law and the courts to apply international rules to the issue - if the domestic laws are not sufficient; or c) alternatively, apply both the domestic rules and customary international law.

9.7.4 Prosecution based on international treaties

There are a series of continental and international treaties that expressly proscribe certain conduct and prescribe same as criminal.[118] Some of these treaties place obligations on the state parties to adopt the necessary measures to implement them by way of providing legislative reform: through civil, administrative or criminal schemes. These proscriptions extend beyond natural persons' conduct and contemplate to regulate the conduct of transnational corporations. The example is the *United Nations Convention against Transnational Organized Crime*[119] which specifically provides for criminal liability of legal persons:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.[120]

The transnational crimes referred to in the quoted provisions include serious crimes such as corruption, money laundering and participation in a criminal group to mention a few. The convention further provides for both substantive and procedural law on international cooperation,[121] confiscation and seizure.[122] The other instrument, from the African Union perspective, which progressively advances the theoretical and

[118] *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349; *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 4 February 1985; *The Convention on the Prevention and Punishment of the Crime of Genocide* was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260, the Convention entered into force on 12 January 1951.

[119] General Assembly Resolution 55/25 of 15 November 2000 Article 10 provides for liability of legal persons (companies).

[120] *United Nations Convention against Transnational Organized Crime,* General Assembly Resolution 55/25 of 15 November 2000 – article 10 provide for liability of legal persons.

[121] Article 11 of the *United Nations Convention against Transnational Organized Crime,* General Assembly Resolution 55/25 of 15 November 2000.

[122] Article 12 of the *United Nations Convention against Transnational Organized Crime,* General Assembly Resolution 55/25 of 15 November 2000.

practical development of the principle of corporate criminal liability is the *Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights* which provides that:

> […] the court shall have jurisdiction over juristic person, with the exception of states. Corporate intention to commit an offence may be established by proof that it was policy of the corporation to do the act which constituted the offence.[123]

The Namibian courts can rely on all these instruments (list of instruments not exhaustive) when adjudicating over crimes committed by transnational corporations. These instruments by virtue of article 144 read together with article 140 of the Namibian Constitution form part of the Namibian legal system and they may be applied directly by the Supreme Court of Namibia. It is therefore submitted that the Namibian Supreme Court can prosecute transnational corporations for transnational crimes based on international treaties.

9.7.5 Prosecution based on the Rome Statute of the ICC - the disjointed jurisprudence

It is important from the onset to state that in the past few years, the Namibian government mooted its intention to withdraw from the Rome Statute of the ICC, a position which appears to be a collective effort among the African leaders (AU).[124] Until the withdrawal becomes effective, the Rome Statute of the ICC still forms part of the Namibian legal system, thereby forming part of the international treaties and this could squarely fit within the discussion elucidated above. However, it is necessary for the Rome Statute of the ICC to be analysed separately. This is because unlike other international instruments, it narrows international crimes to a set of four crimes, namely: genocide, war crimes, crimes against humanity, and crime of aggression.[125]

Furthermore, and relevant to this chapter, it excludes corporate criminal accountability from the purview of the ICC.[126] This exclusion creates a disjointed jurisprudence between domestic courts which provide for a corporate scheme on one end and on the other end, the first permanent court (the ICC) which excludes the liability of corporations. For instance, in the context of the ICC, liability is limited to natural persons (only natural persons may be prosecuted and punished).[127] In contradistinction, the Namibian courts recognise both natural and legal persons as

[123] Article 46C (1) and (2) of the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights.

[124] A Kaure (2017) "The ICC: When is Namibia Going to Exit?" *The Namibian Newspaper* 28 February 2017, 7.

[125] Article 5 of the Rome Statute of the ICC.

[126] Article 25 of the Rome Statute of the ICC.

[127] Article 25 of the Rome Statute of the ICC.

subjects of criminal law capable of being prosecuted.[128] This observed disjoint is capable of causing uncertainty, for instance, which legal regime would be followed if a transnational corporation commits the crimes against humanity as in in the hypothetical example below? This legal uncertainty is exacerbated by the anti-extraterritorial approach adopted by our Supreme Court of Namibia.[129]

Hypothetically, where a transnational corporation obtains a concession to mine sand in Namibia and in the process the natives on the land where the extraction would take place are forced to relocate, subjected to rapes and even wilful killings for those who resist. Would the Namibian courts sacrifice the gravity of the crimes against humanity and prosecute these acts in their ordinary senses, as ordinary murder, rape, etcetera?; or would the court retain the gravity thereof and invoke the customary international law and prosecute offenders for a full scale crimes against humanity?; or would the court adopt a positivist (formalistic) approach that the Rome Statute of the ICC does not recognise corporate criminal liability and therefore, notwithstanding national laws, apply the Rome Statute of the ICC and release (acquit) the offending corporation on the plea of lack of jurisdiction (*Nullum crimen sine lege*),[130] alternatively, raising admissibility issues.[131] The disjoint is complex than it is demonstrated here and as such, its veracity has not yet been tested by the Supreme Court of Namibia.

9.7.6 Corporate criminal liability under self-regulatory framework

It was argued above that corporate criminal liability is recognised in certain jurisdictions (for instance Namibia, South Africa, UK, USA) but not recognised in countries such as Germany, etc, and even at the international sphere. The absence of a corporate criminal scheme at international level is not the end of corporate liability, that is: corporations, through soft law, may still be held to account for the wrongful conduct which they commit. A concerted effort to hold corporations liable for wrongful conduct (not necessarily limited to criminal wrongful conduct), is observed in various initiatives. These initiatives include the corporate social responsibility (CSR), in general, and specifically, CSR which is advanced by the Organisation of Economic Cooperation and Development (OECD). The OECD instruments call on state parties to require transnational corporations to conduct their business within the parameters of the laws. This includes but not limited to proscription on corruption, and corporate participation in international criminal activities.

The other notable approach to regulating corporations is the development by the international community of various instruments such as: The Code of Conduct by Transnational Corporations; UN Global Compact Principles; and the International

[128] See, section 332 of Namibian Criminal Procedure Act 57 of 1977.

[129] See, Note 91 above; and Note 92 above cases (NASC) decisions discussed above.

[130] Article 22 (1) of the Rome Statute of the ICC - A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

[131] See, article 17 and 19 of the Rome Statute of the ICC.

Labour Organisation Tripartite Declaration of Principles Concerning Multinational Enterprises. These instruments share common characteristics, namely: they are not mandatory, and that they encourage self-regulation (voluntary compliance). These instruments, in the context of corporate criminal liability, have attracted criticism. Among such criticism, as observed by Masake, is the argument that:

> Corporation has latitude to weigh the cost of non-compliance against compliance. If the costs for non-compliance are lesser than the cost of compliance, corporations may be tempted to opt for non-compliance.[132]

The ineffectiveness of these voluntary compliance mechanism led to the development and adoption by the UN, of the *Protect, Respect, and Remedy*[133] initiative as elucidated in Professor John Ruggie's report. The Ruggie's framework on business and human rights retained the voluntary corporate compliance scheme. Therefore, just like other voluntary mechanisms that preceded the Protect, Respect, and Remedy initiative, it failed to provide the sufficient force necessary to dissuade corporate criminal activities. The other notable initiative is the Equator Principles of Financial Institutions (the Equator principles), which is another initiative based on voluntary corporate compliance. The Equator principle, as per principle 10 (reporting), contemplates on naming and shaming instances of corporate non-compliance. This approach may persuade corporate compliance, but it falls short of the necessary force to enforce criminal law against corporation.

9.8 COMPARATIVE STUDY: NETHERLANDS AND USA PERSPECTIVE

The jurisprudential disjoint raised above has been tested in other jurisdictions such as Netherlands and the USA and these positions are briefly analysed below. In the Netherlands, the case of Guus Kouwenhoven is instructive. Mr Kouwenhoven, the owner of Royal Timber Company extracted timber from Liberia. It transpired that in order to gain more concessions, Royal Timber Company supplied weapons to Charles Tylor's regime. The weapons were used by Tylor's regime to root-out the rebel groups and as a result, atrocities were committed by Tylor's regime. The supply of weapons was made in direct defiance of the UNSC Resolution 1342 of 2001; 1408 of 2002; the EU Common Position 2001/357/CFSP as well as the Netherlands Sanctions Regulations. Mr Kouwenhoven was indicted and found guilty in his capacity as the owner of Royal Timber Company for war crimes. In the matter, the Supreme Court retained the gravity of war crimes and directly applied international law in domestic courts.[134]

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132 Masake (note 1 above) 153.

133 J Ruggie (2008) "Protect, Respect and Remedy: A framework for Business and Human Rights" 7 April 2008, 15 Document A/HRC/8/5.

134 See, *Prosecutor v Guus Kouwenhoven* Case No. 220043306 (ECLI: NL: GHSGR: 2008: BC6068) Court of Appeal decision delivered on 21 April 2017, available at <https://uitspraken.rechtspraak> accessed [14 September 2019].

The USA's experience is to some degree dissimilar to the Netherlands. This is because the USA courts have an option to exercise extraterritorial jurisdiction over events that occur outside the USA.[135] When this jurisdiction is invoked, the courts apply a mix of domestic and international law to the issue. Here, international law forms part of the USA legal order, *inter alia*, by virtue of self-executing treaties signed by the USA or customary international law.[136] The courts in the USA asserted extraterritorial jurisdiction over transnational corporations. An example in point is the *John Roe and Others v Unocal Corporation and Others*.[137] The transnational corporation was brought to court on allegations of gross human rights violation which occurred outside the US, that is, in Myanmar. The court assumed jurisdiction under the Aliens Tort Act of 1789. However, it was subsequently settled out of court.

9.9 CONCLUSION

There are a series of lessons that can be learnt from the past 3 decades of the Namibian jurisprudence. It was demonstrated in this chapter that the accountability of transnational corporations for transnational crimes is recognised in Namibia. However, until to date, the Namibian Supreme Court is yet to be seized with an opportunity to adjudicate over transnational corporations for international crimes. This is notwithstanding the fact that there was a rebellion attack that was directed at the unarmed civilian and government installations in the former Caprivi region. These events, though condemned, presented our jurisprudence with an opportunity to prosecute and punish international crimes as well as the possibility of extending investigations on the role played by corporations.

The assumption here is technical, namely: the attacks were committed by an organised rebel group (Caprivi Liberation Army); the attacks squarely meet the elements of war crimes committed during peace time and the attack constituted an armed conflict which is non-international in nature; Furthermore, these attacks could not have been possible without the rebel group being supplied with weapons - a fact which suggests the involvement of corporations. However, despite this compelling approach, our courts adopted to prosecute acts which fit the definitional elements of international crimes in their ordinary sense, *inter alia*, namely, treason and sedition. The contention is that this was a missed opportunity, in as far as developing both the corporate scheme and international criminal law as far as the Namibian jurisprudence perspective is concerned.

Furthermore, a lesson that can be learnt specifically from other jurisdictions, which is the domestic courts' extraterritorial jurisdiction over events that occur outside their territorial borders. Here, it was demonstrated that the Namibian Supreme

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135 P Dubinsky (2010) "International law in the legal system of the United States" Vol. 58 *The American Journal of Comparative Law*, 455-478 at 458.

136 E Engle (2006) "Extraterritorial corporate criminal liability: A remedy for human rights violation" Vol. 20(2) *Journal of Civil Rights and Economic Development,* 287 at 313.

137 No. CV-96-06956 RSWL 14187 (395 F.3rd 932b) (9th Cir 2002).

Court appears to prefer a position that criminal law is territorial, and for the court to find jurisdiction, it must be proven that, a) the *actus reus* occurred in Namibia, or b) the effect of the crime was felt in Namibia, or c) the crime commenced and was completed in the territory of Namibia.

Furthermore, it was demonstrated that there is a jurisprudential disjoint between the practices of domestic courts, which on one end recognise corporate criminal accountability; in contrast, the international criminal tribunals do not recognise corporate criminal accountability. Here, the observation is that the disjoint can cause legal uncertainty. On this score, it is incumbent on the Supreme Court of Namibia to demystify this blurring legal position.

CHAPTER 10

The right to refuse medical treatment on religious grounds: A critical analysis of the Supreme Court Judgment in *ES v AC* Case No: SA 57/2012

Boniface S. Konga

10.1 INTRODUCTION

The Namibian Constitution is based on the value of human dignity and equality of rights - which is a catalyst for the enjoyment of freedom, justice and peace.[1] The adoption of the Constitution of Namibia obliges the state to act based on constitutional principles by the observance of constitutionalism.[2] This is so because state authority emanates from the Constitution, which outrightly states that Namibia is a secular state[3] that rejects any form of favouritism of any religion.[4] The incorporation of religious rights in the Constitution maximises religious freedom, as the state is required to advance the religious rights of its citizens by adopting a neutrality approach to differing religious positions. The right to religion might in certain situations give rise to complex issues - such as refusing medical treatment on religious grounds.[5] This can only be answered by examining the extent of constitutional protection of religious conducts; that is, the scope of the right to religion and its limitations.

1 Preamble of the Namibian Constitution Act 1 of 1990. The Constitution came into effect on 21 March 1990.

2 Constitutionalism according to PT Mhodi (2013) "An analysis of the doctrine of constitutionalism in the Zimbabwean Constitution of 2013" Vol. 28(2) *South African Public Law* 383, 385 'encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently in a way that it can be effectively compelled to operate within its constitutional limitations'.

3 This is so because there is an acknowledgement of the existence of different belief system as there is no universally accepted religion. According to JL Neo (2017) "Religious freedom and secularism in anon-liberal state" *Michigan State Law Review* 333, 342-348, religious freedom in a secular but non-liberal state should have the following distinct features: rejection of political dominance by any religion; citizens should not be conditioned by religious identity; there should be recognition of individual right to religious freedom and lastly that religious freedom should be exercised as a public good.

4 See B Bekink (2008) "The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion – a South African Perspective" Vol. 3 *Journal of South African Law* 481, 481-2 who state that the concept of constitutionalism refers to the governance of a particular state directly by constitutional principles. Article 10(2) of the Namibian Constitution state that any discrimination based on religion is prohibited. This equality clause entitles all to equal protection and benefit of the law be ensuring that there is full realisation and enjoyment of all the fundamental rights and freedoms contained in the Constitution.

5 J Coggon & J Miola (2011) "Autonomy, Liberty, and Medical Decision-Making" Vol. 70(3) *Cambridge Law Journal* 523 -547.

Freedom of religion encompasses the autonomy of the individual to make choices - even refusing medical treatment on religious grounds.[6] However, such refusal of medical treatment should be rational and not detrimental to public interest or impinging upon the rights of others. Such freedom of choice based on liberty should not be interfered with by the government unless there exists grounds to limit such right based on fundamental principles of fairness which are necessary in a democratic society.[7] Therefore, the state is required to respect, protect, promote and fulfil the fundamental rights and freedoms contained in the Bill of Rights, subject to limitations set out under article 22 of the Constitution.[8] The extent of protection afforded to these rights is informed by the historical context of a particular country.

10.2 The Right to Religion

Human rights by their nature can be said to be universal, and universalism, freedom and equality are the basis for interpreting religious freedom.[9] By virtue of being human beings, religious freedom is an entitlement to every human being, which allows human beings to realise their potential through the right of choice.[10] Furthermore, religious practices that are not harmful bring good order in society as they allow one the freedom of choice without being sceptical about the reputation due to any religion.[11]

Religious freedom has been articulated as follows:

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6 Ibid.

7 A good example would be a patient who has tested positive of COVID-19 and refuses to be quarantined and treated to avoid spreading the disease to other members of the public.

8 This duty emanates from article 5 of the Constitution which makes the Bill of Rights applicable to all law and binds all the three branches of government (the Executive, the Legislature and the Judiciary) and organs of the state and where applicable to all natural and legal persons in Namibia.

9 H Bielefeldt (2012) "Freedom of Religion or Belief - A Human Rights under Pressure" Vol. 1(1) *Oxford Journal of Law and Religion* 15, 19. See also PM Lenaghan (2013) "Restoring the 'Historical Deficit': The Exercise of the Right to Freedom of Religion and Culture in Democratic South Africa" Vol. 29 *South African Journal on Human Rights* 294, 303. On the question whether human rights are universal especially from an African point of view, the debate has not settled. See in this regard M Mutua (2001) "The Metaphor of Human Rights" Vol. 42(1) *Harvard International Law Journal* 201-209; J Donnelly (1984) "Cultural Relativism and Universal Human Rights" Vol. 6(4) *Human Rights Quarterly* 400-419; Z Motala (1989) "Human Rights in Africa: A Cultural, Ideological, and Legal Examination" Vol. 12(2) *Hastings International and Comparative Law Review* 373-410; NN Agyeman & A Momodu (2019) "Universal Human Rights Versus Cultural Relativism: the Mediating Role of Constitutional Rights" Vol. 12(1) *African Journal of Legal Studies* 23-46.

10 Bielefeldt (Note 9 above) 20. See also S de Freitas (2012) "Freedom of association as a foundational right: religious associations and *Strydom v Nerderduitse Gereforneerde Gemeente, Moreleta Park*" Vol. 28 *South African Journal of Human Rights* 258, 266.

11 G van der Schyff (2004) "The historical development of the right to freedom of religion" Vol. 2 *Journal of South African* Law 259, 261. See also RC Blake & L Litchfield (1998) "Religious Freedom in Southern Africa: The Developing Jurisprudence" Vol. 2 *Brigham Young University Law Review* 515-562.

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination.[12]

Any measures that are contrary to the religious beliefs of people, such as forcing a patient to receive blood transfusion, impairs the right to religion - including indirect constraints.[13] This is so as the essential content of the right to religious freedom is negated and contrary to article 22 of the Constitution. However, religious practices that are harmful (such as ritual murders, female genital mutilation, child abuse, forced marriages) and contrary to the values in the Constitution, can be constrained, as they do not meet the limitation standard set out under article 22.

There is no holistic approach as to what amounts to religious freedom. However, the International Covenant on Civil and Political Rights[14] that Namibia ratified[15] provide what might be viewed to be essential components or contours of the right to religion. The ICCPR provides that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[16]

The United Nations has developed general guidelines of what the right to religion entails through general comment on article 18 of the ICCPR in that it encompasses

12 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), para 92. See also *Christian Education South Africa v minister of Education* 2000 (4) SA 757 (CC) (19), paras 18-19 where the court stated that individuals should be free to join any religion as well as profess and practice such religion.

13 P Farlam (1998) "The ambit of the right to freedom of religion: A comment on *S v Solberg*" Vol. 14(2) *South African Journal on Human Rights* 298, 301. What must be clear is that there might be situations where it is necessary to limit this right, for example, the *African Charter on Human and Peoples' Rights* (Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), https://www.refworld.org/docid/3ae6b3630.html provide for right to religion under article 8 but this right is not absolute as there might be situations where the state would be required to intervene in order to promote physical health or moral well-being of its citizens (article 18(1).

14 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, <https://www.refworld.org/docid/3ae6b3aa0.html> (herein called ICCPR). It entered into force on 23 March 1976.

15 Namibia acceded to this treat on 28 November 1994. See <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec>.

16 Article 18 of the ICCPR.

the following elements: the right to *believe*, the right to *change religion* as well as the right to *manifest* religion.[17]

10.2.1 The right to believe

Article 18 of the ICCPR provides for belief in worship, observance, practice and teaching and no one should be coerced in his or her freedom to adopt religion or belief of his or her choice. The Bill of Rights gives the right to believe and the state should recognise the existence of various religious beliefs.[18] Worship is an inner act of belief in a particular religion and cannot be limited, and other acts are a manifestation of one's faith which are subject to limitations.[19] Thus, any belief of a particular religion is afforded protection in various legal instruments – the ICCPR and the Namibian Constitution being some of them. Thus, any religion or belief that had been newly established or is of religious minorities deserves protection, as belief and religion are not broadly construed under article 18 of the ICCPR.[20]

10.2.2 The right to change religion

Religious freedom encompasses the freedom to reject other religions - this is based upon the right of choice. Article 18(1) of the ICCPR affords the individual the right to adopt a religion of one's choice. The UN Human Rights Committee states that "the freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief."[21] Therefore, the ICCPR gives the right for one to believe or change a particular religion as one cannot be subjected to coercion, which would impair his or her freedom to have or to adopt a religion or belief of his or her choice.[22] Everyone in terms of the ICCPR has the right to hold opinions that differ from others and cannot be forced to reveal his or her thoughts or adherence to a particular religion or belief.[23]

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17 See UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, https://www.refworld.org/docid/453883fb22.html (herein referred to as CCPR General Comment on Article 18). The analysis of these contours of the right to religion is necessary since the Supreme Court in *ES v AC* (57 of 2012) [2015] NASC 11 (24 June 2015) did not deal with this critical aspect of what amounts to religious freedom.

18 I Currie & J de Waal (2016) *The Bill of Rights Handbook* 6th ed Juta: Cape Town, 317.

19 JD van der Vyver (2005) "Limitation of freedom of religion: International law perspectives" Vol. 19 *Emory International Law Review* 499, 500.

20 CCPR General Comment (Note 17 above), Comment 2.

21 Ibid, Comment 5.

22 Article 1 of the Declaration against Discrimination (UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, https://www.refworld.org/docid/3b00f02e40.html).

23 CCPR General Comment (Note 17 above), Comment 3.

10.2.3 The right to manifest religion

The UN Human Rights Committee in its general comment on the right to manifest one's religion stated that:

> The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[24]

The right to manifest one's religion is based on the freedom of speech and expression contained in the Constitution.[25] Although there is freedom to manifest one's belief, such manifestation unlike the freedom to believe is not absolute in nature - it is subject to limitations. The ICCPR places restrictions on the manifestation of religious freedom on the grounds of public safety, order, health, or morals or the fundamental rights and freedoms of others.[26]

10.3 RELIGIOUS FREEDOM UNDER SOUTH AFRICAN LAW

The South African Constitution[27] allows for freedom of religion under section 15(1) in that 'everyone has the right to freedom of conscience, religion, thought, belief

24 Ibid, Comment 4.

25 Article 21(1) (*a*) of the Constitution.

26 Article 18(3) of the ICCPR. See also article 29(2) of the UDHR (UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (II, <https://www.refworld.org/docid/3ae6b3712c.html>. Article 21(2) of the Namibian Constitution imposes restrictions on fundamental freedoms (of which religious freedom is part thereof) on the basis of sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

27 The Constitution of the Republic of South Africa, 1996.

and opinion'.[28] This religious right can function as a liberty right that guarantees freedom of choice which the government should respect.[29] The court in *Christian Education South Africa v. Minister of Education* acknowledged that religion forms part of a new South African constitutional order in that:

> There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support, nurture, and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.[30]

The court in *S v Lawrence, S v Nigel, S v Solberg*[31] held that religious freedom encompasses choice and this right would be infringed upon by laws or actions which coerce people to act or refrain from acting in a particular way contrary to their religious beliefs.[32] However this right, i.e. right to liberty, is not absolute but must be exercised in ways that are consistent with the Bill of Rights principles.[33] The court elaborated on this position in *Christian Education South Africa v Minister of Education* where it was stated that:

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28 This right is further re-enforced by section 9(3) of the Constitution which provides that "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

29 W Freedman (2000) "The right to religious liberty, the right to religious equality, and section 15(1) of the South African Constitution" Vol. 11(1) *Stellenbosch Law Review* 99, 100. The obligation to respect, protect, promote and fulfil emanate from the Constitution (section 7(2)).

30 *Christian Education South Africa* (note 12 above) para 36**.**

31 *Lawrence* (Note 12 above) paras 92-93.

32 The court in *Lawrence* case (Note 12 above) para 92 where Chaskalson P quoting Dickson CJ in *R v Big M Drug Mart* [1985] 1 SCR 295 interpreted section 15(1) by stating that "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear or hindrance of reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination".

33 JD van der Vyver 'The Contours of religious liberty in South Africa' (2007) *21*(1) *Emory International Law Review* 95.

> The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.[34]

The recognition of the right to liberty is imperative in the South African Constitution. The court in *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)*[35] stated that the right to determine one's destiny is imperative under the Constitution in that the right to give consent (even to medical treatment) is recognised under section 12(2) of the Constitution. This therefore implies that informed consent is a fundamental right in determining one's autonomy.

10.3.1 Right to refuse medical treatment under South African Law

All persons have the right to bodily integrity including making of autonomous decisions in relation to themselves - and this implies giving or withholding consent when it comes to medical treatment.[36] The right to refuse medical treatment finds its origin under common law, in that persons who can be able to make informed decisions may refuse medical treatment even if such refusal is detrimental to one's health.[37]

The court in *Castell v De Greef*[38] confirmed that the right of patient autonomy should be respected as it relates to the doctrine of informed consent.[39] The court went further by stating that:

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34 *Christian Education South Africa* (Note 12 above) para 35**.** Van der Vyver (Note 33 above) 108 argue that 'South African law will not tolerate religious practices which threaten the life and limb of any person or that would otherwise constitute decidedly unbecoming conduct'. See further JD van der Vyver (2012) "Equality and sovereignty of religious institutions: A South African Perspective" Vol. 10(1) *Santa Clara Journal of International Law* 147, 165-167.

35 2005 (1) SA 509 (T), 518.

36 M Buchner-Eveleigh (2019) "Is it a competent child's prerogative to refuse medical treatment?" Vol. 52 *De Jure* 242, 242. See also A Nienaber and KN Bailey (2016) "The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go?" Vol. 9(2) *South African Journal of Bioethics and Law* 74.

37 L Jordaan (2011) "The legal validity of an advance refusal of medical treatment in South African Law (part 1)" *De Jure* 32, 35.

38 1994 (4) SA 408 (C).

39 Ibid, 420 H. In respect of minors, the Children's Act 38 of 2005 seems to imply that when a child has reached the age of 12 years, he or she can either refuse or consent

> When it comes to a straight choice between patient autonomy and medical paternalism, there can be little doubt that the former is decidedly more in conformity with contemporary notions of and emphasis on human rights and individual freedoms and a modern professionalised and consumer-orientated society than the latter, which stems largely from a bygone era predominantly marked by presently outmoded patriarchal attitudes. The fundamental principle of self-determination puts the decision to undergo or refuse a medical intervention squarely where it belongs, namely with the patient. It is, after all, the patient's life or health that is at stake and important though his life and health as such may be, only the patient is in a position to determine where they rank in his order of priorities, in which the medical factor is but one of a number of considerations that influence his decision whether or not to submit to the proposed intervention. But even where medical considerations are the only ones that come into play, the cardinal principle of self-determination still demands that the ultimate and informed decision to undergo or refuse the proposed intervention should be that of the patient and not that of the doctor.[40]

Although the doctors were concerned with the best interest of the patient as an issue, the court reasoned that:

> It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention.[41]

It is quite clear from the above judgment and as correctly argued by Jordaan that if a person for religious reasons refuses medical treatment of which he or she could die, the decision taken by such a person should be respected.[42] It is argued that:

> [...] moral debate about a particular course of action or controversy is often rooted not only in disagreement about the proper interpretation of applicable

to medical treatment. See further discussion of this issue Buchner-Eveleigh (Note 36 above) 242-256.

40 *Castell v De Greef* (note 38 above) 422 H-J citing FFW van Oosten *The Doctrine of Informed Consent in Medical Law* (LLD dissertation 1989 UNISA) 414.

41 *Castell v De Greef* (note 38 above) 421 C.

42 Jordaan (note 37 above) 35-6. See also *Clarke v Hurst* 1992 (4) SA 630 (D). See further G van der Schyff (2002) "The Right to Religious Objection in South African Law" Vol 119(3) *South African Law Journal* 526, 531 who argue that "The effect of the right is that religious adherents may live in accordance with the tenets that they hold. The religious adherence is, therefore, the master of her own destiny, in the expression of her beliefs and wishes - a person may, consequently, refuse medical treatment even if such refusal would cause greater illness or even result in death".

> moral principles, but also in the interpretation of factual information and in divergent assessments of the proper scientific, metaphysical, or religious description of a situation.[43]

Thus, patient autonomy as self-governing implies that one has to accept consequences of decisions taken. [44]The National Health Act[45] requires health professions to inform a user of his or her health status, the diagnosis procedures, the treatment options that are available to him or her, and the benefits, risks, costs and consequences connected with each of the option.[46] It follows therefore that once a user has been informed about the provisions of section 6, he or she should then be informed to exercise or refuse the options thereof. Section 7(1) (*d*) of the National Health Act outlines that medical treatment can be administered if failure to treat the person concerned will result in a serious risk to public health.

This provision was utilised in *Minister of Health v Goliath*[47] where the respondents had all been diagnosed with XDR-TB, which was resistant to 'first-line drugs' and to certain other drugs. They were all contagious and all had failed to comply with the voluntary treatment regimen prescribed for them.[48] As a result, the Minister of Health applied for an order compelling the surviving respondents to be detained in a specialist tuberculosis hospital to receive treatment.[49]

Although the South African Constitution allows the right of religion to flourish, justification of limitation of such right under section 36 is determined on the 'standard of reasonableness' by determining the purpose that the limitation intends to achieve.[50] This is evident from the decision in *Minister of Health v Goliath.*

10.4 CONSTITUTIONAL INTERPRETATION OF A BILL OF RIGHTS BY THE SUPREME COURT OF NAMIBIA

Article 21(1) (*c*) of the Constitution provides that "all persons shall have the right to freedom to practice any religion and to manifest such practice." From the reading of this provision and considering that Namibia is a secular state - it means that

43 M Njotini (2018) "Preserving the Integrity of Medical-Related Information How Informed Is Consent" Vol. 21 *Potchefstroom Electronic Law Journal* 1, 4-5 citing RR Faden, TL Beauchamp & NM King (1986) *A History and Theory of Informed Consent* Oxford University Press: Oxford, 4.

44 Ibid, 6.

45 No. 61 of 2003. Section 7 provide for situations under which medical treatment may be administered without consent.

46 Section 6(1) (a) - (d) of the Act.

47 2009 (2) SA 248 (C)

48 Ibid, paras 16 - 17

49 Ibid, paras 5 - 6. The application was brought in terms of section 38 of the Constitution based on public interest or persons who may be exposed to XDR-TB from the respondents.

50 G van der Schyff (2002) "Limitation and waiver of the right to freedom of religion" Vol. 2 *TSAR* 376, 379-80. See also *Christian Education South Africa* (Note 12 above) para 36.

Namibia operates on a model of accepting divergent views of religious positions based on neutrality.[51] The state therefore cannot promote or elevate one religion above the other. What can be deduced from article 21(1) (*c*) read with article 19[52] of the Constitution is that this religious right relates to its freedom, observance as well as practice.[53]

The incorporation of religious freedom means that 'every person is free to adhere to deeply held beliefs and values, without concerning oneself with the origin of such beliefs or values', subject to the limitations as envisaged under article 22.[54] Quite importantly, the right to religious freedom contained in article 21(1) (*c*) and to a certain extent as contained in article 19 have been entrenched in the Constitution.[55]

Before the coming into being of the Constitution,[56] parliamentary sovereignty reigned supreme and was characterised by non-adherence to the protection of rights during apartheid - parliamentary sovereignty was a tool of oppression.[57] This position changed after the coming in force of the Constitution as it became the supreme law of the land and any conduct or law contrary to its provisions is invalid and of no force or effect and there was recognition in the Constitution of protecting fundamental rights that are recognised and protected universally - among them the right to religious freedom.[58]

The Supreme Court is from time to time called upon to interpret the provisions of statutes and the Constitution, in particular, the Bill of Rights. In doing so, a wider and more generous approach should be followed in order to afford constitutional protection to the right(s) concerned.[59] In respect of religion, a wider and generous

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51 See N Horn (2008) "Religion and Human rights in Namibia" Vol. 8 *African Human Rights Law Journal* 409, 430 who contend that Namibia after independence unlike other countries, created space for other types of religion apart from Christianity.

52 Article 19 is titled culture and states that "every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest."

53 F Venter (2015) *Fundamental Rights in South Africa: A Brief Introduction* Butterworths: Durban, 36.

54 Bekink (Note 4 above) 487.

55 See article 131.

56 In its preamble, the Constitution states amongst others that 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 as well as individual life. The adoption of some of these rights was to cherish and protect the gains of independence.

57 JC Mubangizi (2013) *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2nd ed) Juta: Cape Town, 62-63.

58 Article 1(6) of the Namibian Constitution.

59 Van der Schyff (Note 50 above) 378. See also EE Goodsell (2007) "Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa" Vol. 21(1) *Brigham Young University Journal of Public Law* 111, 132-133.

interpretation will generally include observance, participation and promotion of such rights.[60]

The process of interpreting a Constitution containing a Bill of Rights is a difficult one. The courts are required to reconcile a number of factors such as public interest in relation to individual rights, in order to give full effect to the rights contained in the Constitution. Davis argues that:

> The interpretation of a constitutional provision and the further act of application to a set of facts is the outcome of argument, of competing or differing political projects or visions, of the influence and impact of contending ideological argument.[61]

In interpreting any provision of law, it must be able to pass the constitutional test of promoting the ideals of the Namibian people. In *S v Acheson*, the Court emphasised the fact that:

> 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 tenor of the Constitution must therefore preside over and permeate the process of judicial interpretation and judicial discretion.[62]

In *Government of the Republic of Namibia v Cultura 2000 & Another,*[63] the court placed the same emphasis as in the *Acheson* case and went further by stating that:

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must be broadly, liberally and purposively 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.[64]

Thus, in interpreting the provisions of article 21(1) (*c*) and to a certain extent article 19 of the Constitution, sight should not be lost of how our Courts have taken the supremacy of the Constitution. Since the Constitution is above all other laws, any law that is in conflict with what it provides for can be declared unconstitutional by a

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60 Van der Schyff (Note 50 above) 378.

61 D Davis (1999) *Democracy and Deliberation: Transformation and the South African Legal Order* Juta: Cape Town, 14.

62 *S v Acheson* 1991 NR 1 (HC) 2.

63 1993 NR328 (SC).

64 Ibid, 329.

competent court of law.[65] What is clear from cases cited[66] above is that our courts favour a liberal approach to human rights, including the right to religion. When courts are called upon to interpret the provisions of article 21(1) (*c*), a restrictive approach of interpretation should be adopted so that the right to religion is not suppressed. This does not mean that harmful religious practices will pass this test, as the courts should be able to apply restrictions if necessary in achieving a specific purpose.

10.5 INFORMED CONSENT AND MEDICAL TREATMENT

In upholding patient autonomy, every treatment should be accompanied by genuine consent - such patient must be competent in order to make a sufficient informed decision and should not be subjected to any undue influence.[67] Respect for human dignity[68] and the right to personal liberty[69] contained in the Constitution as well as the right to choose one's faith can only be fully realised if individuals are given the right to choose and manifest their own way of identity.[70]

Dickson J in the case of *R v Big M Drug Mart Ltd*, in emphasising the right to religious freedom as contained in the Canadian Charter stated as follows:

> If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting on his own volition and he cannot be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine and limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercions and constraint, and the right to manifest beliefs and practices.[71]

65 See article 25(1) (*a*) of the Namibian Constitution.

66 An exposition of these cases is made to show that during the interpretation process our courts are mindful of the role that the Constitution plays in a democratic society - that of transformation considering that before constitutional supremacy many rights were supressed.

67 V Pacillo (2016) "Free to become martyrs? The Right to refuse medical treatment on religious grounds in a comparative perspective" Vol. 29 *Stato, Chiese e pluralism confessionale* 1, 3.

68 Article 8 of the Namibian Constitution.

69 Article 7 of the Namibian Constitution.

70 See G van der Schyff (2003) "Freedom of religious autonomy as an element to freedom of religion" Vol. 3 *Journal of South African Law* 512, 521 who states that in order to enjoy religious freedom, there should be maximum guarantee of autonomy given to the bearer of such right to ensure a true reflection of religious expression in regulating one's own affairs. See also MJ Wreen (1991) "Autonomy, religious values, and refusal of lifesaving medical treatment" Vol. 17 *Journal of Medical Ethics* 124-130.

71 *Big M Drug Mart* (Note 32 above) 354.

From the above case, it is clear that an individual has the right to choose, change or accept any religion without any form of control (either direct or indirect) from the state - any violation of this right of choice (that is either accepting a certain type of belief or demonstrating such belief in practice) violate the autonomy of an individual founded on the right of liberty.[72] In Namibia, there is no legislation setting out grounds upon which one can refuse medical treatment on religious grounds. Such refusal can only be inferred from the constitutional provision on the right of religious freedom and the right to liberty. This issue was dealt with for the first time in Namibia in the case of *Ex Parte Chingufo in re Efigenia Semente; Semente v Chingufo*.[73]

In the *Chingufo* case, the applicant was a brother to Ms Semente who brought an application before court as a curator to Mrs Semente for Dr Burmesiter to administer blood transfusion on Ms Semente as she had lost a lot of blood after giving birth to a child through a Caesarean section. However, Mrs Semente refused blood transfusion, as she was a member of the Jehovah's Witnesses.[74]

The issue that the court had to decide is that Mrs Semente was not *compos mentis* (having full control of one's mind) to exercise her right to refuse treatment in the form of blood transfusion. The second pillar is that Mrs Semente's enjoyment of her freedom of individual autonomy should be considered against the child rights of Mrs Semente's eight-day old baby boy that was delivered by Caesarean section and, indeed, the child rights of her other two children and the interests of the larger family and society in general.[75]

In considering the first aspect of freedom of individual autonomy, the High Court stated that this would depend upon whether a person is competent to exercise such freedom. The court in giving substance to this concept of individual autonomy quoted the work of Geoffrey Robertson QC[76] and stated that:

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72 Freedman (Note 29 above) 106. The state cannot therefore compel an individual to accept a particular belief or demonstrate such belief in practice.

73 *Ex Parte Chingufo in re Efigenia Semente; Semente v Chingufo* (A 216/2012) [2012] NAHCMD 2 (25 September 2012) (herein called *Chingufo* case). The salient facts of this case are the ones that gave rise to the decision of *ES v AC,* Unreported Judgment of the Supreme Court, Case No. SA 57/2012 delivered on 24 June 2015.

74 It is unfortunate that the court did not deal with the aspect whether Mrs Semente was not entitled to enjoy her right to freedom to practice any religion and manifest such practice as guaranteed in the Constitution by refusing medical treatment on such ground. See in this regard *Chingufo* case, para 8. The court should have dealt with this issue to analyse to what extent one can exercise his or her right to religious freedom specifically whether one can invoke religious freedom to refuse medical treatment specifically in life threatening situations. This is indeed a missed opportunity by our court to develop the law on whether one can refuse medical treatment based on his or her religious beliefs - and if so to what extent.

75 *Ex parte Chingufo* (Note 73 above) para 10.

76 G Robertson QC (1939) *Freedom, the Individual and the Law* Penguin Law Series: United States, 459.

> At issue here is the freedom of the patient as an individual to exercise her right to refuse treatment and accept the consequences of her own decision. Competent adults are generally at liberty to refuse medical treatment even at the risk of death. The right to determine what shall be done with one's own body is a fundamental right in our society.[77]

The freedom to choose is well founded - even to the extent of refusal to receive medical treatment; however, what needs to be enquired is whether a person who has the right to choose has in fact exercised that right.[78] The court after evaluating the evidence of Dr Burmesiter and that of Dr Reinhardt Sieberhagen, concluded that Mrs Semente was not *compos mentis* (having full control of one's mind) *when* she made the decision.[79]

10.6 THE RIGHT TO REFUSE MEDICAL TREATMENT ON RELIGIOUS GROUNDS: A LOOK AT *ES V AC* SUPREME COURT JUDGMENT

The Namibian Constitution places value on fundamental freedom, among them the freedom of choice. Generally, therefore, adults capable of consenting may refuse medical treatment based on religious grounds in certain instances. It is generally accepted that blood transfusion and other medical treatments are a necessity to save life and improve the well-being of the individual concerned.[80] Linnard-Palmer and Kools define medical treatment refusal as:

> Overt rejection by patient, or his or her representative of medication, surgery, investigative procedures, or other components of hospital care recommended or ordered by patient's physician.[81]

Some religions prohibit medical care, such as blood transfusion.[82] The argument advanced is that the use of medical care shows no faith in God but in human beings

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[77] *Ex parte Chingufo* (Note 73 above) para 12.

[78] Ibid, paras 13-14. See also J Thomas (2015) "Parental refusal: legal and ethical considerations" Vol. 21(1) *Southern African Journal of Anaesthesia and Analgesia* 34, 35 who state that it is necessary to determine the reasonableness or unreasonableness of withholding consent after everything has been explained to the individual concerned.

[79] *Ex parte Chingufo* (Note 73 above) para 17. It is because of this order that Mrs. Semente appealed to the Supreme Court in the decision of *ES v AC* Unreported Judgment of the Supreme Court, delivered on 24 June 2015.

[80] H Payne & N Doe (2005) "Public health and the limits of religious freedom" Vol. 19 *Emory International Law Review* 539, 545.

[81] L Linnard-Palmer & S Kools (2004) "Parent's Refusal of Medical Treatment based on Religious and/or Cultural Beliefs: The Law, Ethical Principles, and Clinical Implications" Vol. 19(5) *Journal of Pediatric Nursing* 351, 352. The American Heritage medical technology defines medical treatment as administration or application of remedies to a patient or for a disease or an injury; a medical or surgical management or therapy. See in this regard Pacillo (Note 67 above) 2.

[82] Jehovah's Witnesses is one such religion. For historical foundation and beliefs of Jehovah's Witnesses see N K Chand, HB Subramanya & GV Rao (2014) "Management of patients who refuse blood transfusion" Vol. 58(5) *Indian Journal of Anaesthesia* 658-

and therefore medicine should not be trusted at the expense of God.[83] These types of religious beliefs are common among believers of Jehovah's Witnesses who outrightly reject the administration of blood transfusions.[84] By accepting blood transfusion, Jehovah's Witnesses believe that they cannot enter heaven.[85] The choice to refuse medical treatment is based on religious belief, which is an external manifestation of religious freedom - believing that any ailment can be healed through faith and not through medical care.[86]

In *ES v AC,*[87] the Supreme Court was called upon to decide on the correctness or otherwise of the decision of the High Court. Two critical issues to be decided were whether the court was correct in making a finding that *ES* was not *compos mentis* (having full control of one's mind) and also the question of interest of children involved. With regards to the first issue of *compos mentis* (having full control of one's mind)*,* the court stated that:

> In a case concerning the refusal of an adult patient of full mental capacity to have a blood transfusion administered, the starting point must be the principle of patient autonomy, which embodies both Article 7 (protection of liberty) and Article 8 (respect for human dignity) of our Constitution. The principle of patient autonomy reflects that it is a basic human right for an individual to be able to assert control over his or her own body. Adhering to this principle requires that a patient must consent to medical procedures after having been properly advised of their risks and benefits, so that the consent is informed. Medical practitioners must inform their patients about the material risks and benefits of the recommended treatment but it is up to the patient to decide whether to proceed with a particular course of treatment. For this reason, it is the patient's judgment of his or her own interests that is the most important factor.[88]

Considering the above, the court held that even before any treatment, *ES* had already objected to receiving blood transfusion and the court *a quo* gave insufficient weight to the Durable Power of Attorney (DPA) signed by *ES* some days before the operation.[89]

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664. See also M Ally (2005) "Blood transfusion and Jehovah's Witnesses: the legal and ethical issues" Vol. 14(5) *British Journal of Nursing* 270-274.

83 RB Flowers (1984) "Withholding Medical care for Religious Reasons" Vol. 23 *Journal of Religion and Health* 268, 269-271.

84 Ibid, 269.

85 KL Diaz (2007) "Refusal of Medical Treatment Based on Religious Beliefs: Jehovah's Witness Parents" Vol. 16(1) *Journal of Contemporary Legal Issues* 85, 85.

86 Pacillo (Note 67 above) 4.

87 *ES v AC* (note 79 above). This appeal case results from the judgment of the High Court in the *Chingufo* case (note 73 above).

88 *ES v AC* (Note 79 above) para 48.

89 Ibid, para 54. The court stated that 'advanced powers of attorney anticipate a future moment when a patient may lack decisional capacity or be otherwise incapacitated so that he or she cannot participate in making decisions regarding his or her health treatment and sets out an individual's treatment decisions, which may include the pre-

The court further went to state that the DPA in para 2 directs that no blood transfusion should be done under any circumstances even if the health care providers believe that such treatment is necessary to save life, and thus was her wish regarding her medical treatment in the DPA and therefore the court *a quo* was wrong in making an assessment regarding the *compos mentis* (having full control of one's mind) of Mrs *ES* as she was competent at the time of signing the DPA.[90]

Regarding the second issue of the best interest of the child to be cared for by their parents, the court stated that it could be a different situation where a parent refuses medical treatment on religious grounds, as they are incapable of consenting.[91] However, this should be distinguished from a situation involving adults who have the capacity to make decisions.[92] Thus, persons endowed with the capacity to make decisions such as adults, are at liberty to make decisions that are detrimental or not to themselves.

The court reasoned that:

> A competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reason at all, choose not to have medical intervention, even though … the consequence may be the death or serious handicap of the child she bears, or her own death.[93]

Furthermore, the court in amplifying the above, cited the case of *HE v A Hospital NHS Trust and Another*[94] where it was held that a 'competent adult has an absolute right to refuse consent to any medical treatment or invasive procedure, whether the reasons are rational or irrational, existent or non-existent and even if the result of the refusal is the certainty of death.'[95]

The Supreme Court took the view that the interest of the state in protecting minor children should not be a decisive factor, but rather the competency of the individual concerned as the right to choose is a human right which cannot be ceded.[96] The state is therefore compelled not to interfere with liberty and self-determination as

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emptive refusal of certain treatments and/or the nomination of a specific individual to make healthcare decisions on behalf of a patient unable to make decisions for him or herself'.

90 Ibid, paras 58 and 61.

91 The reasoning of the court is that article 15 on children's rights should not be construed as an absolute right that takes precedence over a parent's right to liberty and bodily integrity. In any event, the court reasoned that article 15(1) envisages situations where children may not be raised by their natural mother or father.

92 *ES v AC* (Note 79 above) para 64.

93 Ibid, para 66.

94 *HE v A Hospital NHS Trust and Another* [2003] EHWC 1017 (Fam).

95 *ES v AC* (note 79 above), para 66.

96 Ibid, paras 70-71. Judge Mainga in his disserting judgment opined that the rights of Mrs. *ES*'s children in preventing their mother from abandoning them through death was enough to order blood transfusion and a parent's right to abandon a minor child through death is totally unnecessary (paras 77-111).

well as liberty in matters of medical treatment to the person concerned. Patient autonomy therefore must be the overriding principle that guides the court and anything less than this will result in restricting the right to liberty of the persons concerned.

10.7 LIMITATION OF FREEDOM OF RELIGION ON MEDICAL GROUNDS

Rights by their nature are not absolute - in certain situations, it might be necessary to limit such rights. This can only be done if the threshold in article 22 of the Constitution has been met. Antieau argue that:

> No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or not do…religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are… imperatively necessary to protect society as a whole from grave and pressingly imminent dangers.[97]

Article 22 of the Constitution requires that any limitation placed on any right should be prescribed as such by law. This implies that the state or any other organ of government cannot simply impose limitations on the rights of individuals if there is no law permitting such limitation. Furthermore, in order not to render the fundamental rights and freedoms contained in the Constitution useless, limitations cannot be imposed for the sake of convenience but rather they are necessary in any democratic society. Article 22 therefore implies that any measure taken must be appropriate, necessary and proportionate to the objective to be achieved.[98]

The existence of freedom of religion must therefore in certain situations be limited in order to protect the rights and interests of others. Such limitation should not be based on intolerance grounds but rather on well-founded principles such as protecting society which should be done by reconciling the interests of society and the religious freedom of the person concerned.[99]

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97 CJ Antieau (1949) "The Limitation of Religious Liberty" Vol. 18(2) *Fordham Law Review* 221, 221.

98 See JT Gunn (2005) "Deconstructing proportionality in limitations analysis" Vol. 19 *Emory International Law Review* 465, 467-8 and J Martinez-Torron (2005) "Limitation on religious freedom in the case law of the European Court of Human Rights" Vol. 19 *Emory International Law Review* 587, 597-599.

99 Religious freedom for example cannot be used as a ground of justification to commit an offence as this cannot be said to have been the intention of the legislature. For general discussion on requirements for limiting rights see K Iles (2007) "A fresh look at limitations: unpacking section 36" Vol. 23 *South African Journal on Human Rights* 68-92.

Article 18(3) of the ICCPR, for example, restricts the manifestation of religion and places no limitation on conscience itself and such limitation should be necessary to protect public safety, order, health, or morals, or the fundamental rights of others.[100]

10.7.1 Interest of society and public health

Freedom of religion can be limited to safeguard the general interest of society - one of them being on health grounds.[101] The general interest of society comes into being when there is a need for them to be protected against danger to their life or physical integrity.[102] Public health is seen as a broad concept that does not only concern individual autonomy but also the community, society as well as the environment in which these choices are made.[103]

The Siracula Principles state that:

> Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.[104]

Although both international and municipal law recognises religious freedom, a person cannot raise it as a defence to expose society to danger of contracting diseases - mainly communicable diseases. Thus, any harm to the public health of society limits the liberty of the individual to manifest his or her religious freedom and can thus be compelled to be either quarantined or given medical treatment for such condition. In this regard, the welfare of society outweighs the interests of the individual concerned - that is the right to refuse medical treatment. The right to manifest one's religion in this regard is not being taken away entirely but only curtailed to achieve a legitimate objective - that is the interest of public safety based on health.

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[100] See *Alymbek Bekmanov and Damirbek Egemberdiev v. Kyrgyzstan* CCPR/C/125/D/2312/2013 (paras 4.6, 7.2-3); *Karima Sabirova and Bobir Sabirov v. Uzbekistan* CCPR/C/125/D/2331/2014 (para 7.5); SEYMA TÜRKAN V. TURKEY CCPR/C/123/D/2274/2013 (paras 7.2, 7.4-5); *Sonia Yaker (represented by counsel, Roger Kallas) v. France* CCPR/C/123/D/2747/2016 (para 5.7).

[101] See article 18(3) of the ICCPR.

[102] Van der Vyver (Note 19 above) 509.

[103] Payne & Doe (Note 80 above) 541. It is further stated that public health embraces among others health protection measures such as immunisations, prevention of epidemics.

[104] Para 25 of The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984, E/CN.4/1985/4, <https://www.refworld.org/docid/4672bc122.html>.

10.7.2 Medical treatment for children

The state has a legal duty to ensure that life is preserved in all circumstances.[105] This legal duty imposed by the Constitution may be constrained by religious freedom - the right to either accept or refuse treatment recommended by health professions.[106] This refusal is based on the doctrine of informed consent - that is consent based on material facts relayed to the individual concerned.[107] However, children are not martyrs themselves and thus they should be protected by the state.[108] Parental consent therefore in respect of minor children can be limited and the court can order blood transfusion or other medical treatment despite parental refusal on medical grounds.

Diaz, citing the case of *In re Clark*[109] in which the court ordered blood transfusion for a badly burnt child of Jehovah's Witnesses parents who had objected to this on religious grounds, stated the ultimate reason why a child should be protected by the state as follows:

> The child is a citizen of the State. While he "belongs" to his parents, he belongs also to his State. Their rights in him entail many duties. Likewise, the fact the child belongs to the State imposes upon the State many duties. Chief among them is the duty to protect his right to live and to grow up with a sound mind in a sound body. When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative. To put it another way, when a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way.[110]

The State as *parens patriae* (parent of the nation) has every right to intervene in cases where religious choice to refuse medical treatment affects the health of the child.[111] It has been argued that:

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105 This is evident from article 6 of the Constitution guaranteeing the right to life.

106 The primary interest of the state to preserve life is threatened by individual right to liberty and dignity which should be respected.

107 D Orentlicher (2018) "Law, Religion, and health Care" Vol. 8 *UC Irvine Law Review* 617, 622.

108 See generally article 3(1) of UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, <https://www.refworld.org/docid/3ae6b38f0.html> and article 20 of Organisation of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), <https://www.refworld.org/docid/3ae6b38c18.html> and section 145 (3)(J) of the Child Care and Protection Act 3 of 2015.

109 185 N.E.2d 128, 130-132.

110 Diaz (Note 85 above) 85.

111 This is so because the child as a citizen does not only belong to his or her parents but also belongs to the state and thus deserves protection. See JL Hartsell (1999) "Mother May I…Live? Parental Refusal of Life-sustaining Medical Treatment for Children Based on Religious Objection" Vol. 66(2) *Tennessee Law Review* 499, 517. See further DS

> While adults enjoy an unlimited right to refuse treatment for themselves, their right to decide is limited when exercised on behalf of their children. Parents generally have authority to make medical decisions for their children, but not to refuse care that provides great benefit […] parents may make martyrs of themselves, but not of their children. If refusal of care will constitute child abuse or neglect, the state may prohibit the refusal. And here too, the sectarian right parallels the secular right. It would not matter under common law or constitutional principles whether parental refusal was based on religious on non-religious reasons.[112]

This limitation by the state of parental consent to medical treatment of a child (based on religious grounds) incapable of giving consent to medical treatment is justifiable under article 22 - as such limitation is aimed at achieving the best interests of the child.[113] Thus, if the interest of the state outweighs the parent's right to refuse medical treatment on behalf of a child, it is sufficient to limit parental autonomy - as the right to religion should not give rise to harm of a child.[114]

The Child Care and Protection Act provides that, 'a person may not subject a child to social, cultural and religious practices which are detrimental to his or her well-being'.[115] Clearly, any religious belief that goes against the ideals of the best interest of the child is outlawed. It can therefore be argued in this respect that refusal of medical treatment by a parent on behalf of a minor child on religious grounds and or beliefs cannot stand if against the best interest of the child.[116]

Diekema (2004) "Parental refusals of medical treatment: the harm principle as threshold for state intervention" Vol. 25 *Theoretical Medicine* 243, 250 who argue that the *parens patriae* doctrine obliges the state to ensure protection of vulnerable members of society

112 Orentlicher (Note 107 above) 623. See also KM Lomond (1992) "An Adult Patient's Right to Refuse Medical Treatment for Religious Reasons: The Limitations Imposed by Parenthood" Vol. 31(3) *University of Louisville Journal of Family Law* 665-684.

113 Section 3 of the Child Care and Protection Act 3 of 2015, which entered into force on 30 January 2019, outlines what should be considerations in the best interest of the child. The age of majority has been lowered from 21 years to 18 (section 10(1)). See further AD Lederman (1995) "Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children" Vol. 45(3) *Case Western Reserve Law Review* 891, 894.

114 Orentlicher (Note 107 above) 623-4. See also T Humphrey (2008) "Children, medical treatment and religion: defining the limits of parental responsibility" Vol. 14(1) *Australian Journal of Human Rights* 141-169 and Hartsell (Note 111 above) 516-519.

115 Section 226(1).

116 The Child Care and Protection Act under section 220 allows a child who is 14 years or older to consent to a medical intervention in respect of himself or herself on condition that a medical practitioner concerned is satisfied that the child is of sufficient maturity and has the mental capacity to understand the benefits, risks and implications of the medical intervention. One can thus infer from this provision that a child who is 14 years and above can in converse also refuse medical treatment on religious grounds as long as such child is able to understand the nature and the consequences of such refusal of medical treatment.

10.8 RECOMMENDATIONS

The right to choose is an essential component of religious freedom. This right can only be realised when the state respects the freedom of choice of an individual - even if a person refuses medical treatment and dies because of religious freedom. The Supreme Court should have at least stepped up in *ES v AC* judgment by defining religious freedom and its limits in light of the Constitution. However, the judgment seems to portray that a consenting adult who is *compos mentis* (having full control of one's mind) has the right to refuse medical treatment even if such person has dependent minor children.

It is therefore recommended that Namibia should consider enacting statutory law (in line with the South African National Health Act), that will determine contours of religious freedom. Such law will aid in determining the right of patients in respect of refusing medical care and also outline situations under which a patient, despite his or her religious right and the right to liberty, could be compelled to receive medical treatment - for example where there is state interest in preserving life.

10.9 CONCLUSION

What has been demonstrated here is that religious freedom is important in democratic societies as it enhances other rights - among them the right to liberty and dignity. However, democracy does not entail that harmful religious practices should be accepted - hence the limitation clause in the Constitution. Allowing harmful religious practices to flourish in a democratic state would imply that the state has failed to uphold its constitutional duty of protecting rights and values so dear to many.

The enjoyment of true democracy of which Namibia is founded, requires enforceable guarantees to ensure general freedom, one of them being the right to religion.[117] Although as stated, the Supreme Court did not decide on refusal of medical treatment based on religious freedom, one can conclude that any person who is *compos mentis* (having full control of one's mind) has the right to refuse medical treatment based on his or her beliefs unless such refusal is outweighed by compelling interests of the state - the general well-being of society and the best interests of a child.[118]

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117 See G van der Schyff (2003) "The bearers of the right to freedom of religion in South Africa" Vol. 66 *Journal of South African Law* 19, 28. The Namibian Constitution through article 25(2) gives any aggrieved person a right to approach court to assert his rights which he or she believes have been violated.

118 See Currie & de Waal (Note 18 above) 321.

CHAPTER 11

Judicial Practice of Constitutional Review and approach to Statute Law in Namibia

Felicity !Owoses

"Who should have the final say as to how a statutory provision should read?"

11.1 INTRODUCTION

The Namibian Constitution[1] is premised on the principle of separation of powers between the three branches of government namely the Executive, the Legislature and the Judiciary.[2] In terms of this principle, the Executive implements policy,[3] the Legislature makes and repeals laws[4] and the Judiciary interprets the law.[5] Article 25 introduces a rigorous form of constitutional review,[6] in that it mandates the Supreme Court[7] to declare statute law[8] which abolishes or abridges fundamental rights and freedoms guaranteed by Chapter 3 of the Constitution invalid. In terms of this model

[1] In this chapter, the terms Constitution and Namibian Constitution will be used interchangeable. The Namibian Constitution is not an Act of Parliament within the meaning of Article 56(1) of the Namibian Constitution and thus does not have an Act number or year and should merely be referred to as the Namibian Constitution.

[2] Article 1(3).

[3] In terms of Article 37(2) the Executive consists of the President and Cabinet. The powers and functions of the Cabinet are set out in Article 40.

[4] The term Legislature refers to competent legislative authorities. See I Currie & J De Waal (2005) *The Bill of Rights Handbook* (5th ed) Juta: Cape Town, 44. In Namibia, Parliament is the competent legislative authority with authority to make and repeal laws. See Article 146(1), 63(1) and 75(1). Parliament through an Act of Parliament delegates law making powers to other functionaries identified in the Act, in that context they qualify as subordinate legislative authorities.

[5] In terms of Article 78(1), the judiciary consists of the Supreme Court, High Court and the Lower Courts.

[6] The terms constitutional review and judicial review are often used interchangeably, but for the purpose of this article constitutional review is used as referring to the review of statute law by the Supreme Court. Judicial Review-Constitutional review refers to the judicial review of the constitutionality of legislation. S Schulz (2010) "In Dubio Pro Libertate: The General Freedom Right and the Namibian Constitution" in A Bösl, N Horn, and Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek, 169, 174.

[7] In terms of Article 79(2), the Supreme Court is the court of appeal in constitutional matters and court of first instance on matters referred to it by the Attorney-General.

[8] For the purpose of this chapter, the words statute or statute law are used interchangeably. Statute or statute law refers to both original legislation and subordinate legislation. Original legislation refers to laws made by Parliament and such laws are called Acts of Parliament. Subordinate legislation is when Parliament in terms of an Act of Parliament delegates the law-making function to other functionaries indicated in the Act of Parliament. On the meaning of the terms statute, statute law, original legislation and subordinate legislation, see F !Owoses-/Goagoses (2012) "Reading down words in a statute, the courts' role, and the place of Parliament: The approach of the Namibian courts" Vol. 4(1) *Namibia Law Journal* 3, 4-5.

of review, the Supreme Court has powers to scrutinise and declare statute law not only invalid but also to amend statute law. The reference to amend in this context takes place when the Supreme Court chooses to add words to or remove words from a statutory provision. When declaring statute law invalid or amending statute law, the Supreme Court as the constituent of the judiciary undoubtedly touches on law making which is the constitutional function of the Legislature.

The questions this chapter aims to answer are the following: What is the legitimacy for constitutional review? What is the justification for judicial law making? What principles guide the exercise of judicial discretion under article 25(1) and 79(2) of the Constitution? Is there restraint on the exercise of judicial discretion during constitutional review? The chapter further advocates for the need for the Supreme Court to develop a systematic approach to constitutional review, an approach that heeds to democracy and the rule of law.

To answer these questions, this chapter examines selected Supreme Court decisions involving constitutional review delivered over the past 30 years.

The chapter also looks at the post interpretation life of the statute interpreted as at 21 March 2020. The aim is twofold, first to advocate for the need for the Supreme Court to develop a systematic approach to Constitutional review; such an approach must accord to the precepts of democracy and the rule of law, and second to influence judicial reasoning in choosing the remedies during constitutional review.

11.2 JURISDICTION AND COMPETENCE FOR CONSTITUTIONAL REVIEW

Namibia became a constitutional democracy on 21 March 1990, founded on the principles of Constitutional supremacy,[9] democracy,[10] rule of law,[11] separation of powers,[12] entrenched rights and freedoms[13] and constitutional review.[14]

Constitutional supremacy changed the order of legal norms in Namibia, with statute law being rendered subject to constitutional review.[15] Prior to the country's

9 The term constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules such as the constitution and legislation. J Diecsho (2010) "The concepts of rights and constitutionalism in Africa in Namibia as a Constitutional Democracy" in A Bösl, N Horn, and A Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek 17, 28. Wiechers states that, the elements of a constitutional democracy are the recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system and regular elections. M Wiechers (2010) "The Namibian Constitution: Reconciling Legality and Legitimacy" in A Bösl, N Horn, and A Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek 45, 52.

10 Du Pusani states that, "In the liberal tradition, *democracy* means the open election of representatives and certain conditions such as democratic rights, including freedom of speech, conscience and assembly; the separation of powers; the rule of law; and the supremacy of the constitution - all of which maintain space for non-violent political argument". In *Itula v Minister of Urban and Rural Development* 2020 NASC 6 paragraph 70 the court stated that the essence of a democratic process is when the sovereignty and power of the Namibian people as a body politic are democratically converted into representative powers of State exercisable by its institutions under the Constitution.

11 In the case of *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2012 NASC 21 paragraph 27 CJ Shivute stated that 'the rule of law demands that the exercise of any public power should be authorised by law- either by the Constitution itself or by any other law recognised by or made under the Constitution'. The requisites for the rule of law are, governing by law, separation of powers, independent judiciary, and limitation of powers, equality before the law, and the provision and enforcement of human rights. S K Amoo and I Scheepers (2009) "The Rule of law in Namibia" in N Horn & A Bösl (eds) Human rights and the rule of law in Namibia Mcmillan Education Namibia: Windhoek 17, 37. FX Bangamwabo (2010) "Constitutional Supremacy or Parliament Sovereingty through back doors: Understanding Article 81 of the Namibian Constitution" in A Bösl, N Horn, and A Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek, 251, 257.

12 The principle of separation of powers is premised on separation of powers between the executive, the legislature and the judiciary. Its purpose is to prevent the concentration of power the hands of one branch and to facilitate accountability. Y Burns (2013) *Administrative Law* (4th ed) LexisNexis: Butterworths 4. *Kambazembi Guest Farm cc t/a Waterberg Wilderness v Ministry of Lands and Resettlements* 2018 NASC 399 paragraph 39. *Itula v Minister of Urban and Rural Development* paragraph 70.

13 The concept of entrenched rights and freedoms was explained in the Itula case as follows Democratic institutions tasked with giving meaning to our constitutional values must be informed by the historical, ideological and socio-political context of those values. The evolution of our present understanding of fundamental rights and freedoms is deeply tied to our collective story and represents the highest aspirations and deepest tragedies that preceded the adoption of our national document. It is thus not surprising that, given our historical background, the founders emphasised that the rights enshrined in the Constitution are most effectively maintained and protected in a democratic society where the government operates under a sovereign constitution and a free and independent judiciary.

14 Note 8 above.

15 Article 25(1).

independence, statute law played a significant role in the hierarchy of norms.[16] Not only was it a tool for advancing the colonial order policies but on a positive note, it served the purpose of regulating conduct and for the maintenance of peace and order.[17] When the 1990 Constitution of Namibia (herein after Constitution) took effect,[18] statute law as a source of law continued to play an important role (as it does to date)[19] as a tool for advancing policies of the post-independence government in addition to regulating conduct as well as the maintenance of peace and order.[20] The plethora of statute law that survived the genesis of the Constitution[21] as well as statute law enacted[22] after the Constitution took effect should not be underestimated. Since the Constitution took effect, approximately 621 Acts of Parliament[23] have been enacted as at 21 March 2020. Added to this is the vast body of subordinate legislation enacted after the Constitution took effect. The vast body of statute law that exists in Namibia is indicative of, 1) the important role of statute law in the current legal order; and 2) statute law which can potentially be challenged for constitutionality.

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16 Article 66. Article 66 recognises the status of statute law in the hierarchy of legal norms in Namibia. Article 66 provides that:

(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statute law.

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

17 The Criminal Procedure Act 51 of 1977, Magistrates Courts Act 32 of 1944, Interpretation of Laws Proclamation 37 of 1920, are examples of statutes enacted for maintenance of peace and order, and the general application and interpretation of laws.

18 The reference to the phrase “took effect” is a reference to 21 March 1990, the date on which Namibia attained its independence and the date on which the Namibian Constitution came into operation.

19 See note 18 above.

(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statute law.

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

20 On the role of statute law see !Owoses (note 8 above) 5-6. Also see L Du Plessis (2011) *Re- Interpretation of Statutes* Juta: Cape Town, 20-21.

21 Article 140(1).

22 The term enacted, refers to statute law made competent legislative authorities. In terms of Article 65(1) and Act of Parliament is a Bill passed by Parliament, assented to by President and published in the *Gazette* in terms of Article 56(1). With reference to subordinate legislation it refers to such instrument made in accordance with the provisions of the authorising law and published in the *Gazette*.

23 Acts of Parliament are not the only form of original legislation that exists in Namibia. Due to the colonial history of Namibia original legislation still exist in the form of Ordinances and Proclamations, for example the Atmospheric Pollution Ordinance 11 of 1976 or the Administration of Justice Proclamation 21 of 1919. Until they are repealed by an Act of Parliament they continue to exist under that name. See Article 140.

On 21 March 1990, the Constitution introduced a system of constitutional review. [24] At the one side of spectrum, within the system of constitutional review in Namibia, article 25(1) endows the Supreme Court as the final arbiter in constitutional matters, with the power to declare statute law which does not comply with the constitutional requirements as unconstitutional and invalid. Article 25(1) provides that:

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

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;
(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

The reference to *competent court* in article 25(1)(a) is a reference to the High Court and Supreme Court. The competence and jurisdiction of the High Court to determine constitutional matters is found in article 25 and article 80(1) of the Constitution and the competence and jurisdiction of the Supreme Court to determine constitutional matters is found in articles 25 and 79(2) of the Constitution. The powers and functions of the Supreme Court relating to constitutional review are performed and exercised by the judges who are appointed by the President on the recommendation of the Judicial Service Commission.[25]

Pursuant to article 25(1) and the principle of the supremacy of the Constitution, the Supreme Court is the upper guardian of the Constitution and protector of the

[24] C Parker (1991) "The 'Administrative Justice' provision of the constitution of the Republic of Namibia: A constitutional protection of judicial review and tribunal adjudication under administrative law" Vol. 24(1) *The Comparative and International Law Journal of Southern Africa* 88-104.

[25] Article 32(4).

fundamental rights and freedoms guaranteed under Chapter 3 of the Constitution. Therefore, the legitimacy[26] of constitutional review lies in the supremacy of the Constitution and in the function of the Supreme Court to give effect to the precepts of democracy, rule of law and justice for all. At the other side of the spectrum, the Constitution endows the legislature with law making power. The Parliament has exclusive competence to make and repeal laws in Namibia.[27] The members of Parliament are elected by the Namibian people.[28] Subordinate legislative authorities[29] derive law making powers from Parliament, who delegate law-making powers in terms of an Act of Parliament to a functionary indicated in the Act. The democratic legitimacy of Parliament lies in it being elected in accordance with the Constitution by the Namibian people and thus acts as a representative of the Namibian people when making laws.[30]

Constitutional democracies, such as Namibia, where appointed judges are empowered to declare statute law unconstitutional and invalid, as well as add words to or remove words from statutes, are faced with the counter majoritarian dilemma.[31] The counter majoritarian dilemma refers to the tension between the will of the majority as embodied in the concept of democracy and the judge's power of constitutional review as embodies in the rule of law.[32] This tension arises when unelected judges have vast powers to overturn the will of a democratically elected Parliament, which is representative of the will of the people.[33] In Namibia, this tension could be seen when the Supreme Court declared the prohibition on labour hire as contained in section 128 of the Labour Act, 2007, as unconstitutional and

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26 Legitimacy relates to the principled acceptance and justification of the state's political rule or dominance, linked with the legality of public authority. The State rule or political dominance should be founded on the principles of the sovereignty of the people and on state values and aims as well as on the limitations and tasks of the state. It also denotes an overall conviction that the existing laws which give concrete form to the principle of legality are worthy of adherence. Wiechers (Note 9 above) 47.

27 Note 6 and 10 above.

28 In terms of article 46 members of National Assembly are elected by registered voters, while members of the National Council are elected by members of the 14 regional councils of Namibia and the members of the regional councils are elected by voters in constituencies in each region in terms of the Regional Councils Act 22 of 1992 and Electoral Act 5 of 2014 as contemplated in articles 69 and 102(3) of the Constitution.

29 Note 6 and 10 above.

30 Article 46(1) and Article 69(1).

31 Bangamwabo (See note 11 above) 256-257. GE Devenish (1998) *A Commentary on the South African Constitution* LexisNexis: Durban, 16-19. A Singh & MZ Mbero (2016) "Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of section 39(2) of Constitution" Vol. 19 *PER/PELJ* 11-12 <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1504>.

32 M du Plessis (2000) "The legitimacy of judicial review in South Africa's new constitutional dispensation: Insights from the Canadian experience" Vol. 33 *The Comparative and International Law Journal* 227, 247. R. Daniels and J Brickhill (2006) "The Counter-Majoritarian Difficulty and the South African Constitutional Court" Vol. 25 *Pennsylvania State International Law Review* 371, 376-377 <http://elibrary.law.psu.edu/psilr/vol25/iss2/2>.

33 Ibid.

invalid.[34] Although this might have been a well-intended policy aimed at protecting workers against unfair labour practises posed by the labour hire employment regime, the court chose to struck down the prohibition as offending the freedom to trade or conduct business as guaranteed under article 21(1)(j) of the Constitution. The counter majoritarian dilemma also suggests that the nature and function of Parliament and the status and role of statute law should inform judicial discretion during constitutional review in Namibia.

To counter the counter majoritarian argument, scholars such as Du Plessis state that while both judicial and legislative self-restraint are of equal importance, judicial self-restraint during judicial review is more urgent.[35]

Seeing that the counter majoritarian dilemma seems to be emerging as a standard to measure the legitimacy of constitutional review, the Supreme Court of Namibia should take cognisance of it. In 2001, the Supreme Court chose to take cognisance of this dilemma in the case of Chairperson of the *Immigration Selection Board v Frank* when it stated that 'I do not believe that this Court, lacking the democratic credentials of a properly elected Parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative'.[36]

Reverting to article 25(1), this provision is both sanctioning and prohibitory in nature. Its sanctioning nature can be found in the introductory words which read, "shall to the extent of the contravention be invalid." The use of the word "shall", in this context is peremptory, to the extent that it mandates the courts to declare as unconstitutional and invalid a statute law, which abolishes or abridges fundamental rights and freedoms.

In the same vein, article 25(1) is prohibitory in that it imposes restraint on Parliament. The counter majoritarian dilemma can also present itself with regards to the Parliament when it is exercising its law-making power. It presents itself when the Parliament as a representative of the Namibian people makes laws which infringe on the rights and freedoms of the Namibian people. Restraint on Parliament is indicated by the use of the words, "shall not make any laws" in the introductory provision to article 25(1). It proscribes the Parliament and subordinate legislative authorities from making laws that abolish or abridge the fundamental rights and freedoms. The exercise of law-making functions in such a manner is a breach of democracy.[37] Hence it is the non-compliance of the Parliament with constitutional requirements when exercising its law-making function which activates the process of constitutional review. Constitutional review is thus a constitutionally permissible

34 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* 2009 NASC 17.
35 Du Plessis (Note 20 above) 28.
36 *Chairperson of the Immigration Selection Board v Frank* 2001 NASC 1.
37 Note 11 above.

tool to check whether the Parliament has acted within the bounds of the Constitution during law making.[38]

Another element of democracy which should inform judicial discretion during the practice of constitutional review is that of participation by the Namibian people in the law making process.[39] Neither the Constitution nor the Administrative Directive of 1993[40] mandates public participation in the law making process in Namibia.[41] In the South African constitutional context, albeit different from that of Namibia, it has been accepted that the status of legislation is largely determined by the degree to which its adoption resulted from deliberation.[42]

In the Namibian context, article 45 of the Constitution confirms that the National Assembly is representative of all the Namibian people, article 63(1) imposes a positive obligation on the National Assembly to make laws in the best interest of the Namibian people, and article74(4)(b) refers to the National Council as servants of the people of Namibia. Hence, it can be argued that based on the principle of democracy and the nature and function of Parliament and subordinate legislative authorities, as drawn from the above-mentioned constitutional provisions, participation of the Namibian people in the law making is an essential requirement giving effect to democracy.

Public consultation is a necessary element of democracy. Namibia does not have a legal framework mandating public participation during the law-making process. Despite this, the Namibian public through demonstrations and representation were able to block proposed legislation on the basis of no public consultations. The nature of the constitutional provisions and democracy, and rule of law requires that the extent of participation or involvement by affected persons in the making of a specific law should inform the exercise of judicial discretion during constitutional review. This will be cases where there have been public demonstrations, representations at the National Assembly and National Council level, and where the nature of the law necessitated such participation. Since the Constitution or a law does not mandate public participation, it will require a necessary leap to judicial activism if the Supreme Court is to create an enlightened jurisprudence of constitutional law.

38 Bangamwabo (See note 11 above) 257.

39 “Democracy has to be judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard”. P Katjavivi (2010) “Foreword” in A Bösl, N Horn, and A Du Pisani, *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek, iii, iv.

40 This Directive contains the procedure for the making of original legislation. *Administrative Directive: Certain Guidelines for Government Ministers and Public Servants* published in GG No. 583 of 5 February 1993.

41 Some statutes also contain provisions which require public participation, see section 60(1) of Civil Aviation Act 6 of 2016. A breach of such a statutory requirement affects the validity of the action taken.

42 Du Plessis (Note 20 above) 97.

11.3 LEGAL REASONING AND CONTOURS OF RESTRAINT DURING CONSTITUTIONAL REVIEW AND INTERPRETATION

Article 79(2) empowers the Supreme Court to adjudicate on matters involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed under the Constitution. The term adjudicate refers to both the process of interpreting the legal text and to the exercise of power.[43] The function of interpreting statute law and the exercise of judicial discretion in terms of article 25(1) is carried out by trained and qualified judges of the Supreme Court. The judges make use of legal or substantive reasoning to carry out these functions during constitutional review.

(a) The exigencies of the constitutional order and constitutional review

One of the requirements of a constitutional democracy is the capacity of the Namibian courts to develop and practise a coherent and consistent system of constitutional review, and linked to this, to develop a coherent and consistent jurisprudence of constitutional law. When the Constitution took effect, the Namibian courts took on the challenging and daunting task of developing principles to guide the interpretation of law and exercise of judicial practise during constitutional review.[44] Former Chief Justice Strydom, at the time, Judge President of the High Court, agreed with this statement, when he stated that, "After a lifetime of applying what is called 'the austerity of tabulated legalism' we were suddenly confronted within a new set of rules foreign to our training and which hitherto did not from part of our legal processes."[45]

Despite the exigencies brought by the post-independence constitutional order, the Namibian courts had no choice but to shoulder the constitutional responsibility of developing a consistent and coherent jurisprudence of constitutional law.

[43] C Roederer (2011) "Interpretative Approaches to Legal Theory" in C Roederer and D Moellendorf in Jurisprudence Juta: Cape Town, 214, 222.

[44] These challenges are not unique to Namibia. With reference to the development of the South African jurisprudence of constitutional interpretation, the late Justice Chaskalson stated "*How should judges and lawyers deal with these stark and dramatic changes; how should we interpreted and develop the law and above all how should we interpret and apply the Constitution*.

[45] GJC Strydom (1994) "A Bill of Rights and value judgments v positivism: The Namibian Experience Interpreting a Bill of Rights" in J Kruger & B Currin *Interpretation a Bill of Rights* Juta: Kenwyn 94, 95.

(b) Overview of judicial review of statute law before independence and constitutional review post-independence

The model of judicial review[46] of statute law that existed before the Constitution took effect was informed by the principle of Parliamentary Sovereignty. In terms of this principle, Parliament is supreme and the law-making function is exclusive providence of Parliament.[47]

Since South West Africa as Namibia was known before independence was a mandate territory of South Africa, the Legislative Assembly of South West Africa and the State President of the Union of South Africa had legislative competency over South West Africa. These functionaries, who drew power from the various legislations such as the South West Africa Constitution Act[48], had authority to enact original legislation in the form of Ordinances, Proclamations and Acts.

During the reign of Parliamentary Sovereignty, the courts did not have power to strike down statute law on the basis of the substance or content of the original legislation but could only do so when procedural or manner or form requirements were not met.[49] The function of courts was premised on the principle *iudicis est ius dicere sed non dare*, which means that the function of the judge is to apply the law, not to make it.[50] The courts' role was confined to finding the intentions of the legislature as expressed in the ordinary meaning of the statutory provision.[51]

The Constitution does not expressly prescribe norms and principles to guide the interpretation and practise of judicial discretion during constitutional review. Rules and principles of statutory interpretation influenced the post-independence approach to interpretation.[52]

The shift brought about by the Constitution in the sphere of statutory interpretation is from that of searching for the intent of the legislature mainly in the language

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46 Here the term is referred to as judicial review of statute law and administrative action, since there was no Constitution in existence.

47 WA Joubert "Statute law and Interpretation" in WA Joubert & TJ Scott The Law of South Africa Vol. 25 *Sentencing to statute law and Interpretation* 1991, 182, 185.

48 Act 39 of 1968.

49 Du Plessis (Note 20 above) 42.

50 Du Plessis (Note 20 above) 255. !Owoses (Note 8 above) 9.

51 The premise of this rule was that the clear and unambiguous meaning of the words or text in the statute must be given effect to as reflecting the intent of the legislature. Departure from these was only allowed when the clear meaning resulted in absurdity, or some repugnance or inconsistency with the rest of the statue or text, in which case ordinary meaning or words may be modified to avoid inconsistency or absurdity. To modify the meaning, the courts were allowed to resort to rules and presumptions of statutory interpretation to find the meaning of statutory provision. Du Plessis (Note 20 above) 255. !Owoses (Note 8 above) 9.

52 Ibid.

of the statute, to that of interpreting statutes in conformity with the Constitution, denoting the purposive approach to statutory interpretation.[53]

With regards to constitutional interpretation, the Namibian courts have adopted a purposive approach which requires that the Constitution must be broadly, liberally and purposively interpreted.[54]

(c) Theoretical basis for the application of remedial measures and contours of restraint during constitutional review

An understanding of the philosophies underlying judicial reasoning assists in understanding the approach to the interpretation and practice of judicial discretion during constitutional review. This is a challenge for the Supreme Court seeing that their decisions have to heed to democracy and rule of law. As Du Plessis correctly states, "… the supremacy of the Constitution offers no guarantee that the language of justice will be heeded."[55]

(d) Legal reasoning, judicial discretion and judicial restraint

Interpretation refers to construing a legal text or finding the meaning of a legal text.[56] Fiss equates adjudication with interpretation when he refers to adjudication as the process by which a judge comes to understand and express the meaning of an authoritative legal text and values embodied in the legal text.[57] The process of coming to understanding a legal text and to give meaning to the legal text is the gist of legal reasoning. Scholars agree that legal reasoning involves both subjective and objective elements.[58]

Those that argue that legal reasoning is subjective are of the view that the meaning of a legal text is not simply found in the language of the text, but is influenced by subjective elements, which is the interpreters' pre-understanding. They argue that the interpreter's pre-conceptions, beliefs and ideologies, amongst others, influence his or her interpretative activities and conclusion arrived at.[59] The subjective constituent of legal reasoning could be seen in the *Frank* case when the court's reasoning was informed by public statements made by the founding President and the Minister of Home Affairs and the fact that during the debate on the law in

53 *Namibia Competition Commission v Puma Energy Namibia (Pty) Ltd* 2020 NASC 33 paragraph 53. Also see *Koujo v Minister of Mines and Energy* 2020 NASC 21 paragraph 48. *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

54 Ibid.

55 Du Plessis (Note 20 above) 13.

56 !Owoses (Note 8 above) 3. Roederer (Note 43 above) 214.

57 Roederer (Note 43 above) 222.

58 Roederer (Note 43 above) 222-223. Du Plessis (Note 20 above) 91-93. HC Du Toit (1998) "The Contribution of Hermeneutics and Deconstruction to Jurisprudence: A Response to Professors Du Plessis and Goosen" in G Bradfield and D Van der Merwe, in Meaning in Legal Interpretation Juta: Cape Town, 42. !Owoses (note 8 Above) 11 -12.

59 Ibid.

question in Parliament, nobody on the Government benches, which represent 77 percent of the Namibian electorate, made any comment to the contrary.[60]

Those that argue that legal reasoning is objective, pin this on the fact that the interpreters is guided by the Constitution and established principles in the search for finding the meaning of a legal text.[61] Scholars of the objective theory argue that the Constitution and rules and principles developed by courts over time constitute the rules and principles to guide the search for a meaning of a text.[62] The application of the objective elements in legal reasoning is demonstrated in the High Court case of *NEF v President of the Republic of Namibia*.[63]

Based on the Supreme Court's decision referred to above, it is clear that both subjective and objective elements influence interpretation and the exercise of judicial discretion under article 25(1). The question that remains to be answered is, what are the contours of restraint in the exercise of this discretion when the court applies remedial measures to statute law. Some scholars argue that legal reasoning is disciplined by an obligation on the part of the interpreter to justify its outcome.[64] This principle should equally guide the Supreme Court of Namibia in the practise of interpretation and exercise of discretion.

The supremacy of the Constitution in itself defines the contours of restraint during the interpretation and exercise of judicial discretion under article 25(1). The principles of constitutional democracy echoed in paragraph II of this article are in themselves sources of restraint.

Article 78(7) of the Constitution provides that, "The Chief Justice shall supervise the Judiciary, exercise responsibility over the Judiciary, and monitor the norms and standards for the exercise of the judicial functions of all Courts". This provision implies that the exercise of judicial functions under the Constitution must be guided by established rules and principles. Where there are no such rules and principles, the Supreme Court is required by precepts of constitutional democracy to develop such rules and principles.

Just a month after the Constitution took effect, the late Chief Justice Mahomed, at the time acting judge, started weaving the contours of restraint with regards to the exercise of judicial discretion. In the case of *S v Acheson*, the judge stated that 'the law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.'[65]

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60 See *Itula v Minister of Urban and Rural Development* paragraph 74.
61 Roederer (Note 43 above) 222-223. !Owoses (Note 8 above) 11 -12.
62 Roederer (Note 43 above) 222-223. Du Plessis (Note 20 above) 98-103.
63 *NEF v President of the Republic of Namibia* 2020 (NAHCMD) 198.
64 Note 20 above.
65 *S v Acheson* 812-813.

Precedent as a source of law undoubtedly also carries a lot of weight in Namibia as a principle that informs restraint during constitutional review and interpretation.[66] Another established principle also used by the courts as a source of restraint during constitutional review and interpretation is that the role of the court is to decide no more than what is absolutely necessary for the decision of a case.[67]

(e) Is there justification for law making by the Supreme Court

The application of remedial measures involves the exercise of discretion by the Supreme Court.[68] When applying remedial measures, the courts are in fact making law by amending a statute, whether by striking it out, severing certain parts, reading in certain parts or reading it down in conformity with the Constitution. If repealing and amending laws and making of laws is the constitutional function of Parliament, what is the justification for law making by the Supreme Court?

Labuschagne and Devenish[69] treat judicial law making as a final act of law making. This theory posits that the law making process is not completed by the promulgation of legislation.[70] It argues that the last step in the law making process is when an abstract legislative (statutory or constitutional) text is harmonized with the facts of the particular case through methods of interpretation, within the framework of the Constitution or the relevant law.[71] Other scholars view judicial law making as an inevitable result resulting from interpretation.[72] The Supreme Court has over the past 30 years been engaging in judicial law making when it applied and struck down a statute or applied remedial measures to statute law, either by making a new rule or repealing an existing rule.

11.4 REMEDIAL MEASURES OF SEVERANCE, READING IN AND READING DOWN

When the Supreme Court makes a finding that statute law has breached a guaranteed right and freedoms, it is faced with the challenge of the appropriate remedy to apply. It is a challenge because the choice of remedy may impact the principles of democracy and rule of law.

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66 R Dworkin states that: "[…] the process of constitutional adjudication must give fidelity to constitutional practice. Constitutional practice includes judicial decisions that have prescribed a legal meaning to that provision or to related provisions". See also E James (2018) "Winterton Lecture Constitutional Interpretation" 5 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/edelmanj/edelmanj26mar18.pdf>

67 *Kauesa v Minister of Home Affairs* 1995 NASC 3 10. See also *Attorney-General of Namibia v Minister of Justice and Others* (2013) NASC 3 paragraph 74.

68 Article 25.

69 CJ Botha (2012) *Statutory Interpretation:* An Introduction for Students (5th ed) Juta: Cape Town, 161. Singh & Mbero (Note 31 above 28) 3-4.

70 Ibid.

71 Ibid.

72 Du Plessis (Note 20 above) 89-129. Botha (Note 71 above)161.

Thus, it is important that the Supreme Court takes cognisance of such principles when choosing a remedial measure. It is equally important that the court thoroughly weighs its options regarding available remedial measures and justifies the choice of remedy.[73]

Currie and De Waal propose that the court should avoid broad rulings whereby it declares a statutory provision unconstitutionally and additionally prescribes alternatives it regards to be constitutional.[74]

The factors relevant in the award of constitutional remedies are to vindicate the right and deter future infringements, the interest of litigants as well as those who may be affected by the order, the separation of powers, the identity of the violator –whether private person or state, the nature of the violation, the consequences or impact of such violation on the victim, the victim's responsibility, and the successful execution of the order.[75]

The choice of remedy should ultimately reflect a balanced approach which gives effect to democracy and the rule of law.

(a) Scope and application of remedial measures of severance and reading in and reading down

The supremacy of the Constitution and the clear wording of article 25(1) that reads, "and any law or action in contravention thereof shall to the extent of the contravention be invalid," indicates that a declaration of invalidity of a statute is not discretionary remedy. The phrase, "to the extent of the contravention be invalid," means that the Supreme Court is mandated to declare as unconstitutional and invalid statutory provisions which do not comply with constitutional requirements and not those parts of the statute which are constitutionally valid. Linked to article 25(1) is article 25(3) which provides that:

> Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

Article 25(3) endows the Supreme Court with the power to make orders which are *necessary and appropriate* to secure the enjoyment of rights and freedoms

73 Currie & De Waal (Note 4 above) 200. Currie & De Waal further state that this approach must be used even if the attack on the validity of the law is not opposed by the state.

74 Ibid. Currie & De Waal further state that the role of the court should be limited to eliminating unconstitutional options rather than prescribing alternatives it regards to be constitutional.

75 Ibid 196-198.

guaranteed under the Constitution. Thus, where the validity of statute is impugned on the basis of non-compliance with fundamental rights and freedoms, articles 25(1) and 25(3) empowers Namibian courts to modify the order of invalidity.

Over the years, the courts in constitutional democracies have developed remedial measures to mitigate the harsh effects of a declaration of invalidity of a statute.[76] These remedial measures are used by courts to restrict or extend the scope of a statutory provision to cure it from invalidity.[77] Du Plessis explains this as follows: "A prima facie unconstitutional (and by that token potentially impugnable) provision is to survive constitutional scrutiny if it can - through the adaption of its language, if so required - be read to be constitutional without distorting it or straining its 'plain meaning'."[78]

The principles of *severance* and *reading in* are remedial measures used by courts in certain circumstances to cure a defective statutory provision from invalidity.[79] Severance means that if an invalid part of a statute can be separated or severed from the other parts of the statute which are not open to challenge, then the latter remains, while only the invalid part or section of the statute will be treated as invalid.[80] Reading in refers to the insertion of words into the impugned part of a statute in order to render it constitutional, and thus avoiding a declaration of invalidity.[81] Severance and reading in take place after the impugned statutory provision is found to be invalid.[82]

At the other side of the spectrum is the principle of *reading down* which means reading the impugned statutory provision restrictively or narrowing its ambit so as to avoid conflict with the Constitution.[83] This principle is applied to give effect to the principle of interpreting statutes in conformity with the Constitution.[84] As opposed to severance and reading in which are referred to as remedial measures, reading down is an interpretative tool used during the process of interpretation.[85]

In constitutional democracies, *severance*, *reading in* and *reading down* are constitutionally acceptable remedial measures. The questions that remain to be answered are, first what are the principles that guide the application of these remedial measures; second, are the courts free to choose which remedial measure to apply in a particular case; and third, what informs the choice of a particular remedial measure. With reference to the application of remedial measures, the South African Constitutional Court in the case of *National Coalition for Gay and*

76 Du Plessis (Note 20 above).
77 Ibid.
78 Du Plessis (note 20 above) 141.
79 Du Plessis (note 20 above) 85-86.
80 Currie & De Waal (note 4 above) 200-203, L Du Plessis (note 20 above) 95.
81 Ibid.
82 Ibid.
83 F !Owoses (Note 8 above) 9-12. Currie & De Waal (Note 4 above) 64.
84 *Africa Labour Services* case note 34 paragraph 89.
85 Du Plessis (Note 20 above) 140-141.

Lesbian Equality and Others v Minister of Home Affairs and Others,[86] echoed the need for courts to develop and be guided by norms when choosing a particular remedial measure. Quoting the work of an American scholar, Evans Caminker, judge Ackermann stated that, the starting point for the choice of a particular remedy by a court is as follows:[87]

> [...] Indeed, employing the norm-based model not only will better execute the judiciary's proper remedial function, but it also will enrich the legislature's contribution by enhancing its subsequent deliberative process. […] When selecting a particular remedy according to this model, a court necessarily will discuss candidly the source and strength of the constitutional preference expressed by relevant inchoate norms. This discussion will inform the ensuing legislative deliberations and generate normative claims for leaving the court's starting point undisturbed; the legislature therefore is more likely to take account of both constitutional values and policy preferences when formulating its ultimate remedial response.

With regards to the principles that should guide the application of the principle of severance, judge Ackermann stated that:[88]

> The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a statutory provision or whether words should be read into a statutory provision, the court must pay careful attention first, to the need to ensure that the statutory provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible.[89]

With regards to the norms and principles that should guide the application of the principle of severance, and relying on the rules of constructions laid down by American courts, the Supreme Court of India, in the case of *R.M.D.*

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86 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 paragraph 72. Applied in *S v Niemand* 2002 (1) SA 21 CC. Refered to in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng, Head of the Department of Health, Gauteng v Public Servants Association obo Ubogu* 2018 (2) SA 365 CC paragraphs 56-57. *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

87 Ibid. According to the norm-based model, when selecting a specific remedy, the court must discuss its sources and strengths based on established norms as well as constitutional principles. Further that, this discussion will guide the court in legislative reforms pertaining to the subject matters covered in the impugned statute.

88 Ibid paragraph 74. Also see *Coetzee v Government of the Republic of South Africa and Others; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* (1995) 4 SA 631 at paragraphs 15-17, 27, 62 and 75.

89 *National Coalition for Gay* note 86 paragraph 74.

Chamarbaugwalla v The Union of India[90] laid down the rules for the application of the doctrine of severability as follows:

(a) As a general principle the doctrine of severability rests, on a presumed intention of the legislature that if a part of a statute turns out to be void that should not affect the validity of the rest of the statute, and that that intention is to be ascertained from the terms of the statute. Further that it is the true nature of the subject matter of the legislation that is the determining factor.

(b) In determining whether the valid parts of a statute are separable from the invalid parts of the statute, the intention of the legislature is the determining factor. The test is whether the legislature would have enacted the valid part of the statute if it had known that the rest of the statute was invalid.

(c) If the valid and invalid statutory provisions are so inseparably mixed up that they cannot be separated from one another, then the invalidity of a part must result in the invalidity of the Act in its entirety. If, the other hand, they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld that the rest of the statute become unenforceable.

(d) Even when the statutory provisions which are valid are distinct and separate from the parts which are invalid, where they all form part of a single legislative scheme which is intended to be operative as a whole, then the invalidity of a part should result in the failure of the whole statute.

(e) When the valid and invalid parts of a statute are independent and do not form part of a legislative scheme but what is left after removing the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it should also be rejected in its entirety.

(f) The separability of the valid and invalid provisions of a statute is not dependent on whether the law is enacted in the same section or different sections and that it is not the form, but the substance of the matter that

90 *RMD Chamarbaugwalla v The Union of India AIR* 1957 SC 628. *Schachter v Canada* (1992) 2 SCR 679. *Coetzee* case note 88. *Case and Another v Minister of Safety and Security and Others*, *Curtis v Minister of Safety and Security* 1996 (3) SA 617 at paragraphs 69-80. See also *Government of the Republic of Namibia and Another v Cultura 2000 and Another* (SA 2 of 1992) [1993] NASC 1 (15 October 1993); and *Medical Association of Namibia And Another v Minister of Health and Social Services and Others* 2017 NASC 1.

is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions in the law.

(g) If after the invalid part is removed from the statute what remains cannot be enforced without making alterations and modifications to the statute then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.

(h) The factors that inform the legislative intent on the question of separability, are amongst others the history of the legislation, its object, the title and the preamble-assuming of course it has a preamble.

With regards to the principles to be applied to the principle of reading in words in a statute, judge Ackermann stated that,[91] reading in should not be applied, unless in so doing a court can define with sufficient precision how the impugned statutory provision ought to be extended in order to comply with the Constitution. Furthermore, that the common threat in the application of reading in or severing is that the court should strive to be as faithful as possible to the legislative scheme within the constraints of the Constitution.[92]

In the *National Coalition for Gay* case, judge Ackermann stated that the application of remedial measures is not final, in that the legislature retains the final control to amend or repeal the statutory provision in question, having regard to the court's direction.[93]

With regards to the reading down statutes, the South African Constitution Court in case of *Democratic Alliance v Speaker of the National Assembly and Others*,[94] stated that the principle requiring that legislation be read in conformity with the Constitution authorises courts to read legislation restrictively if doing so would bring an overbroad provision within the bounds of the Constitution. The court stated that:[95]

> There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional invalidity, such a construction should be preferred to another construction which, although reasonable, would give rise to such inconsistency. It applies even to cases where, like in the present, the validity of a statutory provision is tested against a clause in the Constitution but outside the Bill of Rights.

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91 *National Coalition for Gay* note 86 at paragraph 75.
92 Ibid. Also see Currie & De Waal (note 4 above) 200.
93 Ibid paragraph 76.
94 *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 487 (CC).
95 Ibid, 126

(b) Application of the principle of severance by Namibian courts

In 1993, the Supreme Court of Namibia laid down the test for the principle of severability in the case of *Cultura 2000 v Government of the Republic of Namibia*.[96] The case was concerned with the State Repudiation Act 32 of 1991 in light of constitutionally guaranteed rights, article 16 and 19, and in light of a constitutional provision, article 140(3).

The High Court as the court of first instance in constitutional matters declared the State Repudiation Act unconstitutional and invalid on the basis that it infringed Article 16 - right to own property and 19 - right to culture of the Constitution. The State Repudiation Act was enacted to repudiate certain donations, sales, leases and financial transactions of the previous government. Article 140(3) deemed the acts done by the previous government to be acts done by the Namibian government. In the appeal judgement, the Supreme Court had to determine whether the High Court was correct in finding section 2(1) of the Act unconstitutional and invalid. Section 2(1) repudiated certain donations, sales, leases and financial transactions done by the previous government to Cultura 2000, an Association established to further promote and preserve the interest of Western European cultural groups. At the centre of the appeal was the interpretation of art 140(3) of the Constitution in its application to section 2(1) of the State Repudiation Act. Article 140(3) states that:

> Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

The late former Chief Justice Mahomed adopted the purposive approach to the interpretation of Article 140(1). This approach is premised on the principle that clear words of constitutional provisions must be given an interpretation that is the "most beneficial to the widest possible amplitude".[97] Having regard to the text of the Act, the values enshrined in the Constitution, the court found that section 2(1) served a separate and valid objective of repudiating certain donations and sales of the previous government, and thus not an infringement on the right to own property guaranteed in article 16 of the Constitution. The court applied the test of severability as laid down in the South African court case of *Johannesburg City*

[96] *Cultura 2000* case (Note 90 above).
[97] Ibid 21.

Council v Chesterfield House[98] to cure the valid parts of the State Repudiation Act. The test is as follows:[99]

> […] (W)here it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute […] Where, however, the task of separating the bad from the good is of such complication that it is impractical to do so, the whole statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test.

As at March 2019, Parliament has not amended or repealed the State Repudiation Act and thus section 2(1) read with sections 1 and 7 remains a valid law.

In 1995, in the case *Kauesa v Minister of Home Affairs,*[100] the Supreme Court refused to apply the principle of severability to regulation 58(32) deemed to have been made under the Police Act, 19 of 1990. The Kauesa case was concerned with the interpretation of regulation 58(32) in light of a constitutionally guaranteed freedom - article 21(1) (a). The impugned provision reads:

> 58 A member shall be guilty of an offence and may be dealt with in accordance with the provisions of chapter 11 of the Act and these Regulations if he –
> (32) comments unfavourably in public upon the administration of the Force or any other Government department.

The counsel for the respondents requested the court to apply the principle of severability to the impugned provision to save it from unconstitutionality, by severing the phrase *comment unfavourably in public upon the administration of the Force* from the phrase *any other Government department.* Citing the test for severability developed in the *Cultura* 2000 case, the court refused to apply severance to the impugned statutory provision on the basis that even if the phrase was severed, the range of comments forbidden are too wide and inclusive of the range of unfavourable comments which are prohibited.[101] As a result, the court declared regulation 58(32) as unconstitutional and invalid.

Since the declaration of unconstitutionality of regulation 58(32), in 1994, the minister responsible for home affairs promulgated regulations repealing regulations made

[98] *Johannesburg City Council v Chesterfield House*, 1952 (3) S.A.
[99] Ibid at 809.
[100] *Kauesa* case (Note 67 above) 45.
[101] Ibid 36-37.

under the Police Act 19 of 1990.[102] Provisions re-enacting regulation 58(32) in a constitutional permissible manner have not been enacted.

In 2013, in the case of *Attorney General v Minister of Justice,*[103] the Supreme Court, although requested by the counsel for the Attorney-General, decided not to deal with the principle of severability. This case was concerned with the interpretation of sections 245 and 332(5) of the Criminal Procedure Act 51 of 1977 in light of constitutionally guaranteed rights - article 12. The court decided not to entertain that request on the basis that it was not part of the order sought. The court stated that:[104]

> Although the expression may well be severable, regard being had to the test severability as endorsed by this Court in the Cultura 2000 case, the application before the Court only requires of it to provide answers to the questions posed regarding the constitutionality of the impugned provisions. The terms of the referral under Article 79 and the nature of the relief prayed for in the Notice of Motion do not require of the Court to excise any phrases or provisions from the impugned sections or, for that matter, to strike any of the sections which offend the Constitution.

In both *Kauesa* case and the *Attorney-General* decisions, the Supreme Court refused to deal with requests for severance. The court based its refusal on the principle that it is the settled practice of the Court to decide no more than what is absolutely necessary for the decision of a case.[105]

In 2017, in the case of *Medical Association of Namibia v Minister of Health and Social Services,*[106] the Supreme Court for the first time analysed the principle of severability. The case was concerned with the interpretation of the certain provisions of the Medicines and Related Substances Control Act 13 of 2003 (MRSCA) in light of constitutionally guaranteed freedoms - article art 21(1)(j) - and limitations on freedoms - article 21(2) and limitations on rights - article 22. The issue was whether the licencing scheme which required doctors (as represented by the Medical Association of Namibia) to obtain a licence for the sale of medicines was constitutional as being within the parameters Article 21(1)(j) and limitations in Article 21(2) and 22. Section 29(2) of the MRSCA proscribed the sale of medicine except in accordance with a conditions prescribed in the Act. Section 29 imposed a requirement for a licence to sell medicines. Section 31(3) imposed conditions on the granting of a licence to certain professionals including medical practitioners. Section 31(3) provided that:

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[102] Namlex updatehttp://www.lac.org.na/laws/NAMLEX_2018.pdf. See regulations published under GN 167 GG 919 of 16 September 1994.

[103] *Attorney-General* case (Note 67 above).

[104] Ibid 74.

[105] *Kauesa* case (Note 67 above) 11. *Attorney-General* case (Note 67 above 74).

[106] *Medical Association* case (Note 90 above).

> The Council may issue a licence on application in the prescribed form by a medical practitioner, a dentist or a veterinarian, authorising that medical practitioner, dentist or veterinarian to sell Schedule 1, Schedule 2, Schedule 3 or Schedule 4 substances to his or her patients, subject to such conditions as the Council may determine, if the Council is satisfied that granting such a licence is in the public need and interest and that the medical practitioner, the dentist or the veterinarian has the required competence to dispense those scheduled substances.

Having found that section 31(3) is unconstitutional and invalid, the court on its own initiative dealt with the principle of severability to determine whether the licensing scheme contained in sections 29 and 31 of the MRSCA can be severed from the rest of the MRSCA. Citing the decisions of the South African Constitutional Courts,[107] the court stated that the principle of severance is based on the principle of separation of powers, and empowers the courts '*to tailor orders of constitutional invalidity as closely as possible*.[108] Further, that the principle should be applied to enable the statutory provision to continue in operation. The exception to this principle was illustrated as follows:[109]

> […] Of course, a court may only sever provisions from a statute if, after severance, what remains is workable and consistent both with the Constitution and with the constitutionally legitimate objectives of the legislation.

Although the court found that the licencing scheme contained in sections 29 and 31(1) did not pass the test of permissible limitations in articles 21(2) and 22 of the Constitution, the court recognised that the licensing scheme served a legitimate governmental purpose to regulate the dispensing of medicine to prevent irrational dispensing practices and to avail safe and efficacious medicine to as many people as possible at affordable prices.

As a restraint on the exercise of its discretion, the court stated that, 'It is not our place to say what those standards should be as long as they do not seek to perpetuate an illegal policy rejected by this court: of shielding pharmacists from competition and removing the patient's choice to source medicine either from a treating doctor or a pharmacist.'[110]

As a result, the court severed the words *who holds a licence* contemplated in section 31(3), *subject to the conditions of that license* where they appear in sections

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107 *Chesterfield* (Note 98 above). *Coetzee* case (Note 88 above). It is really interesting to note that the court did not cite Namibian Supreme court decisions of *Cultura 2000* case (Note 90 above), which developed the principles of severability, nor the subsequent cases which applied it.

108 *Namibia Medical Association* case (Note 90 above) paragraph 103.

109 Ibid.

110 Ibid paragraph 99.

29(7) *(b)*, 29(9) *(b)*, 29(13) *(b)*, 29(19) *(b)* and section 31(3) of MRSCA from those provisions, and declared section 31(3) of the MRSCA as unconstitutional and invalid.

With reference to the court order made in the Medical Association case, regulation 34(1) (c) of the regulations[111] made under the MRSCA have been repealed by implication. Since the declaration of invalidity of section 31(3), as at 21 March 2020, the minister responsible for health has not re-enacted a licensing scheme requiring a licence for sale of medicines by medical practitioners.

(c) Application for remedial measure of reading in

In 2012, in the High Court of Namibia, in the case of *Roland and Others v Chairperson of The Council of The Municipality of Windhoek And Others,*[112] read down regulation 29B(1)(c) of the Building Regulations,[113] which applied to the Municipality of Windhoek. The Council of the Municipality of Windhoek approved the construction of a third level in respect of residential premises. The Windhoek Town Planning Scheme approved it in terms of section 26(1) and (2) and section 27(1) of the Town Planning Ordinance 11 of 1963, proscribed the building of three stories in residential areas. Clause 21(3) of the Windhoek Town Planning Scheme reads as follows:[114]

> […] no dwelling unit or residential building may be erected in excess of two storeys on land zoned residential without council approval. Council shall, in considering the application, have regard to the impact, real or potential, of the additional storeys on the neighbouring property.

Regulation 29B(1)*(a)* of the applicable building regulation provides that the *basement storey or cellar shall mean any storey of a building which is under the ground storey*. Regulation 29B(1)(c) provides that:

> […] a ground storey shall mean that storey at a building to which there is an entrance from outside on or near the level of the ground, and where there are two storeys than the lower of the two: Provided that no storey of

111 Regulations Relating to Medicines and Related Substance published in GN 178 in GG 4088 of 25 July 2008.

112 *Roland and Others v Chairperson of the Council of the Municipality of Windhoek And Others* 2012 NAHC 216.

113 *The Municipality of Windhoek Building Regulations* published in GN 56 GG 2992 of 28 April 1969.

114 The court was referring to the units of sentence in the Town Planning Scheme as sections. Town planning scheme are not original legislation but subordinate legislation and the sentence units must be referred to as clauses or paragraphs. On appeal the Supreme Court referred to it as Clauses. On the meaning of town planning schemes see F !Owoses-/Goagoses (2013) Planning Law in Namibia Juta: Cape Town. On sentence unit see VCRAC Crabbe (2008) *Crabbe on Legislative Drafting* (2nd ed) LexisNexis: Butterworths, 105-110.

> which the upper surface of the floor is more than four feet below the level of the adjoining pavement, shall be deemed to be a ground storey.

The applicants sought the review and setting aside of the decision by the Council of the Municipality of Windhoek to approve building plans for the construction of a three level in respect of a residential premises, on the basis that it contravened section 21(3) of the Windhoek Town Planning Scheme.

The court decided that it was difficult to apply the proviso contained in regulation 29B(1)(*c*) to the building under contemplation, as given that the building is being built on a steep slope, and because the land upon which it is being built is bounded by three different roads, the lowest storey of the building is sometimes well below the adjoining pavement, and at other times not.[115] Despite expressing caution on the application of the principle of reading in as expressed in *S v Negongo,*[116] the court concluded that in order to address this anomaly, it should read the word 'any' into the proviso so that the proviso should be deemed to read *Provided that no storey of which the upper surface of the floor is more than four feet below the level of [any] adjoining pavement, shall be deemed to be a ground storey.* If the proviso were so worded, the court concluded, then the lowest level would not be a basement, because at some points it is less than four feet below ground level and would therefore only constitute a storey of the building, in which case the building would be in excess of two storeys in conflict with the clause 21(3) of the Windhoek Town Planning Scheme.[117] Alternatively, even if the proviso were found not to have application, so the court continued in its reasoning, then, in any event, the lowest level of the building was a storey of the building and again the building plans would not be in compliance with clause 21(3) of the town planning scheme.[118] The court chose to read regulation 29(B)(c) restrictively as if the proviso did not apply to the building in question, and if read restrictively, it meant that the lowest level of that erf was a storey and not a basement, making the approval of building plans for a third level a contravention of section 21(3) of the Windhoek Town Planning Scheme.[119]

In 2013, in the appeal judgement of *Chairperson Council of the Municipality of Windhoek and Others v Roland and Others*,[120] the Supreme Court stated that the High court erred in its assumption that Regulation 29B governed the meaning of clause 21(3) of the Town Planning Scheme. Nevertheless, the court paused and tried to explain the principle of reading in the context of statutory interpretation and as a constitutional remedy[121] as follows:

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115 *Chairperson Council of the Municipality of Windhoek and Others v Roland and Others* (2013) NASC 15.
116 Cases cited are *S v Negongo* 1992 NR 352 and *Venter v R* 1907 TS 910.
117 *Roland case* (Note 112 above) paragraphs 12-13.
118 Ibid.
119 *Roland* case (Note 112 above) paragraph 38.
120 Ibid.
121 *Roland* case (Note 112 above) paragraph 56.

> The issue of 'reading in' arises in the context of statutory interpretation, when a court interpreting a legislative provision concludes that it is necessary in order 'to realise the ostensible legislative intention or to make the Act workable' to imply words into a legislative provision that it does not contain. The issue of 'reading in' arises in the context of remedy, when a court, in order to address an issue of constitutional invalidity, orders that words are to be read into a legislative provision to render the constitutional provision consistent with the constitutional framework with the minimum of judicial interference. As a remedy, 'reading in' is similar to severance and requires an express order of the Court. Whether 'reading in' is used as a tool of interpretation or as a constitutional remedy, a court should take care to avoid usurping the legitimate role of the Legislature.

Correcting the error of the High Court, the court found that the approval of building plans by the Council of the Municipality of Windhoek was a contravention of clause 21(3) of the Town Planning Scheme and that regulations 29(B) of the Building regulations were not applicable to the case in question.

Although the case *Joseph v Joseph and Joseph v Joseph*[122]; was not concerned with reading down the court made a remark to that effect, part of the case concerned the interpretation of section 43 of the Communal Land Reform Act 5 of 2002, which reads as follows:

> (1) No person may occupy or use for any purpose any communal land other than under a right acquired in accordance with the provisions of this Act […]
>
> (2) A Chief or a Traditional Authority or the board concerned may institute legal action for the eviction of any person who occupies any communal land in contravention of subsection (1).

The court stated that the only way to interpret section 43 of the Act so as to do away with this common law right is to insert the word 'only' in front of section 43(2) to make it read 'only a Chief or a Traditional Authority or the Land Board concerned' may evict a person who occupies land without it being allocated to such person'.[123] Having regard to the language, the context and the purpose of the Act, and the rule to construe statutes in conformity with common law, the court stated that it was not the intention of legislature to do away with the common law right of the other possessors who have the right under common law to evict such persons are no longer vested with such a right.[124]

[122] *Joseph v Joseph and Joseph v Joseph* 2020 NASC 22.
[123] Ibid paragraph 34.
[124] Ibid paragraphs 34-35.

(d) Application for remedial measure of reading down

In 1993, in the Supreme Court judgement of Kauesa[125], the counsel for the respondents requested the court to read down regulation 58(32), by inserting the words *in a manner calculated to prejudice discipline within the force,* after the words *force.* If the suggested provisions were inserted the provision would read:

> comments unfavourably in public upon the administration of the Force in a manner calculated to prejudice discipline within the force **[or any other Government department]**.[126]

The court refused to read down regulation 58(32) and reasoned that the regulation is over inclusive in the range of unfavourable comments that are covered and as a result impermissibly infringes on the freedom of expression and speech unreasonably.[127] The court adopted the test for reading down as applied in the case of *Osborne v Canada (Treasury Board),* that, if an invalid law, as a result of reading down, bears little resemblance to the law Parliament passed, the courts must exercise the discretion to rather declare the whole law invalid as opposed to reading it down.[128] That this as a lesser intrusion in the role of Parliament. The court further stated that:[129]

> Respondents are inviting the Court to legislate, that is, to perform the constitutional function of the legislature. Reading down may provide an easy solution to respondents' acknowledged difficulties. It may be in suitable cases a lesser intrusion into the work of the legislature. It must be remembered, however, that legislating is the constitutional domain of Parliament. The Court's constitutional duty is to strike down legislation inconsistent with provisions of the Constitution and leave the legislature to amend or repeal where the Court has struck down the offending legislation. The lesser the judicial branch of Government intrudes into the domain of Parliament the better for the functioning of democracy.

In 2009, in the case of Africa Personnel Services[130], the Supreme Court also refused the request to read down article 21(1) (j) of the Constitution, so that the reference to all persons in that article refer to natural persons only. Article 21(1) (j) provides that *All persons shall have the right to practise any profession, or carry on any occupation, trade or business. The request for a restrictive interpretation was based on the notion that the dignity interest that underlies the freedom guaranteed in Article 21(1) (j) can only be exercised by natural persons.*[131]

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125 *Kauesa* case (Note 67 above) paragraph 45
126 The words in bold indicate words omitted and words underlined indicate words inserted.
127 *Kauesa* case (Note 67 above) paragraph 38.
128 Ibid paragraph 39.
129 Ibid paragraph 38.
130 *Africa Personnel Services* case (Note 34 above).
131 Ibid paragraph 37.

The court reasoned that neither the generous or purposive approach to the interpretation of the Constitution commend such a restrictive interpretation.[132] Furthermore, that the construction of a right in its widest form may overshoot the purpose of the right or freedom.[133] If the Supreme Court as requested interpreted article 21(1)(j) restrictively as only applying to natural persons, this would have meant extensively amending section 128(1) and (2) and the definition of employee in section (1) of the Labour Act.

Applying the reasoning in the *Kauesa* case and adopting the principles laid down by the South African Constitutional court,[134] the court declined the request to read down the provisions. The court stated that:[135]

> Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section. Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.

The court reasoned that the prohibition in section 128 of the Labour Act 2007, is overbroad to the extent that it cannot be read down so as to limit its application only to the type of agency services which the applicant -African Personnel Services provides.[136] Further, that such a restrictive interpretation will require a different and more exact reformulation necessitating the insertion of words and phrases which is not the constitutional role of the court.[137]

Since the judgement date, The Labour Amendment Act 2 of 2012 has been enacted.[138] In terms of this amendment of the Act, section 128 which the court

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132 Ibid.
133 Ibid.
134 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, 2001 (1) SA 545 (CC) at 559B.
135 *Africa Personnel Services* case (Note 34 above) at 86.
136 Ibid paragraph 89.
137 Ibid.
138 Labour Amendment Act 2 of 2022 published in GG 4925 of 12 April 2012.

found to be unconstitutional, is substituted and replaced with a new regulatory framework governing labour hire in Namibia.

In 2011, the High Court in the case of *Daniel v Attorney-General and Others*[139] applied both severance and reading to the impugned provision of the Stock Theft Act 12 of 1990. In that case, the court had to determine the question, whether the minimum sentences in section 14(1) of the Stock Theft Act, infringes the right to dignity guaranteed in article 8(2)(b) of the Constitution. Section 14(1) of the Stock Theft Act reads:

> 14 Penalties for certain offences
>
> (1) Any person who is convicted of an offence referred to in section 11(1) (a), (b), (c) or (d) that relates to stock other than poultry —
>
> (a) of which the value —
>
> (i) is less than N$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
>
> (ii) is N$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine;
>
> (b) shall be liable in the case of a second or subsequent conviction, to imprisonment for a period not less than thirty years without the option of a fine.
>
> (2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1)(a) or (b), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
>
> (3) A sentence of imprisonment imposed in respect of an offence referred to in section 11(1)(a), (b), (c) or (d), or an additional sentence of imprisonment imposed under section 17(1)(b) in respect of non-compliance with an order of compensation, shall, notwithstanding anything to the contrary in any law contained, not run concurrently with any other sentence of imprisonment imposed on the convicted person.
>
> (4) The operation of a sentence, imposed in terms of this section in respect of a second or subsequent conviction of an offence referred to in section 11(1)(a), (b), (c) or (d), shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, if such person was at the time of the commission of any such offence eighteen years of age or older.

In terms of s 1 of the Act, stock means *any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, domesticated ostrich, domesticated game or the carcase or portion of the carcase of any such stock*

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139 *Daniel v Attorney-General and Others* 2017 NASC 21. See also !Owoses (Note 8 above) 12-14.

Without explaining the choice of remedy, the court struck down parts of section 14 and read down some parts. The court struck down the phrase *'for a period not less than twenty years'* from s 14(1)(a)(ii) of the Stock Theft Act and words '*for a period not less than thirty years'* from 14(1)(b) of the Act. The court read down the reference to sections 14(1)(a) and (b) and in section 14(2) of Act, to mean references to subsections (1)(a)(i).

After the amendment by the court, the new provisions of section 14 read as follows:[140]

(1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry -

(a) of which the value -

(i) is less than N$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;

(ii) is N$500 or more, shall be liable in the case of a first conviction, to imprisonment **[for a period not less than twenty years]** without the option of a fine;

(b) shall be liable in the case of a second or subsequent conviction, to imprisonment for a **[period not less than thirty years]** without the option of a fine.

(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in **[subsection (1)(a) or (b)], subsection** <u>(1)(a)(i)</u> it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(3) A sentence of imprisonment imposed in respect of an offence referred to in section 11(1)(a), (b), (c) or (d), or an additional sentence of imprisonment imposed under section 17(1)(b) in respect of non-compliance with an order of compensation, shall, notwithstanding anything to the contrary in any law contained, not run concurrently with any other sentence of imprisonment imposed on the convicted person.

If read this way, the sentencing regime gives the sentencing officials the discretion as to the period of imprisonment - in accordance with the applicable law. It also means that substantial and compelling circumstances for a lesser sentence only relate to cases of first conviction in section 14(1)(a)(i).

As at March 2020, Parliament has not revisited section 14 of the Stock Theft Act, meaning that the provision must be read as proposed above.

140 The words in bold and square brackets indicate deletion and words underlined indicate insertion.

(e) Application of remedy of declaration of invalidity

In the decisions of Kauesa, Attorney-General and Itula, the court struck down the impugned statutory provisions and declared them invalid.

In the *Itula* decision the court had to determine whether the Minister in putting into force section 97(1) and (2) of the Electoral Act 5 of 2014, while leaving sections 97(3) and (4) in limbo acted in conflict with the principle of separation of powers. The court applied the following principle:

> The principle of separation of powers is established in Article 1 of the Constitution and emphatically reaffirmed in the provisions vesting the legislative authority in Parliament. Article 44 states that the legislative power is vested in the National Assembly (to pass laws with the assent of the President and subject to the power and functions of the National Council). In this instance, the President assented to the Act in its entirety. The legislature may delegate subordinate legislative powers (to regulate) to the executive and to put legislation into operation but the legislature cannot devolve upon the executive any entitlement to select statutory sub-provisions to implement. It would be for the legislature to amend or repeal an enactment if minded to do so.

The court reasoned that the term ‘subject to’ in section 97(3) means that the use of EVMs under section 97(2) is conditional upon complying with sections 97(3) and (4). The effect is that the legislative authorisation of the use of EVMs in section 97(2) is subordinate to the conditions being met as set out in section 97(3) and (4). The court held that by partially commencing the Electoral Act, the Minister deleted the safeguards enacted by Parliament and thus usurped its role and breached the separation of powers provided for in the Constitution.

In the NEF case, the court applied the following rule on constitutional interpretation as endorsed in *Cultura 2000*.[141] “But the very nature of a Constitution which requires that a broad and generous approach be adopted when interpreting it also requires that where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms must be narrowly or strictly construed”.

In terms of regulation 14(2) of the regulations issued under article 26(5) of the Constitution, the President authorised various Ministers to issue directives to deal with any matter that is within the ambit of any legislation or other law that is administered by the minister concerned.

Applying the ordinary meaning to the words ‘to deal with’ to article 26(5), the principles of legality such as delegation of powers and the ultra vires doctrine, the court held that regulation 14(2) was the purest example of relinquishing power,

141 Paragraph 64.

unfettered and uncontrolled, and is surely impermissible delegation.[142] As a result, the court declared regulation 14(2) amongst others as unconstitutional and invalid.

11.5 Recommendations

Although judicial law making by the Supreme Court is an inevitable outcome resulting from the interpretation process and exercise of judicial discretion, the court should have caution when applying remedial measures to statute law.

Democracy and the rule of law are two common threads that bind the Judiciary and the Legislature. Central to these threads are the Namibian people, meaning that the Legislature in making laws and the Judiciary in interpreting laws should adopt an approach enabling Namibian people to enjoy the rights and freedoms guaranteed in the Constitution.

Equally important is that the Supreme Court should thoroughly canvass the remedy it opts to apply by explaining its reasons for choosing that remedy. The Court should also take cognisance of the impact of the chosen remedy for law reform as well as the socio-economic and political impact. Furthermore, the Court should heed to the nature and function of statute law and the separation of powers in exercising its discretion under article 25.

The Supreme Court should adopt the norm-based model[143] to choosing remedial measures. This will assist in developing a consistent and coherent approach to constitutional review and the development of constitutional law.

Furthermore, the norm-based model must enable or assist the court to identify and determine the weight to be assigned to the rules and principles of interpretation and factors that inform the choice of remedy amongst others.

It is also recommended that the application of the remedy contained in article 25(1) of the Constitution of referring a statute back to Parliament to correct defects within a certain period should be exercised with great caution and only be used in exceptional circumstances; the decisive factor should be the object of the remedy amongst others[144]. This argument is based on the fact that legislative reform is a lengthy process and that both the executive and legislature need time to rethink and deliberate on the policy to drive Law reform.

In the end, the approach the Supreme Court adopts must give effect to democracy, rule of law and justice for all as expressed in article 1(1) of the Constitution. Such an approach must also enable the Supreme Court to positively contribute to the development of statute law in Namibia.

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[142] Paragraph 90.
[143] Note 91 above.
[144] Note 78 above.

Parliamentary law making and judicial law making should be seen as members of the same genus, seeing that both the Judiciary and Parliament in the exercise of their respective constitutional functions repeal or amend statutes and make laws, albeit the different procedures applied. If one applies the Shakespeare script of "*what's in a name? that which we call a rose by any other name would smell as sweet"* to judicial and parliamentary law making, the "name" representing law making, and the "rose" representing the law repealed, amended or made, and the "sweet smell" the giving effect to the values of the Namibian people or the vindication of the Constitution. However, if during the process of judicial law making the rose starts to smell like anything but the rose, that will be the case where the application of remedial measures means extensively amending definitions, sections and the substantive texts of a statute, the court should rather strike down the law and leave it to the Executive and Parliament to iron out the creases and crudities in the policy and statute.

11.6 CONCLUSION

This chapter has demonstrated that although the application of remedial measures is constitutionally permissible, the challenge lies in their application. The Supreme Court decisions delivered from 21 March 1990 to August 2020 indicate an interplay between judicial conservatism and judicial activism regarding the interpretation of statutes, the application of remedial measures and the exercise of judicial discretion. Judicial conservatism was demonstrated when the Supreme Court cautioned the application of, or refused to entertain the request to apply the remedial measures of severance,[145] reading in[146] and reading down.[147] These were cases where the court had to interpret constitutional fundamental rights and freedoms against statute law. The court refused to entertain such requests on reason of the restrictive interpretation of rights and freedoms. The court also heavily relied on the notion of the separation of powers and was hesitant to infringe on what it perceived to be the function of the legislature. Where the court refused to apply the remedial measures, the court chose to strike down the impugned statutory provision.

On the other hand, it is commendable that the Supreme Court has made a giant leap towards judicial activism when it applied the remedial measures of severance[148] and reading down,[149] to save statute law. These cases concerned the interpretation of statutory provisions against rights and freedoms as well as other constitutional provisions.

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145 See *Kauesa* case (Note 67 above) and *Attorney-General* case (Note 67 above).
146 See *Roland* case (Note 112 above).
147 See *Kauesa* case (Note 67 above) and *Africa Personnel Services* case (Note 34 above).
148 See *Cultura 2000* case (Note 90 above) and the *Medical Association* case (Note 90 above).
149 See the *Daniel* case (Note 139 above).

The Supreme Court decisions discussed in this chapter demonstrate that the court is reluctant to discuss a remedial measure or various remedial measures in the absence of such a request. It seems that the court still relies on the principle that the court should not decide no more than what is absolutely necessary for the decision of a case. If the Supreme Court is to heed to democracy and the rule of law and a Constitution adapted to changing values, the court may have to reconsider its position in this regard.

CHAPTER 12

Assessing the constitutionality or otherwise of restraint of trade contracts in Namibia - what does the Supreme Court say?

Marvin Awarab

12.1 INTRODUCTION

The Constitution of the Republic of Namibia[1] is the Supreme Law of Namibia[2] and therefore, any law or practice that is inconsistent with the constitutional principles is said to be invalid. This principle of constitutional supremacy was re-emphasised by the Supreme Court of Namibia in the case of *Pamo Trading enterprises CC and others v Chairperson of the Tender Board of Namibia and 90 others*[3] where the court restated the constitutional provision as contained in chapter 1(1) of the Constitution. In another case of *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others,*[4] the Supreme Court stated that the Constitution as a Supreme Law demands that the exercise of public power should be authorised by law, whether by the Constitution itself or any other law passed under the constitution.[5] In accordance to constitutional supremacy, any common law or customary practice is invalid as long as it conflicts with the Constitution. Therefore, in order for the common law or customary practice to be valid, such common law or custom should conform to the Constitution and not refute any constitutional principle either in substance or form.[6] In Chapter 3, the Constitution sets out the fundamental rights and freedoms. It guarantees the protection of these fundamental rights and freedoms and states that:

> Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid […][7]

The adherence to, upholding and protection of the fundamental rights and freedoms is peremptory and therefore the drafters of the Namibian Constitution took a firm stance in advocating for the protection and promotion of the said rights

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1 Hereinafter referred to as the Constitution.
2 Article 1 of the Constitution.
3 Case No: SA 60/2017
4 (SA 6/2010) [2010] NASC 8) (06 September 2010)
5 Ibid.
6 Article 66 of the Constitution.
7 Article 25 (1) of the Constitution.

and freedoms. The law of contract is to a greater part founded upon common law principles and it is imperative that the common law application does not conflict with the Constitution.

Apart from prohibiting the enactment of laws that contravene constitutional provisions, the Constitution also sets out the mechanisms and provides for structures to be followed when one's right or freedom stands to be violated. To this end, Article 25(2) of the Constitution succinctly and authoritatively states that:

> Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court or tribunal to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.[8]

The High Court of Namibia, whose decisions can be scrutinised by the Supreme Court of Namibia, is empowered by section 16 of the High Court Act[9] to conduct a two-stage inquiry when called upon to declare a law, practice or custom invalid. The first question the Court asks itself is whether the applicant is interested in any existing, future or contingent right. Secondly, the court determines whether the case is the proper one in which it can exercise and discharge its discretion.[10] Only if the first question is answered in the affirmative, will the court proceed to determine the second inquiry.[11] This therefore requires anyone who claims infringement of his or her constitutional right, in particular, the right to freedom of trade to prove that he or she has a *prima facie* right and this right has been infringed or stands to be infringed.

The Constitution is written for the people and the constitutional provisions should be applied in such a way to promote the needs and the interests of the people governed by such a Constitution. The right to practice any profession, or carry on any occupation, trade or business is contained in Chapter 3 of the Bill of rights.[12] Considering the protection as afforded to Chapter 3 rights and freedoms contained in the Constitution as mentioned above, the question which arises is whether the enforcement of the restraint of trade contracts violates Article 21(1)(j) of the Constitution?

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8 S Amoo & I Skeffers (2008) "The Rule of law in Namibia" <www.kas.de/upload/auslandshomepages/namibia/HumanRights/amoo_skeffers.pdf> 19.

9 High Court Act 16 of 1999.

10 *Daniel and Another v The Attorney General and Others* (A 430/2009) [2011] NAHC (10 March 2011).

11 Ibid.

12 Article 21(1)(j) of the Constitution.

12.2 POWERS AND FUNCTIONS OF THE SUPREME COURT OF NAMIBIA

The Supreme Court is a constitutional establishment. Article 78 of the Constitution clearly states that the judiciary shall consist of the Supreme Court, the High Court and the Lower Courts. In addition, article 79 of the constitution sets out the modus operandi of the Supreme Court, the important one being that the Supreme Court shall be headed by the Chief Justice and its jurisdiction shall be determined by an Act of Parliament. Resultantly, the Supreme Court of Namibia is a creature of statute. Thus, its powers are set out in the Supreme Court Act, 1990 (hereinafter referred to as the Act).[13] According to section 2 of the Act, the Supreme Court has jurisdiction to hear and to determine appeals and any other matters which may be conferred or imposed upon it by the Act or the Namibian Constitution or any other law.

There are two principles that need to be taken into consideration when it comes to the binding nature of the Supreme Court decisions. This includes the principle of the *res judicata* and the *stare decisis*.[14] In terms of the first principle, once the Supreme Court has taken a decision in a case, such a decision is final and binds the parties to the dispute and the court becomes *functus officio*.[15] This means that an aggrieved party cannot come back to court for issues in the same case to be decided on again.[16] The second principles demand that the Supreme Court must follow a legal principle established by it after due deliberation, if similar facts occur in the future.[17] In fact, this principle is applicable to all courts of Namibia, provided that decisions of a superior court also bind all other courts below a particular superior court. The Supreme Court can only depart from the principle of *stare decisis* if later facts are distinguishable; it was arrived at *per incuriam* or is found to be clearly wrong. [18]

12.3 UNDERSTANDING THE GENERAL PURPOSE OF RESTRAINT OF TRADE CONTRACTS

The mere fact that a contract restricts one's freedom of trade does not mean that such a contract should be treated as an agreement in restraint of trade. Christie illustrates this principle by stating that:

> A tie agreement under which a liquor licence ties himself to a particular brewery, or a garage owner to a petroleum company, a co-operative scheme for selling farm produce, a sole buying agency, a praedial

13 Supreme Court Act 15 of 1990.
14 *Likanyi v S* (SCR 2 / 2016) [2017] NASC 10 (07 August 2017).
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.

> servitude and a restriction in a lease of a shop against using a purpose in competition with another business in the building have all been held on their facts not be contracts in restraint of trade.[19]

This calls upon a party seeking to enforce a restraint of trade contract to display certain facts such as the possible infringement on one's right to proprietary interests that indicate that the clause under scrutiny constitutes a restriction on the individual's constitutionally guaranteed freedom of trade or profession not only in form but also in substance. Hence, the Courts when called upon to have the restraint of trade contract enforced or set aside will scrutinise the facts presented to it and pronounce itself based on those facts, although the host of other factors might also be taken into consideration.

Restraint of trade clauses normally form part of employment contracts or contracts in the sale of business.[20] In terms of the restraint clause, an employee is prevented from conducting activities in competition with the employer. In the same vein, a contract for the sale of business may contain a clause in which the seller of the business is prohibited from carrying out undertakings that are in competition with the business or commercial activities of the new owner.[21] The primary purpose of restraint of trade contracts is to protect the business interests of the employer or the new business owner.[22] One must have protectable interests worthy of protection. The objective of the person to the restraint of trade contract should therefore be to protect the reasonable interest of the employer or new business owner and not be aimed at preventing healthy competition and the courts consider various factors in deeming whether the restraint is reasonable and should therefore be enforced.[23] In other words, there must be a commercial justification[24] for restricting the employee's right to enter into another trade or profession and therefore enforcing the restraint of trade agreement against the employee. It was stated in the South African case of *Magna Alloys Research (SA) (Pty) Ltd v Ellis*,[25] that it is in the public interest that an agreement entered into liberally should be honoured and that everyone should be able to operate freely in the professional and business world.[26]

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19 RH Christie (1991) *The law of Contract in South Africa* (2nd ed) Butterworths: Durban, 353-354.

20 Y Mupangavanhu "The Relationship between Restraints of Trade and Garden Leave" Vol. 21(1) PER/ PELJ 2017(20) 1-22.

21 MA Fouche (2012) *Legal Principles of Contracts and Commercial law* (7th ed) Cape Town: LexisNexis, 88.

22 Ibid.

23 Ibid.

24 *Digicore Fleet Management v Steyn* (722/2007) [2008] ZASCA 105 (22 September 2008).

25 1984 (4) SA 874 (A).

26 *Magna Alloys Research (SA) (Pty) v Ellis* 1984 (4) SA 874 is a leading case in South Africa on the subject of restraint of trade clauses. Prior to the *Magna* Decision, the South African Courts follow the legal principle that all restraints of trade agreements where invalid and a party who wishes to to have such agreements enforced must allege and prove that the agreement in question is reasonable and thus enforceable. However, the Magna decision brought a change in the law to the effect that all restraint

12.4 NAMIBIAN POSITION WITH REGARDS TO RESTRAINT OF TRADE CONTRACTS

12.4.1 Enforcement and limitations of restraint of trade contracts

The Namibian position with regards to the enforcement of restraint of trade contracts has been well-formulated by Frank J. in the landmark case of *Alpine Caterers Namibia (Pty) Ltd v Owen & Others*[27]as follows:

(a) The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction on the person's freedom of trade would probably also be contrary to public policy should it be enforced.

(b) Public policy can vary from time to time and does not remain static. Furthermore, the fact that a certain provision is regarded as contrary to public interest in South Africa would not necessarily mean that it would be contrary thereto in Namibia.

(c) A restraint invoked purely for the purpose of avoiding competition and not to protect some proprietary interest would be unreasonable and against the public interest.

(d) Whether a covenant is contrary to public policy is a factual issue.

(e) The court will have regard to the circumstances pertaining at the time when it is asked to enforce the restriction.

(f) A court would be entitled to cut down a restraint so as to enforce only that part of it which would be reasonable and not against public policy.

In determining whether a restraint of trade clause in a particular contract is against public policy, the courts will consider the facts that prevailed at the time the court was asked to enforce such a clause and thus the question of whether the restricting clause is against public policy and is a factual issue.[28] It is a trite principle that agreements that are contrary to public interest are unenforceable and a restraint of

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of trade agreements is prima facie valid and enforceable and a party who claims that it must not be enforced bears the onus to prove the basis of his or her argument, i.e. that the restraint is unreasonable and thus enforceable. Though this is a South African Court decision, Namibian Courts have followed this decision and it has been cited with approval by the Namibian Courts.

27 1991 (2) NR 341.

28 Ibid. which paragraph? It is important to note that the courts consider the circumstances pertaining at the time it is asked to enforce a restraint of trade clause and not the circumstances that prevailed at the time the contract was concluded.

the trade clause will be unenforceable if the enforcement of the clause is deemed to be prejudicial to the public interests.[29]

The principles laid down in the *Alphine* case as mentioned above are derived to a greater extent from the Constitution. The fundamental rights and freedoms contained in Chapter 3 of the Namibian Constitution are not absolute and they are subject to certain limitations.[30] In order for such limitations to be lawful, the limitations must "specify the ascertainable extent of such limitation…"[31] From this constitutional provision, it is clear that a restricting clause should be wide in scope to provide the essential factors of restraint of trade and this includes the period of restraint and the area of restraint in order for such a restraint to be valid and enforceable.

A restraint of trade contract should provide a time frame within which an individual is restricted from conducting or carrying commercial undertakings within a certain area. If a clause restricts an individual *ad infinitum* to do business with any existing clients of the other party, such a clause will be against public policy.[32] One cannot restrict another's right to trade for an indefinite period of time and or over an unreasonably large area. In the case of *Experian South Africa (Pty) Ltd v Haynes Andrew Michael and Transunion Credit Bureau (Pty) Ltd,*[33] one of the respondents opposed the enforcement of the restraint clause and stated that the restraint is unreasonable on the basis that it operates nationwide. The court gave a judgment in favour of the applicant and ruled that:

> The restraint agreements contained in the agreement are reasonable as to the subject matter, area and duration and are reasonably required to maintain its goodwill and proprietary interest and may be enforced against him.

The reasonableness requirement plays an important role in enforcing the restraint clause. The court will not come to the aid of a party wishing to have the restraint clause set aside simply because the clause is intended to operate nationwide. The South African Court of Appeal said in the case of *Digicore Fleet Management v Steyn*[34] that "it is now trite that provisions in restraint of trade are enforceable unless shown by the person wishing to escape an undertaking to be unreasonable…". On the contrary, the courts will not enforce a restraint clause solely on the grounds that the area of restraint is limited. The court draws its focus to the overriding factor

29 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 897.

30 Article 22 of the Constitution.

31 Ibid.

32 *Alieta Elizabeth Wiese t/a Support.com v Pastec Distributors & Training CC Case No: 285/2011 Judgment delivered on 24 February 2016.*

33 Case No 487/11/2011.

34 *Digicore Fleet Management v Steyn* (722/2007) [2008] ZASCA 105 (22 September 2008). Although this is a decision of the South African Supreme Court of Appeal, there is a high possibility that the Supreme Court of Namibia will come to the same decision, when it is call upon to decide on the issues similar to the ones raised in this case.

being the purpose of the restraint in testing the reasonableness of the restraint to determine whether such a restraint clause must be enforced or set aside.[35]

12.5 Limitation on the right to trade or carry a profession

12.5.1 General

The Constitution provides for derogable and non-derogable rights. Article 24 (3) of the Constitution clearly sets out the rights from which a derogation may be permissible. Accordingly, by implication of article 21(1)(j) is derogable because it is not expressly included in the rights which are declared non-derogable by Article 24 (3) of the Namibian Constitution. Furthermore, the exercise and enjoyment of the Article 21(1)(j) right is not illimitable and thus it is subject to a restriction insofar as the exercise of the Article 21 (1)(j) right is subject to the law of Namibia.

The constitutional restriction or limitation to the exercise of that right is provided for by the Namibian Constitution as follows:

> The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[36]

The restrictions should be applied only in so far as it is necessary for the purposes contemplated by the specific restrictions.[37] Article 22 provides that any law providing for a limitation must be of general application, and shall not be aimed at a particular individual.[38] If a limitation imposed on a person's right is not of general application, but is rather aimed at a particular individual, such a person may claim that the limitation is unlawful and that he or she is for factors victimised or discriminated against.

The constitutional perspective therefore lays down certain important principles with regards to restraint of trade contracts and their enforcement. Firstly, all persons regardless of their citizenship are afforded the right to organise their activities in a manner affording them the opportunity to carry out any trade or business. Therefore, generally it would be unlawful to restrict one's freedom of trade. However, the restriction may be subject to a permissible limitation. Secondly, the business

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35 *Basson v Chilwan* 1993 (3) SA 742.
36 Article 21 (2) of the Constitution.
37 K*auesa v Minister of Home Affairs* (SA 5/ 94) [1995] NASC 3.
38 Article 22 of the Constitution.

or trade to be carried out must not be prohibited by the law.[39] A person cannot claim the enforcement of a right to trade if the object or purpose of the trade is unlawful. The conduct of engaging in unlawful trade is a violation of the law. Thirdly, the constitutionally guaranteed right to practice lawful trade or conduct legitimate business or profession may be restricted.[40] Finally, the reasonable criterion gives rise to the geographical area and period of the restraint.[41] Therefore, in order to determine the reasonableness or unreasonableness of the restraint clause, the Courts pay meticulous attention to the time frame and the geographical area which the individual is purported to honour in terms of a restraint clause.

12.6 Specific limitation principles

12.6.1 Public policy

The Constitution places certain requirements or conditions that must be complied with in order for the limitation or restriction on one's freedom of trade or occupation to be lawful. Article 21(2) provides that the restriction must be necessary in a democratic society. What is necessary in one society will obviously differ from what is regarded as necessary in another society. This therefore requires the Courts to pay particular attention to the surrounding circumstances such as the economic situation of the country or State in which a restraint of trade clause or contract is sought to be enforced. Individuals are entitled to seek relief from the Courts where their rights have been infringed and thus whether it is in the common law or constitutional context, an individual seeking relief bears the burden to prove his or her standing.[42] The onus of proof that the enforcement of restraint clause will be against public interest rests with the party who makes such an allegation. Conversely, the defendant carries a principal duty to prove to Court that he is entitled to the enforcement of the restraint contract.[43]

The Supreme Court of Namibia in the case of *Trustco Limited v Deeds Registry Regulation Board* [44] said that the concept of reasonableness has at its core, the idea that many considerations are at play. The courts are therefore required to take into consideration and pronounce themselves on two issues to comply for the principle of public policy. Firstly, in compliance with the public interest, parties should comply with their contractual obligations, i.e. the notion of *pacta servanda sunt*.[45] Secondly, all persons should in the interests of society, be commercially active, productive

39 Ibid.

40 Ibid.

41 Mupangavanhu (Note 20 above).

42 *Hendricks and Others v Attorney-General of Namibia and Others* (PA140/00, PA140/00 [2002] NACH 4 (Judgement delivered on 20 August 2002).

43 Christie (Note 19 above) 436.

44 *Trustco Insurance Limited and Kruger, Van Vuuren and Co v Deeds Registries Regulation Board and Others*, Case No: SA 14/2010.

45 *Reddy v Siemens* [2006] SCA 164 (RSA).

and be allowed to engage in trade and commerce or the professions.[46] There is therefore a need to perform a balancing act.

12.6.2 Morality

Article 21(2) further provides for an additional requirement to be complied with before a restraint may be enforceable and this is the requirement of morality. The constitutional drafters did not specifically define the concept or requirement of morality, which calls for the need to look at other sources for a proper definition of morality and application of the morality requirement or principle. Morality can be likened to order and it is concerned with human actions that are ordered to one another.47In determining what is morally right, the Court should evaluate the values and aspirations of the given society.

12.6.3 Reasonableness requirement

Apart from the two requirements of public interest and morality as discussed above, another crucial requirement to be complied with for the limitation to be justifiable is the requirement of reasonableness. In order for the restriction placed on one's freedom of trade or profession to be lawful and in compliance with the constitutional order, such restriction should be reasonable.

In the case of *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others,*[48] the Supreme Court of Namibia said that the freedom protected by Article 21(1)(j) does not imply that persons may carry on their trades or businesses free from regulation. Thus, one's right to trade or conduct a business can be restricted. One needs to determine whether a restraint of trade contract qualifies as a constitutional limitation on a person's right to freedom of trade or profession. If this question is answered in the affirmative, the next enquiry is whether a particular restraint of trade contract or clause meets the requirements for a limitation as prescribed by Article 21(2). If the restraint clause fails to meet the requirements as provided, such a clause will be unconstitutional and therefore invalid. On the contrary, a restraint clause that complies with Article 21(2) requirements is constitutional and eligible for enforcement. Covenants in restraints of trade are *prima facie* constitutional based on the limitation provision of the Constitution, unless otherwise declared unlawful by the court of law.

If the restriction on the person's right to trade or conduct his profession complies with the constitutional principles of derogable rights and limitation, then such restriction does not violate article 21(j) of the Constitution. Conversely, if the restraint of trade contract or a clause in any agreement restricting one's right to trade or

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[46] Ibid.

[47] A Scheller Jr. (1953) "Land Morality" *Maarquette Law Review* Vol. 36(3) <http://scholarship.law.marquette.edu/mulr/vol36/iss3/12> 321.

[48] (SA 51/2008) [2009] NASC 17 (14 December 2009)

conduct his profession does not adhere to the said constitutional principles, then such an agreement or clause violates the person's right to the freedom of trade as guaranteed by the Constitution.

In the Namibian case of *Hendricks and Others v Attorney-General of Namibia and Others*[49]*,* where the issue of whether the laws preventing the keeping of a brothel or alternatively engaging in prostitution conflicts with the constitutional provision protecting and promoting one's right to freedom of occupation, Maritz J, (as he then was) relying on Article 21 (2) of the Constitution said that the law should impose reasonable restriction on the freedom[50], the restriction should be necessary in a democratic society, and the restriction should be required in the interest of sovereignty and integrity of Namibia, national security, public order, decency or morality. Furthermore, it was stated in the same case that in deciding whether a particular provision of an Act of Parliament passes the constitutional muster of Article 21(2), the court should strive to deduce the Legislative objective in passing the Act. The Courts are also under a duty to examine the means used by the Legislature to achieve its objective. The Court should satisfy itself that the objective and the means employed to achieve the objective is reasonably and rationally connected to each other. The Courts are under an obligation to apply the principles and values of society in determining the objective and means used by legislature to achieve its objective in order to ensure compliance with Article 21(2).

Although the above case did not expressly deal with contract law principles and concentrated on an Act of Parliament, the same principles as laid down will equally apply to restraint of trade contracts. This therefore means that when determining whether the restraint contract places a justifiable limitation on one's right to trade, the decision-maker should look at the objective of the limitation, and whether such limitation is connected to the values and principles of society. Most common than not, in order for a limitation on a person's freedom to pass the constitutional test as stated in Article 21(2), it is a requirement that such a limitation should be aimed at protecting the reasonable interest of the employer or new owner of the business.[51]

In the case of *Trustco Limited v Deeds Registry Regulation Board,*[52] the Supreme Court of the Republic of Namibia dealt with the constitutional challenge involving article 21(1)(j) in terms of one's right to practice the legal profession. The Court re-visited its earlier decision in the case of *Africa Personnel Services (Pty) Ltd v*

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49 (PA140/00, PAQ40, 00 [2002] NAHC 4 (20 August 2002).

50 Reasonable restriction means that the restriction on one's freedom to enjoy a particular right should not be beyond what is required. Reasonableness in itself requires balancing the two interests. In this case we need to look at the interest sought to be achieved in allowing an individual to fully enjoy his or her right and versus the interest sought to be achieved in limiting one's freedom to enjoy his or her rights. Thus, the question that is to be answered in questions of reasonable restriction of one right is whether or not the restriction placed on one's right is reasonable.

51 Fouche (Note 21 above) 88.

52 *Trustco Insurance Limited and Kruger, Van Vuuren and Co v Deeds Registries Regulation Board and Others*, Case No: SA 14/2010.

Government of Republic of Namibia and Others[53] and reiterated that article 21(1) does not give individuals the freedom to carry on their trades or business free from regulation. In other words, although individuals, owing to a free market system have a right to choose and practice their trade or occupation, such freedom may be limited in accordance with the law.

The Court formulated a three-step approach as follows:

> The first is to determine whether the challenged law constitutes a rational regulation of the right to practise; if it does, then the next question arises which is whether even though it is rational, it is nevertheless so invasive of the right to practise that it constitutes a material barrier to the practice of a profession, trade or business. If it does constitute a material barrier to the practice of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of art 21(2).

12.7 CORRELATION OF CHAPTER 3 RIGHTS WITH PRINCIPLES OF STATE POLICY UNDER ARTICLE 95 OF THE CONSTITUTION

The permissible restrictions provided for under the explicit Articles of the Constitution, read together with the general nature of the provisions of a Constitution, necessitate the exercise of the constitutional jurisdiction of the Courts in interpreting and construing the grey areas of the Constitution to determine what constitutes morality or decency.[54] The principles of State policy are not rights in their original form and thus such are not enforceable on their own. Article 101 of the Constitution makes it undoubtedly clear that the principles of State policy shall not on their own be legally enforceable by any Court, but such principles are simply meant to guide the Government in making and applying laws and the Courts are therefore entitled to have regard to such principles in interpreting any laws that have a bearing on such principles. This was reiterated by the Supreme Court in the case of *Metropolitan Bank of Zimbabwe Ltd and v World Eagle Properties (Pty) Ltd v Bank of Namibia*[55] where the court stated that Article 95(j) enjoins the State to promote the welfare of people. This calls for the need to improve the living standards people. In addition, the court held that Article 98 defines Namibia's economic order whose aim is to secure economic growth, prosperity and a life of human dignity for all Namibians.

Principles of State policy remain principles unless they are linked with Chapter 3 rights from which no derogation is allowed unless in accordance with the law. An applicant can succeed on his/her claim based on an Article 95 principle if he or she

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53 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51/2008) [2009] NASC 17 (14 December 2009).

54 Amoo & Skeffers (Note 8 above) 19.

55 CASE NO: SA 77/2017.

links such a principle with a right or fundamental freedom contained in Chapter 3 of the Constitution. For example, Article 95(c) of the Constitution which deals with the promotion of the welfare of the citizens of the country, can be linked with Article 21(1)(j) as the former gives effect and further promotes the right to the freedom of choice of occupation and profession guaranteed in terms of Article 21(1)(j).

In a nutshell, when called upon to determine the enforceability of a restraint of trade clause, the Courts may employ the principles of State policy to determine whether the enforcement or otherwise of the restraint clause will promote the welfare and interests of either of the individuals that stand to be affected by the Court's decision.

12.8 HEALTHY COMPETITION ARGUMENT

Most countries have enacted laws that are directed at providing regulation or exclusion of restriction on competition. The aim of such laws is to make provision for the maintenance and protection of competition in a specific country.[56] Namibia is a developing country and as such, it is imperative that Namibia puts in place laws that not only regulate but also promote healthy and fair competition as this will also have a positive impact on the economy of the country. Hence, in the year 2003, the Namibian Parliament promulgated the Competition Act[57] to address the issues relating to trade, commercial undertakings and competition. The Competition Act[58] established the Competition Commission (hereinafter referred to as the Commission). Section 2 of the Competition Act sets out the primary purpose of the Act and states that, ''the purpose of the Act is to enhance the promotion and safeguarding of competition in Namibia''.

In its aim to promote competition in Namibia, the Competition Act prevents restricted business practices and section 23(1) of the Act in particular provides that:

> Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited.

Section 23(1) of the Competition Act proscribes agreements or clauses that prohibit or limit restrictive practices. In particular, sections 2 and 23(1) of the Competition Act are in line with Article 21(1)(j) of the Namibian Constitution which promotes freedom of trade and profession amongst individuals within the country. Hence, from the competition law perspective, any restrictive clause in a contract will be said to be void. In the case *Alieta Elizabeth Wiese t/a Support.com v Pastec Distributors*

56 N Van Heerden (1995) *Unlawful Competition* LexisNexis: Butterworths, 4.
57 Act 2 of 2003.
58 Ibid.

& Training CC,[59] Miller AJ opined that if the restriction is intended to subsist for an unlimited duration and prevents the restricted individual from ever seeking to conduct commercial undertakings with the respondent's clients, such restriction is directed at preventing fair competition with the respondent.

Healthy Competition is crucial not only for the economic development of a country but also for consumers because competition can yield more choices and variety for consumers; greater efficiency and productivity; greater wealth equality; more innovation; and lower costs and prices for services and goods.[60]

Despite the fact that competition laws promote competition in Namibia, the Constitution provides a limitation in terms of Article 21(2) as discussed above, which sets out justifiable grounds for the limitation on the rights contained in Chapter 3 of the Constitution, in particular Article 21(1)(j).

12.9 ENFORCEMENT OF CONSTITUTIONALLY GUARANTEED RIGHTS AND FREEDOM

The Constitution authorises all aggrieved persons to approach an appropriate forum to have their rights protected or enforced. In particular, Article 25 of the Constitution states that:

> Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.[61]

Accordingly, if a person claims that his or her fundamental rights or freedoms have been violated or stands to be violated in one or the other way, he or she should approach a suitable forum and discharge his or her onus by proving that firstly he or she has a right that is in terms of the constitution worthy of protection, and secondly, his or her constitutional right has been infringed through the action of the other and that he or she seeks for the protection of his or her right or freedom.

12.10 RECOMMENDATIONS: THE BALANCING ACT

The Courts have a duty to perform a balancing act. There are two rights in conflict, namely, the employer or business owner's right to protect his or her business

59 Case No: 285/2011 Judgment delivered on 24 February 2016.

60 ME Stucke (2013) "Is competition always good?" Vol. 1(1) *Journal Antitrust Enforcement* 165-166.

61 Ibid.

interests on one hand conflicts with the employee's right to carry out his or her trade or business on the other hand. One right cannot be said to be more important than the other right. This therefore calls on the Courts or judges to exercise their discretion in determining whether a restraint of trade contract has been breached and should be enforced or set aside. In performing the balancing Act, the Courts should look at the surrounding circumstances and various factors that prevail at the time of enforcing the restraint of trade contract. Although the rules relating to the enforcement of trade contracts must be applied universally to all contracts of restraint nature, each case should be judged on its own merits. The Courts are required to pay particular attention to the constitutional requirements of public interest, morality and reasonableness. The Constitution does not expressly spell out what morality is, and as it is a wide concept, difficulties may arise in deciding whether or not a particular clause is morally acceptable.

The rights that are under consideration, that is the right to freedom of trade or profession, and the right to protect one's business interests which although not expressly made provision for but which may be incorporated into the constitutional provision dealing with justifiable limitations on Chapter 3 rights are both constitutional rights and thus the Courts in interpreting and enforcing or setting aside restraint of trade contracts must consider the aims and the purpose and purport of the Constitution and the goals the drafters of the Constitution sought to achieve through not only the drafting of the Constitution but also in the implementation thereof.

Article 95(c) of the Constitution seeks to protect the rights and interests of the employees and also promote sound employment relationships and fair and equitable employment practices within the workplace. This places a duty on employers to see to it that the employment contract as a whole or clauses included in such a contract are fair for both the employers and the employees. The Court may be reluctant to have a restraint of trade clause enforced if in interpreting or considering the enforcement of the restraint clause it concludes that such a clause is not fair to either of the parties.

Restraint of trade contracts in essence turn on the economy of the state. The enforcement or the setting aside of restraint of trade contracts, be it in the employment or business context, is to a greater part dependent on whether the said contract seeks to promote the welfare of the people in society and in turn contributes to the economic stability of the country. Healthy competition is one of the essential elements of any country that aims to achieve economic stability. However, one cannot simply violate or infringe on the other's right to freedom of trade for the purpose of encouraging competition, hence the need for performing a balancing act.

Fundamentally, when scrutinising and inspecting the nature of a restraint with the aim of assessing its reasonableness and thus its probable enforcement, it is important to make a comparison between what the contract aims to protect and

what it aims to prevent.[62] Thus the action of performing a balancing act plays a crucial and central role in having a restraint of trade contract or clause enforced or set aside. The enforcement of the restraint of trade contract will only be said to be valid and legal once the courts are satisfied that the constitutional and common law rules regarding justifiable limitation and/or derogation of rights with regards to trade or employment or profession have been complied with. The courts look at the totality of facts, the circumstances, factors and events in deciding on whether the restraint of the trade contract violates one's right to trade or choose to follow a profession and as such, the restraint clause should not be enforced.

The practice of limiting a fundamental right or freedom as guaranteed under the supreme law is not unique to the Namibian position as this practice is common to Namibia's counterparts such as our neighbour South Africa and the likes of Zambia. Similar to the Namibian Constitution, the Zambian Constitution provides for the limitation on its constitutionally guaranteed rights and freedoms. In particular, Article 66 of the Zambian Constitution provides that:

> A right or freedom is limited by - (a) a limitation, restriction or qualification expressly set out in the Article or clause containing that right or freedom; (b) the limitations and restrictions specified in this Article and Article 67; and (c) the limitations and restrictions provided in a law of general application as provided in Article 67, which do not negate the core or the essential content of the right or freedom and is reasonable and justifiable in a democratic society, taking into account - (i) the nature of the right; (ii) the purpose of the limitation or restriction; (iii) the extent of the limitation or restriction; and (iv) whether there are alternative means to achieve the required purpose.

The Zambian position regarding the limitation on the rights and freedoms is tantamount to the Namibian position. What is of greater importance is the fact that the limitation must be reasonable and the reasonableness factor must be viewed in a democratic society, and finally the purpose of the restriction should be considered. Furthermore, Article 67 of the Zambian Constitution clearly requires that any restrictive clause should be reasonable in the public interest, which is synonymous to the limitation clause provided for in Article 21(2) of the Namibian Constitution. Similarly, Article 22 of the South African Constitution contains a limitation clause, providing for a justifiable restriction on an individual's right and/or freedom.

12.11 CONCLUSION

In this research, the author has assessed the constitutionality of the restraint of trade contracts. The focus was therefore, on the justifiable limitations on the business or professional freedom both from the constitutional and common law

62 Christie (Note 19 above) 364.

perspective. The first part of the paper gave a brief distinction between constitutional supremacy and parliamentary sovereignty. Namibia is governed by a supreme Constitution as clearly stated in Article 1(6) of the Constitution, and therefore, it follows constitutional supremacy. The second part of the paper highlighted the underlying purpose of restraint of trade contracts. Most often than not, a restraint of trade agreement is concluded with the purpose of protecting the proprietary interest of the previous employer or business owner. Despite the fact that Article 21 1(j) provides for the right to the freedom of trade, an individual does not have an absolute right and accordingly such a right may be limited provided that such limitation is reasonable and justifiable, which reasonableness and justification must be determined on a case by case basis. Thirdly, the author meticulously looked at the right to freedom of trade as guaranteed by the Constitution and the limitations placed by the Constitution on Chapter 3 rights, in particular, the right to freedom of trade or profession. Amongst others, the limitation of business or professional freedom may be justified if such limitation is reasonable and in the public interest. Reasonableness is viewed in the context of the duration and area for which the restraint is intended to operate.[63] In discussing the central point of the paper, the author also drew a closer look at section 23 of the Competition Act, which prohibits restrictive business practices and seeks to promote fair and healthy competition.

In its final analysis, the chapter outlined the balancing act which the courts are obliged to perform when addressing the issues of restraint of trade clauses to protect the rights of the parties involved in the enforcement of restrictive business agreements. The courts are therefore, required to pay meticulous attention to the facts presented, properly apply their minds to the facts and find out the underlying purpose of the restraint of trade agreement before ordering the enforcement or setting aside of the restraint clause.

All agreements including agreements in restraint of trade should meet the constitutional yardstick that it must not unnecessarily limit one’s right to the freedom of trade or profession, and where such a limitation has been placed, it must be a reasonable limitation that complies with the principles of public policy.[64] A good balance should be striked between the competing rights and interest, and the competing interest should be harmonised as far as it is reasonably possible.

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63 *Alpine Caterers Namibia (Pty) Ltd v Owen & Others* as follows: 1991 (2) NR 341.

64 *Reddy v Siemens* [2006] SCA 164 (RSA).

CHAPTER 13

The legal principles governing condonation applications in Namibia: Is the Supreme Court a Condoning Court?

John Baloro and Phillipus Balhao

13.1 INTRODUCTION

Throughout the common law world, including the Republic of Namibia, the initiation of causes of action and the launching of appeals from court judgments and the conduct of other related legal processes are governed by court rules of either the lower courts, the High Court and the Supreme Court. It is these rules which specify the set deadlines by which litigating parties must abide when launching various legal actions and processes. To ensure the smooth and expeditious administration of justice and the achievement of finality in the resolution of disputes in the country, it is crucial for litigating parties to adhere to these guidelines as stipulated in the various court rules. However, this is not always the case. For various reasons, parties are every so often late in initiating legal actions such as review applications and even noting appeals when they are dissatisfied with the judgments arrived at by the lower courts and the High Court. In such circumstances, it is common for such parties to apply to the relevant courts to condone their non-compliance with court rules either in terms of delay in the launching of legal actions, noting of appeals or non- adherence with other aspects of court procedures.

An important purpose of this Chapter is to scrutinise the practice and attitude of the courts of Namibia, especially the Supreme Court itself, when confronted with applications for the late initiation of legal actions and other court processes or other non-compliance with court rules. Also, the Chapter will examine the important legal principles and standards which govern the consideration of condonation applications which have over time been evolved by the Supreme Court of the Republic of Namibia to guide the courts below it, the members of the legal profession and in general, potential litigants who may be compelled to approach the courts including the apex court itself to seek indulgence for non-compliance with court rules. To achieve this end, in this chapter, the leading judgments of the High Court and the Supreme Court in this area of the law will be analysed and conclusions drawn therefrom. Judgments of the Supreme Court will also be observed from a statistical perspective to identify tendencies which emerged in deciding condonation applications.

The Chapter will also examine the various interpretative approaches, guidelines, considerations, and steps which must be followed by all Namibian courts when confronted with condonation applications for non-compliance with time schedules

set by court rules and procedures. The ensuing analysis in this Chapter will assess to what extent the Supreme Court of Namibia has succeeded in evolving and clarifying the various legal principles governing condonation applications which arise before the courts in the country. A related but equally important issue to consider is to what extent the Supreme Court has shown flexibility and even leniency and compassion when considering condonation applications. It will be seen from the discourse below, that to its enormous credit, the Supreme Court of Namibia, has in a number of leading cases, which have progressed the judicial ladder up to it, has not been reluctant or slow to clarify and set forth the parameters of the factors that all Namibian courts must be cognisant of and be guided by or indeed be bound when considering condonation applications which may come before them.

13.2 PROCEDURAL LAW IN NAMIBIA: A BRIEF HISTORICAL OVERVIEW

Many aspects of Namibian Civil Procedure Law can be traced to English Law. When Namibia became independent, it adopted, largely, Civil Procedure Law from South Africa.[1] South African Civil Procedure Law in turn was adopted, or was at least largely influenced by, English Law.[2] Below is a broad overview of traits of early English Civil Procedure Common Law that is still prevalent in Namibian Civil Procedure Law today.

In an early part of English court practice, a prospective litigant could only take legal action against another person if permission was given in the form of a writ by the Lord Chancellor, a representative of the monarch.[3] The writs were categorised and similar writs were issued for repeated complaints.[4] Specific procedural requirements developed for specific writs.[5] Only a single writ was issued at a time, thus limiting the amount of litigation.[6] This formed part of the development of English Common Law which became increasingly complex and rigid over time.

In some instances, prospective litigants would however, plead to the Lord Chancellor to resolve a dispute to avoid the rigidity of the common law. In the early stages, this was allowed for vulnerable persons like the elderly.[7] However, as the common law became more rigid, this practice grew and later developed into a procedural

1 See Article 140 of the Constitution of the Republic of Namibia.

2 HH Erasmus (1991) “Historical foundations of the South African law of civil procedure” Vol. 108(2) *South African Law Journal* 265-276 at 265.

3 SN Subrin (1987) “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective” Vol. 135(4) *University of Pennsylvania Law Review*, 1909-1002 p. 915 referring to SFC Milsom (1969) *Historical Foundations of the Common Law*. Butterworth: Heinemann.

4 SN Subrin (1987:915) referring to TFT Plucknett (1956) *A Concise History of the Common Law* (5th ed) Liberty Fund Inc: Indianapolis.

5 Subrin (Note 3 above).

6 Ibid, 915-6.

7 Ibid, Subrin, S. N. (1987:918) referring to amongst others SFC Milsom (1969).

practice in its own right and also gradually formed the basis of the development of equity courts which over time developed the well-known doctrines or maxims of equity which were aimed at assuaging the rigidities and injustice caused by the strict adherence to common law principles by the ordinary common law courts.[8] Contrary to the common law system, the courts of equity which eventually became the courts of chancery did not adopt adversarial traits. Procedure for instance was much more lenient towards litigants.[9] The Lord Chancellor, who adjudicated in the equity courts, had broad powers regarding procedure to deal with cases compared to the rigid predetermined procedure established under the common law by the common law courts.[10] It should be pointed out that unlike the common law courts, the courts of equity lay emphasis more on substance rather than form. Thus, they developed the well-known equitable maxim to the effect that, “equity looks to the substance rather than form”. In other words, equity looked to achieve justice rather than a blind and unyielding adherence to formal technical procedural rules. This formed part of the development of equity in England’s legal system. These two systems were eventually merged into a single legal and procedural system.[11]

Traits of both these systems are found in Civil Procedure Law in Namibia still today. The rules of the High Court place a lot of emphasis on resolving the “real issues in dispute”.[12] Appeals to the Supreme Court, mainly a court of appeal, are for instance regulated by statute.[13] This is reminiscent of the permission required from the Lord Chancellor in England’s early system to institute legal proceedings. It also shares the adversarial traits of the English Common Law by attempting to limit issues. Further examples of this in the Supreme Court include the rules which dictate the time limits for certain procedures like when to file an appeal and when to file records, both common reasons for which condonation is often sought for non-compliance.[14] Overall, the procedural rules of Namibian courts can be classified as strict. This is supported by our finding that 58 per cent of condonation applications for non-compliance with the rules are refused.[15] However, despite this, there are also traits or influences of the English equity courts. One example of this is for instance condonation, the focus of this chapter. In appropriate cases, the High Court rules make provision for extension of time, relaxation of rules and condonation in situations of delay or non-compliance considering the merit of each case.[16] The Supreme Court rules also have a provision for the granting of condonation in appropriate cases. The relevant rule reads as follows:

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8 Ibid.
9 Ibid, 919-2.
10 Ibid, 920.
11 This was done by means of the Judicature Statutes of 1873 and 1875.
12 Rules 1(3), 18(1)(h) and 27(3) of the Rules of the High Court: High Court Act 16 of 1990.
13 Section 18 of the High Court Act 16 of 1990.
14 Rules 7 and 8 of the Supreme Court Rules: Supreme Court Act 15 of 1990.
15 See heading 4.0, specifically sub-heading 4.2 below.
16 Rule 55 of the Rules of the High Court: High Court Act 16 of 1990.

> The Court may, for sufficient cause shown, condone a party's non-compliance with any of these rules, and may give such directions in matters of practice and procedure as it may consider just and expedient under the circumstances.[17]

In the context of this type of rules, the courts have a wide discretion reminiscent of the wide discretionary powers of the Lord Chancellor in the English equity courts. The following statement in a judgment in the matter between *Robinson v Randfontein Estates GM Co Ltd* quoted in *Dannecker v Leopard Tours Car and Camping Hire CC and Others* captures the interplay between the strict application of court rules and when non-compliance can be endured:

> The object of pleading [or in this instance procedure] is to define the issues; and parties will be kept *strictly* to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those *limits* the Court has a *wide discretion*. For pleadings are made for the Court, not the Court for pleadings.[18] (Emphasis added).

13.3 DISCUSSION OF LEGAL PRINCIPLES GOVERNING CONDONATION WITH REFERENCE TO CASES DECIDED BY THE SUPREME COURT

The judgment in the matter between *South African Poultry Association and Others v Minister of Trade and Industry and Others*[19] ("*South African Poultry Association* case") presented an opportunity for the Supreme Court to make a signal contribution to the law on condonation for review applications and condonation applications generally. The court seized the opportunity to extensively review the leading cases on the issue of condonation including all its previous decisions such as *Kruger v Transnamib Ltd (Air Namibia) and others*,[20] *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others*[21] and *Keya v Chief of Defence Force and Others* ("*Keya* case").[22] In this regard, before proceeding to analyse some of the relevant legal principles enunciated in the *South African Poultry Association* case referred to above, it is important to refer to the summary of the legal principles governing condonation made by O'regan AJA in the *Keya* case where Her Ladyship summarised the legal principles as follows:

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17 Rules 29 of the Supreme Court Rules: Supreme Court Act 15 of 1990.

18 *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173; *Dannecker v Leopard Tours Car and Camping Hire CC and Others* 2019 (1) NR 246 (SC) at 260.

19 *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

20 *Kruger v Transnamib Ltd (Air Namibia) and others* 1996 NR 168 (SC).

21 *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* 2004 NR 194 (SC).

22 *Keya v Chief of Defence Force and Others* 2013 (3) NR 770 (SC).

> This Court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the High Court has held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.
>
> The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weigh to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the Court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'[23] (Footnotes omitted).

In a later case of the *South African Poultry Association and Others* v *the Ministry of Trade and Industry and Others*, the Supreme Court affirmed its previous decisions and cited with approval and applied the above principles as formulated by O'regan AJA.[24]

In this case, the Supreme Court, after extensively examining the detailed facts of the case and the length of delay which passed before the appellants launched the review application and the fact that there was an unexplained time of 6 months which passed without the appellants showing any activity connected with preparations towards launching the application or even notifying the respondents of their intention to do so, fully agreed with the finding of the court a quo that the delay on the part of the appellants was unreasonable. However, it was at the

[23] *Keya* case (Note 22 above) 21 - 22.
[24] *South African Poultry Association* case (Note 19 above) 17 per Smuts JA.

application of the second stage of the enquiry that the Supreme Court found fault with the approach of the high court and rejected the exercise of its discretion not to condone the unreasonable delay caused by the appellants. As O'regan AJA stated in the *Keya* case above, the Supreme Court reiterated that in determining whether or not to grant a condonation application, a court exercises a very broad discretion and an appellate court will be very slow to interfere with this discretion unless it has not been exercised judicially or it has been exercised using a wrong principle of law or capriciously. In casu, the Supreme Court held that the court a quo erred by applying the wrong principle of law as it failed to consider the merits of the case and the prospects of success when considering the question of whether or not to grant condonation.

In order to support its position on the circumstances under which an appellate court will interfere with the exercise of a court a quo's discretion to determine whether or not to grant a condonation application, Smuts JA cited with approval the following observations of the full court in the judgment in the matter between *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* ("*RDP* case"). The full court stated as follows:

> The relief sought related to a matter falling within the inherent powers of the High Court to regulate its own procedures. As such, the discretion which the Court a quo exercised on consideration of the facts of this case, was judicial in nature and involved a value judgment on whether the appellants had given a proper and satisfactory explanation for their failure to include the amplified papers as part of the election application. Although a discretion of that nature is not unfettered, it is well settled that a Court of Appeal would be slow to interfere with it "unless a clear case for interference is made out and (it) should not interfere where the only ground for interference is that the Court of appeal might have an opinion different from that of the Court a quo or have made a different value judgment". The power to interfere on appeal in such instances is strictly circumscribed. It is considered a discretion in the 'strict or narrow sense, i.e. a discretion which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself.[25]

However, in the *South African Poultry Association* case, even though the Supreme Court unanimously concluded that the court a quo was on the facts correct in holding that the appellants, in failing to take the necessary steps to launch their review application during an unexplained period of six months, committed an

[25] *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) 106 per Shivute CJ and cited with approval by the unanimous judgment of the Supreme Court in the *South African Poultry Association* case 44 per Smuts JA.

unreasonable delay, it erred in exercising its discretion not to grant condonation by applying a wrong principle of law. In this regard, the Supreme Court explained that the court a quo failed to consider the merits of the case and the prospects of success on appeal, even though it did not find that it did not find the unreasonable delay or non- compliance with court rules to be glaring, or inexplicable. In such an instance, the court will be excused from any further consideration of the prospects of success when exercising its discretion regarding the grant of condonation. The court cited with approval the decisions in the following cases in as far as they bore on condonation applications: *Arrangies t/a Auto Tech v Quick Build,*[26] *Katjaimo v Katjaimo,*[27] and *Tweya and Others v Herbert and Others*[28].

In further elucidation of other legal principles which courts must take into account when exercising their discretion as to whether or not to grant a condonation, the Supreme Court stated that another criterion to consider is the interest of justice, citing with approval two South African cases namely the decision of the Supreme Court of appeal in *South African National Roads Agency v Cape Town City*[29] ("*SANRAL* case") and the South African Constitutional Court in the case of *Khumalo and Another v MEC of Education, Kwazulu Natal*.[30] In the *SANRAL* case, the Supreme Court of Appeal found that although in condonation applications, the issue of whether the delay was unreasonable should first be considered before the court considers the merits, and found that this:

> […] cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case, in order to determine whether the interest of justice dictate that the delay should be condoned. It would have to include a consideration as to whether the non- compliance was egregious.[31]

As already alluded to earlier in this chapter, it is precisely on the ground of the failure of the court a quo in the *South African Poultry Association* case to consider the issue of merits and the prospects of success even at the stage of exercising its discretion with respect to the consideration of a condonation application that the Supreme Court set aside its decision not to grant the condonation application. In this respect, the Supreme Court found that although the court a quo referred to public interest in the context of the prejudice to the government respondents due to the lack of finality concerning the implementation of industrial policy and its implications for employment creation and investments in the country, prominently

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26 *Arrangies t/a Auto Tech v Quick Build* 2014 (1) NR187(SC) 5.

27 *Katjaimo v Katjaimo* 2015 (2) NR 340 (SC) 34.

28 *Tweya and Others v Herbert and Others* case No.: SA 76/2014 delivered on 6 July 2016.

29 *South African National Roads Agency v Cape Town City* 2017(1) SA 468 (SCA) 80.

30 *Khumalo and Another v MEC of Education, Kwazulu Natal* 2014 (5) SA 579 (CC).

31 *SANRAL* case 81 and cited with approval in the *South African Poultry Association* case (Note 19 above) 60.

absent was the question of the merits and the prospects of success.[32] Consequently, the court found as follows:

> [A]s already indicated, it is incumbent upon a court in determining the criterion of the interests of justice to consider the merits of a review in the absence of a finding that the delay is so egregious so as to justify determining the question of condonation without consideration of the merits. The merits are thus a fundamental factor to be considered by a court in such an enquiry. The failure to do so, as occurred in this appeal, results in the application of a wrong principle in the exercise of the court's discretion which was not exercised judicially [therefore]. It follows that the court's decision on is to be set aside.[33]

A recent contribution of the Supreme Court to its existing jurisprudence on the law governing condonation applications is the case of *China State Engineering Construction Corporation v Namibia Airports Company Ltd* which was unanimously delivered by the court on 7 May 2020.[34] This case is of interest not only because the Supreme Court consistently restated and applied its previously legally down legal principles on how courts should handle condonation applications which come before them, but also because the merits of the appeal in the case were handled solely on the basis of the court a quo's decision to reject the appellant's point in limine contending unreasonable delay in the launching of the respondent's review application. The case concerned an appeal from the judgment of the high court in which it reviewed and set aside a tender award made by the Namibia Airport Company ("NAC") to the appellant company, China Engineering Construction Corporation (Southern Africa) (Pty) Ltd for the construction of taxi ways and apron at the Ondangwa airport in northern Namibia. The new NAC board applied to review the tender award which was made by the old NAC board on the ground that the award did not comply with the procurement policy of NAC. Before the high court, the appellant, China Engineering Corporation took a point in limine to the effect that NAC unreasonably delayed in launching the review application. The high court rejected this preliminary objection and held that even if it was wrong in its holding, considering the circumstances of the case, it was an appropriate case to grant condonation for the review application.

On appeal, the sole argument of the appellant was that the high court was wrong in holding that there was no unreasonable delay on the part of NAC and that the court was equally wrong in condoning any delay which may have occurred. On appeal, the Supreme Court agreed with the appellants as it held that NAC failed to demonstrate that all the steps it took in preparation for launching the review application were in fact necessary. It therefore held that there was indeed unreasonable delay on the

[32] *South African Poultry Association* case (Note 19 above) 66.

[33] Ibid 67.

[34] *China State Engineering Construction Corporation v Namibia Airports Company Ltd*, Case No.: SA 28/2019 delivered on 7 May 2020.

part of NAC in launching its review application. The court then went on to hold that considering all the circumstances of this case, it was proper to condone the unreasonable delay on the part of NAC. The Supreme Court reiterated the legal principles applicable to the consideration of condonation applications and stated that the high court did not misdirect itself when it held that this was a proper case to grant condonation. Among other factors, the most important factor which tilted in favour of NAC was the issue of public interest in the manner that the tender award was made to the appellants. The Supreme Court found that it was not only contrary to the procurement policy of NAC but also woefully lacked transparency and accountability. Furthermore, the court characterised the tender award as an imprudent use of public funds. It was these factors which convinced the Supreme Court to grant condonation of the unreasonable delay by NAC, and went on to review and set aside the tender award to the appellants purely on the basis that the court aquo was correct in granting condonation. It is important to observe that in its unanimous judgment, the Supreme Court, per Damaseb DCJ, cited with approval the statement by it of the legal principles governing condonation applications in cases such as the *Keya* case[35], *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others*[36] and the *South African Poultry Association* case[37].

13.4 DESCRIBING THE APPROACH OF THE SUPREME COURT FROM A STATISTICAL PERSPECTIVE

In the preceding headings, a brief historical overview of procedural law in Namibia has been provided followed by a discussion of the legal principles regarding condonation with reference to Supreme Court judgments. Under this heading, the question whether the Supreme Court is a condoning court will be considered from a statistical perspective. Tendencies which emerged with respect to when the Supreme Court decided applications for condonation are identified and discussed.

(a) Outline of statistical approach

Data have been obtained from the outcome of 19 condonation applications in 18 reported judgments of the Supreme Court (“the sample”). The judgments have been identified from a database using a keyword search. The data have been obtained in respect of eight factors relating to condonation applications in the Supreme Court, listed below:

Condonation status, condonation with reference to the year in which the judgments was delivered, condonation with reference to the author of the judgments, condonation with reference to area of law, condonation with reference to the applicant in condonation applications, condonation with reference to the reasons

35 *Keya case* (Note 22 above) per O’regan AJA.

36 *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR (HC) 132F-J.

37 *South African Poultry Association* case (Note 19 above) 17.

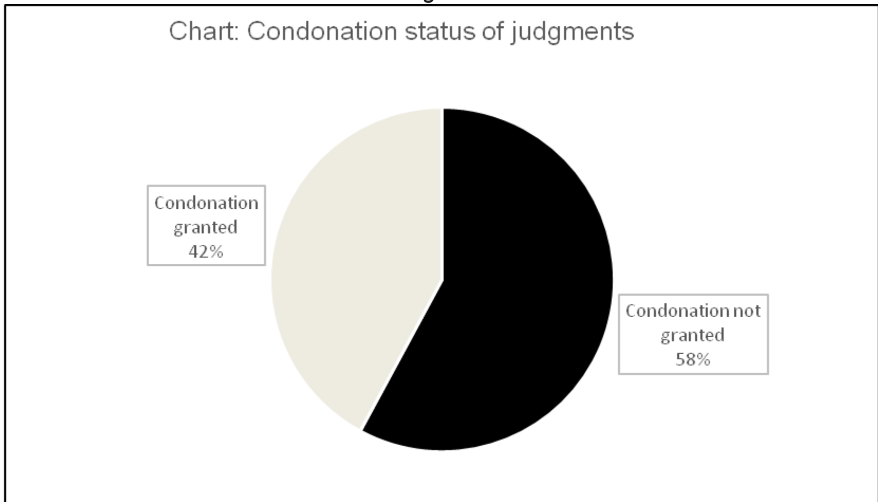
for seeking condonation, condonation with reference to the reasons for the court's decisions, and condonation with reference to costs awards.

Each of the above factors is considered in turn below. For each of the factors, a brief description is provided for the nature and the scope of the collected data. The findings from observing the data for each factor are provided in a chart followed by a discussion.

(b) Condonation status of judgments

Data from the sample was obtained regarding whether condonation was granted or not. No other factors have been considered for the purpose of observing this data. The findings of this observation will form the basis against which the remainder of the factors will be viewed. The findings of the observation are illustrated in chart 1 below.

Chart 1: Condonation Status of Judgements

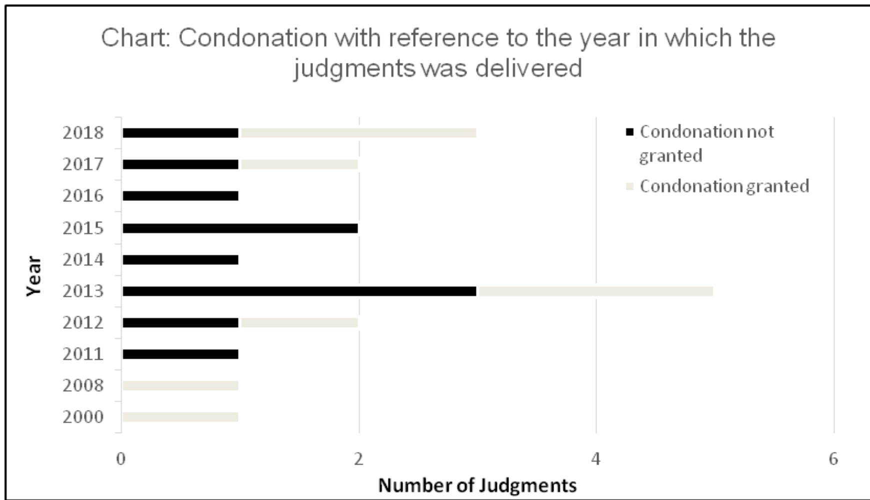


The findings show that there was a slight tendency to refuse condonation applications. This data is not convincing to suggest how the Supreme Court will decide condonation applications in the future. However, when viewed in the context of other data, it is possible to identify more clear-cut tendencies from which certain suggestions can be made regarding how the Supreme Court is likely to decide Condonation applications in the future.

(c) Condonation with reference to the year in which the judgments were delivered

Data has been obtained from the sample regarding the year in which the judgments were delivered. It has first been observed from the data how condonation applications were distributed over the years with reference to when the judgments were delivered. Secondly, it has been observed from the data whether there was a tendency to grant or refuse condonation applications in any year. The findings are illustrated in chart 2 below.

Chart 2: Condonation with reference to the year in which the judgements were delivered



The judgments in the sample were delivered between the year 2000 and the year 2018. In the years 2000, 2008, 2011, 2014 and 2016, there was only one application for condonation in each year. This is not sufficient data to identify a tendency of how condonation applications were decided in these years.

In the years 2012, 2015 and 2017, there were two applications for condonation in each year. In the years 2012 and 2017, one application for condonation was granted and one application for condonation was refused. In the year 2015, both applications for condonation were refused. The data may show that there was a tendency in 2015 to refuse condonation applications. However, based on the number of judgments in this year, this finding may not be credibly significant.

In the year 2018, there were three applications for condonation of which two were granted and one refused. The data shows a slight tendency towards applications for condonation that were granted in 2018. Again, based on the number of judgments in this year, this finding may not be credibly significant. The findings for 2018 may suggest that in years after 2018, the Supreme Court was more likely to grant applications for condonation. This is the only year in which more applications for condonation were granted and not refused.

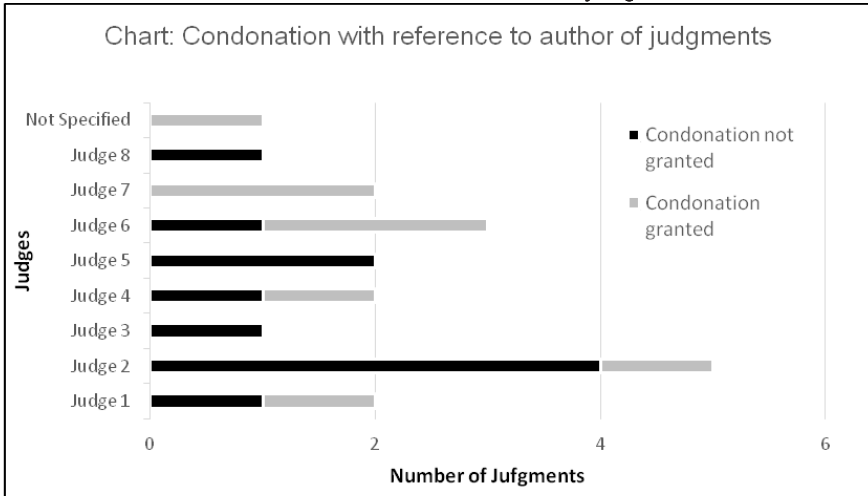
In the year 2013, there were five applications for condonation of which two were granted and three refused. In this year, there were more applications for condonation than in any other year. There was however, no overwhelming tendency to either grant or refuse applications for condonation in this year.
The findings about condonation with reference to the year in which the sample judgments were delivered by itself may not be useful to suggest how condonation applications will be decided in the future. However, when viewed in the context of

the other factors in this chapter as well as economic, political and social factors prevalent in the years in which these judgments were delivered, it may explain a prevalent tendency and perhaps also therefore how condonation applications may be decided in the future in similar circumstances.

(d) Condonation with reference to author of the judgments

Data was obtained from the sample regarding who the author of the various judgments is. Though it is trite that the proceedings in the Supreme Court are never constituted by a single judge, our findings from the sample were that the judgments were almost always unanimous. It is therefore plausible to identify a tendency of how condonation applications were decided by the Supreme Court with reference to the author of the judgments. It has firstly been observed from the data on how the applications for condonation were distributed amongst different judges according to who the author of the judgments was. Secondly, it has been observed from the data how many times the judges granted or refused condonation. The findings are illustrated in chart 3 below.

Chart 3: Condonation with reference to author of judgements



The findings show that judgments in the sample were distributed between eight judges. The findings show one peculiar occurrence. In one of the judgments, the name of the judge who delivered (authored) the judgment was not disclosed. Reference was only made to *The Court*.

Judges 3 and 8 only authored one judgment each in the sample. This is not sufficient data to identify a tendency of how condonation applications were decided by these judges.

Judges 1, 4, 5 and 7 authored two judgments each in the sample. Judges 1 and 4 both granted one and refused one application for condonation. Judge 5 refused

both applications for condonation whilst Judge 7 granted both applications for condonation. This data shows what the inclination for each of these four judges in deciding condonation applications were. The data is however not sufficient to identify a definitive tendency in how these judges are likely to decide condonation applications in the future.

Judge 6 authored three judgments of which two applications for condonation were granted and one refused. Again, the data shows an inclination of how this judge decided condonation applications. The data is however, not sufficient to identify a tendency of how this judge is likely to decide condonation applications in the future.

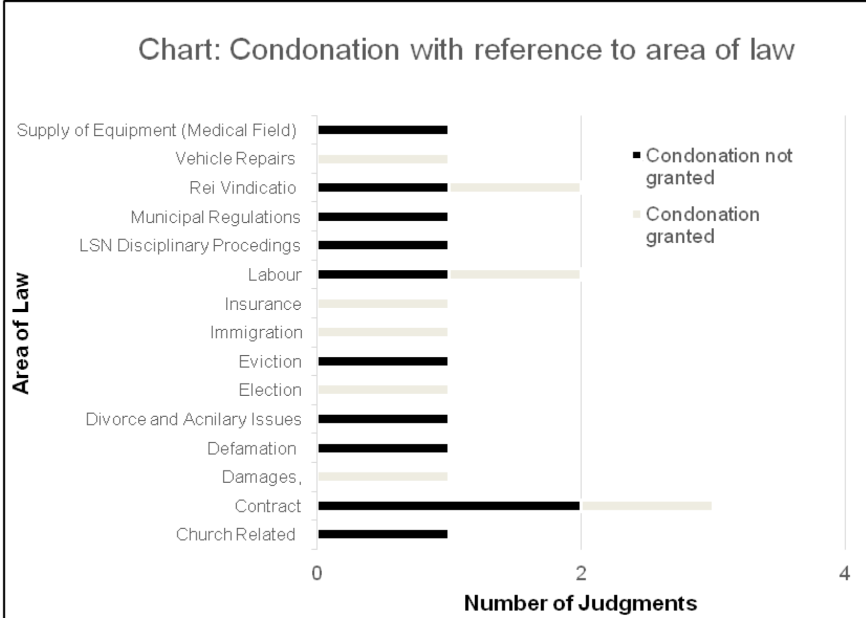
Judge 2 authored five judgments in which one application for condonation was granted and four refused. Only the data for judge two is sufficient to suggest that there was a tendency for this judge to refuse applications for condonation and that this judge may be likely to refuse condonation applications in the future. This finding must, however, be viewed in the context of all the other factors.

The finding about the authors of the judgments in the sample may not be that significant by itself. However, viewed in context of other factors in this chapter as well as external factors including adjudication in other jurisdictions, education, experience, social background and psychological considerations, these findings may be helpful to consider how a particular judge may decide condonation applications in the future. This data may also be useful to review the process concerning condonation in Namibia in a comparative perspective in terms of the development of the law. This can be done by comparing how judges from other jurisdictions decide condonation applications when adjudicating in Namibia compared to judges who have only adjudicated in Namibia.

(e) Condonation with reference to area of law

Data was obtained from the sample regarding the area of law to which the substantive judgments related. Condonation is concerned with non-compliance of procedural requirements. Condonation applications only arise in the context of processes which seek to resolve disputes that arise from substantive law. It has been observed from the data whether there is a tendency for condonation applications in the resolution of disputes in any specific area of law. Areas of law considered include broad classification of laws like law of contract and labour law, as well as more specific classifications of laws which relate to specific remedies. The findings are indicated in chart 4 below.

Chart 4: Condonation with reference to area of law



The findings show that condonation applications were made in proceedings relating to several areas of law. There were however, only three instances in which condonation applications were brought more than once in a specific area of law.

In proceedings relating to labour law and proceedings where rei vindication was claimed, two condonation applications were made in respect of both areas of law. In each instance, one application for condonation was granted and one refused.

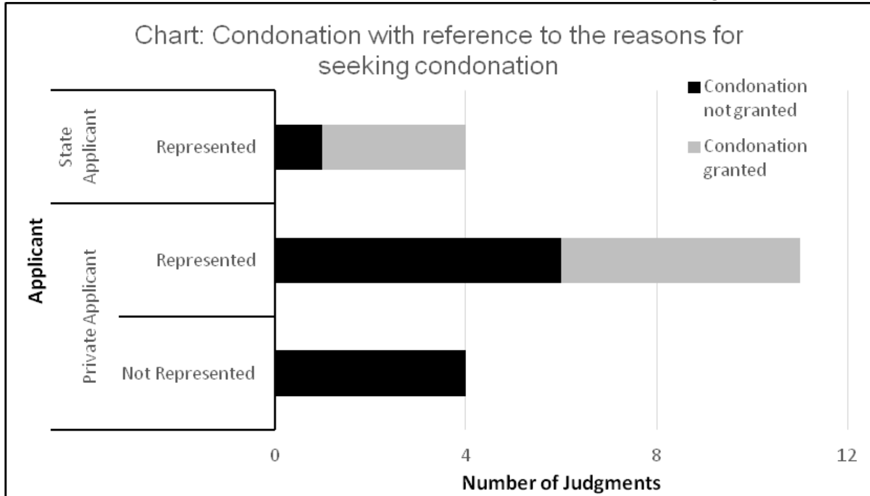
In proceedings relating to contract law, three condonation applications were made of which two were refused and one granted. This shows a slight tendency to refuse condonation applications made in proceedings relating to contract law. The data is however, not sufficient to suggest that this tendency will occur in future proceedings relating to contract law.

(f) Condonation with reference to the applicant in condonation applications

Data was obtained from the sample regarding the applicant, specifically whether the applicant was a state party or a private party and whether the applicant was represented by a legal representative during the application for condonation. State applicant in this context refers to any party who is representing the state in any manner whether for a ministry, a directorate of a state-owned enterprise or a representative of a statutory body. Examples of state applicants in the sample included the Disciplinary Committee for Legal Practitioners, the Road Fund Administration and the Minister of Health and Social Services. It has firstly been observed from the data whether the applicants in the sample were state or

private parties. Secondly, it has been observed from the data whether applicants, both state and private, were represented by a legal representative. Thirdly, it has been observed from the data whether there was a tendency to grant or refuse a condonation application depending on whether or not an applicant was a state or private party. Fourthly, it has been observed from the data whether there was a tendency to grant or refuse condonation applications with reference to whether an applicant was represented by a legal practitioner. The findings are indicated in chart 5 below.

Chart 5: Condonation with reference to the reasons for seeking condonation



The findings show that four applicants were state parties and 15 applicants were private parties. The findings further show that all the state applicants were represented by a legal representative. This is not surprising as state applicants are either represented by the Government Attorney, have internal legal representatives, or have enough resources to appoint a legal representative. Out of the 15 private applicants, 11 were represented by a legal representative and four applicants were not represented by a legal representative.

Condonation was granted three times, 75 per cent of the time, when the applicant in condonation applications was a state party and only refused once. Condonation was granted five times, 33.3 per cent of the time, when the applicant in condonation applications was a private party and refused 10 times. The above findings are interesting, however, not necessarily by themselves that significant. What is more significant is the ratio of success of unrepresented applicants in condonation applications. When the applicant in a condonation application was represented, condonation was granted 8 times, that is 42 per cent of the time, and refused 7 times. On the contrary, when applicants were not represented by a legal representative, condonation applications were refused in all instances.

There was thus a tendency to grant condonation applications when the applicant was a state party and to refuse condonation applications when the applicant was a private party. However, when the private party applicant was represented by a legal representative, there was a slight tendency to grant condonation applications and a clear-cut tendency to refuse condonation applications where the applicant was not represented by a legal representative. The plausible explanations for these findings have not been explored in this chapter and remain an agenda for future research.

Regarding unrepresented applicants ("lay litigants"), the following was stated in the Supreme Court judgment in the matter between *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (in Liquidation) and Others*:

> The appellant [a lay person] implored the court to overlook his procedural noncompliance and determine the substantive issues […] However, we cannot overlook the rules which are designed to control the procedures of the court. Although a court should be understanding of the difficulties that lay litigants experience and seek to assist them where possible, a court may not forget that court rules are adopted in order to ensure fair and expeditious resolution of disputes in the interest of all litigants and the administration of justice generally. Accordingly, a court may not condone noncompliance with the rules even by lay litigants where noncompliance with the rules would render the proceedings unfair or unduly prolonged.[38]

In an earlier Supreme Court judgment in the matter between *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* the court stated the following:

> Bearing in mind that lay litigants face significant hurdles due to their lack of knowledge and experience in matters of law and procedure and, more often than not, financial and other constraints in their quests to address real or perceived injustices, the interests of justice and fairness demand that courts should consider the substance of their pleadings and submissions rather than the form in which they have been presented.'[39]

Interestingly, in the first instance the court looked at the conduct of lay litigants towards other parties from an unfair perspective. In the second instance, the court looked at what would be fair towards lay litigants. Procedural fairness thus is a significant consideration in matters concerning non-compliance. In neither instance is a sufficiently clear indication given of what fairness entails and what would or what is likely to sway the pendulum to any side.

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38 *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (in Liquidation) and Others* 2014 (1) NR 234 (SC) at 240.

39 *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC) at 759.

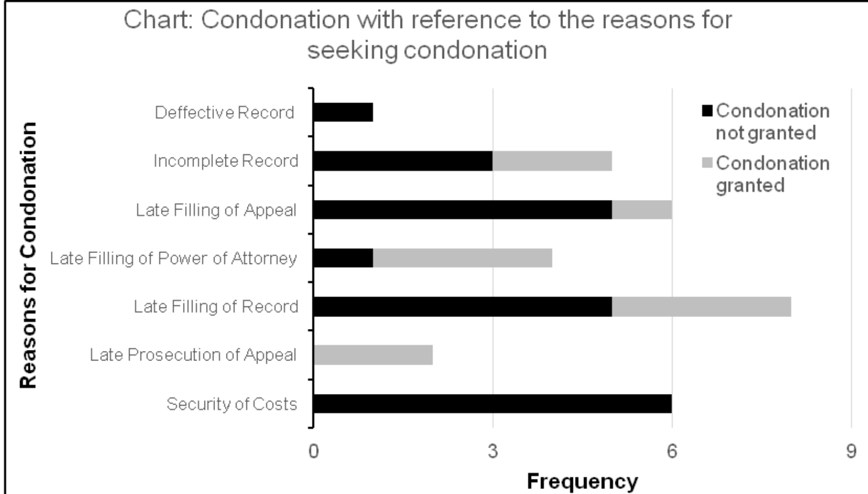
Our findings under this heading raise two prominent concerns. The first concern relates to the aspect of biasness, particularly biasness which benefits state applicants in condonation applications. With due respect, condonation applications should not merely be granted or perceived to be granted because the applicant is a state party. This concern is beyond the scope of this chapter and we do not suggest that the findings are conclusive proof of biasness in any form. However, as already alluded to above, this is an issue which demands further scrutiny through further research.

The second concern relates to the aspect of whether the law is appropriate in the context of our society. Law, or at least practice and procedure, can easily be perceived as highly formalistic and technical and consequently reserved only for the few who are professionally trained to understand and manipulate it. Again, we do not suggest that our findings are conclusive proof that the law is not appropriate for our society. Having said that and having observed the number of condonation applications including the number of dismissed applications; there is however, a possibility that the rules of court, in this instance the Supreme Court, are not entirely appropriate or at the very least user-friendly to all parties who may approach the courts seeking justice. Appropriate in this context means not suitable or not fit for the purpose for which it aims to achieve. If non-compliance is due to the way in which the rules are formulated or the magnitude of the requirements stipulated by the rules, the rules may be inappropriate. Compliance with the rules may for instance be almost impossible or very impractical. This issue too requires further scrutiny and research. It is submitted that both of these concerns require much more research to draw any meaningful conclusions.

(g) Condonation with reference to the reasons for seeking condonation

Data was obtained from the sample regarding the reasons for which condonation was sought. The data relates to the nature of the non-compliance of parties in the proceedings before the Supreme Court. It has first been observed from the data what the different reasons were for seeking condonation. Secondly, it has been observed whether any tendencies emerged in how condonation was granted in respect of the different reasons for which condonation was sought. The findings are illustrated in chart 6 below.

Chart 6: Condonation with reference to the reasons for seeking condonation



The findings show that there were a variety of reasons for which condonation was sought. The five most prominent reasons were: late filing of the appeal record, late filing of the appeal, failure to provide security of costs, and late filing of a power of attorney.

Applications for condonation which related to a defective record or failure to provide security of costs were refused. Applications for condonation which related to late prosecution of an appeal were granted. The findings show that there was a tendency for the Supreme Court to refuse condonation applications where the reason for seeking condonation related to an incomplete record, where an appeal was filed late, and where the record was filed late. On the contrary, there was a tendency to grant applications for condonation where the reason for seeking condonation related to late filing of a power of attorney.

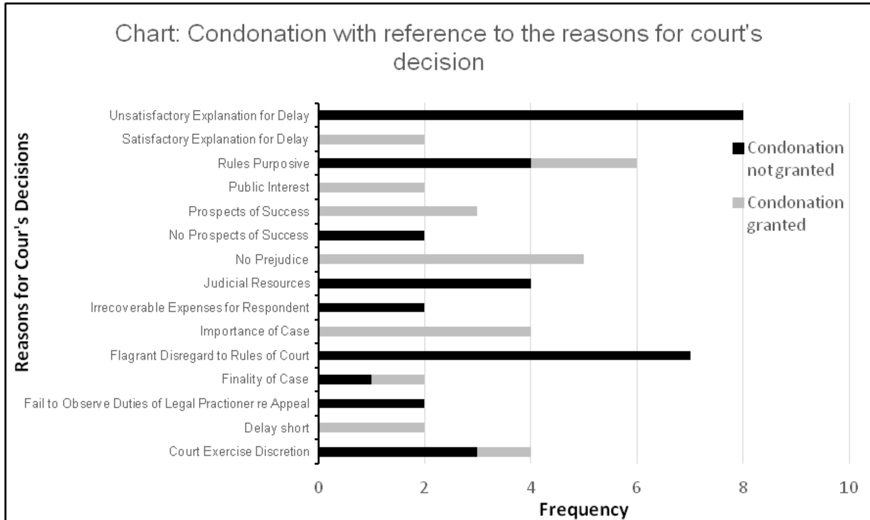
It is worth noting that condonation can be sought for more than one reason at a time. The findings should be considered in the context of how the court decided applications for condonation. i.e., did the court decide whether to grant or refuse condonation based on each account of non-compliance separately or based on the accounts of non-compliance collectively. This has not been considered when the data was observed. This factor does, however, not detract from the findings because an applicant seeking condonation must be successful in respect of all the accounts of non-compliance irrespective of whether the same is condoned on individual grounds or on a collective ground.

(h) Condonation with reference to the reasons for the court's decisions

Data was obtained from the sample regarding the reasons for the Supreme Court's decisions in condonation applications. It has first been observed from the data what

the different reasons were for the court's decisions in condonation applications. Secondly, it has been observed whether any trends emerged in how condonation was granted in respect of the different reasons the court provided for its decisions. The findings for the ten most common reasons provided by the court for its decisions are illustrated in chart 7 below.

Chart 7: Condonation with reference to the reasons for the court's decision



The findings show that there are a variety of reasons provided for the court's decisions in condonation applications. The four most common reasons are that: there was an unsatisfactory explanation for a delay, there has been a flagrant disregard for the rules of court, the rules of court are purposive, and there was no prejudice.

Applications for condonation were refused for the reasons that an unsatisfactory explanation was given for a delay, that there was no prospect of success on the merits of the case, the court's limited resources, where a respondent would have suffered irrecoverable expenses, where there has been a flagrant disregard of the rules of court, and where there was a failure to observe the duties of a legal practitioner.

Applications for condonation were granted for the reasons that a satisfactory explanation was given for a delay, where the case had an impact on public interest, where the case had prospects of success on the merits, where no prejudice was suffered, due to the importance of the case, and where there was only a short delay.

Applications for condonation were also refused on the grounds that the rules of court are purposive and must be adhered to even though these reasons also

occurred where condonation was granted. This can be because there can be more than one reason for which condonation is sought; and, because there can be different reasons for deciding a condonation application in respect of different forms of non-compliance.

There has been one application for condonation which was granted, and one refused where the reason of the court related to the need to reach finality in the case.

(i) Granting condonation due to the importance of the case: what does importance entail?

One of the factors to consider in an application for condonation is the importance of the case.[40] In four of the condonation applications in the sample, condonation was granted where reference was made to this factor. Importance of the case is however a broad concept which can be differently interpreted from different perspectives. When and why is it important for the merits of the case to be determined notwithstanding non-compliance with the rules of court? What factors are considered when deciding whether a case is important? In the ensuing discussion, the different perspectives which impact on the question of the importance or lack of importance of a case are considered

In the case of *Chairperson of the Immigration Selection Board v Frank and Another* ("*Frank* case") Judge O'linn agreed that:

> [T]he attorney for the appellant, […] was grossly negligent, but did not agree that this negligence justified penalising the appellant board to the extent that condonation for the late filing of the record is refused, notwithstanding reasonable prospects of success on appeal and the importance of the case, particularly the importance to all the parties of an authoritative decision on the issues raised.[41]

The learned judge further stated that:

> In the circumstances, it is wrong; to say that there is no explanation at all for the default and to use that together with the admittedly gross negligence of an attorney, against a litigant, as justification for refusing to decide important issues of public interest on the merits.[42]

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40 See *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 164 and *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) at 445, both referring to *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362. See also the *RDP* case at 700 and the *South African Poultry Association* case at 17.

41 *Frank* case (Note 40 above) at 123.

42 *Frank* case (Note 40 above) at 125.

The learned judge still further elaborated that:

> An issue such as the "lesbian relationship" relied on by respondents, is a very controversial issue in Namibia as in all or most of Africa and whether it should be recognized and if so to what extent, is a grave and complicated humanitarian, cultural, moral and most important, constitutional issue which must of necessity take time to resolve.[43]

However, in his minority judgment, Judge Strydom took the view that:

> In the present instance this court is dealing with this issue in the context of an application for condonation where further considerations such as the interest of the respondents in the finality of the proceedings, is a most relevant factor. To require of the respondents, after a period of more than three years, to have to go through the same uncertainty and anguish and to face the risk of again making the same tiresome way through the courts will constitute an injustice which this court is not prepared to sanction... For the above reasons it seems to me that the importance of the case must give way to the interest of the respondents in the finality of the case and the prejudice which a referral back to the board will cause. All this coupled with the fact that the non-compliance with the rules was flagrant and was not at all explained have convinced me that this is a case where the court should refuse the appellant's application for condonation.[44]

This judgment illustrates the nature and extent of the challenge with which a court is faced with when dealing with condonation applications. On the one hand there is a need for timeous disposal of cases. On the other hand, there is also recognition of the possible consequences in failing to deal with important legal principles. Importance in this judgment related to ascertaining the legal position on a specific matter of law. In an instance where only one of these factors is present, that factor could be decisive in determining the request for condonation.

In the case of *Channel Life Namibia (Pty) Ltd* v *Otto,* it was stated that: "there is also no doubt … that this case is of importance to both parties. The amount involved in this matter is substantial.[45] The case was concerned with an insurance claim which the insurer repudiated on the ground on non-disclosure. Importance in this judgment related to the financial consequences on the parties based on the outcome of the case. This factor was only one of the factors considered in deciding the condonation application and in the end, the court found that other factors in this instance had a greater impact on its decision to grant the condonation application. Financial implications are unlikely to be a decisive factor in deciding applications for condonation.

43 Ibid at 128.
44 Ibid at 177-178.
45 *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 at (SC) at 445.

The issue of the importance of the legal issues raised in a case was also dealt with in the *RDP* case, a significant case in the Supreme Court jurisprudence on condonation applications. It was stated in the judgment that:

> [T]he importance of the constitutional principles which the election application is seeking to vindicate, the undeniable public interest in the running of free and fair multiparty elections on a regular basis and the constitutional mandate of the Superior Courts in such matters, the court should not be unduly critical of a political party's failure to secure funding timeously - even less if the application is bona fide, the delay is relatively short and has not resulted in any prejudice to the opposing parties, inconvenience to the court or otherwise impeded the administration of justice.[46]

It was further stated that:

> Suffice it to say that the principles at stake are important; that complex issues are raised about the interpretation of the Act, the correct evidential approach to the adjudication of factual issues, the onus of proof and that the volumes of evidence to be considered are intricate in detail and touch on multiple issues.[47]

The issue of importance in this judgment related to ascertaining the legal position on a specific matter of law. The arguments on importance were further strengthened in this instance by the insignificant or lack of prejudice for the opposing parties. However, as seen in the minority judgment in the *Frank* case, the importance of the need to ascertain the law may not always prevail in dealing with condonation applications.

Another significant case in the Supreme Court jurisprudence on condonation applications dealing with importance is the *South African Poultry Association* case discussed above. It was stated in this judgment that:

> Clearly the issue raised in the review is of considerable public importance. It concerns the validity of a trade measure restricting poultry imports in the implementation of an economic policy to protect a fledgling industry. It also concerns the interpretation to be given to art 144 of the Constitution and the extent, if any, to which international trade treaties form part of the domestic law of Namibia and can be enforced in the national courts of Namibia. The review also concerns the principle of legality and whether international treaties in conflict with national legislation would prevail and whether the

46 *RDP* case (Note 40 above) at 703.

47 *RDP* case (Note 40 above) at 703.

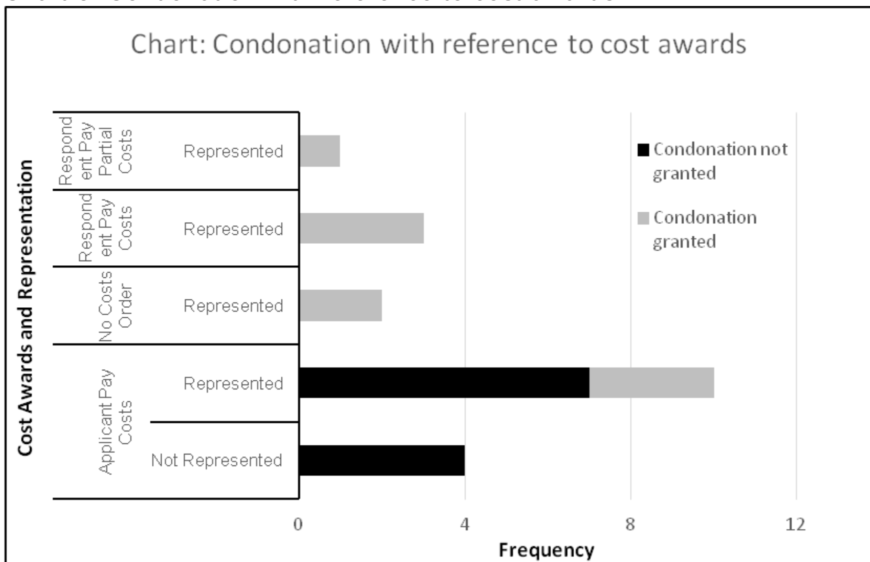
> extent to which the content of those treaties must inform the exercise of statutory powers conferred to the minister under the Act.[48]

Again, the issue of public importance in this judgment, like in the *Frank* and the *RDP* cases, related to ascertaining the legal position on specific matters of law.

(i) Condonation with reference to cost awards

Data has been obtained from the sample regarding costs awards that were made in respect of condonation applications. It has firstly been observed what different type of cost awards have been made. Secondly it has been considered whether there was a tendency to make a certain cost order with reference to whether condonation was granted or refused. A third issue considered is whether there was a tendency to make a specific costs order when parties were represented or unrepresented. The findings are illustrated in chart 8 below.

Chart 8: Condonation with reference to cost awards



The findings in the above chart show that four different types of cost orders were made of which the most prominent was that the applicant (in condonation applications) must pay the costs. Other types of costs orders included: no costs, the respondent (in condonation applications) must pay the costs and the respondent must pay part of the costs. The latter three types of orders have been made where the application for condonation was granted.

There was a tendency to make costs orders against the applicant where condonation applications were refused irrespective of whether the party was represented or not. It may however be concerning that condonation applications were refused

48 *South African Poultry Association* case (Note 19 above) at 18.

where the applicant was unrepresented, and the applicant also had to pay costs in all instances. In respect of represented applicants there were instances in which the applicant had to pay the costs despite the court granting condonation. In an earlier section, concerns have been raised regarding potential bias when dealing with condonation applications where the applicants were unrepresented by a legal practitioner. However, as already alluded to above, in view of the small size of the sample considered, it will be premature to draw a definite conclusion either way.

13.5 CONCLUSION

The analysis in this chapter has proven instructive. It has evidenced the fact that generally, the Supreme Court of the Republic of Namibia has lived up to its role as the apex court of the land in a very important and practical aspect of civil procedure and practice, i.e. the development of the legal principles governing condonation applications. In the post-independence era, there have been many cases involving condonation applications which have meandered their way through appeals to the Supreme Court. The Supreme Court has admirably discharged its responsibility by clarifying the various legal principles and showing consistency in their application to guide the courts below it, the legal profession, and potential litigants. In several of these cases, the Supreme Court has shown great flexibility and in exercising its broad discretion, has looked upon with favour condonation applications whenever the need to reach finality in the resolution of disputes arises, or whenever it considers that it is in the cause of justice or in the public interest. Based on the limited sample data, the chapter has also shown that there may be certain tentative or emerging pointers regarding how condonation applications before the Supreme Court have been dealt with depending on certain circumstances such as whether or not the applicant for condonation was represented by a legal practitioner, and the issue of costs orders.

CHAPTER 14

Malicious Prosecution Actions from Treason Trial Cases: An analysis of the Supreme Court judgment in *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa (SA-2017/7) [2019] NASC 2 (28 February 2019)*[1]

Eugene Lizazi Libebe and Tapiwa Victor Warikandwa

14.1 INTRODUCTION

On 2 August 1999, a group of people who either belonged to or were sympathetic to the Caprivi Liberation Army attacked several state installations at or around Katima Mulilo with the purpose of seceding the then Caprivi Region (now Zambezi Region) from the Republic of Namibia.[2] As a result of the attack, people were killed, others injured and property damaged. In the aftermath of the attack, several people were arrested, detained and prosecuted. The respondent (Mr Mahupelo, plaintiff in the High Court), in the Supreme Court appeal case of *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa*[3] was among the persons so arrested, detained and prosecuted.

In *Minister of Safety and Security and Others v Mahupelo,* a case emanating from the High Court of Namibia, the respondent and other accused persons were indicted on 18 May 2001 for their alleged role in the attack in what became known as the Caprivi Treason Trial.[4] The charges against the accused included high treason, sedition, public violence, murder and robbery based on allegations of common purpose and conspiracy to commit the said offences.[5] The Caprivi Treason trial was distinctive and unprecedented in the legal history of Namibia - where 126 accused persons were charged on 278 counts, based on the doctrine of common purpose and conspiracy. There were 379 witnesses who testified on

1 *Minister of Safety and Security and Others v Mahupelo (SA-2017/7) [2019] NASC 2 (28 February 2019)/*2019 (2) NR 308 (SC).

2 The various installations and government institutions attacked included the Katima Mulilo Town Centre, the Katima Mulilo Police Station, the Wenela Border Post, the Katounyana Special Field Force Police Base, the Mpacha military base and the Namibia Broadcasting Corporation building.

3 *Mahupelo* case (Note 1 above).

4 Ibid, para 3.

5 Ibid. See also *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018). There are four other Namibian High Court decisions on this issue: *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC) at para [3]; *Kahorere v Minister of Home Affairs* (A292/2008) [2011] NAHC 44 (22 February 2011); *Meyer v Felisberto* 2014 (2) NR 498 (HC); *Prins v Government of Namibia* (I 1361/2004) [2013] NAHCMD 259 (18 September 2013).

behalf of the State and more than 900 witness statements had to be considered.[6] The duration of the trial is estimated to be about 10 years, during which period the accused were detained in custody and some of the accused and witnesses have died.[7] In *Minister of Safety and Security and Others v Mahupelo,* appellants appealed against the judgment and order of the High Court in which it granted a claim of malicious continuation or maintaining of a prosecution in favour of the respondent against the second appellant, the Prosecutor-General (PG). The claim against the second appellant is founded on the allegations that the Prosecutor-General maintained the prosecution of the respondent maliciously and without reasonable and probable cause from November 2011 onwards until the accused was discharged in terms of section 174 of the Criminal Procedure Act.[8]

The Supreme Court of Namibia in *Minister of Safety and Security and Others v Mahupelo* appeal and other similar cases reversed High Court judgements in which it was ruled that the state's continuation with its prosecution in the main Caprivi Treason Trial had been malicious. To date, the highest court has arrived at the same conclusions in five appeals flowing from the trial on damages claims instituted by some of the men acquitted in the protracted high treason trial.[9] The Appeal Court found that the prosecution in the treason trial had sufficient evidence at its disposal for it to believe in the guilty of the former accused persons and to continue to prosecute them until they were found not guilty. This chapter reflects on and analyses the Supreme Court of Namibia's stance in the treason trials' malicious prosecution damages claims in *Minister of Safety and Security and Others v Mahupelo* and similar cases. In contrast with the High Court judgements' stance and approaches in other jurisdictions, the chapter highlights some pertinent jurisprudential issues and developments for consideration in the law of malicious prosecution in Namibia.

14.2 SYNOPSIS OF THE HIGH COURT AND SUPREME COURT JUDGMENTS

Mr Mahupelo (the respondent in the Supreme Court) was one of the accused persons in the protracted criminal trial involving some 126 accused persons who were charged in the High Court of Namibia, amongst others, with the crimes of high treason, murder, attempted murder and several other crimes and offences.[10] At the end of the prosecution case in the criminal trial, Mr Mahupelo was discharged as the prosecution had failed to establish a case against him.

6 *Mahupelo* case (Note 1 above) para 4.

7 Ibid.

8 The *Criminal Procedure Act 51 of 1977*.

9 These cases include: *Minister of Safety and Security & Others v Mutanimiye* 2020(1) NR 214 (SC); *Minister of Safety and Security & Others v Chunga* (SA 1/2018) [2020] NASC 10 (07 May 2020); *Minister of Safety and Security & Others v Makapa* 2020(1) NR 187(SC); *Minister of Safety and Security & Others v Kauhano* (SA 56/2018) [2020] NASC 16 (20 May 2020).

10 *Mahupelo* case (Note 1 above) para 4.

Mr Mahupelo later sued the Minister of Safety and Security, the Prosecutor-General and the Government of Namibia (the defendants) for wrongful and malicious institution of the prosecution, claiming N$15 321 400 in damages from them.[11] The main claim of the institution of the prosecution was amended to introduce an alternative claim for the wrongful and malicious continuation of the prosecution. The High Court dismissed the claim for the wrongful and malicious institution of the prosecution, but upheld the alternative claim for the 'malicious continuation of the prosecution without reasonable and probable cause.'[12] The High Court held that as the delict of 'malicious continuation of a prosecution' was not known at common law, it had to develop the common law in line with the constitutional ethos to accommodate the delict.[13] It accordingly developed the common law and held that the Prosecutor-General was liable for maliciously maintaining the prosecution after 2011 when it became clear that the State had no evidence leading to the respondent's conviction.[14]

The defendants (now appellants) appealed to the Supreme Court against the decision of the High Court. The appellants argued inter alia that the High Court was wrong to have found that the prosecutors who were delegated by the PG to prosecute Mr Mahupelo had no reasonable and probable cause to prosecute him and that the PG was therefore liable for damages. The appellants argued that there was ample evidence during the criminal trial implicating Mr Mahupelo in the commission of the crimes and offences and on the basis of which it could have been found that there was reasonable and probable cause to continue with his prosecution.[15]

The Supreme Court agreed with the appellants' argument that there was reasonable and probable cause to have continued with the prosecution of Mr Mahupelo. The Supreme Court reasoned that the High Court had adopted a wrong approach to the consideration of the evidence against the respondent led during the civil claim, pointing out that the evidence and considerations necessary in establishing whether there was reasonable and probable cause and the lack of malice (as the law requires) to continue with the prosecution were different from those necessary to prove the guilt of an accused person in a criminal trial.[16] After evaluating the evidence as a whole, the Supreme Court held that there was evidence establishing reasonable and probable cause as well as the lack of malice in the prosecution of Mr Mahupelo.

In the High Court, Mr Mahupelo pleaded that if his claim for malicious continuation of the prosecution did not succeed, then the court should award him constitutional damages for the violation of his rights. This issue was, however, not decided by

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11 *Mahupelo* case (Note 1 above) para 5.
12 *Mahupelo case* (Note 1 above) para 4.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.

the High Court as that court found that the claim for malicious maintenance of the prosecution was well founded. The Supreme Court held that it was inappropriate for this alternative claim to be decided by it for the first and final time as a party who may be dissatisfied with its decision in this regard will not have a chance to appeal. It has accordingly declined to decide the issue and referred the matter back to the High Court for that court to decide it first.[17] The issues on appeal included determination whether the High Court was justified in developing the common law to include a claim for malicious continuation of the prosecution? Whether the court a quo was correct in holding that the PG maintained the prosecution after November 2011 maliciously and without reasonable and probable cause? Also, under consideration by the court was the issue of whether or not the appellants would be liable to the respondent for constitutional damages, in the event that the claim for malicious continuation of the prosecution fails.[18]

14.3 OTHER SIMILAR JUDGEMENTS

14.3.1 *Minister of Safety and Security & Others v Mutanimiye*[19]

In this case, the respondent was amongst the 125 people who were arrested following the secessionist attacks at Katima Mulilo in 1999. The respondent was said to have been involved as an organiser and supporter of the United Democratic Party and was indicted together with approximately 122 accused persons on 278 high treason charges. He was prosecuted and later discharged in terms of s 174 of the Criminal Procedure Act. Following the discharge, the respondent instituted a delictual action against the appellants claiming damages for malicious instigation of prosecution. Alternatively, to that claim, the respondent sought damages for malicious continuation of the prosecution. He also sought constitutional damages for the alleged breach of certain constitutional rights.[20]

Regarding the main claim, the High Court considered the evidence available to the State as constituting reasonable and probable cause and absolved the Minister. It also concluded that there was a probable and reasonable cause for the prosecution to initiate the proceedings, and the prosecution did not act with malice.[21] It did not decide the constitutional claim. Regarding the alternative claim, the court, however, ruled in favour of the respondent, hence this appeal.

On appeal, the court held that, due to certain fundamental flaws a quo, it was entitled as a court of appeal, to interfere with the portion of the judgment of the High Court specifically with regards to whether that court misdirected itself on the facts and the law. Relying on earlier decisions such as *Minister of Safety*

17 *Mahupelo case* (Note 1 above) para 4.
18 Ibid para 47.
19 *Minister of Safety and Security & Others v Mutanimiye* 2020 (1) NR 214 (SC).
20 Ibid para 1.
21 Ibid.

and Security & others v Mahupelo case and the applicable legal principles, the court held that the respondent failed to establish reasonable and probable cause regarding his alternative claim. Regarding the further alternative claim for the alleged violations of various constitutional rights, the court held that for the same reasons pronounced in *Mahupelo* judgement, the matter should be remitted to the High Court. Accordingly, the court upheld the appeal in part, referred the question regarding the constitutional claim back to the High Court.

14.3.2 *Minister of Safety and Security & Others v Makapa*[22]

The respondent, Mr Rosco Matengu Makapa, together with 125 co-accused persons were arrested and charged with several offences including high treason, murder, attempted murder, sedition and malicious damage to property for their alleged role in the event that took place in Katima Mulilo on 2 August 1999.[23] At the close of the State's case in the criminal proceedings, Mr Makapa was discharged in terms of section 174 of the Criminal Procedure Act.

Mr Makapa, following his discharge, instituted an action against the appellants (defendants in the High Court) for damages suffered as a result of alleged unlawful arrest and subsequent malicious prosecution respectively. Mr Makapa claimed N$ 30 436 850, 68 in damages from the appellants.[24] The main claim was amended to introduce an alternative claim for the wrongful and malicious continuation of the prosecution. After hearing arguments on behalf of the parties, the High Court dismissed the main claim of malicious prosecution, but upheld the alternative claim arising from an alleged 'malicious continuation of the prosecution without reasonable and probable cause.' The court did not decide the constitutional claim for the reason that the claim based on maliciously continuing with the prosecution had succeeded.[25]

Disgruntled by this decision, the appellants noted an appeal to the Supreme Court against the decision of the High Court. The appellants argued first that there was no need to develop the common law, and secondly, that the High Court erred in finding that the prosecutorial team lacked reasonable and probable cause to continue with the prosecution of the respondent. The appellants further argued that the High Court was wrong to infer malice from the actions of the PG and Mr July, the lead prosecutor in the criminal case.[26]

The Supreme Court agreed with the appellants' arguments and found that at all times during the prosecution, there was reasonable and probable cause to continue the proceedings against Mr Makapa, and that there was no need for

22 *Minister of Safety and Security & Others v Makapa* 2020 (1) NR 187 (SC).
23 Ibid para 3.
24 Ibid para 5.
25 Ibid paras 112-113.
26 Ibid para 86.

the High Court to have developed the common law. Further, that the High Court adopted the wrong standard in assessing the evidence to determine whether or not the appellants had a reasonable and probable cause to maintain the prosecution up to the discharge stage as the standard of evidence required in a civil claim for malicious prosecution is not the same standard of evidence required to establish guilt in a criminal case.[27] The Supreme Court evaluated the information available to the prosecutorial team at the time and concluded that they had reasonable and probable cause to maintain the prosecution and showed no evidence of malice. As to the alternative claim for constitutional damages, the Supreme Court declined to decide this issue as a court of first and final instance, it thus referred it back to the High Court for determination.

14.3.3 Minister of Safety and Security & Others v Chunga[28]

In this matter, the Minister of Safety and Security, the Prosecutor-General and the government appealed to the Supreme Court against the decision of the High Court giving judgment in favour of Mr Chunga for alleged malicious continuation of his prosecution. Mr Chunga was one of the persons arrested and prosecuted for high treason, murder and other crimes arising from attacks in and around Katima Mulilo on 2 August 1999.[29] Mr Chunga was discharged at the end of the State's case following a protracted criminal trial in the High Court, after which he sued the government and the Prosecutor-General for damages for malicious prosecution, alternatively for the continuation of his prosecution. The High Court dismissed the claim for malicious prosecution, but allowed the alternative claim for malicious continuation of prosecution without reasonable and probable cause. The High Court found that the prosecution should not have continued to prosecute Mr Chunga as there was no evidence implicating him.[30]

In the Supreme Court, it was found that the state had evidence in witness statements available against Mr Chunga, and that based on this evidence the prosecution team in the trial had an honest belief in the men's guilt, albeit the trial judge found after the state had closed its case that the evidence was not sufficient to place Mr Chunga on his defence.

14.3.4 Minister of Safety and Security & Others v Kauhano[31]

This appeal was against a judgment and order granted by the High Court in favour of Mr Simon Elvin Kauhano (the respondent) against the second appellant, the Prosecutor-General and the third appellant, the Government of the Republic of

27 Ibid para 107.

28 *Minister of Safety and Security & Others v Chunga* (SA 1/2018) [2020] NASC 10 (07 May 2020). <https://namiblii.org/na/judgment/supreme-court/2020/10>.

29 Ibid para 1.

30 Ibid para 2.

31 *Minister of Safety and Security & Others v Kauhano* (SA 56/2018) [2020] NASC 16 (20 May 2020). <https://namiblii.org/na/judgment/supreme-court/2020/16>.

Namibia. The High Court held that the PG maintained the prosecution of the respondent maliciously and without reasonable and probable cause beyond November 2007. It also held that the Government was vicariously liable for the conduct of the public prosecutors who conducted the criminal proceedings against the respondent. The court then ordered that the two appellants were liable to the respondent for damages.[32] However, just like the reasoning in all the other cases discussed above, the appeal succeeded.

14.4 CONSTITUTIONAL DAMAGES CLAIMS

In the landmark judgement of *Minister of Safety and Security and Others v Mahupelo,* the Supreme Court recognised that the decision to initiate and maintain the prosecution of an accused person forms a central part of the constitutional obligation of the prosecutorial authority.[33] Further, that it is imperative that prosecutors are able to perform their functions without the fear of attracting civil liability, their constitutional mandate should nonetheless be executed in a manner that ensures a fair trial for the accused persons they are prosecuting.[34] Accordingly, accused persons must be accorded their full rights and must not be subject to baseless prosecutions. At the heart of this appeal lies the intricate question of the extent to which the prosecutorial authority may be held liable for a delictual claim for maintaining the prosecution allegedly without reasonable and probable cause after an identifiable event.

As to the second alternative claim in *Minister of Safety and Security and Others v Mahupelo,* the respondent contended that should the claim for malicious prosecution fail, the appellants through their conduct violated his rights contained in Articles 7, 8, 11, 12, 13, 16, 19 and 21 of the Namibian Constitution and as such, were liable for constitutional damages. According to the respondent, as a result of his arrest, detention and subsequent prosecution and the unreasonable delay in finalising his criminal trial, he suffered loss and damage. Hence, he was entitled to an award of compensation in terms of Article 25(3) and Article 25(4) of the Constitution.[35] The court also stated that it is a sacred duty of a prosecutor to ensure that the trial of an accused person is fair in line with his or her obligation to prosecute subject to the Constitution and the law.[36]

Due to the fact that the issue of whether the appellants are liable to the respondent for constitutional damages was referred back to the High Court for determination has limited the discussion on this aspect in this chapter, as that might tend to influence the outcome of a pending case. However, it is imperative not to lose sight

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32 Ibid.

33 *Mahupelo* case (note 1 above) para 1.

34 Ibid.

35 These articles concern the protection of liberty, respect for human dignity, prohibition of arbitrary arrest and detention, the right to privacy, the right to property, the right to practise a culture and the protection of fundamental freedoms respectively.

36 *Mahupelo* case (note 1 above) para 32.

of the constitutional relevance, interpretations and developments in *Minister of Safety and Security and Others v Mahupelo* and the other similar cases discussed above.[37]

14.5 PERTINENT ISSUES AND REQUIREMENTS IN MALICIOUS PROSECUTION LAW

According to McQuoid-Mason,[38] malicious prosecution refers to 'an abuse of the process of the court by intentionally and unlawfully setting the law in motion on a criminal charge.' Generally, actions for malicious prosecution are discouraged on the grounds of public policy because the exercise of prosecutorial discretion in the prosecution of cases is central to the criminal justice system. It is essential that prosecutors perform this function without the fear of attracting civil liability.[39] Damage caused by malicious prosecution consists primarily in the impairment of the plaintiff's good name, physical liberty and feelings of dignity.[40]

An action for malicious prosecution is the remedy for baseless and malicious litigation - not limited to criminal prosecutions but may be brought in response to any baseless and malicious litigation or prosecution, whether criminal or civil.[41] A claim of malicious prosecution is a tort action filed in civil court to recover monetary damages for certain harm suffered. The plaintiff in a malicious prosecution suit seeks to win money from the respondent as recompense for the various costs associated with having to defend against the baseless and vexatious case.[42] In most jurisdictions, an action for malicious prosecution is governed by the common law, meaning that the authority to bring the action lies in case law from the courts, not statutes from the legislature.[43]

Furthermore, an action for malicious prosecution is distinct from an action for false arrest or false imprisonment.[44] In malicious prosecution torts, the law seeks to hold a balance between two opposing interests of social policy, namely: safeguarding persons from being harassed by unjustifiable litigation; and the interest in

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37 See C Okpaluba (2018) "Damages for wrongful arrest, detention and malicious prosecution in Swaziland: liability issues" Vol. 43 *Journal for Juridical Science* 55-83; C Okpaluba (2019) "Quantification of damages for malicious prosecution: a comparative analysis of recent South African and Commonwealth case law (3) - research" Vol. 32(1) *South African Journal of Criminal Justice* 28-51; *Chombo v Minister of Safety and Security and 2 Others* (Note 5 above) para 49.

38 McQuoid-Mason "*Malicious Proceedings*" in Joubert et al The Law of South Africa (LAWSA) (2nd Ed), 2008) Vol 15 Part 2 para 315.

39 Ibid.

40 JM Potgieter, L Steynberg & TB Floyd (2012) V*isser & Potgieter Law of Damages* (3rd ed) Juta: Cape Town, 549-50.

41 Malicious Prosecution - Elements of Proof, Damages, Other Considerations <https://law.jrank.org/pages/8407/Malicious-Prosecution.html#ixzz6PkSlBG8G>.

42 Ibid.

43 Ibid.

44 G Kodilinye *Tort: Texts, Cases & Materials Commonwealth Caribbean Law Series* (1995) 57.

encouraging citizens to assist in law enforcement.[45] The courts have tended to give more weight to the latter interest, with the result that the action for malicious prosecution is more guarded than any other law of tort, and the number of successful actions is small.[46] Very few civil or criminal cases result in an action for malicious prosecution because it is difficult to prove that the defendant procured or continued the original case without probable cause and with an improper purpose.[47]

In *Minister of Safety and Security v Mahupelo,* the Supreme Court stated with reliance on *Akuake v Jansen van Rensburg*[48] where Damaseb JP set out, the requirements on the merits and the quantum which must be alleged and proved in a matter for malicious prosecution. These are: (a) The defendant must have instituted or instigated the proceedings; (b) The defendant must have acted without reasonable and probable cause; (c) The defendant must have been actuated by an improper motive or malice (or *animo injuriandi*); (d) The proceedings must have terminated in the plaintiff's favour; and (e) The plaintiff must have suffered damage (financial loss or personality infringement).

Proof of damage is the fifth element in a claim for malicious prosecution in Namibia. The other four elements are the same as those canvassed in the South African and other Commonwealth jurisdictions such as Australia and Canada.[49]

The Supreme Court further stated that in addition to malice, *animus iniuriandi* must be proven before the defendant can be held liable for malicious prosecution.[50] The Supreme Court referred to *Neethling's Law of Personality* in showing the distinction between malice and *animus iniuriandi*, as follows:

> *Animus iniuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely of consciousness

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45 Ibid.

46 Note 42 above.

47 Ibid.

48 2009 (1) NR 403 HC. See also V Harphood (2003) *Modern Tort Law* (5th ed) Cavendish: London, 364-66; DB Dobbs & PT Hayden (1997) *Torts and Compensation: personal accountability and social responsibility for injury* (3rd ed) West Publishing: New York, 930; and Kodilinye (Note 44 above) 59.

49 See C Okpaluba (2017) "Revisiting the elements of malicious prosecution in the law of delict: The Namibian experience in comparative" Vol. 30(3) *South African Journal of Criminal Justice* 316-338.

50 *Mahupelo* case (Note 1 above) para 21.

of wrongfulness, and therefore *animus injuriandi,* will be lacking. His mistake therefore excludes the existence of *animus injuriandi.*[51]

The requirement of "malice" has been the subject of discussion in a number of cases in the courts. The Court adopted an approach that, although the expression "malice" is used, the claimant's remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved was *animus injuriandi*.[52] In the *Mahupelo case,* the Appeal Court referred to various authorities on malicious prosecution law and drew its reasoning therefrom[53] as it endorsed approaches in other commonwealth jurisdictions. One may argue that, usually the court's quest for much reliance on foreign authorities denies itself the opportunity to develop the common law in their contexts, and therefore the law will often remain as is rather than it ought to be.

14.6 MALICIOUS PROSECUTION LEGAL PERSPECTIVES IN OTHER JURISDICTIONS

Although malice has always played and continues to play a very important role in claims for malicious prosecution, its meaning remains unclear, as in other branches of the law of civil liability.[54] In England, the original home of the tort of malicious prosecution, the courts have been invited to lower the threshold for proving malice which, it was argued, was too high, whereas lowering it will be in compliance with article 5(1)(c) of the European Convention.[55]

51 Ibid.

52 See also *Moaki v Reckitt & Colman (Africa) Ltd & Another* 1968 (3) SA 98 (A) 103G-104E; *Prinsloo & Another v Newman* 1975 (1) SA 481 (A) 492A-B.

53 See *Gregory v Portsmouth City Council* 2000 1 All ER 560 (HL); The Supreme Court of Canada in *Miazga v Kvello Estate* 2009 SCC 51 para 42-44 explained the approach to be adopted when claims of malicious prosecution against the Attorney-General as opposed to claims against private litigants are considered. The court did this against the backdrop of the historical origin of the claim for malicious prosecution. The court said that 'care should be taken to not simply transpose the principles established in civil suits between private parties to cases involving the prosecution without necessary modifications. Due regard had to be given to the constitutional principles governing the office of the Attorney-General. It is for this reason that the Supreme Court of Canada has adopted 'a very high threshold for the tort of malicious prosecution in an action against a public prosecutor'.; see also *Rudolph and others v Minister of Safety and Security and another* 2009 (5) SA 94 (SCA) para 18; *Relyant Trading (Pty) Ltd v Shongwe and another* 2007 1 All SA 375 (SCA) para 5; *Minister for Justice & Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 62; *Waterhouse v Shields* 1924 CPD 155, 162; *Glinski v Mclver* 1962 (1) All ER 696 (HL); *Prinsloo and another v Newman* 1975 (1) SA 481 (A); *Relyant Trading (Pty) Ltd v Shongwe; Beckenstrater v Rottcher and another* 1955 (1) SA 129 (A) 136A-B.

54 C Okpaluba (2013) "Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth" Vol. 37(2) *Journal for Juridical Science* 65-95, 66.

55 In *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 (13 May 2010) it was urged on the Court of Appeal that 'it should lower the threshold requirement for proof of malice in malicious prosecution cases in order to comply with article 5(1)(c) of the European Convention on Human Rights (ECHR). Both the High Court and the Court of Appeal had found that the police had acted at all times material to this case on reasonable and probable ground and would, therefore, not consider malice. It was

An attempt to refocus malicious prosecution in the light of the modern system of professional prosecution as against the historical private prosecution through which the action developed, the High Court of Australia in *A v New South Wales and Another*[56] extensively revisited the tort with particular emphasis on malice and reasonable and probable cause. In some Canadian decisions, the Supreme Court had also reviewed the law of malicious prosecution in the light of the professional prosecutorial services prevalent in modern times.[57] The same court has made it clear that the lack of reasonable and probable cause may well be evidence of malice.[58] Whereas the courts in Australia, Canada and England maintain the traditional approach to the requirement of malice (except that, in Canada, that requirement tends to be blurred with probable and reasonable cause), recent debate in South Africa has been dominated by the question as to whether recklessness and negligence play any role, alongside or in place of malice, in the law of malicious prosecution.[59]

In South Africa, malicious prosecution is an aspect of delictual liability arising from "malicious proceedings" which may occur where a person abuses the process of the court by wrongfully or maliciously setting the law in motion against another.[60] Whether the resulting action is criminal or civil, the person instigating the proceedings will be liable for damages if s/he acted intentionally, maliciously and without reasonable and probable cause. The requirements for successful claims for malicious prosecution were also discussed in *Minister of Justice & Constitutional Development v Moleko*[61] as follows:

> In order to succeed on the merits with a claim for malicious prosecution, a claimant must allege and prove - that the defendants set the law in motion (instigated or instituted the proceedings); that the defendants acted without reasonable and probable cause; that the defendants acted with 'malice' (or *animo injuriandi*); and that the prosecution has failed.

Again, from the South African standpoint, the term "malice" is as confusing, for it is often equated with both improper motive and animus *injuriandi*. For instance, Neethling et al. submit that *animus injuriandi*, and not malice, is required for

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contended that the burden of proving malice which lies on a claimant is unduly onerous in the English jurisdiction and that the law of malicious prosecution is out-of-date and inadequate remedy. It provides no redress for victims of investigatory or prosecutorial maladministration.'

56 *A v New South Wales and Another* (2007) 230 CLR 500 (HCA).

57 Okpaluba (Note 54 above) 65 - 95, at 66-67.

58 *Miazga v Kvello Estate* [2009] 3 SCR 339 (SCC); *Miazga v Kvello Estate* (2008) 282 DLR (4th) 1 (Sask. CA).

59 See *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA); *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA).

60 Okpaluba (Note 54 above) 68.

61 [2008] 3 All SA 47 (SCA) para 8; Dobbs & Hayden (Note 48 above) 930.

malicious prosecution in South African law.[62] They submit, however, that there are instances in the case law where *animus injuriandi* has been replaced with gross negligence.[63] The courts have given various meanings to the requirement of malice.[64] In a number of South African cases, it has been held that malice in the context of malicious prosecution also includes *animus injuriandi* and there has been much judicial pronouncement on whether malice has been replaced by *animus injuriand*i in the third requirement that a plaintiff has to prove.[65] The South African approach is akin to that of the Supreme Court of Canada where it has been held that an action for malicious prosecution must be based on a much higher threshold of deliberate and intentional conduct than recklessness or gross negligence.[66] This is not different from the Supreme Court's stance in *Minister of Safety and Security v Mahupelo* and the similar judgements discussed earlier.

14.7 NEED TO DEVELOP THE AMBIT OF THE DELICT OF MALICIOUS PROSECUTION?

According to Professor Okpaluba, the remarkable lesson emanating from the *Mahupelo High Court judgment*[67] is that even if the defendant is held not liable in a claim for malicious prosecution because a reasonable and probable cause existed at the time the decision to prosecute was taken; that ground could turn out to be unreasonable once it becomes obvious that it no longer existed.[68] Thus, instead of withdrawing or terminating the prosecution, the prosecutor maintains or continues, knowing that reasonable and probable cause no longer existed, hence triggering an inquiry into the prosecutor's improper motive and whether liability would attach in the circumstances. The High Court *in Mahupelo v Minister of Safety and Security and Others*[69] held that the element of continuing or maintaining criminal proceedings beyond a stage where it could not be said to have been reasonable and probable to do so was not recognised in our common law and had also not previously been dealt with by our courts. The court was thus of the view that the common law should be developed to introduce a delictual claim based on

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62 See J Neethling J Potgeiter & PJ Andvisser (2010) *Law of Delict* (6th ed) LexisNexis: Butterworth.

63 The Supreme Court of Appeal of South Africa in *Woji v Minister of Police* 2014 (1) SACR 409 (SCA) maintained that 'negligence or gross negligence, short of *dolus eventualis*, would not suffice in a claim for malicious prosecution. The defendant must have been aware of the wrongfulness of his or her conduct in initiating or continuing the prosecution, but nevertheless continued to act, reckless as to the consequences of his or her conduct'. See C Okpaluba (2016) Vol. 37(2) "Between reasonable and probable cause and malice in the law of malicious prosecution: A Commonwealth update" *Obiter* 265-292.

64 Ibid.

65 See for example *Lederman v Moharai Investments (Pty) Ltd* 1969 (1) SA 190 (A) 196; *Moaki v Reckitt and Colman* 1968 (3) SA 98 (A) 103-104; *Prinsloo v Newman* 1975 (1) SA 481 (A) 492A-C; *Thompson v Minister of Police* 1971 (1) SA 371 (E) 373-374.

66 Okpaluba (Note 63 above) 265-292, 291.

67 *Mahupelo* case (Note 1 above).

68 See Okpaluba (Note 49 above).

69 *Mahupelo* case (Note 1 above).

continuing or maintaining the prosecution without reasonable and probable cause. Even in the absence of any express constitutional authority to develop the common law, Christiaan AJ proceeded to develop the common law of Namibia to recognise the delict of maintaining or continuing the prosecution against the plaintiff where the prosecutor knew that the prosecution was unjustified and nevertheless went ahead with the proceedings.[70] Okpaluba concludes that public policy embodying the legal convictions of the community taking into account the norms and values embedded in the Constitution of Namibia dictates such a result.[71]

This is not the first time the issue of the development of the common law had arisen in Namibian courts in the absence of a constitutional mandate to that effect, unlike the South African courts which are expressly authorised to develop the common law whenever it is necessary.[72] The Supreme Court of Namibia has had occasion to consider the issue as well as adopt the South African stance and develop the common law where the Constitution or statute law is silent on a matter before court in *JS v LC*.[73] And, along the lines of the Constitutional Court's approach in *Carmichele v Minister of Safety and Security,*[74] Christiaan AJ, held that the courts in Namibia had a duty to develop the common law whenever that was warranted. It is clear from the elements of malicious prosecution set down in the *Akuake case*, that the element of continuing or maintaining criminal proceedings beyond the stage where it could be said to be reasonable and probable, is a matter that has no precedent in Namibian law.[75] However, Okpaluba observes that it would provide a remedy to those persons who may have initially been brought into court on the basis of good faith, but who were maliciously kept there during the course of the criminal proceedings.[76] Further, Christiaan AJ stated that the rights of the accused to be free from costly and harassing prosecution, the time and energies of the courts, and the rights of citizens awaiting their turns to have their matters resolved must be taken into consideration.[77] In the light of these reasons, the court held that it is implicit in the plaintiff's case that the common law has to be developed beyond the existing precedent.[78] Therefore, that 'in order to properly guard against harm associated with protracted prosecution, the tort of continuing or maintaining malicious prosecution should be recognised'. In addition, the High

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70 Ibid.

71 Okpaluba (Note 49 above) 338.

72 See Section 39(2) of the Constitution of the Republic of South Africa 1996.

73 *JS v LC* 2016 (4) NR 939 (SC) para 24; see also the Supreme Court of Canada adopting a similar approach in *R v Salituro* [1991] 3 SCR 654 where Lacobucci J said the following about developing the common law: 'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform.

74 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 36.

75 *Mahupelo v Minister of Safety and Security* (Note 1 above) paras 169-171.

76 Okpaluba (Note 49 above) 328.

77 *Mahupelo v Minister of Safety and Security* (note 1 above) paras 173-174.

78 Ibid para 175.

Court reasoned that, as in bringing a claim for initiating malicious prosecution, a complainant would have to premise his or her claim for maintaining a malicious prosecution on a narrowly construed element. The tort of maintaining malicious prosecution would not chill zealous advocacy, because liability would only attach when the defendant maliciously maintained an unreasonable claim.[79]

Furthermore, whereas we agree with the Supreme Court in many respects, perhaps the court a quo was correct in developing the common law to accommodate the element of continuation or maintenance of the prosecution. As Counsel for the respondent contended that the common law had to be developed to bring it in line with the constitutional obligations imposed upon the prosecuting authority by Art 12(1)(b) read with Art 88 of the Constitution. One would argue that this is an important consideration in a constitutional dispensation with a Bill of Rights. With reference to *Heyns v Venter*[80], the respondent submitted that courts were constitutionally obliged to develop the common law to bring it in line with the spirit, purport and objects of the Bill of Rights. Therefore, in view of the constitutional protection of human dignity, it might be imperative to develop the ambit of the delict of malicious prosecution, especially where accused persons take many years of subjection to criminal prosecutions.

In light of the foregoing, it may be submitted that the political nature of the offences or treason trials, regardless of the doctrine of separation of powers, has political elements. The jurisprudence emanating from the cases might tend to discourage future litigation in that sphere of the law, and encourage rather than deter unreasonably lengthy or continued prosecutions in similar cases in future. While the *Minister of Safety and Security v Mahupelo* landmark judgement heavily relies on authorities and approaches in other commonwealth jurisdictions, the Supreme Court has nothing new to offer on the ambit of malicious prosecution law in Namibia. In malicious prosecutions, attention must be given to constitutional values such as liberty and dignity (*Ubuntu*) taking into account factors like the period of incarceration or period of time during which the charge hung on the plaintiff's head,[81] persistence of the defendant in the charge, the fact that the charge has not been withdrawn but proceeded with until the plaintiff was acquitted at the end of the state's case,[82] tests of legality and rationality, and limits of prosecutorial discretion.

14.8 CONCLUSION

The tort or delict of malicious prosecution provides redress for those prosecuted without cause; it is however, notoriously difficult to prove because of the

79 Ibid paras 181-182; Okpaluba (note 49 above) 329.
80 2004 (3) SA 2000 (T).
81 *Law v Kin* 1966 (3) SA 480 (W) 482.
82 *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) 851.

requirements on the claimant.[83] The Supreme Court's approach, like in most of the commonwealth, seems to carefully guide the action for malicious prosecution than any other law of tort, hence the number of unsuccessful actions. This raises questions whether the threshold for proving malicious prosecution is very high and perhaps untenable.[84] The law as is on malicious prosecution in Namibia, it can now only be preferable for the claimant and his/her legal representative to explore other remedies before delving into the difficulties of an action for malicious prosecution. Whereas, the Supreme Court was reluctant to stretch its hand and develop the common law on malicious prosecution in a constitutional dispensation, it will also be interesting to see the development of jurisprudence on constitutional damages in *Minister of Safety and Security and Others v Mahupelo* and the other similar treason trial cases. Further research should examine whether there is need to develop the common law on malicious prosecution in Namibia as was envisaged in the High Court judgment of *Mahupelo v Minister of Safety and Security and Others*.

83 Harphood (Note 48 above) 364-66, 364.

84 See also Okpaluba (Note 54 above) 86.

CHAPTER 15

More Freedom for the Media: An appraisal of *Trustco Group International Ltd and Others v Shikongo (SA-2009/8) [2010] NASC 6 (07 July 2010)*

Mariette Hanekom

15.1 INTRODUCTION

In the commemorative book *The Constitution at work: 10 years of Namibian Nationhood,* Clement Daniels, then Director of the Legal Assistance Centre, Windhoek, described post-independence Namibia as having 'a very conducive environment for media freedom.'[1] He based this rather exuberant statement on both the express reference in the Namibian Constitution to freedom of the press and other media, as well as the relative absence of statutory provisions limiting the media's right to publish.

The Namibian Constitution did not, however, bestow unlimited freedom on the media, but (almost in the same breath) cautioned the media that their freedom to publish was exercised subject to such reasonable restrictions imposed by the law of Namibia, and specifically subject to the law of defamation.

It was only in 2010 that the Supreme Court, in the matter of *Trustco Group International Ltd v Shikongo (Trustco)*[2] got the opportunity to examine the ambit of the limitations clause with regards to the common law of defamation versus freedom of the media. Admirably so, they made use of this opportunity to develop the common law to also include the defence of a 'reasonable publication' in the public interest, as opposed to insisting on the far harsher criterion of 'truth' and public interest.

This chapter examines the development of the jurisprudence on the freedom of speech and expression with regards to defamation in Namibia, with specific reference to the *Trustco* judgement, as well as the impact of that judgement not only on subsequent defamation claims, but also on the development of the law regarding freedom of speech and expression in Namibia in general.

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1 C Daniels (2000) "Press Freedom, the Namibian Constitution and state practice" in Manfred O Hinz, SK Amoo and D Van Wyk (eds) *The Constitution at work: 10 years of Namibian Nationhood* Mcmillan Education Namibia: Windhoek,188.

2 2010 (2) NR 377 (SC).

15.2 FREEDOM OF SPEECH AND DEMOCRACY

The Constitution of the Republic of Namibia, which was adopted by the Constituent Assembly on 9 February 1990, states in its preamble:

> 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 [...][3]

Article 1(1) of the Constitution then proceeds to immediately emphasise the principles on which the fledgling State is to be based, namely 'democracy, the rule of law and justice for all'. There can therefore be absolutely no doubt about the importance of Namibia as a democratic state, and that the essential tenets of democracy must be appreciated and upheld at all times.

Freedom of speech and expression is fundamental to democracy. As so eloquently stated by Dumbutshena AJA in the oft-quoted matter of *Kauesa v Minister of Home Affairs*[4] *(Kauesa)*:

> In order to live in and maintain a democratic state, the citizens must be free to speak, criticise and praise where praise is due. Muted silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy. In order for people to make political choices they need information, and in order to contribute to progress and peaceful change they need to be able to make their opinions known and possibly persuade others to follow their line of thinking.

This realisation was undoubtedly foremost in the minds of the drafters of the Namibian Constitution when they stated, in Article 21(1)(a) thereof, that: 'All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.'

(a) What is freedom of speech?

Article 21(1)(a) of the Constitution creates and preserves the right to freedom of speech and expression, including that of the press and other media. Generally speaking, the word 'freedom' means the power or right to act, speak, etc. in the

3 Preamble to the Constitution of the Republic of Namibia (NC).
4 1995 NR 175 (SC).

manner that one wants, without restrictions. It refers to the liberty and independence to choose between various available options, without restriction and coercion in exercising that preferred option. 'Expression' is a much wider term than 'speech'. It includes both verbal and non-verbal communication, displaying posters, painting, dancing and the publication and broadcasting of photographs and reports.

Although the Namibian Constitution does not expressly guarantee the public's right to information, this can be seen to be integral to the right of freedom of speech and expression. In a democratic society, the public has the right to receive information and ideas. The public has the right to know and the media is entrusted with this duty to inform the public. The media thus has the corresponding right to report on issues that have an element of public interest, no matter how controversial, sensitive or offensive.

(b) Related rights and freedoms

The Namibian Constitution also entrenches various other rights and freedoms that strengthen and complement the protection of freedom of speech and expression. Foremost of these is the right to freedom of thought, conscience and belief,[5] which not only complements, but also extends the right to freedom of expression, in that forms of expression based on the individual's (and the media's) intellectual thinking, principles and convictions are given specific constitutional protection. This includes not only thoughts and ideas that have popular appeal, but also those that admonish and criticise.

The right and freedom to assemble[6] and the right to freedom of association[7] similarly strengthen the right to freedom of expression. Acts of assembly and association, or the refusal to do so, are one of the most effective ways of communicating grievances and opinions. These rights go hand in hand with the right 'to participate in peaceful political activity intended to influence the composition and policies of Government'.[8] The role of the media in this regard is of vital importance. No society can develop effectively without information and the publication and distribution of ideas and opinions.

The Namibian constitution furthermore protects the right and freedom of all persons to practice any profession, or to carry on any occupation, trade or business[9]. This includes not only the freedom to choose one's profession, occupation or trade, but also the freedom to practice one's chosen profession without unreasonable interference or restrictions.

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5 Article 21(b) NC.
6 Article 21(d) NC.
7 Article 21(e) NC.
8 Article 17(1) NC.
9 Article 21(j) NC.

(c) Freedom of the press and other media

The role of the media in the dissemination of information requires no explanation. The media has variously been described as 'the fourth estate' or 'the fourth pillar of democracy' (the other three being the executive, the legislature and the judiciary). It is the role of the media to act as a 'watchdog' over the other three pillars – by providing the citizenry with information, they contribute to healthy debate and decision-making.

Although at common law freedom of the media as part of freedom of speech has always been regarded as a residual freedom (i.e. that which is not expressly forbidden is permitted), the tendency in pre-independence Namibia was that the freedom of expression of the media was more heavily restricted than that of the individual. More often than not, the media had to contend with various draconian statutes specifying what they were and were not allowed to publish - the Protection of Information Act 84 of 1982 and the rather ironically named, Protection of Fundamental Rights Act 16 of 1988 comes to mind. This can be attributed to the political climate of the time and dispensation of parliamentary supremacy, where the media was viewed as a challenge to state authority.

Not only was the media under constant threat of censorship and prosecution, but the media was also treated differently from private citizens when it came to defamation claims. The media was held strictly liable for defamation, and the defences of truth and public interest or fair comment more often than not failed to come to their rescue.

Perhaps this is one of the reasons why the drafters of the Namibian Constitution deemed it necessary that freedom of the press and other media should be explicitly mentioned in Article in Article 21(1)(a) thereof. It is an indication that they recognised the importance of the media and that it warrants specific and separate mention.

15.3 THE LIMITATIONS CLAUSE

The fundamental rights and freedoms referred to previously are, however, not absolute, and must be understood and exercised in the light of and subject to the limitations contained in the limitations clause, which states as follows:

> The fundamental freedoms […] shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred … which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[10]

[10] Article 21(2) NC.

Limitations are imposed in order that the rights enshrined in the constitution should not interfere with the rights and freedoms of others, such as the right to dignity and not to be defamed. The media accordingly has no *carte blanche* and should fulfil its role within the confines of these restrictions. There can be no doubt that unlimited freedom will not benefit the growth and progress of society, and that it is vital to strike a balance between competing rights and interests.

(a) The role of the judiciary

The advent of Namibian Independence brought with it a new challenge to the judiciary, namely to lead the way in a constitutional dispensation which was, at the time, as unknown to them as it was to the general populace. That it was no longer business as usual was recognised in the very first case reported in the law reports of an independent Namibia, namely *S v Acheson*[11], when Mahomed AJ stated that:

> 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 and permeate the processes of judicial interpretation and judicial discretion.[12]

The Namibian Constitution itself specifically tasks the Courts with the onerous duty of enforcing the rights and freedoms enshrined therein.[13] This power is itself, however, not unlimited but must, in turn, be exercised subject to the provisions of the constitution, as the constitution also expressly makes provision that 'the fundamental rights and freedoms enshrined […] shall be respected and upheld […] by the Judiciary.'[14] It is therefore the duty of the Judiciary to interpret, uphold and enforce the provisions of the constitution, and to decide, in terms of the limitations clause, what is 'reasonable' and what is 'necessary'.

(b) The judicial approach to the limitations clause

The ambit and application of the limitations clause with reference to freedom of speech and expression has come under judicial scrutiny on a number of occasions since the advent of Namibian independence. Not all of these cases relate to the media, however, the approach to and interpretation of the limitations clause indicated therein is relevant in as far as it gives us an indication as to the approach

11 1991 NR 1 (HC)
12 Ibid at 10A.
13 Article 5 NC. "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed."
14 Ibid.

of the judiciary when it comes to striking a balance between the constitutionally guaranteed rights of freedom of speech and of the media, and the limitations placed thereon by Article 21(2).

In *Kauesa,* Dumbutshena AJA firstly examined the manner in which the limitations clause was to be interpreted, stating that, "(the) Court, in assessing the extent of the limitations to rights and freedoms, must be guided by the values and principles that are essential to a free and democratic society […]".[15] He further opined that the limitations clause should be strictly interpreted so as to avoid unnecessary limitations on the enjoyment of free speech.

Similarly, in *S v Smith,*[16] Frank J held that exceptions to the right of freedom of expression should be restrictively interpreted. The reasonableness of a restriction would be determined by having regard to the principle of proportionality, in other words, the means chosen to achieve the objective has to be reasonable and demonstrably justified.

From the perusal of the judgements discussed supra, it becomes apparent that the Namibian Judiciary places a high premium on the value of free speech and expression in the development of democracy in the country. Their attitude is therefore that the limitations clause contained in Article 21(2) of the Namibian Constitution should be strictly interpreted so as to avoid unnecessary impediments on the enjoyment thereof.

It is recognised that restrictions are required as a way to guard against the intrusion of freedom of speech on other conflicting constitutionally guaranteed rights; however, the restrictions should only be those necessary and reasonable in a democratic society, should be closely connected to the intended objective and should not be so wide as to prevent legitimate speech in the exchange of ideas.

15.4 DEFAMATION

Although the personal right to one's name and fame is not specifically mentioned in the Namibian Constitution, it can be argued that these rights form part of the right to privacy and the right to the protection of dignity.

This construction is not, however, essential to justify the continued existence of the law of defamation, as the drafters of the Constitution have deemed it sufficiently important to warrant express mention in the limitations clause, which stipulates that the exercise of the fundamental freedoms protected in the constitution must, "be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions […] in relation to […] defamation."[17]

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[15] Supra note 4 at 186H.
[16] 1997 (1) BCLR 70 (Nm).
[17] Supra note 10.

Defamation can be defined as "the wrongful (intentional or negligent) publication of something about another, which causes his/her dignity and reputation to be impaired."[18] The law of defamation derives from the actio injuriarum in Roman law. It is merely required from the plaintiff to prove the publication of a defamatory statement. Proof of a defamatory statement will then give rise to rebuttable presumptions of both wrongfulness (an objective element) and intent (animo injuriandi) (a subjective element). It will then be up to the defendant to plead facts (defences) to prove the contrary. At common law, these defences were largely restricted to truth and public interest, fair comment and relative privilege.

Defending themselves against claims of alleged defamation was further complicated for members of the mass media (as opposed to ordinary individuals) by the decision of the South African Appellate Division in *Pakendorf v De Flamingh*,[19] *(Pakendorf)* which ruled that the media should be held strictly liable for defamation. The effect of this was that if the Plaintiff could prove the publication of defamatory material, this was assumed to be unlawful. Should the defendant not be able to rebut the presumption of unlawfulness, he/she was held liable, without the possibility of providing proof that the defamatory statement was published without the intent to injure the plaintiff.

The court stated that, unlike other defendants, "newspaper owners, publishers, editors and printers are liable without fault and, in particular, they are not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness of the publication of defamatory material".[20]

Subsequent to the first democratic elections and the adoption of a Bill of Rights in South Africa, the South African Supreme Court of Appeal in the matter of *National Media Limited v Bogoshi*[21] *(Bogoshi)* rejected the principle of strict liability of the media. Hefer JA considered the potential effect of strict liability of the media vis-à-vis the role of the media in disseminating information and stated as follows:

> If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*. Much has been written about the "chilling" effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.[22]

18 *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (8 March 2011). See also *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002).

19 1982 (3) SA 146 (A).

20 Ibid.

21 1998 (4) SA 1196 (SCA).

22 Ibid at 25-26.

The learned judge then proceeded to examine the defendant's defence that the publication was reasonable (in that the defendant was unaware of the falsity of the facts published and did not publish it recklessly) and that the defendant did not act negligently. In this regard he held that:

> […] the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.[23]

With regards to animus iniuriandi, he held that, "[…] it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case."[24]

The defence as set out by Hefer J (which subsequently became known as the *Bogoshi* defence) encompasses both the elements of wrongfulness and intent. Although it extended the scope of possible defences available to media defendants, it does not affect the burden of proof in defamation actions, in that it is still up to the defendant to prove that the publication was reasonable and that he was not negligent.

This decision, ground-breaking as it was, was however taken after Namibia became independent and accordingly could only have persuasive value in Namibian courts. The jurisprudence regarding defamation that Namibia inherited at the time of independence was thus that there was a presumption of unlawfulness and intent, and that the media was held strictly liable. Furthermore, the media's potential defences to rebut these presumptions were limited to truth and public interest, fair comment (which in itself requires that the facts commented on are true) and relative privilege. More often than not, this made it extremely difficult for members of the media to defend themselves against such claims, and they often found themselves in a position where they had to either 'shut up or pay up'.

15.5 THE IMPACT OF THE NAMIBIAN CONSTITUTION ON THE LAW OF DEFAMATION

With the dawn of the new Constitutional era, it was left to the judiciary to examine the ambit of the limitations clause (and specifically the law of defamation) vis-s-vis the new constitutional guarantee of freedom of speech and expression, and the specific recognition of the media in this regard. A balance had to be struck between the individual's right to dignity (and a good name) on the one hand, and the media's right (and duty) to freely report on matters of public interest on the other hand. As stated by Mainga J in *Free Press of Namibia (Pty) Ltd v Nyandoro (Nyandoro)*:

23 Ibid at 30-31.
24 Ibid at 35.

'The law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name.'[25]

On the one hand, it is apparent from the wording of the limitations clause that any restrictions placed on fundamental freedoms must be reasonable, and the Courts have held that 'the requirement of reasonableness requires that the limitation of a fundamental freedom should be structured in such a manner that it impairs the freedom as little as possible.'[26] On the other hand, the same limitations clause expressly recognises that the law with regard to defamation can limit the constitutionally guaranteed right to freedom of speech. As emphasised by Parker J in the matter of *Pohamba Shifeta v Raja Munamava (Shifeta)*:

> In sum, the defendants cannot hide behind Article 21(1)(a) of the Namibian Constitution and defame the plaintiff. The other side of the coin is this: the plaintiff may rely on the law relating to defamation to protect his rights to human dignity and privacy- and that is exactly what the plaintiff is seeking to do in the present application. Thus in terms of our law, the common law of defamation is expressly set up as being a constitutionally valid rule of law that can limit the right to freedom of speech and expression.[27]

(a) Earlier judgements

A scrutiny of some of the earlier judgements handed down by the High Court of Namibia post-independence reveals a tendency to adhere to the common law (pre-independence) approach to defamation.

One of the first cases relating to defamation heard in post-independent Namibia was that of *Smit v Windhoek Observer (Pty) Ltd.*[28] No reference whatsoever was made in this judgment to the Namibian Constitution, freedom of speech or, for that matter, the limitation thereof. Instead, Hannah AJ regarded what he considered as 'journalistic sensationalism' in a serious light and awarded the Plaintiff an amount of damages which, at the time, was considered as high within the Namibian context.

In *Afrika v Metzler,*[29] Teek J similarly awarded a high amount of damages, basing his award on what he termed 'aggravating circumstances', in that the defendant, subsequent to the issue of summons, continued publishing negative articles about the plaintiff. The constitutional issues were not specifically canvassed or discussed, and the learned judge appeared to accept the strict liability of the media as given law. He only mentioned the limitations clause in passing with regard to the quantum of damages, when he stated:

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[25] 2018 (2) NR 305 (SC) para 36.

[26] *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and Another (HC): Nasilowski and others v Minister of Justice* (1998 NR 96 (HC).

[27] Unreported judgment of Parker J, case No I 2106/2006, delivered on 5 December 2008 para 24.

[28] 1991 NR 327.

[29] 1997 (4) SA 531 NM.

> With the new democratic dispensation heralded by the Namibian Constitution entrenching fundamental human rights and fundamental freedoms … the time has come to have a liberal approach … and award much higher damages, especially in instances where there are aggravating circumstances present as in the present case. Only then will persons, especially newspaper editors/reporters, publishers/printers and/or owners, be more on their qui vive and be mindful of the strict/absolute liability applicable to members of the press and hopefully act in accordance with the special duty of care that rests upon their shoulders and subject to the law pursuant to the reasonable restrictions on the exercise of their fundamental freedoms imposed by Article 21(2) of the Namibian Constitution. If they know that substantive exemplary/punitive damages could be visited upon them if they defamed another animus iniuriandi. This might prevent these aforementioned persons from being motivated by and/or frolicking with journalistic sensationalism.[30]

Teek J thus made it abundantly clear that he had no intention of deviating from the common law position concerning the strict liability of the media with regards to defamation, and that he relied heavily on the restrictions imposed by Article 21(2) of the Constitution.

In 2000, the judgement in *Muheto v Namibian Broadcasting Corporation*[31] *(Muheto)* was hailed as 'a significant victory for the cause of press freedom in Namibia,'[32] whereby Manyarara AJ declined to grant a final interdict prohibiting the Namibian Broadcasting Corporation from screening a television programme commenting unfavourably on the applicants.

Although the respondent sought to rely on the defence of truth and public benefit, the learned judge referred briefly but with approval to the principle enunciated in *Bogoshi,*[33] stating that:

> [P]ublication of defamatory matter in the public media will be regarded as lawful if, in all the circumstances of the case, publication is found to be reasonable, i.e. that it involves a matter of public interest, and that defendant had reasonable grounds for believing the words were true and took proper steps to verify the accuracy of the material.[34]

The applicability of this defence in Namibian law was, however, neither canvassed nor discussed, and neither was the issue of the strict liability of the media.

30 Ibid at 331I-332A.
31 2000 NR 178 (HC).
32 Media Institute of Southern Africa (2000) "Court strikes a victory for media freedom" <https://ifex.org/court-strikes-a-victory-for-media-freedom>.
33 *Bogoshi* (Note 21 above).
34 Supra note 31 at 184H-I.

Manyarara J ruled that, "the balance of convenience disentitles applicants from obtaining a final interdict for the reason that, if respondent's programme defames applicants, they have a cause of action which will result in an award of damages, whereas a denial of respondent's right to publish is likely to be the end of the matter for respondent."[35]

With due respect and despite the popular acclaim, the *Muheto* judgement did little to alter the common law principles of defamation or advance the cause for freedom of the media. Although Manyarara J declined to grant a final interdict prohibiting the screening of the programme, he left the door wide open for the applicants to take further action should they so wished.

The matter of *Afshani v Vaatz*[36] *(Afshani)* did not concern the media and accordingly did not touch on the issue of the strict liability of the media; however, in his judgement, Maritz J addressed the limitations clause and the restrictions it placed on the exercise of freedom of speech in general. Although the learned judge conceded that a balance must be struck between the right to dignity (and hence a person's right to a good name) and the right to freedom of speech and expression, he had no doubt that the right to dignity is the more important of the two rights; a 'core value' which, by virtue of it being referred to in the preamble to the Namibian Constitution,[37] must extend throughout the exercise of all the other rights and freedoms.

According to the learned judge, the express reference to defamation in Article 21(2) of the Constitution was a clear indication that, "the founders of the Constitution recognised that the right to freedom of speech and expression must yield to the rights of an individual which the law of defamation is seeking to protect - in particular the right to dignity and privacy."[38]

Maritz J re-iterated with approval, the common law principles of defamation, namely that once the publication of defamatory material has been proven by the plaintiff, the full onus is on the defendant to rebut the presumptions of unlawfulness and animus injuriandi on a balance of probabilities. He then proceeded to examine the requirements of the defence of absolute or qualified privilege, which is one of the accepted defences at common law, and found that, although the defendants' statements were defamatory, they were not unlawful.[39]

Although the *Afshani*-judgement was one of the first judgements in an independent Namibia concerning defamation that purported to examine the interaction between the right to dignity and the right to freedom of speech as contemplated in the

35 Ibid at 185E-F.
36 2006 (1) NR 35 (HC).
37 Ibid at 48A.
38 Ibid at 47I-48A.
39 Ibid at 48G.

limitations clause, it is apparent from the judgement that, more than fifteen years after Namibian independence, the learned judge was prepared to accept, without question, the common law of defamation as inherited by an independent Namibia to be the correct and binding law.

(b) Later judgements

The tide finally began to change in favour of the media in late 2008. In a series of judgements[40] delivered in December 2008 and January 2009, the High Court of Namibia indicated that it was finally ready to consider changes to the common law of defamation in favour of the media.

In the unreported *Shifeta*[41] judgement, Parker J paid direct attention to the issue of strict liability of the media in Namibia. After a short discussion of the persuasive South African judgements in *Bogoshi*[42] and *Khumalo v Holomisa*[43] and in the light of various judgements of the Namibian Supreme Court having stressed 'the importance of freedom of speech and expression in the development of Namibia's nascent democracy and the maintenance of the democratic State of Namibia',[44] he declared that:

> I think the time has come for this Court to jettison the unconstitutional baggage of the doctrine of strict liability of the media in the context of defamation and embrace and apply, as I do, the *Bogoshi* decision, which conduces to the development of our own constitutionalism, conduces to the strengthening of our democratic State and, moreover, conduces to deepening of Namibia's culture of respect for human rights.[45]

The learned judge then proceeded to examine the defendants' defences, namely, that the defamatory articles were published pursuant to the defendants' constitutionally guaranteed right to freedom of speech and expression; that the defendants had acted in good faith and without recklessness or negligence or that the defendants had acted reasonably and without negligence (the *Bogoshi* defence). It is interesting to note that the defendants did not attempt to raise the common law defences of truth and public interest or fair comment, presumably because the untruth of the defamatory articles had already been proven.

Parker J was quick to reject the first defence on the basis that the Namibian Constitution itself provides that the right to freedom of speech and expression is subject to a restriction in the form of defamation, which, according to him, is

40 *Shifeta* supra note 27, *Universal Church of the Kingdom of God v Namzim Newspaper t/a The Southern Times* 2009 (1) NR 65 (HC) and *Shikongo v Trustco Group International Ltd* 2009 (1) NR 363 (HC)

41 Ibid.

42 Supra note 21.

43 (5) SA 401 (CC).

44 Supra note 27 para. 9.

45 Ibid para 10.

necessary because it cannot be "permissible for a person to enjoy his or her right to freedom of speech and expression […] *at the expense* of the enjoyment by another person of his or her […] right to reputation […]".[46]

He then proceeded to analyse at length the events leading up to the publication of the defamatory articles and the steps taken (or not taken) by the reporter in order to establish the veracity of the story that he was about to publish. He concluded that, with regard to one article, the defendants were reckless and negligent and could therefore not rely on the defence that the publication is reasonable,[47] however the second article was, in fact, a reasonable publication.[48]

The *Shifeta* judgement is significant in that this was the first Namibian judgement to accept the defence of a reasonable publication as an additional defence to the usual defences that were available at common law. Although Parker J did not discuss the law of defamation in this regard, it is apparent from his judgement on the facts that he was prepared to accept this defence as being good in law.

The judgement in *Universal Church of the Kingdom of God v Namzim Newspaper t/a The Southern Times*[49] *(Universal Church)* followed shortly after the *Shifeta* judgement. Although the largest part of the judgement dealt with the identification of the plaintiff in the defamatory article and whether a newspaper headline on its own could also be defamatory, Manyarara J was "firmly of the view that strict liability is inconsistent with the provisions of […] the Constitution."[50]

In contrast to the approach taken by Maritz J in the *Afshani*[51] judgement, namely that the right to dignity (and a good name) is a superior right to which other rights should yield, Manyarara J was prepared to place more emphasis on the importance of the media and their right to publish. Although he agreed that "it is necessary to strike a balance between the competing right to reputation, on the one hand, and freedom of expression, on the other".[52] He was of the opinion that, "in an open and democratic society, such as ours, the importance of the constitutional recognition accorded to the singular role that the media (both publicly and privately owned) plays in the free flow of information to society, cannot be overstressed."[53]

The defendants in this matter relied on the usual defences of truth and public interest, alternatively fair comment, and the defence of reasonable publication was not pleaded nor discussed in the judgement. Manyarara J found that the facts published were neither true nor substantially true and that the defendants

46 Ibid para 22.
47 Ibid para 43.
48 Ibid para 44.
49 Supra note 40.
50 Ibid at 75I.
51 Supra note 36.
52 Supra note 40 at 76C.
53 Ibid at 76D.

could therefore not discharge their onus to prove that the publication, although defamatory, was not unlawful.[54]

Arguably one of the most important judgements of the High Court regarding defamation is that of *Shikongo v Trustco Group International Ltd*,[55] even if only because the matter was subsequently taken on appeal, which finally gave the Supreme Court the opportunity to pronounce itself on matters concerning freedom of speech and defamation. The defences raised by the defendant were the common law defences of truth for the public benefit or fair comment, as well as the constitutional defence of reasonable publication, namely that the defendants were not negligent.

At the outset, counsel for the defendant submitted that the plaintiff relied on strict liability and therefore the onus must be on the plaintiff to prove that the statements he complained of were false. In considering this submission, Muller J discussed the law of defamation in some detail, from its origins in Roman Law to the status quo inherited by Namibia at independence. He also referred with approval to both the *Shifeta* as well as the *Universal Church* judgements, both of which were handed down after completion of the case at hand.

In keeping with the approach taken in these two cases, Muller J agreed that, "the decision of *Pakendorf* to place a burden of strict liability on the media was wrong'[56]. He held that 'the media in Namibia is not subject to strict liability, but that media defendants bear a full onus to rebut the presumptions of animus injuriandi and unlawfulness, namely on the basis of a balance of probabilities."[57] Counsel for the defendant's submission that the burden was on the plaintiff to prove that the facts published were false was therefore rejected.

Muller J then proceeded to consider the defences raised by the defendant. With regards to the defences of truth and public benefit, he stated that:

> It is not required that everything alleged need to be true in every minute detail. As long as the material allegations of the statement are true, the defence may succeed. Some protection is allowed for erroneous statements of defamatory facts in the interest of free and fair political activity.[58]

On the evidence presented, Muller J was convinced that the article was not the truth, and that the defendant had not taken even the most basic steps to verify the information before publication. He concluded that the defendant had intended to damage the plaintiff's good name and that the publication was unreasonable.

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54 Ibid at 76H.
55 Supra note 40.
56 Ibid at 386C.
57 Ibid at 386D-E.
58 Ibid at 390C.

15.6 TRUSTCO GROUP INTERNATIONAL LTD v SHIKONGO

It was only 20 years after Namibian independence, when the *Shikongo* judgement discussed above was taken on appeal, that the highest court in the country got the opportunity to examine the interaction between the limitations clause and the common law of defamation on the one hand, and the constitutional guarantee of freedom of the media on the other hand.

The issues placed before the court for consideration in *Trustco Group International Ltd v Shikongo*[59] (*Trustco*) were as follows: 1) whether the strict liability of the media as espoused in *Pakendorf*[60] was still appropriate in a post-independence Namibia with a constitution that expressly guaranteed freedom of the press and other media, or whether a media defendant can escape liability by proving that he/ she did not intend to injure the plaintiff (lacked animus iniuriandi); 2) whether the Supreme Court of Namibia had the power to develop the common law in order to align it with constitutional requirements; and 3) whether the common law of defamation needed to be developed to align it to the constitutional right to freedom of speech and the media.

(a) Strict liability of the media

With regards to the first issue, O'Regan AJA reiterated the sentiments regarding the importance of freedom of speech expressed in *Kauesa*[61] and stated:

> The media plays a key role in disseminating information and ideas in a democracy, which is why, no doubt, the Constitution specifically entrenches the freedom of the media and the press in art 21(1)(a). One of the important tasks of the media is to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians.[62]

She held that the principle of strict liability of the media had the effect of limiting their possible defences to those that were available at common law, and required members of the media to ensure that every fact published was the truth, or at least substantially the truth.[63] This, she stated, could have a 'deterrent effect'[64] on the media exercising its right to freedom of speech and expression, and could not be regarded as a reasonable restriction as contemplated by Article 21(1)(a) of the Constitution. She accordingly held that the principle of strict liability did not pass constitutional muster and could not be seen as part of Namibian law.[65]

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[59] Supra note 2.
[60] Supra note 19.
[61] Supra note 4.
[62] Supra note 2 at 389D-E.
[63] Ibid at 389F-G.
[64] Ibid at 390C.
[65] Ibid at 390D-E.

(b) The power of the Supreme Court to develop the common law

O'Regan AJA made short shrift of the appellant's argument that the Supreme Court in Namibia did not have the power to develop the common law in order to align it with constitutional requirements.

Counsel for the appellant argued that in terms of Article 66 of the Namibian Constitution[66], a rule of common law that conflicts with the Constitution was rendered invalid at the date of independence, and that only Parliament, and not the courts, had the power to make new laws (or develop the common law.) The learned judge rejected this argument and pointed out that '[c]ommon law is judge made law and from time to time it needs to be developed to take account of changing circumstances.'[67]

(c) Development of the common law of defamation

The next, and perhaps most important issue examined by the court was whether the common law of defamation needed to be developed to align it to the constitutional right to freedom of speech and the media, and if so, how this should be done.

With regards to whether the law needed to be developed, O'Regan AJA stated that:

> There can be little doubt that the law needs development to protect the freedom of speech and the media. Article 21(2) of the Constitution expressly mentions the law of defamation as a part of the law that may limit rights as long as it does so by the imposition of "reasonable restrictions […] necessary in a democratic society". The express mention of the law of defamation in art 21(2) makes it clear that the Constitution contemplates that the law of defamation must be developed to give effect to the right to freedom of speech, expression and the media.[68]

As to how the law should be developed, the appellant submitted that the common law should be developed to increase the onus of the plaintiff in a defamation matter, in that they would not only have to prove that a defamatory statement has been published, but that the facts published were false. The respondent, on the other hand, argued that the law of defamation should be developed to include a defence of 'reasonable publication' in addition to the common law defences of truth and public interest, and fair comment.

Counsel for the appellant argued that requiring the plaintiff in a defamation claim to prove that the alleged defamatory material is false would be in line with the general

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66 Article 66(1) NC 'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary law or common law does not conflict with the Constitution or any other statutory law.'

67 Supra note 2 at 391A.

68 Ibid at 394G-I.

approach to constitutional litigation in Namibia. He referred to *Kauesa*[69] where it was held that a person who claims that a constitutional right has been infringed has the onus to establish that such right has been limited or restricted. Once that onus has been discharged, a person claiming that the limitation is justifiable in terms of the limitations clause has the burden to prove that.

O'Regan AJA rejected this argument, pointing out that the onus rule in *Kauesa* does not relate to the proof of facts, but rather to an issue of law, namely whether a law that limits a fundamental freedom constitutes a reasonable restriction necessary in a democratic society. Accordingly, the correct application of *Kauesa* would rather mean that a party who claims that the law of defamation is a reasonable restriction necessary in a democratic society would have to convince the court of that[70]. Since neither of the parties to the appeal wished to submit that the current law of defamation constituted such a reasonable restriction, the reference to *Kauesa* was not relevant.

She further rejected the appellants' submission that the law should change to require a plaintiff to prove that the defamatory facts are false on the basis that this would require a plaintiff to prove that each and every defamatory fact was untrue, which would be just as difficult as it is for a plaintiff to prove the truth of each and every fact. This, she stated, 'would put plaintiffs' constitutional rights at risk, just as requiring publishers to prove truth puts their constitutional rights at risk.'[71]

O'Regan AJA also referred briefly to the possibility of changing the law of defamation to allow the media to raise the defence that, although the publication was defamatory, they did not act intentionally. This defence speaks to the presumption of intent (animo injuriandi) that arises when the publication of defamatory material has been proved. Neither of the parties to the appeal raised this possibility, and the learned judge also rejected it out of hand, since it will not require persons wishing to publish harmful facts to make any effort to establish the veracity of these facts, as long as they can prove that they did not intend to harm the person thus defamed. This, according to her, will not give sufficient protection to the constitutional principle of human dignity.[72]

(d) Reasonable publication

The only remaining issue was therefore to consider the defence of 'reasonable publication'. O'Regan AJA held that to develop this defence (as proposed by the respondent and already previously accepted by the High Court of Namibia) would give increase to the constitutionally protected right of freedom of speech and the media without jeopardising the protection of human dignity.[73]

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[69] Supra note 4.
[70] Supra note 2 at 394D-E.
[71] Ibid at 395D-E.
[72] Ibid 395B-C.
[73] Ibid 395F-G.

In terms of this defence, as explained by the learned judge, was that the media would not have to establish that each and every fact is true, but 'that it is important and in the public interest that it be published, and that in all the circumstances it was reasonable and responsible to publish it.'[74]

The defence of reasonable publication addresses the presumption of unlawfulness, namely that a defendant who can convince the court that a particular publication was reasonable and in the public interest, will not have acted wrongfully.

With regards to the element of fault (animus injuriandi), O'Regan AJA referred with approval to the decision in *Bogoshi*[75] where it was held that the media will be held liable on the basis of negligence (not intent). According to her, this is in keeping with the defence of reasonable publication and should be adopted.[76]

On the facts, O'Regan AJA ruled that the appellant could not establish that the facts published were true, or even substantially true. Although the publication might have been in the public interest, the manner in which it was approached was not in keeping with standard good journalistic practice. The appeal against the High Court's ruling that they were liable for defamation was dismissed.

(e) The importance of Trustco

The Supreme Court judgement of O'Regan AJA in the *Trustco* case will undoubtedly have a huge impact on defamation cases in Namibia. Not only will the media no longer have to contend with strict liability but they now have an additional defence available in instances where the truth of each and every fact cannot be established, but it is nevertheless in the public interest to publish a particular matter. This should encourage them to fulfil their role in making important information available to the public without fear of getting embroiled in costly litigation. To quote O'Regan AJA:

> The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity.[77]

The *Trustco* matter does not, however, close the door on further developments in the jurisprudence on the freedom of speech and expression with regards to defamation. Two issues were referred to but not discussed, namely: 1) whether a media defendant can avoid liability by relying on a reasonable mistake (in the event

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74 Ibid at 395G-H.
75 Supra note 21.
76 Supra note 2 at 396A.
77 Ibid at 396C-D.

of not succeeding with a defence of reasonable publication); and 2) Secondly, whether the defence of reasonable publication will be available only to members of the media, or also to ordinary citizens.

15.7 SUBSEQUENT JUDGEMENTS

After the ground-breaking judgement in *Trustco,* there have been a number of defamation cases heard in Namibia where the principles as set out by O'Regan AJA have been referred to with approval and followed.

The matters of *Tuhafeni Hangula v Trustco Newspapers (Pty) Ltd*[78] *(Hangula)* and *Nghimtina v Trustco Group International Ltd* [79] *(Nghimtina)* are similar and can thus be discussed together. In both instances, the plaintiffs were persons who held (at the time) prominent positions in government, namely as Deputy Commissioner General of the Namibian Correctional Services and (then) Minister of Works and Transport respectively, who alleged they were defamed by articles published in the Informanté newspaper, which is published by the defendant.

In *Hangula,* the defendant relied on both the defences of truth and public benefit as well as reasonable publication; however, Smuts J ruled that 'the defendants have dismally fallen short in establishing the truth of the allegations in the report.'[80] In *Nghimtina,* the defendant's defences raised in the pleadings were similar (they also included fair comment), however, at the commencement of the trial they conceded that they could not establish the truth of the matter reported on.

The only defence that was thus elaborated on in both matters was that the publications were reasonable and in the public interest. Both Smuts J and Parker AJ respectively referred with approval to the dictum in *Trustco*[81] but found, on the facts, that the defendants' conduct in gathering information and attempting to establish the veracity of the stories reported on fell far short of accepted journalistic practice. The publications were therefore unreasonable and in both matters judgement was given in favour of the plaintiffs.

The matter of *Nahole v Shiindi*[82] does not concern the media but nevertheless warrants mention. Although the defendant did not oppose the matter, Damaseb J deemed it necessary to briefly discuss the applicable law. With regards to the onus of proof in defamation claims he stated:

> Once publication of defamatory statements relating to the plaintiff has been proved, the two presumptions arise: that the publication was unlawful

[78] [2012] NAHCMD 77 (November 2012).
[79] [2014] NAHCMD 11 (23 January 2014).
[80] Supra note 78 para 38.
[81] Supra note 2.
[82] [2014] NAHCNLD 53 (03 October 2014).

> and the defendant acted with animus injuriandi. The onus is now on the defendant to establish justification or that the publication was reasonable.[83] (My emphasis).

Unfortunately, since the defendants chose not to enter appearance to defend, no evidence was led to rebut the presumptions and there was no need for Damaseb J to further discuss the applicability of the reasonable publication defence with regards to a defendant who is not a member of the media. His mere mention of it, in this context, however, indicates a measure of acceptance that this defence might well in future be available to individuals and leaves the door open for this issue to be deliberated on in future cases.

In the matter *Director General Namibia Central Intelligence Service v Haufiku,*[84] the applicants brought an urgent application for an interdict restraining the respondents (representatives of a Namibian daily newspaper) from publishing an article on alleged corrupt activities in the Namibia Central Intelligence Service. The applicants relied on certain provisions of the Namibia Central Intelligence Service Act 10 of 1997 and of the Protection of Information Act 84 of 1982. The respondents, in turn, argued that the order sought would violate their right to freedom of speech and expression as accorded to them by Article 21(1)(a) of the Constitution.

Although the matter does not relate to defamation, but rather to the provisions of the limitation clause limiting the right to freedom of speech in the interest of national security, Geier J referred with approval to the Supreme Court's recognition (in *Trustco*) that 'the media play a key role in disseminating information and ideas in a democracy, which is the reason why the Constitution specifically entrenches the freedom of the media'[85] and 'that it is one of the important tasks of the media to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians.'[86]

The learned judge elaborated on the role of the media with regards to accountability in democratic states, and stated that:

> (b) members of the public have a right to be informed about the manner and fashion in which the authorities are performing their public duties and mandates, which right includes the right to be informed about how public figures, officials and politicians execute the tasks entrusted to them;
> (c) members of the public have the consequent right to form an opinion about the manner and fashion in which the authorities and public figures are performing their public duties, which opinion is dependent in a very large

83 Ibid para 7.
84 2018 (3) NR 757 (HC).
85 Ibid at 786A.
86 Ibid at 786B.

measure upon the media's ability to provide accurate information on the way in which politicians and functionaries are fulfilling their mandates;

(d) the media plays a key role in that its members are important agents in ensuring that government is open, responsive and accountable to the citizens as the founding values of the Constitution require.[87]

He held that the applicant had failed to establish the requirements for a final interdict and declined to grant the order sought.

The matter was subsequently taken on appeal to the Supreme Court,[88] which upheld the order of the High Court.

The most recent judgement of the Supreme Court dealing with defamation is that of *Nyandoro.*[89] In the trial court, the defendant (Free Press of Namibia) raised the defences of truth in the public benefit; fair comment; qualified privilege and reasonable publication. On examining the evidence, the judge a quo found that the articles contained several inaccuracies and ruled against the defendants on all their defences.

On appeal, the appellant persisted with their defence of truth and public benefit, with the defences of qualified privilege and reasonable publication in the alternative. The decision to continue with the defence of truth in the public benefit is surprising, to say the least, given that the trial court had already found that the defamatory article was largely incorrect, and since the respondent had provided them with documentary evidence of the real state of affairs even before summons was issued. Mainga JA similarly found that the 'article is substantially if not wholly untrue'[90] and accordingly the appellants' defence failed in this regard. The defence of qualified privilege was rejected on the same grounds.

With regards to the defence of reasonable publication, Mainga JA re-iterated with approval the approach taken in *Trustco,* namely that 'In considering whether the publication of an article is reasonable, one of the important considerations will be whether the journalist concerned acted in the main in accordance with generally accepted good journalistic practice.'[91] He found that the journalist in question had, on the contrary, acted 'unreasonably and negligently'[92] and could therefore not rely on this defence.

With due respect, the *Nyandoro* judgement merely confirmed the principles espoused in *Trustco* and did not, as such, add to the law of defamation, except

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87 Ibid at 786D-G.
88 *Director-General of the Namibian Central Intelligence Service v Haufiku* [2019] NASC (12 April 2019).
89 Supra note 25.
90 Ibid at 333J.
91 Ibid at 335D-E.
92 Ibid at 338A.

to confirm that the defence of reasonable publication should not be construed as a carte blanche to the media to act recklessly under the guise of 'public interest.'

15.8 THE CURRENT SITUATION

A perusal of the above judgements allows one to come to the pleasing conclusion that the judiciary has, in recent years, taken a stance in favour of allowing more latitude to the media with regards to the law of defamation. Provided that they act responsibly, the threat of damning defamation claims needs no longer deter them from publishing matters that are in the public interest. The Office of the Media Ombudsman, which was launched on 13 November 2009, also provides a forum where complaints can be addressed without resorting to costly litigation.

Namibia has restored its position as the top-ranking African country on the 2019 World Press Freedom Index[93], and President Hage Geingob, in his State of The Nation address delivered in April 2019, reconfirmed his commitment to freedom of speech. He stated that: "As long as the electorate put us here, our Government will guarantee the freedom of the Fourth Estate, who play a constructive role in building the Namibian House."[94] He however warned that: "The Media and Civil Society particularly have a key role to play and must be mindful of the information they convey and the impact it has on society."[95]

Despite the judiciary's willingness to recognise the importance of the media, the current legislative and political climate indicates that the media is not yet as free as they might want to be.

What is particularly worrying is the argument advanced on behalf of the appellant in the Supreme Court matter *Director-General of the Namibian Central Intelligence Service v Haufiku*[96] that, in terms of the Protection of Information Act 84 of 1982 and the Namibia Central Intelligence Service Act 10 of 1997, the Namibia Central Intelligence Service and its Director General have the sole discretion to decide whether information might jeopardise Namibia's national security interests, and not even the courts have the authority to query this decision. According to them, once they have labelled a matter as relating to national security, the courts are obliged to interdict the publication of same, and they are under no obligation to respond to any enquiry, even if it involves an allegation of a crime such as corruption.[97]

Although the Supreme Court rejected this argument, it is still indicative of a political willingness (or desire) to legislate against freedom of speech. Similarly, calls by members of the ruling party to establish a Ministry of Cyber Security have also

93 Reporters without Borders (nd) "Data of press freedom ranking" <https://rsf.org/en/ranking_table>.

94 <Available at *https://www.gov.na›documents›STATE+OF+THE+NATION+ADDRESS*>.

95 Ibid.

96 Supra note 88.

97 Ibid para 49-50.

come across not as a legitimate attempt to protect Namibia against breaches of cyber security, but rather as an attempt to control social media. Fortunately, however, any political attempts to curb freedom of speech and the media will still have to pass constitutional muster, and will ultimately have to be approved by the Supreme Court.

15.9 CONCLUSION

> *The constitutional dispute between the right to freedom of speech on the one hand and the right to dignity on the other, will remain a vexed issue not only in this jurisdiction but in many other democratic societies like ours.*[98]

The Namibian Constitution expressly protects the right to freedom of speech and expression, including that of the media, as a fundamental freedom; however, it also states that this right must be exercised subject to the reasonable restrictions imposed by the law of defamation (a person's right to a good name, protected by the similarly guaranteed right to dignity).

This chapter examined the post-independence judicial approach to striking a balance between the right of freedom of speech and expression of the media on the one hand, and the right to dignity (and the right not to be defamed) on the other hand.

Although very few defamation claims end up in court (the majority are either settled or die a silent death), there have been some judgements handed down, which allowed our Courts to test pre-independence legal approaches against the freedom of expression (including the freedom of expression of the media) required in a constitutional dispensation. The law of defamation inherited by Namibia at the time of independence tended to favour the aggrieved individual at the expense of the media, and initially our courts seemed reluctant to change this.

The Supreme Court finally got the opportunity in 2010 to develop the common law of defamation in order to align it with the constitutional precept of freedom of speech and the media. In *Trustco Group International Ltd v Shikongo,*[99] the concept of strict liability of the media was finally abolished. Furthermore, the court extended the common law to allow for the defence of a reasonable publication in the public interest in addition to the usual defences of truth and public interest or fair comment.

In its judgement, the Supreme Court held that, given the difficulty of establishing truth in many circumstances, requiring the media to establish the truth or substantial truth of every potentially defamatory statement may have an effect on the media's freedom to publish, since they might refrain from publishing information they are

98 Mainga JA in *Nyandoro*. Supra note 82 at 325A.
99 Supra note 2.

not entirely sure is the truth, rather than run the risk of a successful defamation action against them. The Court further held that such a deterrent effect is at odds with the freedom of the media entrenched in the Namibian Constitution and cannot be justified as a reasonable restriction necessary in a democratic society.

The Supreme Court therefore ruled that the development of a defence of reasonable or responsible publication of facts that are in the public interest would provide greater protection to the right of freedom of speech, while at the same time still respecting the individual's constitutionally protected right to dignity and a good name.

Although the *Trustco* judgement has made it easier for diligent journalists to continue playing their vital role in bringing important information to the attention of the public, the political climate in Namibia still indicates a desire, at least by some, to legislate against freedom of speech. Undoubtedly, the Supreme Court will again, sometime in the future, be called upon to adjudicate on the balance between reasonable restrictions and freedom of speech.

CHAPTER 16

Namibia Superior Courts' findings on adultery claims: A case of undermining African jurisprudence?

Tapiwa Victor Warikandwa and Lizazi Eugene Libebe

16.1 INTRODUCTION

The action for adultery is part of a group of actions, based on the action *iniuriarum*, which are connected to the institution of marriage. The group also comprises the action for breach of promise to marry. From a historical perspective, Roman law punished adultery as a crime but did not afford an action in private law.[1] As to Roman Dutch Law, support for the proposition that Roman Dutch Law afforded a private law action for adultery, is hard to find amongst our old authorities.[2] Many years ago, the court in *Green v Fitzgerald*[3] held that adultery was no longer a criminal offence in our law, because it had become obsolete due to disuse. In mid-2016, both the Supreme Court and High Court of Namibia delivered judgements in which their reasoning was poised with the abolition of the award of damages based on adultery. The Supreme Court case of *James Sibongo v Lister Lutombi Chaka & Another [Sibongo case]*[4] was delivered on 19 August 2016, and the High Court case of *Van Straten v Bekker [Bekker case]*[5] was subsequently delivered on 25 August 2016. The Supreme Court concluded that the award of damages in action for adultery against a third party was no longer sustainable in our law. The High Court also stressed that the action has lost its lustre in the modern day and there are winds of change that are currently blowing in some jurisdictions such as South Africa. A judgement of the Constitutional Court in South Africa, upholding a judgement of the Supreme Court of Appeal of that country, held that no damages should henceforth be recoverable from a third party for adultery.[6] While our courts concur with this stance, it is difficult to reconcile it within the African context. Most African societies perceive adultery as immoral. Although it is maintained that the courts find less or the same answers from other jurisdictions to the same legal problems, it is improbable that ideals in Eurocentric jurisdictions are totally consistent with Afrocentric ideals. A complete disregard of African ideals and values will hinder the development of African jurisprudence. In the process, our courts will

1 M Carnelley (2013) *"Laws on Adultery: Comparing the Historical Development of South African Common Law Principles with those in English Law"* <http://www.scielo.org.za/pdf/funda/v19n2/01.pdf>.

2 *RH v DE 2014 (6) SA 436 (SCA)* para 22.

3 *Green v Fitzgerald* 1914 AD 88.

4 *James Sibongo v Lister Lutombi Chaka & another* Case No: SA 77/2014.

5 *Van Straten v Bekker* (I 6056-2014) [2016] NAHCMD 243 (25 August 2016), Case No. I 6056/2014.

6 *RH v DE* 2014 (6) SA 436 (SCA).

continue to import judgements and miss the opportunity to develop unique laws that reflect the values and morals of the people from an Afrocentric perspective.

16.2 NAMIBIA AND SOUTH AFRICA

The Supreme Court in Namibia[7] and the Constitutional Court in South Africa[8] have both taken decisions which have resulted in the abolishing of third-party claims emanating from adultery. Previously, in both jurisdictions, a non-adulterous spouse had an actio iniuriarum action in delict against a third party for insult to their self-esteem (*contumelia*) and loss of comfort and society (*consortium*) of the spouse.[9] This practice was consistent with African customary norms, values and creeds with regards to the marriage institution. Third parties to the marriage, as part of the African society, had and still have an obligation to assist the married parties to protect their marriage institution. The African society emphasises on the greater good of the collective (with individual interests being protected in pursuit of the collective good) and not the narrow focus on the individual interests at the expensive of the collective interests. The net result of the decisions by Namibia's Supreme Court and the Constitutional Court in South Africa is that third party adultery claims are now a thing of the past in common law but not so in African customary law. This section will discuss the Namibian and South African position with regards to the abolishing of third party claims in adultery.

16.2.1 Namibia

The Supreme Court of Namibia in the 2016 *Bekker case* declared that Namibians who commit adultery with married individuals are no longer at risk of being prosecuted for damages by disgruntled parties to the marriages they interfered with as third parties. Judge Dave Smuts ruled that third party claims on adultery had to be abolished as they were based on "outdated Namibian morals and values" that considered wives to be the property of their husbands, in a case in which a husband was seeking N$100,000 in adultery damages from a man who allegedly slept with his wife. Judge Smuts pointed out that:

> An examination of the origin of the action (demanding compensation for adultery) and its development reveals that it is fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy. That examination also demonstrates that the action has also lost its social and moral sub-stratum, and is therefore no longer sustainable.

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7 *Van Straten* case (Note 5 above).

8 *DE v RH* (CCT 182/14) [2015] ZACC 18.

9 M Carnelley (2016) "The impact of the abolition of the third party delictual claim for adultery by the Constitutional Court in DE v RH (CCT 182/14) [2015] ZACC 18" Vol. 30 *Speculum Juris* 1-14.

According to Judge Smuts, the Supreme Court also determined that grounds for adultery compensation claims were founded on an outdated English legal proceeding known as "criminal conversation", which was abolished by English courts in 1970. He claimed that adultery allegations were based on the "antiquated concept" that a husband had property rights over his wife, which may be viewed as treating women as simple "service providers" for their male counterparts.

Several other countries that had inherited the English law's adultery law had long since abolished it, according to Judge Smuts. South Africa, New Zealand, Australia, Scotland, and Canada are among them. Judge Smuts further stated that while the right to marry and start a family is a fundamental value of the Namibian Constitution, any legal action based on adultery could not protect any marriages because it did not strengthen the weak or breathe life into those that were collapsing. He pointed out that, in the vast majority of cases, infidelity was the aftermath of unhappy marriages, rather than the cause of their dissolution.

The decision by Judge Smuts is based on the understanding that while the major engine for law reform lies with the legislature,[10] the courts are nonetheless obliged on occasion to develop the common law in an incremental way. These occasions are dictated, firstly, by the Constitution, which imposes the duty on the courts to develop the common law so as to promote the spirit, purport and objectives of the Bill of Rights. Secondly, by the acceptance that the courts can and should adapt the common law to reflect the changing social, moral and economic fabric of society; and that we cannot perpetuate legal rules that have lost their social substratum.[11] However, what was not fully interrogated by the learned Judge Smuts is the issue of the legal convictions of the society regardless of the changing times. The law must reflect the society for which it is passed for. The *boni mores* of society or the legal convictions of the community, which in effect constitute expressions of considerations of legal and public policy, are of particular significance in determining wrongfulness, which is an essential element of delictual liability in Namibian law, both under the *lex Aquilia* and the *actio injuriarum*. Is there compelling empirical data that informed Judge Smuts's finding in this matter? This question has not been fully addressed. Instead, reference was given to the matter of *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*[12] where the *boni mores* principle was formulated thus:

> In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately

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10 *Sibonga v Chaka and Another* (SA 77/2014) [2016] NASC 16 (19 August 2016).

11 See, for example, *Du Plessis & others v De Klerk & another 1996* (3) SA 850 (CC) (1996 (5) BCLR 658; [1996] ZACC 10) para 61; *Carmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22 para 36.

12 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4) para 122. See also *F v Minister of Safety & Security & others* 2012 (1) SA 536 (CC) (2012 (3) BCLR 244; [2011] ZACC 37) paras 117–124; *Roux v Hattingh* 2012 (6) SA 428 (SCA) para 33.

> depends on a judicial determination of whether - assuming all the other elements of delictual liability to be present - it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.

The above, according to Judge Smuts, means that, especially in determining whether conduct should be regarded as wrongful, i.e. whether delictual liability should follow, courts are more sensitive to the dynamic and changing nature of the norms of our society. Reference in justifying this position was given to the decision taken by the Canadian Supreme Court in the case of *R v Salituro*[13] in which Lacobucci J held that:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law […] In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform […] The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[14]

The development of the common law can raise complex questions. It must be questioned as to what basis the Judges in the matter relied upon to justify the supposed, "changing mores of our society the delictual action based on adultery". Such decisions raise the uncomfortable discourse of westernisation and/or acculturation using the law as an instrument. Public policy and the legal convictions of the community are of relevance and significance in determining the element of wrongfulness, a prerequisite for delictual liability. There is no compelling evidence to substantiate the judges' findings apart from reliance on foreign law. This is a key problem of this decision as will be outlined later in this chapter.

16.2.2 South Africa

The South Africa Constitutional Court had the opportunity to decide on third party claims on adultery, much earlier than the Supreme Court of Namibia. In the famous case of *DE v RH*, the question of infidelity and the remedies available to an injured spouse was raised before the Constitutional Court in 2015, in front of some of

13 (1992) 8 CRR (2nd) 173, also [1991] 3 SCR 654.

14 Quoted with approval by Kentridge AJ in the South African Constitutional Court in *Du Plessis & others v De Klerk & another* [1996] ZACC 10; 1996 (3) SA 850 (CC) para 61 and in *Carmichele v Ministry of Safety & Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) 938 (CC) para 36.

South Africa's most learned legal minds, as both a constitutional and a public-interest matter, thus fulfilling the requirements vesting the Constitutional Court with the power to hear the case. The Court began by stating that the issues at hand were whether, in the legal context, when a spouse commits adultery: 1) Does the non-adulterous spouse have a right of action in delict against the third party for injury or insult to self-esteem (contumelia); 2) Does the non-adulterous spouse have a right of action in delict against the third party for loss of comfort and society (*consortium*); and 3) If so, is there justification for the non-adulterous spouse?

There was no doubt that delictual acts were part of our legislation, until the Supreme Court of Appeal's ruling in the same case, which brought the case before the Constitutional Court. In the High Court of Pretoria, the Applicant (Mr DE) had successfully sued Mr RH for damages arising from Mr RH's adultery with Mr DE's former wife, Ms H. Mr DE filed a claim for loss of *consortium* and *contumelia* under the *actio iniuriarum*.

The Supreme Court of Appeal then asked, *mero motu* (on its own initiative), whether the claim should be kept in South Africa's law at all. According to the Court, the Applicant did not have a claim for loss of *consortium* based on the facts, but he did have a claim for *contumelia* based on the law at the time. The Supreme Court of Appeal, on the other hand, stated that, based on existing *boni mores* in the South African society, it was time for the claim to be dropped from our legal system.

The Court discussed the claim's history, the evolution of foreign law and analogies, as well as our evolving culture and its values. The claim had become obsolete, according to the Court, and could no longer be upheld. The Court was evolving the common law and expunging an ancient action that, in the Court's judgement, had become obsolete, in conformity with its authority.

The applicant's argument before the Constitutional Court focused on three constitutional issues: 1) the Supreme Court of Appeal's failure to develop the common law in accordance with the Constitution; 2) the right to dignity; and 3) the constitutional importance placed on marriage and the family by Section 15(3) of the South African Constitution.[15]

The Constitutional Court held that the most essential question to be answered was whether the claim could continue to exist, and that this question could be answered

[15] Section 15(3) of South Africa's Constitution provides as follows:

(a) This section does not prevent legislation recognising –

(i) Marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) Systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

by assessing whether adultery fits the criterion of wrongfulness for liability to attach today, within society's existing mores.

The Court addressed the fact that the claim was based on patriarchal traditions that considered a female spouse as chattels (property), and that the action might be taken by a male spouse in the case of another man, thus depriving him of his chattels in the form of his wife.

This is also obvious from the fact that the claim is only against the third party and not against the wife, who is only the property that is the subject of the claim rather than another subject. In *Rosenbaum v Margolis*,[16] the claim was made open to spouses to overcome the discriminatory aspect of the claim, which was later confirmed in *Foulds v Smith*.[17]

The Court cited Kentridge AJ's statement in *Du Plessis and Others v De Klerk and Others*,[18] in which the learned judge noted that judges "can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared." The Court went on to discuss how societal norms on adultery are changing, as well as how attitudes towards children born of adulterous marriages are changing. These children are accorded all of the rights that any child born to married parents is entitled to. This is an illustration of a "softening" attitude to infidelity. In addition, the Court mentioned the penal offense of adultery being abrogated by disuse. The Court considered academic papers on the subject, all of which, with the exception of a few, adopted the same position on the claim's continued existence: it is outmoded.

The applicant claimed that the delict was available to protect marriage as a sacred institution in its previous form. In response, the Court emphasised the recent liberalisation of divorce laws, which now allow spouses to divorce based on an "irretrievable breakdown of marriage" rather than the particular circumstances that had to be present in the past to end a marriage. The Court went on to declare unequivocally that it was not saying that marriage as an institution should not be safeguarded, citing *Dawood and Others v Minister of Home Affairs and Others*,[19] among other cases.

Many other jurisdictions, particularly those founded on English civil law, where the majority of countries had moved to abolish a claim like this, were examined in depth by the Court. Some governments kept track of both the claim and the criminal offense, but these are few and far between. In view of specific statements declared

16 1944 WLD 147.
17 1950 (1) SA 1. (A).
18 [1996] ZACC 10.
19 [2000] ZACC 8.

by the Constitutional Court itself, the applicant claimed that all of the preceding was for naught. The Constitutional Court stated in Dawood as follows:

> Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children… The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society.

The petitioner used these forceful remarks in support of his argument that the claim should be part of our legislation. The Court then explained the meaning of its decision, stating that it dealt with laws governing the immigration of spouses of South African citizens, as well as the case of *Minister of Home Affairs and Others v Fourie and Others*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*,[20] which dealt with the law prohibiting foreigners from marrying South African citizens.

The Court determined that there was a fundamental difference between laws prohibiting the pleasure of marriage, such as those prohibiting homosexual marriage, and those that spouses tried to utilize to "hold up" a marriage that was collapsing for non-legal reasons. The Court quoted Carnelly's "One Hundred Years of Adultery- Reassessment Required" as follows: "Love and respect are the foundations of a solid marriage and not legal rules."

Finally, the Court stated that it was up to the spouses to maintain control over their relationship because they were the ones who took solemn vows and swore to remain faithful. In addition, the Court weighed the rights of the adulterous spouse and third party to privacy, dignity, and freedom of person and association against the rights of the non-adulterous spouse to dignity, as well as the multifaceted nature of human relationships, where any number of acts and omissions could

20 [2005] ZACC 19.

lead to the disintegration of the marriage relationship, which ultimately resulted in the divorce. The Court ruled that judging marital fidelity in terms of money seems to be a mistake in today's world.

In Chief Justice Mogoeng's concurring judgement (signed by Justice Cameron), the learned justice stated that:

> I agree with these views. The law does and can only create a regulatory framework for the conclusion of marriage and the enforcement of obligations that flow from it. It can also help ensure that barriers to family life are removed. The rest is in the hands of the parties to the marriage. Barring exceptions, they decide freely to get married and it is within their ability to protect their marriage from disintegrating.[21]

As a result, the Court determined that bringing a claim against a third party for a spouse's adultery is outmoded and inconsistent with modern societal values. As a result, the claim is no longer a part of our legal system. While this ruling was legally valid, the results of the "softening" approach to infidelity across all genders is concerning to people who cherish family values, and it is impossible to anticipate how far the Courts will go in their effort to decrease the importance of marriage commitment.

16.3 OTHER JURISDICTIONS: NIGERIA AND ZIMBABWE

16.3.1 Nigeria

In Nigeria, the law still takes a very strict view of adultery. The legal system there is pluralist in nature and consists of English, customary and Islamic laws which regard adultery as a matrimonial wrong and a ground for divorce.[22] The Matrimonial Causes Act deals with damages in respect of adultery.[23] A party may, in a divorce petition based on adultery join the other party as a respondent and claim damages for the adultery.[24] Damages are not, however, awarded if the adultery has been condoned, whether subsequently revived or not or if a decree of divorce based on the adultery is not granted, or the adultery was committed more than three years before the date of the petition.[25]

In assessing the damages, some factors to be taken into account were set out in the Nigerian case of *Mohammed v Mohammed.*[26] It includes the actual value of the adulterous spouse to the petitioner i.e. both pecuniary and consortium; injury to the claimant's feelings and the blows to his or her honour; the co-respondent's

21 Paras 70-71.
22 Ibid, para. 29-30.
23 Ibid.
24 Ibid.
25 Ibid.
26 (1952) 14 WACA 199.

means and conduct; the conduct of the spouses themselves, especially the adulterous spouse and whose harshness or cruelty might have undermined the non-adulterous spouse and the co-respondent's knowledge that the adulterous party is married. In *Adeyinka v Ohuruogu,* the Supreme Court of Nigeria stated that the said damages are to compensate for loss of consortium and outrage of honour and family caused by adultery and not to punish the adulterer.[27]

16.3.2 Zimbabwe

The law in Zimbabwe is akin to the law that presently obtains in Nigeria, as discussed above.[28] In this regard, there has been some degree of consternation from some feminists who incline to the view that some judges appear to take a lackadaisical approach to adultery cases, considering the fact that it affects Zimbabwean women more than men. In this regard, they take the view that the law has treated the issue of adultery with less seriousness than it deserves.[29]

Soon after the South African Supreme Court of Appeal gave its judgment in *RH v DE*, Justice Hlekani Mwayera of the High Court of Zimbabwe, handed down judgment in the case of *Njodzi v Matione*[30] in January 2016, wherein the court refused to follow the South African example and declare the action of damages for adultery unconstitutional. The central question was whether in the Zimbabwean context these foreign decisions were applicable? In other words, one has to consider whether the reasoning adopted in South Africa, Seychelles, Canada and New Zealand is possible and applicable in light of the Zimbabwean Constitution's normative framework and our social context.[31]

From case law, it is settled in that jurisdiction that in coming up with adultery damages the following factors have to be considered: 1) The social and economic status of the plaintiff and the defendant; (2) The character of the spouse involved; (3) Whether or not the defendant has shown Contrition; (4) The need for deterring measures against the adulterer; and (5) The level of award in similar cases.[32] The Court further noted that of course the circumstances of each case come under scrutiny as the court makes the decision. The reason behind adultery damages being the protection of the sanctity of the marriage institution.[33]

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27 (1966) 1 All N.L.R. 210 at 212-213

28 *Takadiini v Maimba* 1996 (1) Z.L.R. 737.

29 S Chirawu (2006) "Till Death Do Us Part: Marriage, HIV/Aids and the Law in Zimbabwe" Vol. 13 *Cardozo Journal Law & Gender* 29.

30 (HC 11253/14) [2016] ZWHHC 37 (14 January 2016), <https://www.zimlii.org/zw/judgment/harare-high-court/2016/37/HH%2037-16.pdf>.

31 Ibid.

32 Ibid, p 5; See also *Khumalo v Mandishona* 1996 (1) ZLR 434; *Nyakudya v Washaya* 2000 (1) ZLR 65 C; *Chenesai Rateiwa v Tsistsi Venge* HB 152/11.

33 Ibid.

Furthermore, in the case of *Katsimbe v Buyanga*[34] Robinson J affirmed the purpose of adultery damages as the protection of the marriage institution when he remarked as follows:

> Before addressing myself to the quantum of damages to be awarded to the plaintiff, I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of duty of marital fidelity which each spouse owes the other by committing adultery with one spouse, the courts, in the absence of mitigating circumstances should be seen, in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of 'expedient reasons.

Precedents in the Zimbabwean jurisdiction reveal that adultery damages are underpinned on the preservation of the sanctity of marriage. The Matrimonial Causes Act[35] provides sanction issues of divorce and distribution or apportionment of property. Divorce is granted in circumstances where it would have been shown that the marriage has irretrievably broken down. Adultery is still a recognised ground of divorce and as such it is still part of Zimbabwean law.[36] Thus clearly for all intents and purposes, the legislature as it currently stands condemns adultery in Zimbabwe.[37]

16.4 THE ABOLITION ADULTERY CLAIMS IN THE LENS OF THE CONSTITUTION

The preamble of the Namibian Constitution recognises and accepts that the Namibian moral fabric is engraved in the country's culture, religion and traditional values. The institution of marriage is entrenched deeply in the country's culture, tradition and religion and its protection has been in unambiguous language propagated by the courts.[38] Malaba J (as he then was) in the *Mungate case* held: "Adultery is still prohibited by public opinion as an act of sexual incontinence."[39] The nation has a duty to protect the marriage institution and third parties encroaching into a marriage are part of the nation.[40]

The import of the delict in the interest of protection of the marriage institution is also of constitutional interest or national interest given the values under which our constitution is underpinned.[41] Adultery damages are to compensate the innocent

34 1999 (1) ZLR 256 H at 258-259.
35 Matrimonial Causes Act [Chapter 5:13].
36 *Njodzi* case (Note 30 above) at 5.
37 Ibid.
38 *Njodzi* case (Note 30 above) at 7; see also *Katsumbe v Buyanga* 1991 (2) ZLR 256 and *Mapuranga v Mungate* 1997 (1) ZLR 64.
39 Njodzi case (Note 30 above) at 7.
40 Ibid.
41 Ibid.

party to a marriage for their loss of consortium and *contumelia.* Marriage and family are social fundamental institutions. They have more than personal significance. The Constitution would not seek to protect the marriage institution if the duty for the sustenance of the institution was wholly for the parties, at least the African context, given the importance placed by society on the marriage institution.

The argument that the delict brings about indignity on the third party and that it infringes on the rights of the third party cannot be sustained when from the perspective of its invasion of the marriage institution.[42] The marriage institution is protected by the society and the nation in the Constitution.[43] In circumstances where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values.[44] The invasion of a marriage by a third party should be seen as an attack on the dignity and privacy of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage, the dignity and right to privacy of all citizens is not absolute.[45] The rights in the Constitution should be enjoyed responsibly, and each one has the duty to uphold and respect the fundamental freedoms and rights enshrined in the Constitution. To argue that dealing with an adultery damages claim trial, would infringe on the privacy of the defendant as issues of intimacy would be delved into, amounts to barring prosecution of all matters of a sexual nature.[46]

The authors concur with the High Court decision of Zimbabwe that there is nothing unconstitutional when one considers the purpose of adultery damages. The potential infringement of dignity and privacy should not be viewed in isolation of the rights of the innocent spouse in a marriage. All persons are equal before the law and have equal protection and benefit of the law.[47] Reading that article does not reveal that wrongful conduct is sanctioned by the law.

Other jurisdictions have in part or fully done away with the delict of adultery. Whereas it is important to take note and appreciate what is going on in other jurisdictions, it is of paramount importance to apply the principle in the context of our nation as a constitutional democracy.[48] Public policy, as reflected in our Constitution, depicts our values as a nation. The protection of the family and marriage institutions is encapsulated in the constitution. It can therefore be argued that society which was involved in the constitution making process still views adultery negatively.

Adultery is still a consideration in our law for divorce and as such given our constitutional provisions on the rights, freedoms, protection of the marriage and

42 Ibid, 8.
43 Article 14(3) of the Namibian Constitution.
44 *Njodzi* case (Note 30 above).
45 Ibid.
46 Ibid, 8.
47 Article 10 of the Namibian Constitution.
48 *Njodzi* case (Note 30 above).

family institution, one cannot just in the obstruct, from foreign jurisdictions with different societal values, declare an otherwise legitimate claim illegitimate.[49] The importance of the marriage and family social institutions cannot be underplayed, more so given that the relationship is not only significant to the individuals concerned but also for the public at large.[50] Therefore, marriage should be treated as a human institution which is regulated by law and protected by the Constitution which, in turn creates genuine legal duties. It can clearly be deduced therefore, that a marriage institution, has both the private and public complexion, hence the need for its protection.[51]

Adultery is viewed as sin in most Christian and African communities. While the South African and Namibian courts are influenced by western jurisdictions, the courts in Nigeria and Zimbabwe envisage an African vantage point in their judgements and they have developed a criterion for awarding damages in an action for adultery. Since adultery is considered as a ground for divorce, then it would be a contradiction to consider the delictual claim for adultery damages as irrelevant.[52] In the case of *Zimnat Insurance Company Limited v Chawanda,*[53] it was stated that the court in the interests of justice can develop common law but that this does not mount to usurping the legislature's function of making law.[54] Albeit it can be said that the Namibian Courts have a moral duty to develop the common law, as unlike the South African Constitution, there is no provision for doing so in terms of the Namibian Constitution.

16.5 THE ABOLITION IN THE LENS OF AFRICAN CUSTOMARY LAW AND UBUNTU PRINCIPLES

In Africa, adultery has for a long time been regarded as a social evil and a blatant aberration from the morals of humanity. The legal consequences of committing adultery have varied according to place, community values, the historical era and prevailing ideology.[55] In African communities, adultery has for a long time also been viewed critically and treated as a serious issue, as it has been treated as a criminal offence in some and a civil wrong in others. The approach to adultery has been largely informed by religious and cultural notions of the inviolability of marriage. The civil action of *contumelia* is thus touted to be geared to protect

49 Ibid, 9-10.
50 Ibid.
51 Ibid.
52 *Njodzi* case (Note 30 above) at 5.
53 1990 (2) ZLR 143.
54 *Gubbay ACJ in Zimnat Insurance Company Limited v Chawanda* 1990 (2) ZLR 143; see also *Duplessis and Others v De klerk and Another* [1966] ZACC 10, 1996 (3) SA 850.
55 M Carnelley (2013) "Laws on Adultery: Comparing the Historical Development of South African Common Law Principles with those in English Law" <http://www.scielo.org.za/pdf/funda/v19n2/01.pdf>.

marriages and family values through the award of damages against a paramour who is adjudged to have violated and desecrated marriage and the marital bed.[56]

In the *Bekker case,* it was pointed out that in recent years the attitude towards the inviolability of marriage appears to have thawed somewhat as adultery as a matrimonial offence or civil wrong seems no longer to serve its purpose i.e. of preventing break-ups in marriage by adulterous elopers.[57] But it is evident that the development of law surrounding adultery and its consequences has taken place over centuries and in different jurisdictions. Therefore, throughout time it has been common cause that the act of adultery was regarded as unacceptable and contradictory to societal customs, norms and morals. It was also seen to be a complete desecration of the sanctified marriages and family life. Marriages were not placed on a pedestal but they were protected by the state and the society alike.

Customary law is given recognition by the Namibian Constitution where all customary laws that are considered to be operating within the parameters set out by the Constitution may remain valid unless repealed by an Act of Parliament.[58] Generally, the union of a marriage under customary law is viewed as sacred and holds a significant role in the advancement of the society, because such communities place marriage on a pedestal. When two parties jointly engage in an act of adultery, customarily, they are perceived as having desecrated the holy union that is marriage. As a result, there are avenues for action to be taken among some communities, which may also lead to a punishment being imposed on the wrongdoers.[59] Adultery is therefore classified as a wrong and may be brought forth to a community court to be resolved as a dispute. What differs between civil proceedings and customary decisions is that the amount offered to the aggrieved party is usually considerably lower in traditional courts as compared to formal law courts.[60] However, there is indeed a common consensus that the act of adultery

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56 *Bekker* case supra para. 24-5.

57 Ibid.

58 Article 66(1).

59 See MO Hinz (ed) assisted by NE Namwoonde (2010) "Customary Law Ascertained: Vol. 1, Customary of the Owambo, Kavango and Caprivi communities" Namibia Scientific Society: Windhoek. See also MO Hinz (ed) assisted by A Gairiseb (2013) "Customary law ascertained: Vol. 2, the customary law of the Bakgalagari, Batswana ba Namibia and Damara communities of Namibia" UNAM Press: Windhoek; MO Hinz (ed) assisted by A Gairiseb (2016) Customary law ascertained: Vol. 2, the customary law of the Nama, Ovaherero, Ovambanderu, and San communities of Namibia" UNAM Press: Windhoek. See further JU Kavari (2005) "Estates and systems of inheritance among Ovahimba and Ovaherero in Kaokoland", The Meanings of Inheritance: Perspectives on Namibian inheritance practices <http://www.lac.org.na/projects/grap/Pdf/meaninheri.pdf>.

60 Customary law compensation is different from compensation under common law. While the claim for compensation under common law has to substantiate the loss in economic terms, compensation under customary law consists of a standardised amount of cattle (or the equivalent in money as determined by customary law) irrespective of the economic weight of the loss, thus weighing out the loss in a broader sense. In other words, customary law compensation balances the economic side of the loss, but also has, in terms of the conventional civil or criminal matter dichotomy, a punitive element.

is a violation of the innocent spouse's personality rights, and the payment of compensation is seen as *wiping the tears*.[61]

Cultural diversity within states is increasingly considered as something that ought to be legally reflected.[62] There is more and more talk about the right to culture and even the right to one's own law.[63] Cultural diversity is increasingly being accepted as a societal asset that is worthwhile to recognize in legal terms.[64] Legal pluralism has developed from a mere empirical tool of anthropologists and sociologists into a normative concept according to which legal plurality ought to be interpreted in legal terms.[65]

The assumptions in the judgements of the courts are not based on concrete responses from the public itself but viewpoints that are influenced by foreign or western jurisdictions. Surveys and debates for the public to provide its input in this regard would inform whether there are changes in our societal attitudes towards the claim based on adultery. We cannot reason that such an action has lost its lustre, as loss of consortium and *contumelia* caused by adultery can also be argued to be in violation of the Namibian Constitution[66] and is still viewed as a serious offence in African customs and norms or customary laws.[67] Hence, the abolition of the claim has various implications on African customary laws and even the African philosophy of *Ubuntu* as it relates to issues of human relationships.

The word *Ubuntu* is derived from a Nguni (isiZulu) aphorism: *Umuntu Ngumuntu Ngabantu*, which can be translated as 'a person is a person because of or through others'.[68] *Ubuntu* can be described as the capacity in African culture to express compassion, dignity, humanity, reciprocity and mutuality in the interest of building and maintaining communities with justice and mutual caring.[69]

The *Ubuntu* philosophy and principles represent an African conception of the human being, and his or her relationship with the community that embodies the ethics that define Africans and their social behaviours.[70] Within the African

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61 MO Hinz (2007) "Traditional governance and African customary law: Comparative observations from a Namibian perspective" <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf>.

62 Ibid, 67-8.

63 MO Hinz (2006) "Legal pluralism in jurisprudential perspective" in MO Hinz (ed) *The shade of new leaves. Governance in traditional authority: A Southern African perspective* <https://books.google.com.na/books?id=OQjr1othDrgC&pg=PA24&lpg=PA24&dq=Hinz,+M.O.+(Ed>.

64 Ibid.

65 Ibid.

66 Article 14(3).

67 See Hinz & Namwoonde (Note 59 above); Hinz & Gairiseb (2013) (Note 59 above); Hinz & Gairiseb (2016) (Note 59 above).

68 D Tutu (2004) *God has a dream: A vision of hope for our future* Rider: London.

69 D Tutu (1999) *No future without forgiveness* Rider: London.

70 L Mbingi & J Maree (2005) *Ubuntu: the spirit of African transformation management* Knowledge Resources: Johanesburg.

environment, socio-cultural underpinnings are rigorously applied and the African *Ubuntu* principles are omnipresent throughout the continent. Therefore, both the *Ubuntu* socio-cultural and legal dimensions should be applied and considered critical in our legal systems. The reasoning in the two judgements of the superior courts are contrary to the *Ubuntu* principles and African customary laws.

16.6 COMPARATIVE LAW AND ITS FUNCTIONS: A PITFALL UNDETECTED

Comparative law plays a central role in national judicial processes. Knowledge of the law and practice of foreign courts has often been relied upon in African courts to suggest preferable solutions to legal problems encountered in a specific society. Little regard has been given to the societal context within which such foreign law is imported to supposedly remedy societal ills. For example, there have been recent cases in Namibia, Zimbabwe and South Africa in which it had to be decided whether third party claims to adultery are still an acceptable legal norm in contemporary African societies. African societies recognise third party claims on adultery.[71] It is no wonder that in the Zimbabwean case of *Timothy Chinyadza* v *Melton Phiri*,[72] Kudya J defined *contumelia* as follows: "*Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by adultery committed by a defendant with his or her spouse". One does not require a magnifying glass to scrutinize and come up with a conclusion that *contumelia,* that is injury, hurt, insult and indignity occurs to an innocent spouse where the other commits adultery. The injury is so obvious that there would be no justification in not seeking legal redress for the wrongful hurt occasioned.

Strangely, in the case of *RH v DE*, as already outlined above, the South African Supreme Court of Appeal found that delictual action based on adultery of the innocent spouse has become outdated and can no longer be sustained. A similar decision was recently arrived at in the Namibian case of *Van Straten v Bekker*. In principle, adultery is no longer actionable at law (adulterers are not legally liable for their immoral conduct). In the case of *DE v RH*, De Villiers CJ pronounced that the criminal offence of adultery had been abrogated by disuse. The same sentiments were echoed by Kentridge AJ (as he then was) in *Duplessis and Others* v *Deklerk and Another*,[73] remarked that: "Judges can and should adapt the common law to reflect the changing, social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared […].

It is pertinent to question which processes the Namibia and South Africa's judges followed to determine that third party claims to adultery are outdated in countries where customary law remains fundamental. Clearly courts have a duty to develop

71 *Mangole v Rapuleng* 1990 BLR 450 (HC).
72 HH 76-09 at page 4.
73 [1966] ZACC 10, 1996 (3) SA 850 quoting *R* v *Salituro* (1992) 8 C.R.R. 2nd 173.

the common law whenever it is warranted and in conformity with the interests of justice. However, it is also common knowledge that public policy is now infused with constitutional values and norms. It is apparent that public policy often represents the legal convictions of the community and reflects those values that are held dearly by a society. To that extent therefore, in deciding whether a delictual claim of adultery damages is outdated or otherwise, while appreciating and respecting foreign jurisdictions' decisions, the decision should be contextualised to reflect the legal convictions and societal values of the African society. African countries' moral fabric is engraved in each country's culture, religion and traditional values. Any development of the common law therefore ought to be underpinned on the interests of justice, and of course, in conformity with the Constitution.

The institution of marriage is entrenched deeply in African countries' culture, tradition and religion and its protection has been in unambiguous language propagated by the courts.[74] In both cases, the courts frowned on the wrongfulness of adultery in so far as it is a threat to the marriage institution. Malaba J (as he then was) in the *Mungate* case held, "Adultery is still prohibited by public opinion as an act of sexual incontinence." Given that Constitutions in Africa are people driven and recognise African Customary law which in turn regards marriage as sacred, it can be concluded that the marriage institution has a public complexion. African countries have a duty to protect the marriage institution and obviously third parties encroaching into a marriage are also part of the nation. In the case of *DE* v *RH*, the court largely proceeded on the premise that the import of the delict is to restore a marriage or to prop it up. From an African Customary Law perspective, this is not the consideration and thus the court misdirected itself. This marks a point of departure. The point which must be made is that the import of the delict in the interest of protection of the marriage institution is also of constitutional interest or national interest given the values under which our constitution is underpinned. Adultery damages are to compensate the innocent party to a marriage for their loss of consortium and *contumelia*.

When an award for damages for adultery is made, the innocent party is not precluded from suing for divorce or condoning the wrong by the other spouse and forging ahead with the marriage. It is accepted that marriage and family are social institutions of vital importance in the African culture. They have more than personal significance, as shown by the constitutional protection of the morally underpinned relationship. Constitutions would not seek to protect the marriage institution if the duty for the sustenance of the institution was wholly for the parties, at least in the African context, given the importance placed by society on the marriage institution. The argument that the delict brings about indignity on the third party and that it infringes on the rights of the third party cannot be sustained when viewed from the perspective of its invasion of the marriage institution. The marriage institution is protected by the society and the nation in national Constitutions. In circumstances

[74] See *Katsumbe v Buyanga* 1991 (2) ZLR 256 and *Mapuranga v Mungate* 1997 (1) ZLR 64.

where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values. The invasion of a marriage by a third party in the African context is an attack on the dignity of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage.

The dignity and right to privacy of all citizens is not absolute. It is made abundantly clear that rights, as given in any Constitution have to be responsibly enjoyed. Everyone has the duty to respect the fundamental human rights and freedoms as entrenched in any constitution. In *casu,* the defendant has rights to dignity, privacy and equality before the law, which are the same rights the plaintiff has. What remains is the balancing act on whether there is an intrusion on the other's rights which would require the delictual sanction. The remarks and sentiments by Honourable Robinson J in *Katsumbe* v *Buyanga* still hold true today. Robinson J remarked;

> **<u>Hopefully, we have not reached the stage where we have to be told adultery is not something to be eschewed and condemned</u>**. Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the court will only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against premarital and extra marital sex and which has landed the world in the sexual moral over which monsters, AIDS, now presides in all its frightening aspects.[75]

It must be remembered that marriage and family remain the basic structure of our African society, the preservation of which squarely lies on the couple and African countries as per our traditional norms and values as set out in national constitutions. The third party who, with knowledge, intrudes into the marriage institution ought to compensate the innocent spouse for the injury occasioned. It goes without saying, that adultery is almost always debilitating for the victimised spouse who suffers indignity and hurt because of the adultery. The importance of the marriage and family social institutions cannot be underplayed, more so given that the relationship is not only significant to the individuals concerned but also for the public at large. Marriage is a human institution which is regulated by law and protected by many constitutions in Africa, which in turn creates genuine legal duties. In the case of *Dawood*,[76] the court therein alluded to the importance of marriage and family institution, and O'Regan J had this to say:

75 See also the case of *Elizabeth Tanyanyiwa* v *Lindiwe Huchu* HH 668-14.

76 *Dawood and Another* v *Minister of Home Affairs and Others*, *Shalabi and Another* v *Minister of Home Affairs and Others*, *Thomas and Another* v *Minister of Home Affairs and Others* [2000] ZACC 8; 2000(3) SA 936 (OC); 2000(8) BCLR 837 (CC).

> Marriage and family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties […] Such relationships are of profound and/or significant to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well […].

It can clearly be deduced therefore, that a marriage institution has both the private and public complexion, hence the need for its protection.[77] Third party claims for adultery are therefore not outdated. Any deliberate intrusion into the marriage institution is an attack on the dignity of an innocent spouse which ought to be sanctioned by the law. The *boni mores* or legal convictions of our African society have not changed so much that adultery could objectively be regarded as reasonable and thus it remains unlawful.[78] The legal and public policy in Africa are still reflective of adultery as wrongful. This is more so given Africa's customary as well as religious values and traditions which are inclined towards the protection of the marriage and family institution.

The marriage institution in Africa is founded upon morals. As such, a constitution in Africa, as the supreme law of the country, ought to protect marriage as a morally underpinned relationship. Intrusion in the marriage institution by adultery therefore remains wrongful and there is nothing outdated about it.[79] Therefore, abolishing third party claims for adultery illustrates the dangers of judges relying on comparative law to arrive at decisions which do not reflect the religious and cultural norms of African societies. Instead, they relied upon decisions in other jurisdictions to unjustifiably and/or erroneously acculturate African people to western value systems. Such practices should be prohibited in African courts.

16.7 CONCLUSION

This chapter has advanced a strong case for African countries to rethink their reliance on comparative law. It is evident that comparative law has largely been employed as a tool for advancing social engineering in pursuit of western imperialist agendas. African countries have lost their identities and value systems through employing foreign legal systems to regulate their societies. Decolonisation has failed to take place as African economies are still regulated through western laws. It is therefore imperative that reliance on comparative law be reviewed in African law schools, in legal practice, in courts and any other relevant legal institutions. If at all comparative law must continue to be relied upon, it is proposed that it be done within the African context. Such comparative study must focus on: 1) studying transplanted foreign

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77 *Njodzi v Matione* (HC 11253/14, HH 37-16) [2016] ZWHHC 37 (14 January 2016).

78 Carnelley (Note 55 above).

79 *Njodzi* (Note 30 above).

laws in Africa have negatively impacted on Africa's development; and 2) evaluating how to integrate African Customary Law in Africa's legal system. To achieve this objective, African scholars must be encouraged to publish rigorous publications advancing the pan-African law agenda from a scientific perspective. Pan-African comparative law must thus be made a mandatory part of every African law school's curriculum as part of the decolonisation agenda. Legal academic literature must also be relevant to the African context as opposed to the current context in which legal textbooks are written in Europe for use in Africa. This approach only serves to promote imperialist agendas and undermine Africans' development goals.

Legal reform must not be driven by western legal traditions. African countries must focus on an African centred legal reform approach. The use of the *Ubuntu* philosophy in any such legal reform will rid Africa of unjust neoliberal laws and inequality inducing policies. Adopting laws at the behest of western organisations such as the International Monetary Fund, the United Nations, European Union, and the World Bank in return for loan facilities which keep African countries in perennial debts must be frowned upon at all costs. If African countries want to harmonise their business and human rights laws, as a means of solving colonially induced problems, let them do so amongst themselves. A pan-African comparative study must be conducted to evaluate in-country risks and the effects of supranational laws especially those introduced by international organisations. Africa can develop its legal systems in order to grow its economies and decolonise. The continual reliance on western driven comparative law by African countries dovetails perfectly into the New World Order agenda, an initiative that does not have Africa's developmental agenda as a priority. Radical transformation is thus sought in Africa's legal education and legal fraternity.

CHAPTER 17

A critical examination of the meaning of the words “ordinarily resident” in Article 4(1)(d) of the Namibian Constitution in relation to the acquisition of citizenship

Leonard Tjiveze and Tapiwa Victor Warikandwa

17.1 INTRODUCTION

Citizenship is a very important concept because with it comes a lot of benefits and an enjoyment of rights[1] that would otherwise not be enjoyable without being a citizen of a specific country. The concept of citizenship describes the state of being a member of a political community and owing allegiance to the community and being entitled to enjoy all the protections and rights flowing therefrom.[2] The lack of a concise and articulate definition of the words ordinarily resident in the Namibian Constitution and statutes has left its application of the provisions with those words to the discretion of the administrative personnel of the relevant bodies, which if one is aggrieved by it, may seek redress in a competent court of law as stated in the Namibian Constitution.[3] It is not possible to speak of the evolution and development of almost any aspect of Namibian life without referring to the bitter past of colonialism and apartheid[4] from where most of our systems have been inherited.[5] The laws were based on racial segregation and the applicability of the citizenship laws would later be found to be against the new world order where all persons are to be equal.[6] This leaves the legal fraternity as no exception to

1 R Blackburn (ed) (1993) *Rights of Citizenship* Mansel Publishing Limited: London.
2 B Garner (2005) *Black’s Law Dictionary* (8th ed) Thomson/West: St. Paul, 201ff.
3 Article 18 of the Namibian Constitution provides for administrative justice.
4 Upon South Africa taking over the mandate over South West Africa, now Namibia, the laws regulating citizenship and other areas of life were laws applicable to the Union of South Africa. These would be British Nationality and Status of Aliens Act 1914; British Nationality in the Union and Naturalisation and Status of Aliens Act, 1926 (Act No. 18 of 1926); Naturalisation of Aliens (South West Africa) Act, 1928 (Act No. 27 of 1928) South West Africa Naturalisation of Aliens Act, 1924 (Act No. 30 of 1924). See also the South African Citizenship Act, 1949 (Act No. 49 of 1949).
5 Namibia is a product of international law (UN Resolution 435) and as a result has evolved over a period of German colonialism, which laws were applicable to then South West Africa, and in the later part of the 20th Century after Germany lost the first world war, the mandate of South West Africa was given to the British Empire by the League of Nations (formed in 1919 at Versailles, France), with South Africa exercising administrative power over the territory on behalf of Britain. See HJ Fischer (2000) *Die Deutsche Kolonien-die Koloniale Rechtsordnung und ihre Entwicklung nach dem ersten Weltkrieg* Duncker & Humblot: Berlin, 76. See also L Wildenthal (1997) “Race, gender and citizenship in the German Colonial Empire” in F Cooper, AL Stoler *Tensions of empire, colonial cultures in a bourgeois world* University of California Press: Berkeley and Los Angeles, 263-283, 266.
6 Article 10 of the Constitution deals with equality.

the dents and perhaps some polishing of the development of laws, for instance, citizenship laws that will be discussed hereunder.[7]

This chapter discusses the meaning of the words *ordinarily resident* as defined in Article 4(1)(d) of the Namibian Constitution in relation to the acquisition of citizenship. The focus of the examination of the words was prompted by the *De Wilde*[8] case in the High and Supreme Courts of Namibia and how the courts gave meaning to the words as found in the Constitution. The Constitution of Namibia does not define what the words *ordinarily resident* mean and much of the interpretation was sought from *stare decisis* and other jurisprudence on the subject. The issues in the *De Wilde* case inspired the writing of this chapter.

While Namibia has recognised the need for citizenship regulation and codified that in the Constitution, there are loopholes within the definitions of some of the terms and these were left to individual interpretation, thus proving to be administratively daunting and esoteric on the bodies that are to exercise functions in the granting of citizenship, thus acting *ultra vires* at times. Those needing these services would in most cases not succeed without a lawyer, which would be extremely expensive and out of reach to the ordinary and perhaps indigent but deserving citizen. This would in some cases amount to a situation where children or persons would be rendered stateless, a situation that is unwanted, even in international law.

The whole of Article 4 of the Namibian Constitution is dedicated to the acquisition and loss of citizenship. For purposes of the chapter, much emphasis was placed on Article 4(1)(d) and Article 4(1)(d)(aa) to (dd). However, it must be noted that citizenship may be acquired by birth,[9] descent,[10] marriage,[11] registration,[12] naturalisation[13] and by conferment.[14] The rest of the Article deals with loss of citizenship, and other powers that parliament may possess in the regulation of acquisition and loss of citizenship which was not very relevant to the chapter.

The aim of the chapter was to make a comparative analysis of the case law available and attempt to bring about recommendations and solutions that may

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7 J Klaaren (2004) *South African Citizenship: Past, Present and Future*. See also TRH Davenport (1987) *South Africa: A Modern History*. Toronto. University of Toronto Press: Buffalo; AP Cheater (1996) "Citizenship in Neo-Patrilineal States: Gender Mobility in Southern Africa" Vol. 22(2) *Journal of Southern African Studies* 189-200 and FB Nyamnjoh (2006) *Insiders & Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* Zed Books: London/New York.

8 *De Wilde v The Minister of Home Affairs and Immigration A 147/2013 [2014] NAHCMD 160 (22 May 2014).*

9 Article 4(1)(a)-(d) with its provisos which were discussed throughout in understanding the Constitutional position in relation to acquisition of citizenship by means of being "ordinarily resident".

10 Article 4 (2).

11 Article 4 (3).

12 Article 4 (4).

13 Article 4 (5).

14 Article 4 (6).

influence policy, as far as the acquisition of citizenship in terms of Article 4(1)(d) of the Namibian Constitution is concerned.

17.2 BACKGROUND OF THE *DE WILDE* CASE

The *De Wilde* case has highlighted some of the intricacies surrounding citizenship in Namibia and how the courts interact with the legislature and the executive. The crux of the matter was basically to determine who qualifies for Namibian citizenship when born in Namibia by parents who are "ordinarily resident" in Namibia in line with the provisions of Article 4(1)(d) of the Constitution of Namibia. The case under discussion first went to the High Court of Namibia, which dismissed the application by the applicant(s), and the applicants appealed to the Supreme Court which ruled in their favour and gave the words '*ordinarily resident*' a purposive interpretation in line with the spirit and tenor of the *lex fundamentalis* (the Constitution).[15]

The brief facts are that the son of the applicants was born in Namibia in 2009 and his parents had been staying and doing business[16] in Namibia[17] since 2006. His parents had sold their belongings in their country of origin, Holland, opened businesses and intended to make Namibia their permanent abode. Registration of his birth as a Namibian citizen was refused by the authorities and he was registered as a non-Namibian. This irked his parents who then sued the authorities in the High Court on the basis that their son qualified for Namibian citizenship by birth on their being ordinarily resident in the country, thus being in conformity with Article 4 (1) (d) of the Namibian Constitution. The High Court found that they did not meet the test in respect of the cited Constitutional Article and dismissed their application. An appeal was made to the Superior Court. The Supreme Court set aside the decision of the High Court and made an order in favour of the appellants. A decision of the Supreme Court is final.[18] This situation created a tussle between the legislature and

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15 In *Thloro v Minister of Home Affairs 1996 (4) SA 965 (NMS*) the court said "the principle purpose of a substantially constitutional- as opposed to a purely legislative- citizenship was to guarantee citizenship as of right or the right to acquire citizenship for certain categories of persons upon and after Independence whilst, at the same time, allowing in broader terms the acquisition of citizenship by other categories of persons to be regulated wholly or partly by Parliament in future."

16 This was on the strengths of work permits issued in terms of Section 27 of the Immigration Control Act, Act No. 7 of 1993.

17 It is not very certain at this point whether the provisions of Article 98 and 99 of the Namibian Constitution may be grounds to be used in the acquisition of citizenship, but the enjoyment of these rights as protected in the Constitution may also place reliance on Article 4 (1) (d) of the Namibian Constitution as far as who qualifies for citizenship in terms of our law is concerned. Article 98 of the Constitution deals with the principles of economic order and this Article describes the type of economy Namibia is, while Article 99 regulates foreign investments which shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.

18 Article 81 of the Constitution states that 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.

the judiciary in that parliament nearly enacted a law contrary to that decision, had it not been for the intervention by the executive (the president).[19]

17.3 THE HIGH COURT DECISION

The High Court in its interpretation of the words ordinarily resident decided that the words should be accorded their ordinary and literal meaning[20]. This would in our view be a very rigid way of interpreting a Constitutional provision, consequences of which may be daunting. This is what the court said at paragraph 21:

> And as I have stated previously, ‘ordinary resident’ connotes continuous and permanent residence. And continuous and permanent residence is then proven on basis of one being issued with a permanent residence permit.

The High Court was of the view that indeed one’s residence must be lawful[21] for one to enjoy the benefits and rights of the Constitution, this may open a flood gate of unwarranted and an unwanted situation as far as the acquisition of citizenship is concerned. The residence of the parents of the applicant should rely on something more substantial and permanent than a routinely way of living.[22] On conclusion, the court went on to state:

> […] irrefragable that the phrase ‘ordinarily resident’ does not imply ‘lawful resident’ for purposes of Article 4 (1) (d).

What is important in the ruling of the High Court above and which relates to the present matter is that the interpretation and application of Section 22 (2) (b) is that if a permit issued under Sections 11, 27, 28 or 29 of the Immigration Control Act, and nothing is relied upon to compute the period of lawful residence, then that period cannot be taken into account but if reliance is placed on the permit issued under Sections 11, 27, 28 and 29 and ‘something else’ then the period of lawful residence

[19] “Our strength depends on the independence of the judiciary”. This is a statement by President Hage Geingob on the issue of a citizenship bill that was hastily to be passed by parliament to circumvent the decision of the Supreme Court on citizenship in the De Wilde versus The Minister of Home Affairs and Immigration (SA 48/2014) “President rejects citizenship bill” The Namibian Newspaper, 15 August 2016, Windhoek, Namibia.

[20] After all; if Article 4 (1) is not given its real and ordinary meaning and implemented, the provisions there would remain high-falutin ideals; to be admired and not to be implemented. But that could not have been the intention of the framers of the Namibian Constitution. See *De Wilde v Minister of Home Affairs (A 147/2013) [2014] NAHCMD 160 (22 May 2014)* at paragraph 11.

[21] See *Getachew v Government of the Republic of Namibia 2006 (2) NR 720 (HC).*

[22] The natural and ordinary meaning by context that is by legal context of Article 4 (1) (d) of the Namibian Constitution is something more than ‘habitually and normally resident’ in Namibia. There must be a degree of permanence for one to be ordinarily resident within the scope of Article 4 (1) (d) of the Constitution, in the opinion of the Court a quo. See also *Shah v Barnet Borough Council and Other Appeals [1983] 1 ALL ER 226 (House of Lords) at 234b-f.*

by virtue of the permit issued under sections 11, 27, 28 and 29 can be taken into account when computing the period of lawful residence in Namibia.

The High Court was of the opinion that the mere incidence of birth in the country does not qualify a person so born for automatic acquisition of citizenship as of right; the person's mother or father must be ordinarily resident in Namibia at the time of the birth of such person. It appears that the High Court was not concerned with the status of the person concerned, as to whether its decision would render such person stateless or not. A situation of statelessness is to be avoided at all costs, even if it means stretching the bound and limits of the system, because the Constitution aims to give rights to as varied a class of persons as possible, and even children of illegal immigrants will fall in this saving net.[23]

17.4 THE SUPREME COURT DECISION

The Supreme Court of Namibia heard the *De Wilde* case on appeal.[24] In its judgment, the court found that the approach adopted by the High Court was wrong and not in conformity with Constitutional principles.[25] The appellants were in possession of work permits as issued in terms of appropriate legislation and did not have a permanent residence permit as would be required by the High Court in its interpretation to pass the test of being ordinarily resident for purposes of Article 4(1)(d) of the Namibian Constitution. The High Court was supposed to give a purposive interpretation to the words "ordinarily resident" rather than a literal approach, because the latter would limit the scope of those that are to benefit from the rights that ought to be derived from the words. What must not be lost sight of is the fact that the words to be interpreted were directly from the Namibian Constitution, which many judgments of our courts continue to emphasize, should be interpreted broadly and purposefully.[26] The interpretation of the High Court, according to the Supreme Court, did not pass the Constitutional test for the interpretation of a Constitutional provision. There are instances in which the High Court narrowly interpreted the Constitution and such interpretation did not find favour on appeal

[23] Article 4 (1) (d) (dd) of the Constitution. See also *De Wilde v Minister of Home Affairs and Immigration (SA 48/2014) [2016] NASC 12 (23 June 2016)* at paragraph 57 where it was stated expressly that in its 'spirit and tenor' the Constitution of Namibia seeks to avoid statelessness and to grant citizenship by birth to as varied a class of people as possible as exemplified by the extension of citizenship by birth to even the offspring of illegal immigrants in order to avoid statelessness.

[24] *De Wilde v Minister of Home Affairs and Immigration (SA 48/2014) [2016] NASC 12 (23 June 2016).*

[25] The spirit and tenor of the Constitution must…preside over and permeate the process of judicial interpretation and judicial discretion. See *S v Acheson 1991 NR 1 (HC) at 10A-B.*

[26] *Frank v The Chairperson of the Immigration Selection Board 1999 NR 257 (HC); Chairperson of the Immigration Selection Board and Erna Elizabeth Frank and Another 2001 NR 107 (SCA).* In *Mwandingi v Minister of Defence 1992 (2) SA 355 NmSC* the court expressly endorsed the purposive approach to constitutional interpretation in order to avoid the austerity of tabulated legalism. See also *Government of the Republic of Namibia v Cultura 2000. 1999 NR 328.*

with the Supreme Court, as in the present case.[27] Constitutional issues cannot be answered with a reference to technical issues alone. It is cited with approval in the *De Wilde* case from the case of *R v Dibdin*[28] that '*ordinary residence'* is not a term of art and is ultimately a question of fact, depending more upon evidence of matters susceptible of objective proof than upon evidence as to the state of mind.[29] So the interpretation[30] should also meet the circumstances of each case in order to reach a proper and balanced conclusion which satisfies the rod of Constitutionalism.

The High Court understood that the words permanent residence and ordinary residence were to be used interchangeably which was not right as it may have relied on statute to do so.[31]

It was the belief of the Supreme Court that the circumstances and legality of the stay of the De Wildes, coupled with the duration thereof, there was nothing, at least in the mind of the appeal court, that would preclude the said child of the appellants from acquiring citizenship by birth on the premise that at the time of his birth his parents were *"ordinarily resident"* within the confines of Article 4 (1) (d) of the Namibian Constitution. There was no need to limit the interests of the said child as opposed to advancing them as the circumstances of the case fell well under the purpose and generous interpretation of the Constitution and the said child was accordingly at the time of his birth, a Namibian citizen. The order of the High Court was thus set aside and the prayer for relief by the appellant was made an order of the appeal court.

The interpretation of the words "*ordinarily resident*" can be better explained in the manner that the legislature did not attach time limits to residence for "ordinary residence" for acquiring Namibian citizenship. It is the way of life of the concerned person as far as their domicile[32] is concerned. The approach adopted by the Supreme Court is summed up in this quotation below:

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27 See also *Kauesa v Minister of Home Affairs and Others 1995 (1) SA 51 (NM).*

28 1910 at 57 & 125.

29 See also *Shah v Barnet London Borough Council and Other Appeals 1 ALL ER 226 (House of Lords) at p 235-f.*

30 See *Biro v Minister of the Interior 1957 (1) SA 234 at 239* where the court stated that the phrase ordinarily resident is not a technical expression-it must be interpreted in the context in which it is used.

31 The Court a quo therefore misdirected itself in holding that 'permanent residence' as defined in the Immigration Control Act 7 of 1993 is a condition precedent to ordinary residence. In any event, it is jurisprudentially unsupportable to use a statute as a metric for the interpretation of the Constitution, especially in the face of well-established principle that the Constitution should not be interpreted like an ordinary statute. See also *Swart v Minister of Home Affairs, Namibia 1997 NR 268 (HC), 1998 (3) SA 339 at 272C-E.*

32 "The concept of 'residence' must not be confused with the physical element necessary for the acquisition of a domicile of choice. Whatever criteria must be satisfied for the *de cuius* to be considered resident in South Africa. *Toumbius v Antoniou 1999 (1) SA 636* at p641. See also *Kallos & Sons (Pty) Ltd v Mavromati 1946 WLD 312; Tick v Broude and Another 1973 (1) SA 462 (T) at 469G*. It is trite that the physical requirement for the acquisition of a domicile of choice is simply presence in the country concerned.

> Unless therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinary resident" refers to a man's abode in particular a place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being whether of short or long duration.[33]

The judgment of the Supreme Court was thus the overarching principle which must open the door for policy frameworks and development that would make the acquisition of citizenship less complicated, especially where Constitutional interpretations are to be interpreted. However, what the Supreme Court failed to do in its judgment was to lay down proper procedure to be followed and applied in considering applications of this nature. This will be discussed at the end of this chapter in the recommendations and conclusions.

17.5 AN INTERNATIONAL COMPARATIVE ANALYSIS

Namibia as a country does not exist in isolation. This means that a comparison was made with other jurisdictions on the topic of acquisition of citizenship by a child born of parents being ordinarily resident in the country concerned. These countries are South Africa, Australia, Canada and the United Kingdom. This chapter examined the global position on the topic and would also be informed by the African and European Union positions. Legal recognition of nationality or citizenship is the most critical legal link between an individual and the state whose nationality is claimed.[34]

International comparative analyses of this transition in human status over the ages have shown that nations exercise their own sovereignty, but such sovereignty is limited by what is desirable for accommodation and recognition of diversity as advocated by the United Nations.[35] Other countries have gone further to declare neutrality in the global political discourses that shape the way humans treat each other as aliens and as a member.[36] What must be noted is that the aspiration of the world order in relation to citizenship, that being its acquisition and loss, is that in all that is done, a situation that would leave a person stateless should at all costs be avoided. Children often suffer the status of statelessness and because of lack of recognition they experience lack of identity and opportunities.[37] Therefore some of the countries' legal systems as examined have made explicit

33 Ibid: at p 235-f.

34 B Manby (2016) *Citizenship Law in Africa: A Comparative Study* African Minds: Cape Town, 21.

35 J Dronkers & MP Vink (2012) "Explaining Access to Citizenship in Europe: How Policies Affect Naturalisation Rates" Vol. 13(3) *European Union Politics* 309-412.

36 J Hainmueller & D Hangartner (2013) "Who gets a Swiss passport? A natural experiment in immigrant discrimination" Vol. 107(1) *American Political Science Review* 159-87.

37 CA Batchelor (1998) "Stateless and the Problem of Resolving Nationality Status" Vol. 10(1/2) *International Journal of Refugee Law* 159-160.

requirements in line with the liberal requirements of the global legal and human rights order. International law does not offer an overarching definition of citizenship or requirements of residence and does not prescribe rules for any qualification for situations, conditions and statuses.

Comparative international law and the law of diplomacy shows that ordinary residence and citizenship rules under the ordered system of nations poses challenges to a system of unclear rules and multiple actors when a new nation is born and seeks recognition and registration to participate in that ordered system of nations. The approaches that were discovered as part of the international analysis of access to citizenship have shown two major approaches being the concerns of "ascriptive membership" and "access to a territory" as ways to acquire citizenship. Ascriptive membership to a society is a channel to acquisition of citizenship by birth or by naturalisation. This calls in the requirement of "ordinary resident" which sends many migrants into a valley of melancholy about their fate and future opportunities. As a consequence of the challenges seen from above, the European jurisdictions have largely ignored the ordinary residence requirement and included in their laws, transmission of citizenship via 'territorial access'.[38]

The type of jurisdictional design as stated above is meant to prevent the scourge of statelessness suffered especially by the children or the unborn. It also allows the so-called illegal and trafficked or smuggled persons to get citizenship once on the territory access. This approach which removes ordinary residence also helps those who have access to a different jurisdiction, but their origin cannot be established. This point explains why the International Law Commission uses the term "appropriate connection[39]" rather than "ordinary residence."

On the other hand, "appropriate connection" can mean habitual residence, a legal connection with one of the constituent units of a predecessor state, or birth in the territory of a state concerned.

This is but just some of the regulating instruments on the concept of the granting of citizenship to persons born in territories in which their parents do not have citizenship or have been displaced from their countries of origin due to socio-economic, political and/or other turmoil.

There is a blend of the ascriptive and access methods used to citizenship which require ordinary residence and access elements under their laws as well. The United States of America for example, has grappled with this quest for balance and each leadership of the US administration has had a different approach on the accommodation of foreigners (migrants as they call them) who cry for

38 J Dronkers & MP Vink (2012) Explaining Access to Citizenship in Europe: How Policies Affect Naturalisation Rates Vol. 13(3) *European Union Politics* 390-412.

39 International Law Commission in its Draft Articles on National of Natural Persons in Relation to the Succession of States.

recognition and removal of barriers to achieve the American Dream. Successive administrations have also had internal disputes in themselves about how to deal with access to citizenship.[40] Ordinary residence has been at times the subject of many a question in some jurisdictions.[41] We shall proceed to shortly discuss individual jurisdictions hereunder.

17.6 AFRICA

African legal instruments[42] do not take the concept of *"ordinary residence"* as a requirement for conferral of citizenship. Instead they recognize the wider concept *"habitual resident"* or appropriate connection as a criterion for the conferment. These concepts are widely interpreted to avoid situations of statelessness. In terms of the African legal instruments on the concept of citizenship, the term citizenship itself does not find application, but instead they use the word nationality. These should be read at national level in the light of international legal instruments.

Thus, in May 2014, the African Committee of Experts on the Rights and Welfare of the Child adopted a General Comment on Article 6, which "reminds African States that States do not enjoy unfettered discretion in establishing rules for the conferral of their nationality but must do so in a manner consistent with their international legal obligations."

The Committee endorsed the rule of "double *jus soli*"[43] where a child is automatically attributed nationality if one parent (either mother or father) was also born in the State, and urges that children born in the territory of a State of foreign parents should have "the right to acquire nationality after a period of residence that does not require the child to wait until majority before nationality can be confirmed.[44]

Recently, the African Court has indicated that withdrawal of nationality must "conform with international human rights standards." Generally, international law does not allow "loss of nationality" and in a crucial finding, that Court held that the

40 C Laborde (2003) "Republicanism and Global Justice: A Sketch" Vol. 9(1) *"European Journal of Political Theory* 48-69.

41 G Jasso & M Rosenzweig (1986) Family Reunification and the Immigration Multiplier: U.S. Immigration Law, Origin Country Conditions, and the Reproduction of Immigrants Vol. 23(3) *Demography* 291-311. O Lowenheim & O Gazit (2009) "Power and Examination: A Critique of Citizenship Tests" Vol. 40(2) *Security Dialogue* 145-67.

42 The African Commission on Human and People's Rights adopted two resolutions and a study on the right to nationality in Africa, leading up to the adoption in July 2015 of a draft Protocol to the African Charter on Human and People's Right on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.

43 Law of the Soil.

44 African Committee of Experts on the Rights of the Child, 2014. General Comment on *Article 6 of the African Charter on the Rights and Welfare of the Child*, ACERWC/GC/02 (2014), adopted by the Committee at its 23rd Ordinary Session, 7-16 April 2014, paragraphs 83-101. This has recently been adopted by South Africa.

burden of proof lay with Tanzania, in this instance, whether the applicant's claim to nationality was valid or not.[45]

African States must be in conformity with Article 15 (2) of the Universal Declaration of Human Rights, as well as Article 12 (2) of the African Charter on Human and People's Rights. The lesson learnt from the African perspective in its legal dispensation on acquisition and perhaps loss of citizenship, is that Namibia as like other African States, has to take necessary measures to prevent one from being in a situation of statelessness.[46]

17.6.1 Republic of South Africa

South Africa has a well-entrenched right to citizenship in its Constitution[47] and national legislation. The South African Act, 1995, provides for citizenship on a *jus soli* basis for any child who does not have the citizenship of any other country or the right to any other citizenship, as well as a general right for a child born in the country of non-national parents to be able to apply for citizenship at majority; however, these rights are dependent on the child's birth being registered.[48]

There is contemporary jurisprudence about the acquisition of citizenship by being ordinarily resident on South African soil. It is however important to understand the previous position. Section 4 (3) of the Act provides that a child qualifies for South African citizenship upon attaining majority if born in the Republic to parents who are not South African citizens or who have not been admitted into the Republic for permanent residence if (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major, and (b) if his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act.[49]

This was interpreted in the case of *Ali and Others v Minister of Home Affairs and Another*[50] in which it was held by the court that the respondents were "ring-fencing" the applicants as "non-citizens" in the country that they have lived in since birth and which most likely the only country that they have ever experienced and known.[51] This expression shows that there is a strong connection between a person's birth place and the country in which they are born. One cannot be deprived of citizenship in a place that you are born. Even Namibian law supports this.

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45 *Anudo v United Republic of Tanzania (Application No. 012/2015) [2018] AFCHPR 5; (22 March 2018)*
46 Article 13 of the ICCPR.
47 Section 28 (1) (a) of the South African Constitution, which states that, "Every child has right to a name and nationality from birth."
48 South Africa Citizenship Act (No.88 of 1995, as amended to 2010), Section 2 (2) (a) and 4 (3).
49 Act 51 of 1992.
50 2018 (1) SA 633 (WCC). See also *Attorney-General v Coote (18 RR 692).*
51 Ibid: at 633-4.

There are non-immigration cases that help South African courts in interpreting ordinary residence under immigration laws. But it must be noted that the concept of ordinarily resident is not synonymous with domicile. Recently, the South African Constitutional Court ruled that a child who was born in South Africa to Cuban parents was entitled to be registered as a South African citizen by birth. This was since Cuban laws state that a person who is not born in Cuba, even to Cuban parents does not qualify to be a Cuban citizen.[52] This set of facts may then result in the concerned child being stateless, a situation that South Africa, like all other members of the global village, ought to guard against. Lack of citizenship also comes with a deprivation of rights and benefits that may otherwise have accrued immediately at birth, if one has to wait until majority to attain South African citizenship. Even an amendment to the Citizenship Act has left some people who were citizens by descent stateless because it spoke of citizenship by birth to those born in South Africa after the amendment, without mentioning either tacitly or expressly, what the position would be for those whose either or both parents are South African nationals, albeit themselves having been born beyond South African borders.[53] This was ruled unconstitutional and that part of the amendment is thus void.

17.7 EUROPE

It is generally accepted that ordinarily resident is a concept that is used in European countries, most of which have time limits attached to one's duration of stay for one to qualify for citizenship as an ordinary resident or by one being ordinarily resident in that European country.

In a nutshell, the definitions attached to ordinary residence and laws made a community of nations who identify with each other as far as the acquisition of citizenship is concerned. But it is also notable that there may be a conflict with regional laws with jurisdictional or individual national laws on the use or interpretation of phrases which may mean the same or interpreted similarly to ordinary "residence." So, it is not weird perhaps to find that additional requirements may exist that should accompany one's claim to citizenship on the basis of being ordinarily resident, such as the need for the residence period to be uninterrupted or the requirement to have permanent residence, either at the moment of application or when considering the duration of the concerned residence.[54]

An example of this elucidation can be made of Polish laws versus the general laws of the European Union. For instance, for one to access Polish citizenship, it

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52 <http://www.iol.co.za/news/girl-of-cuban-parents-gain-sa-citizenship-1716126>.

53 The South African Citizenship Act has undergone three amendments since it was first enacted in 1949 under the apartheid government. The new amendment does not include descent and this was ruled unconstitutional.

54 See sentiments raised in Vink, MO, 2016. Citizenship and Legal Statuses. Maastricht University/European University Institute Paper presented for the "Conference on the Integration of Migrants and Refugees", EUI Forum on Migration, Citizenship and Demorgraphy. European University Institute, Florence, 29-30 September 2016.

is nominally required three years of ordinary residence which is strictly defined by the possession of a permanent residence permit. In addition to this, the applicant is required by the European Union to carry its residence permit for a period of five years before a country can grant a permanent residence permit to that person. This translates to a period of eight years in full for one to acquire Polish citizenship. The *De Wilde* case in Namibia has proven that permanent residence and ordinary residence are two different concepts and one does not need either to prove the other or to lay a claim to a benefit deriving from either. The laws of the African Union are also dissimilar to those of the European Union and it becomes more of domestic laws, which however should conform to international best practices.[55]

17.7.1 Canada

The historical development of Canadian law and its modern composition inform the topic today. It is an integrated system where international law, the civil system and common law and related concepts of "ordinary residence" and "habitual residence" are being used. In this context, the term residence was used at a conflict of laws level primarily as one of several contacts to ascertain the place in which an individual had a real and substantial connection. Habitual residence was not used as a connecting factor at common law but was a major point of contact between a person and a place in Continental European civilian systems of law and particularly popular with the Hague Conference on Private International law.[56]

Canadian domestic laws, including statutory law recognizes the citizenship[57] of someone who is ordinarily resident in Canada, but the term ordinarily resident like in Namibia was and is still not defined in the statutes. So, the meaning is to be deduced from case law. It can be argued that the term habitual residence[58] and ordinary residence[59] are used interchangeably.

17.7.2 United Kingdom

The English authorities seem to emphasise the term "bona fide residence" not "ordinary residence." Thus, the English system is similar when compared to the Namibian position, in the context that ordinary residence must be bona fide, and it means no more than residence resorted to, for example, for the mere purpose of getting divorce in a convenient country such as was held in cases of *Indyka v*

[55] *Anudo v United Republic of Tanzania (Application No. 012/2015) [2018] AFCHPR 5; (22 March 2018).*

[56] JG McLeod (2006) "The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context" Family, Children and Youth Section Department of Justice Canada, Canadian Ministry of Justice, p3.

[57] The Canada Business Corporations Act (the CBCA).

[58] Children's Law Act 1997 SS 1997 c. C-8.2. s.15. See also Domicile and Habitual Residence Act, RSO 1990 c. C-12 s. 22.

[59] This term, although used, finds minimal use countrywide. It is for example used in the Divorce Act, RSC 1985 c. D-3 ss. 3, 4 & 5. The unfortunate part of this maze of law is that the concept remains unclearly defined.

Indyka,[60] and *Welsby v Welsby.*[61] There is a requirement that one must be settled in the United Kingdom (UK) for one to acquire British citizenship. The term "settled" includes "ordinarily resident" in the UK.

It is also found in statutes[62], that a person is "settled" in the UK if they are ordinarily resident in the UK without being subject to immigration time restrictions. Consequently, a person born in the UK will be a British citizen if either parent is settled in the UK at the time of the birth.[63] The challenge found in these laws and policies is that the term ordinarily resident is not defined in the immigration or nationality Acts and has not been defined in any Act of Parliament. Case law would again come to the rescue of the quest for a definition of this apparent universal concept, in that it can be attributed to a regular habitual mode of life in a particular place for the time being, whether of short or long duration, the continuity of which has persisted apart from temporary or occasional absences.[64] The state of mind and actions of a person may sometimes be guiding aspects in defining or establishing whether a person is ordinarily resident or not.[65]

While current ordinary residence guidance indicates that a person is less likely to be ordinarily resident if they have been in the UK for under six months, it is equally important to note that a person can be ordinarily resident from the first day they arrive in the UK if they have genuinely come to settle for the time being.[66]

17.8 AUSTRALIA

Australian citizenship is also governed by statute, being the Australia Citizenship Act[67] which also provides for the concept of ordinarily resident as a form of criteria upon which citizenship can be granted. The difference between Australian law and that of Namibia is that Australia has a 10-year period[68] of which a person should have been ordinarily resident to qualify for citizenship, whereas the Namibian law in terms of Article 4(1)(d) of the Namibian Constitution does not provide such a

60 1967 (2) All ER 689 (HL).
61 1970 (2) All ER 467.
62 The Immigration Act of 1971; The British Nationality Act of 1981.
63 UK Home Office, 2017. Nationality policy: assessing ordinary residence. Version 2.0. UK Home Office, 25 October 2017, 4.
64 *R v Barnet LBC Ex Parte Shah [1983] 1 All ER 226.*
65 In *R v Siggins [1984] Imm AR 14*, it was held that there are times when a court can and must properly use hindsight to consider whether a person's purpose has been followed up by their subsequent action. Therefore, a person's intentions or state of mind at the date on which they are seeking to be regarded as ordinarily resident in a particular place needs to be considered. See also UK Home Office, 2017. Nationality policy: assessing ordinary residence. Version 2.0. UK Home Office, 25 October 2017, 5.
66 UK Department of Health. 2014. Determining if a person is properly settled in the UK in order to establish if they are ordinarily resident here. Department of Health. <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/430967/OR_Tool_1_pdf>.
67 Act 20 of 2007.
68 *Kim v Minister for Immigration and Board Protection* [2016] FCA 959, judgment delivered on 16 August 2016.

long-time limit before qualifying for citizenship on the basis of the said provision.[69] In relation to someone born in Namibia and who lays claim to Article 4 (1) (d), it becomes more of a discretionary aspect as to what constitutes ordinarily resident, and sadly enough, no proper and concise definition exists for the term to this day.[70] The Australian Act also has prohibitions, much more like the provisos found in Article 4 (1) (d) of the Namibian Constitution.[71]

In terms of Australian law, it is actually the individual themselves making the application who should have been 'ordinarily resident' for the required period before citizenship is granted, whereas in Namibia, it is clear that if one relies on Article 4 (1) (d) of the Namibian Constitution, it should be the parents of a person born in Namibia who should have been ordinarily resident in the country, but there is no express or tacit expected duration of the stay for one to enjoy the said provisions. Section 12 of the Australian Citizenship Act provides for citizenship by birth. Subsection (1) states that a person born is an Australian citizen if and only:

(a) A parent of the person is an Australian citizen, or a permanent resident at the time the person is born; or
(b) The person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.

The above clearly indicates that the parent must have been a permanent resident, with a permanent residence permit which would prove a degree of permanence, a position that was adopted by the Namibian High Court in its ruling in the *De Wilde* case. In terms of the Supreme Court of Namibia, this route was clearly wrong. Whether a person satisfies the requirements of Section 12(1)(b) of the Citizenship Act[72] is a jurisdictional fact, to be determined by the court. Therefore, in the our opinion, that is the reason why the interpretation of the words 'ordinarily resident' was left to the courts.[73] The nature and circumstances of the applicants, the parents in the Namibian context, would often be used as a test whether their mode of life

69 Article 4(1)(d) of the Namibian Constitution does not provide a time frame as to how long one's parents should have been ordinarily resident at the time of the birth of such person. In the provision of Article 4(3)(a) (aa) it is provided that for a person to acquire Namibian citizenship by marriage, such person should have, subsequent to that marriage been ordinarily resident in Namibia as the spouse of such person (Namibian citizen) for a period of not less than two (2) years. Article 4(4) provides that citizenship by registration can be acquired by persons who are not Namibian citizens but who have been ordinarily resident in Namibia for a continuous period of not less than five (5) years prior to the date of Independence. This application as a matter of law, should have been made within a period of twelve (12) months from the date of Independence and that such person making an application under Article 4 (4) should have renounced the citizenship of any other country they may have had prior to the date of Independence.

70 However, Section 3 of the Citizenship Act defines what the term ordinarily resident means in the Australian perspective.

71 These are the prohibited categories, although they do not speak of aliens and enemies.

72 Act 14 of 1990.

73 *Lee v Minister for Immigration and Immigration Citizenship* [2011] FCA 1458; (2011) 199 FCR 336 at [89]- [90].

has satisfied what would deemed to be ordinary residence in the country, for their offspring to enjoy the eventual fruits accorded by immigration laws.

17.9 LESSONS LEARNT FROM A HISTORICAL PERSPECTIVE

It is an open secret that there exists differential rules regarding the acquisition of citizenship across the world. The historical development of the laws, the political mood of the day and the socio-economic statuses would in the past inform what kind of citizenship one would enjoy. It can be deciphered that citizenship laws of Namibia are carved on a historical slate as emphasised in the case of *Thloro v Minister of Home Affairs*.[74] Soon after the implementation of the United Nations Resolution 435 of 1978 on 1 April 1989 (referred to in Article 146(2)(d) of the Constitution) many people who had left Namibia for exile returned to participate in a process (political) which would lead to Namibia’s independence through free and fair elections supervised by the United Nations. These peoples needed a sense of belonging and a stable future for themselves and their offspring. Given this, it was the duty of the Constituent Assembly to draft and adopt the Namibian Constitution that would define who would qualify for Namibian citizenship upon independence and to outline who would be citizens or qualify[75] thereafter.

The historical aspect in relation to the acquisition of citizenship has been extensively written on and discussed in detail this chapter. To curtail the chronology of events, what is notable is that the Namibian Constitution, after the brunt of all the lessons learnt from the past, has one of the unique characterizing features in it, which is the incorporation of a substantial citizenship scheme not normally present in others.[76] The Constitutional interest to “achieve national reconciliation and to foster peace, unity and common loyalty to a single state[77]contributed to a very detailed regulation of citizenship.[78] There are two other forms of citizenship that Namibian law has remained silent on, and these are honorary citizenship and global or world citizenship. Namibia does not provide these types of citizenships. For purposes of this chapter, these will not be discussed herein because they would otherwise be discussed with the global position on citizenship and the terms concerned. There is also another form of citizenship that can be conferred in Namibia through service to the nation or due to circumstances that rendered certain people stateless due to persecution. This is called special conferment. The Namibian Citizenship Special Conferment Act[79] was enacted to regulate the conferment of Namibian citizenship

74 2008 (1) NR 97 (HC). See also: *Le Roux v The Minister of Home Affairs and Immigration and Others 2011 (2)* NR 606 (HC). See further *Alberts v Government of Namibia and Another 1993 NR 85 (HC).*

75 *Thloro v Minister of Home Affairs (Case No. (P) A159/2000 [2008] NAHC 65 (02 July 2008*) at paragraph 19.

76 Carpenter G, (1989-90) “The Namibian Constitution-ex Africa Aliquid Novi after All?” Vol. 15 *The South African Year Book of International Law*.

77 Preamble of the Constitution.

78 *Swart v Minister of Home Affairs 1997 NR 268 (HC) at 274-A-B.*

79 Act No. 14 of 1991.

upon certain descendants of persons who left Namibia owing to persecution by the colonial government which was in control of the country before 1915.

17.10 CITIZENSHIP AND MIGRATION

Recently, there has been a change in how countries treat immigrants and set them on a path of gaining citizenship. This new wave has surfaced especially in Europe.[80] Recent comparative research on citizenship for immigrants has focused on issues such as: the conditions for acquiring citizenship of the host country, how they differ between countries, how they change over time and how they distinguish various classes of would-be citizens.

Recent research has also examined the overall effect of citizenship policies and naturalization on various integration indicators.[81] In light of the long-term status of refugees that are currently entering Europe, the more immediately relevant question is what kind of legal statuses and protection the refugees are offered. Refugees[82] have a different status to the ordinary immigrants.[83] Namibia has followed international practices of refugee integration into the mainstream. It appears that a refugee can locally integrate and gain citizenship through naturalisation. Naturalisation is a very important aspect and the International Court of Justice has emphasised same.[84]

It also appears that a refugee, under Namibian law, can acquire citizenship once they are ordinarily resident in the country for a long time. This can be through marriage to a citizen or other forms in line with immigration legislation. The courts of Namibia are very conscious of the diversity thus advocate a common citizenship to all those who have a common heritage with Namibia especially children born in exile and children born in Namibia of refugees.

According to the case of *Alberts v Government of Namibia and Another,*[85] children born in Namibia of refugees can apply for citizenship by birth when they become

80 P Abrahamson (2005) "Coping with Urban Poverty: Changing Citizenship in Europe?" Vol. 29(3) *International Journal of Urban and Regional Research* 608-21.

81 R Baubock & C Jopple (ed) (2010) "How Liberal are Citizenship Tests?" EUI Working Paper RSCAS 2010/41. OECD. 2011. Naturalisation: A passport for the Better Integration of Immigrants? Paris: OECD.

82 The treatment of refugees is altogether a different aspect and is regulated by international law. Namibia has ratified the 1951 UN Refugee Convention and the 1967 Protocol related to refugees but has made reservations on Article 26 on the freedom and movement of refugees and asylum seekers in Namibia, whereupon transgression, this may lead to detention, arrest and prosecution. Government has also not signed the 1969 OAU Convention governing the Specific Aspects of Refugees in Africa but has incorporated its provisions within the country's Refugees Act, 1999 (Act 2 of 1999).

83 A Grahl-Madsen (1996) *The Status of Refugees in International Law, Volume 1: Refugee Character* A.W. Sijthoff: Leyden, 259.

84 See the judgment of the International Court of Justice in the Nottenbohm Case (*Liectenstein v Liechtenstein*) 1955 ICJ Reports 4 at 24.

85 1993 NR 85 (HC).

majors. This is premised on the fact that a citizen by birth cannot be deprived of citizenship and the government cannot redefine citizenship by way of policy decisions. This decision makes the practice of the government constitutionally suspect, and if challenged, will not see the light of day because the courts in Namibia are bound to defend, promote and carefully, but purposefully interpret the Constitution. If the children of the refugees would otherwise become stateless at birth, then it is only common sense that the citizenship of their place of birth should be considered and be accorded to them. Children of refugees born in Namibia, should thus be accorded Namibian citizenship at birth, a right which can be renounced in later life, should the concerned child so wish. The law also has provision for that.

17.11 LESSONS ON THE DOMICILE THROUGH MARRIAGE

The matrimonial domicile determines the patrimonial consequences of a marriage under Private International Law. The matrimonial domicile[86] is the domicile of the parties at the date of the marriage. *Domicile* for the purposes of the issue before us, is the domicile as defined for the purposes of the Immigration Control Act, in the said Act itself. It is defined in Section 1 of the Act as follows: "Domicile" subject to the provisions of Part IV means the place where a person has his or her home or permanent residence or to which such person returns as his or her permanent abode, and not merely for a special or temporary purpose.[87]

As it stands, domicile can consist of either/or the place where a person has his / her home; or permanent residence; or the place to which such person returns as his or her permanent abode, and not merely for a special or temporary visit.[88]

The definition of what domicile is through marriage, is more like how the courts have interpreted the word ordinarily resident in judgements that are aimed to ease the burden on administrative bodies in exercising their duties and functions, when faced with immigration issues, and also protect the broader mandate of holding the Constitution and its dispensation supreme. So, one can acquire citizenship through marriage[89] on the premise that you are ordinarily resident, if satisfying the regime that governs that very aspect of acquisition of citizenship.

86 Married Persons Equality Act, 1996 (Act 1 of 1996) regulates matrimonial domicile and the immutability thereof, the disadvantages and the fact that all that is not part of a new world order that recognises feminism, has been abolished by section 12 of this Act, coupled with Article 10 of the Namibian Constitution that deals with equality. This aspect is only discussed herein for purposes relevant to acquisition of citizenship only.

87 *Government of The Republic of Namibia v Sikunda 2002 NR 203 (SC) p203.*

88 Ibid. *Thloro v Minister of Home Affairs (Case No (P) A159/2002) [2008] NAHC 65 (2 July 2008).*

89 Article 4(1)(3) of the Constitution. Particularly, the proviso in this Article, which is (bb) states that subsequent to that marriage, one must have ordinarily resided in Namibia as the spouse of such person for a period of not less than two (2) years.

17.12 RECOMMENDATIONS

Based on the investigation into the various jurisdictions herein, the case laws, literature and a pedagogical analysis, it is not easy to come to an all-encompassing conclusion, due to the fact that each specific jurisdiction has its own processes, but it has been useful as a guide at this stage for Namibia as a country to carve its own concise interpretation with regards to the words *"ordinarily resident"*, much like it is found in Section 2(2) of the Australian Citizenship Act of 2007 and to have clear and regulated policy guidelines. The Namibian Citizenship Act, 1993 (Act No. 7 of 1993) is silent on how Article 4(1)(d) is to be implemented and the search elsewhere has not yielded the desired directive. It is evident from the ruling of the Supreme Court that the rigid rules of interpretation will not serve the purpose and bring about the desired result, and thus where rights are to be adversely affected by an administrative decision or interpretation, the direction should cease and the end-result for those concerned should be in their favour.

Parliament should not at all have the power to remove from a person a right accorded at birth, for instance citizenship. The Constitution is the Supreme law of the country.

Article 81 of the Constitution gives parliament the power to lawfully enact an Act of Parliament that may reverse a decision of the Supreme Court of Namibia. The wording of the Article creates a loophole with regards to the binding nature of the decisions of the Supreme Court, in so far as the remaining two organs of state[90] are concerned. It is not really a desired aspect in a democracy that one organ of state should be at the mercy of the other because the principles upon which the state was founded at independence will not be useful or relevant.[91] Although at the moment it would be entirely lawful for parliament to enact a law that contradicts a decision of the Supreme Court[92], this should be avoided as it undermines the independence and standing of the judiciary, which is in most instances steady, unlike the legislature and the executive which are normally informed by the political mood of the time. The *De Wilde* case has been the ultimate test of the relationship between the legislature and the judiciary and has also shown that the executive branch of government may have influence on the legislature which may then challenge the judiciary. In view of the foregoing, we propose the following:

1. It must be noted that if parliament was not happy with the contents of Article 4 (1)(d) of the Constitution, they should amend the Constitution so that the benefits pronounced in Article 4(1)(d) will no longer cover the concept of one being ordinarily resident or to make the necessary amendments to suit the current socio-political dispensation of Namibia.

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90 Article 1(3) of the Constitution makes provision for organs of state.
91 See also Article 78 (2) of the Constitution.
92 See Constitutional supremacy or parliamentary sovereignty through the back doors: Understanding Article 81 of the Namibian Constitution.

2. Alternatively, it is recommended that the Constitutional provision of Article 81 that gives the legislature the power to lawfully enact legislation that contradicts a decision of the Supreme Court be amended not to allow any other organ of state to interfere with judicial proceedings. This will enhance the concept of judicial independence and separation of powers that echoes the sentiments of the members of the Constituent Assembly, of which President Hage Geingob of Namibia was the Chairperson, that framed and drafted one of the best legal documents of all time; the Constitution of the Republic of Namibia. If there exists the power under Article 81 of the Constitution that allows the legislature to constitutionally challenge a decision of the Supreme Court, the legislature shall always have the power to *lawfully* enact law that contradicts the decision of the Supreme Court. It is again Parliament that has the power to amend the Constitution if it wishes to correct, enhance or do away with a certain aspect in the Constitution. In a nutshell, if we want to see total independence of the three organs of state, there should not be a provision in our legal instruments that allows the other to *lawfully* undermine the work of the other because it may create an unfortunate situation where the rule of law[93] is no longer the order of the day.

3. There is still a loophole in Namibia’s law and Constitutional dispensation that will still allow interference from parliament with the work of the judiciary, unless such discrepancy is corrected through an urgent amendment. The amendment in point two above should wipe away the power of the legislature to be able to change law or make contradictory laws to judicial decisions whenever such decisions are not in the interest of the government of the day.

4. Legislation should be amended to remove the vagueness of the term *ordinarily resident*. Alternatively, an amendment to the Constitution that will remove the benefits spelled out in Article 4(1)(d) may be ideal. The term *ordinarily resident* must be described in definite terms to aid anyone who wants to understand its meaning and/or lay a claim to this part of the law. This will also avoid personal feelings interfering in matters that are of a Constitutional nature. The rights and benefits stated in Article 4(1)(d) should be accessed without the assistance of a lawyer. By this, it is meant that the interpretation and understanding should be so obvious that enjoyment of this right flows naturally from the operation of the law.

5. A time frame or limit should be attached to how long one should be ordinarily resident in order for their offspring to acquire the citizenship of Namibia if born in Namibia during that period of their ordinary residence. This will

93 Article 1(1) of the Constitution states that “The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.

provide an easy approach and ease the burden on administrative officers, for instance, immigration officials.

17.13 CONCLUSION

It can be deciphered from the lessons drawn from this work that each nation has its own way of regulating citizenship, more specifically when it comes to the acquisition of citizenship by means of ordinary residence. Each system has its advantages and disadvantages and each country has adopted a system that works best for it. However, for any system to work within the legal framework, it has to follow the Constitution of the country. Namibia's Constitution has left the concept of ordinary residence hanging, that is, without defining what the term connotes, and this has been left much to the courts to interpret the meaning of the words ordinarily resident, just like it has been left to the courts in other jurisdictions discussed herein to interpret and define the words ordinarily resident. Judging from the interpretation of the High Court of Namibia in the *De Wilde*[94] case, this discretion given to the courts in the absence of a concise definition[95] from the Constitution has produced adverse interpretations that would have created a very bad precedent, that of rendering the applicant's son stateless; a situation that is in direct conflict with the spirit and tenor of the Namibian Constitution and also giving the same Constitution a narrow interpretation, as opposed to the purposive and value-based interpretation it ought to be accorded. There is a need to have a proper legal framework that would avoid future incidences where citizens will be deprived of their birth right, just because of terminologies that are not easy to interpret and are found in our legal instruments.

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94 *De Wilde v Minister of Home Affairs (A147/2013) [2014] NAHCMD 160 (22 May 2014).*

95 The High Court of Namibia held that there must be a degree of permanence, which means that the applicants should have been in possession of permanent residence permits as opposed to work permits they possessed. This position was set aside by the Supreme Court in an appeal judgment of the same case.

CHAPTER 18

The Supreme Court of Namibia and election disputes: Maintaining the *Status Quo* 30 Years on!

Dennis U. Zaire

18.1 INTRODUCTION

On 21 March 2020, Namibia celebrated 30 years of independence. During this time, the country managed to conduct 26[1] elections at national and sub-national level which included six Presidential[2] and six National Assembly[3] elections.[4] Generally, elections in Namibia are conducted in an atmosphere of peace and stability and they are largely free from violence. Results of the majority of these elections have been accepted by the majority of stakeholders over the years as legitimate, credible and representing the wishes of the majority of the Namibian people. Since independence, elections have been lauded and declared as 'free and fair' by local, regional and international observers. However, some stakeholders including certain opposition parties, refer to (some) previous election results in the country as 'unfair and compromised.'

Given that elections entail a process which touches on the distribution of political power and the future of the country, this has triggered public debate. The debate has centred on the management, transparency, accountability issues and how elections are conducted in Namibia. The 2004 and 2009[5] Presidential and National Assembly elections are prime examples. Controversy on the fairness or lack thereof of elections results ended in a number of election disputes being contested in the courts. The highest court of appeal in the country, the Supreme

1 The Electoral Commission of Namibia (ECN) was not able to provide exact and precise number as, according to the staff, they do not have the figure. Information with ECN verified on 18 June 2020 at 11:24.

2 Article 134 (1) of the Constitution of Namibia provide that, *"notwithstanding the provisions of Article 28 hereof, the first president of Namibia shall be the person elected to that office by the Constituent Assembly by a simple majority of all its members."* Article 134 (2), states, notwithstanding Article 29 (3), the first President of Namibia may hold office as President for three terms. This provision or sub-Article (3) was inserted by the Namibian Constitution First Amendment Act 34 of 1998. This allowed Namibia's first President Dr. Sam S. Nujoma to serve three Presidential terms of 15 years in total.

3 Under Article 133 of the Namibian Constitution, the Constituent Assembly – which drafted the Constitution of Namibia, was *"…deemed to have been elected under Article 46 and 49 hereof, and shall constitute the first National Assembly of Namibia, and its term of office and that of the President shall be deemed to have begun from the date of independence."*

4 The first democratic elections in Namibia were held from 7-11 November 1989 in terms of the United Nations Security Council Resolution 435 (1978) of 29 September 1978. This election was supervised by the United Nations Transition Assistance Group (UNTAG).

5 Held on 27 and 28 of November.

Court of Namibia (SCN) had the opportunity to consider appeals and it delivered its judgments.

This chapter looks at how the SCN dealt with these disputes, how its judgments in such matters reflect on the court, and if the nature of its decisions, thus far, instil confidence in the independence of the highest court of appeal in the land. The chapter asserts that the Supreme Court, thus far in its judgments, held on to the *status quo* and avoided *rocking the political boat*. Arguably, this was justified in the name of peace and political stability in the country. In the process, the court may have avoided providing clear and unequivocal directions on elections matters which could help with clear interpretation of future disputes.

First, the chapter briefly looks at elections and democracy. Second, it considers the function of the Supreme Court. Third, it looks at why Supreme Court decisions matter. Fourth, it deals with rules of ethical judicial conduct in Namibia, as well as the guidelines for delivery of reserved judgment in the Supreme Court. Fifth, it looks at Supreme Court judgments in two (2) crucial election disputes. Finally, it considers what the SCN judgments (may) indicate before it concludes.

18.2 ELECTIONS AND DEMOCRACY

Elections[6] represent a vehicle through which people in an independent and democratic state choose its leaders and government. Any form of elections in a democratic state such as Namibia is an important exercise which can influence and determine the future of the country. However, elections do not necessarily guarantee democracy but they are central to it. It can also not be denied that a conceptual linkage exists between democracy and the electoral processes. The two are essential on issues of poverty reduction, service delivery, political distribution of power, peace and stability in the country, and socio-economic progress. In a judgment delivered on 25 October 2012, the Supreme Court stated:[7]

> The right accorded to people on the basis of equal and universal adult suffrage to freely assert their political will in elections regularly held and fairly conducted is a fundamental and immutable premise for the legitimacy of government in any representative democracy. It is by secret ballot in elections otherwise transparently and accountably conducted that the socio-political will of individuals and, ultimately, that of all enfranchised citizens as a political collective, is transformed into representative government: a

6 The International Covenant on Civil and Political Rights (ICCPR) of 1996, which Namibia ratified defines the term 'elections' as providing *the rights and opportunities to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors"*

7 See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012), Introduction at A paragraph 4.

> "government of the people, by the people, for the people". It is through the electoral process that policies of governance are shaped and endorsed or rejected; that political representation in constitutional structures of governance is reaffirmed or rearranged and that the will of the people is demonstratively expressed and credibly ascertained.

Eight years down the line, in a recent election dispute, the Supreme Court[8] Chief Justice, Peter Shivute stated in the introductory remarks to the judgment:

> Elections are not perfect instruments for upholding the promises of democracy. Like any other public undertaking, they are susceptible to human error, voter fatigue, and the risk of being unrepresentative. However, they are a necessary premise for the legitimacy of government by facilitating the public's delegation of its inherent power to their representatives. The public's right to vote creates the executive's privilege to govern. It is therefore crucial that the voice of the electorate does and should find expression, meaning and content in the electoral process to ensure that elections are free, fair, accountable and transparent. After all, power ultimately rests with the people. This onerous task is entrusted to the Electoral Commission of Namibia, a body constitutionally charged with the conduct and management of national elections.

Therefore, the centrality of elections to any democratic dispensation is, without doubt, important. Elections in Namibia had a difficult beginning. The problem was to be found in the law. The first election of regional and local authority took place under a Namibian law that was put together in a rush in order to allow for elections to take place. Basically, it was a version of the South African Electoral Act adapted to Namibia. The law was not well written and it had many shortcomings, loopholes and inadequacies.[9] As a result, the conduct and management of elections in the country was pretty much a trial and error scenario. This brought problems that were highlighted by election cases in the courts over the years. In the matter brought by *Rally for Democracy and Progress and others,*[10]Judges Petrus Damaseb and Collins Parker remarked:

> We have shown how in significant respects some of the allegations regarding irregularity in the conduct of the 2009 National Assembly (NA) elections were premised on provisions that no longer have the force of law. In fairness to the applicants and their counsel, that is attributable to the fact that the law is very scattered. We had ourselves to wade through a myriad of amendments to ascertain what the applicable provisions are. That is an

8 *Itula& Others v Minister of Urban and Rural Dvelopment & Others* (A 1/2019) [2020] NASC 6 (05 February 2020), paragraph 3.

9 Electoral Act has been amended 10 times since it became law in 1992.

10 *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others* (A01/2010) [2011] NAHC (14 February 2011) at paragraph 325.

> unsatisfactory state of affairs and something must be done as a matter of urgency and before the next round of elections to consolidate the electoral law of Namibia.

The Constitution[11] of the Republic of Namibia provides the primary mandates for elections in the country. In the Preamble, reference is made to the “freely elected representatives of the people”. Article 17 (1) of the Constitution states:

> All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the government […]

The same Article (17) under sub-section 2, further states that: *“Every citizen who has reached the age of eighteen (18) years shall have the right to vote [...]”*. Under Article 94B[12] (1) of the Constitution, the Electoral Commission of Namibia (ECN) was established as an *“[…] exclusive body to direct, supervise, manage and control the conduct of elections and referenda […]”* The same Article under sub-section 2 directs the ECN to be *“[…] independent transparent and impartial body.”* Article 106 of the Namibian Constitution deals with Regional Councils elections, and under Article 111, Local Authorities and their elections are mandated.

Acts of the Parliament of Namibia, the second arm of the state (legislative),[13] regulates and provides the legislative framework for the conduct and governance of elections in the country through the various pieces of legislation, such as the Electoral Act (No. 24 of 1992)[14] as amended,[15] the Regional Councils Act (22 of 1992) as amended[16] and Local Authorities Act (23 of 1992) as amended.[17] These laws established the mechanisms and provide for procedures to be followed for the conduct and governance of elections in the country. The effectiveness of such laws and challenges within them has been highlighted and dealt with in the cases before the courts of Namibia.

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11 Article 1 (6) provides that *“this Constitution shall be the Supreme law of Namibia”*. “A States Constitution is that body of rules determining fundamental matters such as the composition, powers and procedures of the legislature, executive and judiciary”, See G Erasmus (2010) “The Constitution: Its impact on Namibian Statehood and Politics” in C Keulder (ed) *State, Society and Democracy - A reader in Namibian politics* Mcmillan Education Namibia: Windhoek, 84.

12 This Article was inserted by the Namibian Constitution Third Amendment Act 8 of 2014.

13 The first being the Executive, which comprises the President and Cabinet and the Third Branch is the Judiciary (Courts).

14 See Government Gazette No. 471 of 31 August 1992.

15 By Electoral Amendment Act No. 23 of 1994, published in Government Gazette No. 957 of 21 October 1994. See latest amendment, Electoral Act 5 of 2014 <https://www.lac.org.na/laws/annoSTAT/Electoral%20Act%205%20of%202014>.

16 This Act has been amended 6 times including Proclamation 25 of 2013.

17 This Act has been amended 14 times since 1992.

Furthermore, Namibia is a signatory to various binding regional[18] and international[19] treaties which come with various demands and obligations for the conduct of elections. Under Article 144 of the Namibian Constitution, it is stated that, *"general rules of public international law and international agreements binding upon Namibia under this Constitution form part of the law of Namibia".*

Hence, the conduct and the participation in elections by all stakeholders[20] in Namibia are therefore, legally well founded. Where grievances or disputes arise, it is left to the courts to provide clarity and directions in such matters by interpreting the law that governs elections in the country, which includes the Namibian Constitution. In the interpretation of the Constitution, regard must be had to the fact that:

> [T]he Constitution of a nation is not simply a statute which mechanically defines the structure 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 tenor of the constitution must therefore preside over and permeates the processes of judicial interpretation and judicial discretion.[21]

This approach was supported by the late Chief Justice Mahomed in *Government of the Republic of Namibia & Another v Cultura 2000.*[22] He stated:

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, literally 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.

Through judicial interpretation of the law (such as statutes, policies and directives, among others) and, especially the Constitution as the supreme law of the land,[23] the SCN is expected to provide legal clarity, certainty and directions on the way forward in how the law is to impact on society and the political processes, in a fair, transparent and speedy manner. Such judicial interpretation constitutes an important source for understanding the law, the political process in the country and

[18] For example, the African Charter on Democracy, Elections and Governance (ACDEG) which Namibia signed on 10 May 2007.

[19] Ibid.

[20] I.e. registered voters, political parties, and the electoral body (ECN), among others.

[21] *State v Acheson* 1991 NR 1 (HC) at 10 AB.

[22] 1993 NR 328 (SC) at 340 B-D.

[23] By virtue of Article 1 (6) of the Constitution of Namibia, which state: *"This Constitution shall be the Supreme Law of Namibia"*. Thus, the Constitution is a normative guideline for the entire citizenry and its government.

the relations between the three organs of the state, the Executive, the Legislature and the Judiciary.[24] In fact, the judiciary has a duty to act as a watchdog to check that the other branches of government do not abuse their powers.[25]

18.3 FUNCTION OF THE SUPREME COURT

The judiciary[26] constitutes the third arm of the state (courts). The Administration of Justice is set out in Chapter 9 of the Constitution of the Republic of Namibia. The courts are independent and subject only to the Constitution and the law.[27]

Under Article 79 (2), the Supreme Court is empowered to:

> […] hear and adjudicate upon appeals emanating from the high court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorized by Act of Parliament".

The Supreme Court also hears appeals from the Electoral Court, which is a division of the High Court.[28] In Presidential electoral challenges, section 172 (1) of the Electoral Act (5 of 2014), states:

> In any election of the President any challenge relating to the return or outcome of the election, including any request to review electoral materials in respect of the election for the purposes of bringing a challenge, the challenge or request is directed to and adjudicated by the Supreme Court of Namibia as a Court of first instance and final recourse as contemplated in Article 79(2) of the Namibian Constitution, read with section 15 of the Supreme Court Act, 1990 (Act No. 15 of 1990).

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24 "The need for checks and balances on the powers of the separate branches of government is central to a constitutional state, because these measures avoid the concentration of power in one particular branch of government and so prevent dictatorship and arbitrariness in government", SK Amoo (2004) *"The concept of constitutionalism*". Unpublished notes prepared for first year students taking the "Introduction to law" course. University of Namibia, Windhoek 170, taken from OC Ruppel (2008) "The role of the executive in safeguarding the independence of the judiciary in Namibia" in N Horn & A Boesl (eds) *The independence of the judiciary in Namibia* Mcmillan Education Namibia: Windhoek.

25 By virtue of Artic 25 and 18 read together, the court can subject executive power to judicial review.

26 According to Article 32 (1) (a) (aa) of the Constitution, the President is responsible for, inter alia, the appointment of the Chief Justice, the Judge President, and the judges of the High and Supreme Courts, on the recommendation of the Judicial Service Commission (JSC). JSC is regulated through Article 85.

27 Article 78 (2) of the Namibian Constitution.

28 See section 167 (1) of the Electoral Act 5 of 2014.

Under Article 81:

> 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.

The Supreme Court,[29] "[…] has the inherent jurisdiction and power to regulate its own procedures and to make court rules for that purpose."

Rules of the Supreme Court are further regulated through the Supreme Court Act, 1990 (Act No. 15 of 1990). Under section 37 of this Act, the Chief Justice of the Supreme Court of Namibia, Justice Peter S. Shivute, made the rules for the conduct of the proceedings of the Supreme Court of Namibia as set out in the Schedule and determined that the said rules come into operation on 15 November 2017.[30]

Henceforth, the function of the SCN is an important one as the highest court of appeal in the land. Its decisions carry a lot of weight as it influences and shapes public opinion and direction of the political process in the country. In *Rally for Democracy and Progress and Others*,[31] the Supreme Court took cognizance of this fact:

> The Courts were invested with powers to preclude or punish election malpractices – whatever the manifestation thereof and irrespective of whether they have been initiated or perpetrated by voters, candidates, political parties, election officials,[14]institutions or by any other person or authority. Parliament also recognised the Courts' overarching judicial powers of constitutional supervision and review[15]and, regard being had to the proposition that the public process of free and fair elections is an intrinsic, indivisible and essential component of the democratic aspirations, principles, values and rights articulated in the Constitution, Parliament also entrusted the Judiciary with the duty to adjudicate election disputes under the Act,[16]including complaints that an election return rendered or an election itself is undue 'by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever'.[17] This obligation casts an onerous responsibility on the Courts to scrupulously maintain and enforce the principle of a representative democracy in our constitutional society and to jealously guard against any infringement or erosion thereof.

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29 Under Article 78 (4) of the Namibia Constitution.

30 See Government Notice 249 of 29 September 2017; or Government Gazette No. 6392 of 25 August 2017.

31 Ibid, (Note 7 & 10 above).

18.4 WHY DECISIONS OF THE SUPREME COURT MATTER

The SCN is the court of last resort in all legal and constitutional matters in Namibia. Hence, its decisions provide final legal direction to the parties in a dispute. Second, the decisions provide legal clarity and certainty through the court's interpretation of the law. Third, they (SCN decisions) help with understanding of the constitution and the principles underlining it. Fourth, the court decisions determine the future of the country and its political system as well as the interpretation of the concept of separation of power between the three organs of the state. Thus, no doubt, the SCN is an important entity that holds immense power and influence. Its decisions are final, unless set aside, by the court itself or contradicted by an Act of Parliament lawfully enacted, as per Article 81 of the Namibian Constitution. No further recourse is available to the parties to the disputes after the court has made its final decision. Hence, its decisions are binding on all lower courts and they form the law which affects all citizens in the country in one way or another. The SCN's decisions also have both convincing and influential power on other institutions as well as the other two arms of the state, the executive and the legislature. Hence, as a result of its rulings, certain laws, policies, regulations and directives are ruled as unconstitutional and these have to be amended by Parliament or the relevant responsible entities for them to be in line with the constitution as the supreme law of the land. Any law that violates the Constitution cannot stand.

18.5 RULES OF ETHICAL JUDICIAL CONDUCT IN NAMIBIA[32]

The rules provide standards and they serve as a guideline for judicial conduct in Namibia. Under Part A (1), the rules state as follows:

> To persistently maintain, jealously defend and vigorously enforce their judicial independence and that of other judges and judicial officers and the independence and authority of the courts of law established by or under the constitution. Without derogation from the generality of this duty, judges:
>
> Shall exercise their judicial discretion and functions on the basis of their assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influence, inducements, pressure, threats, or interference, direct or indirect from any person or entity or for any extraneous reasons whatsoever.

Section 6.1 of the said rules states: "Judges shall give judgment, orders, or rulings without unreasonable delays".

32 As adopted by the judges of the High and Supreme Courts in the country, available at <https://ejustice.moj.na/JUDICIARY/LegislationAndDirectives/Pages/DirectivesJudiciary.asp>

In Part B, Chapter One of the rules, under Section 3(b), Chief Justice Peter Shivute wrote in the introduction:

> It is absolutely essential that the standards aforesaid are effectively maintained in order to avert the risk of eroding public confidence in the independence and impartiality of the judiciary as well as the trustworthiness of judges so as to enhance the administration of justice.

Justice Shivute went on under 3(c) to point out that, "[…] it is public confidence in the independence of the judiciary, in the integrity of judges, and in the impartiality and effectiveness of its processes that sustain the judicial system of a democratic country". Justice Shivute's position echoed Value 1 of the 2002 Bangalore Principles of Judicial conduct,[33] which reads:

> Judicial independence is a prerequisite for the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
>
> The Rules of Court are devised to further and secure procedures for the inexpensive and expeditious institution, prosecution and completion of litigation in the interest of the administration of justice;[69] to facilitate adjudication of the litigation in a manner that meets the convenience of, and resources available to the Court; to allow the litigants an equal, fair and reasonable opportunity to present their respective cases fully for final determination to the Court; to accommodate public interest in the efficiency, regularity, orderliness and finality of the legal process and, finally, to give procedural effect to the constitutional demand that, in the determination of their civil rights and obligations, all persons shall be entitled to a fair and public hearing.[34]

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33 These principles, developed by the Judicial Groupon Strengthening Judicial Integrity, are increasingly seen as a document which all judiciaries and legal systems can unreservedly accept. These principles were then termed the Bangalore Principles. For Bangalore Principles see <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>. The United Nations (UN) Social and Economic Council, in Resolution 2006/23 of 27 July 2006, invited Member States, consistent with their legal systems, to encourage their judiciaries to take the Bangalore Principles into consideration when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary. For Resolution 2006/23 of 27 July 2006 see <https://www.refworld.org/pdfid/46c455ab0.pdf>.

34 See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012) at paragraph 66.

18.6 GUIDELINES FOR THE DELIVERY OF RESERVED JUDGMENT IN THE SUPREME COURT[35]

Suggested time for delivery of judgment in civil appeal is 9 months plus 3 months to render dissenting judgment. Twelve months plus 3 months are suggested to render concurring or dissenting judgment in Appeal by a panel of 5 judges or more. In criminal appeal where the appellant/responded is in custody, 3 months unless matter is disposed with by way of an order or is complex in which event judgment must then be given within 6 months. When the election challenge is considered urgent, the SCN must give judgment in 14 days. Recently in the Itula[36] case, the challenge was brought before a five-member panel on 17 January 2020. Chief Justice Shivute indicated that the judgment would be delivered on 6 February 2020.

18.7 SUPREME COURT RULINGS IN TWO (2) CRUCIAL ELECTIONS DISPUTES

18.7.1 *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*

In this case, nine (9) opposition parties sought a court order to set aside the November 2009 General elections for members of the National Assembly. The parties sided numerous corrupt, illegal, irregular and unprocedural election practices which resulted in an undue election or return. The Electoral Commission of Namibia and five (5) other respondents which included the ruling Swapo party opposed the applications. The appeal was dismissed by the Supreme Court.[37]

This case was a significant test for the rule of law, the independence of the judiciary and governance of elections in Namibia. Despite the outcome of the case, which maintained the *status quo*, the delays experienced in this case were a setback for the speedy execution of justice in the country. The delays were a violation of the Namibian Constitution, in particular Article 12 (Fair Trial), as well as Section 6.1 of the rules of ethical judicial conduct in Namibia as adopted by the High and

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35 Full title is *"Judicial Service Commission's guideline for delivery of reserved judgments in the supreme Court of Namibia*, adopted by the Chief Justice of the Supreme Court in consultation with the Judicial Service Commission" <https://ejustice.moj.na/JUDICIARY/LegislationAndDirectives/Pages/DirectivesJudiciary.aspx>.

36 *Itula & Others v Minister of Urban and Rural Development & Others* (A 1/2019) [2020] NASC 6 (05 February 2020).

37 The case was heard on 3-5 October 2011 and Judgment was delivered on 25 October 2012. This case took three years, from date of institution in the High Court to the date of final judgment in the Supreme Court. Heard on 1st, 2nd March 2010 in the High Court. Section 10 of the Electoral Act,1992, required that election petitions could only be presented within 30 days of the results being announced. The petitioners presented their petition on the thirtieth day at 16:30 and, therefore, within the statutory requirement. The Registrar of the High Court accepted the petition. However, a rule of court did not allow the filing of a process on any day after 15:00. Because the petition was filed after 15:00, the Court held that the petition was invalid for being filed out of time and, therefore, in the eyes of the law there was no valid petition to adjudicate on.

Supreme Courts of Namibia, which states: "Judges shall give judgment, orders, or rulings without unreasonable delays".

The delays of about three (3) years experienced, which was based on procedural technicalities, meant that by the time the case was concluded in 2012, there was two (2) years before the next elections, which took place in 2014. This particular experience may have defeated the purpose why the dispute was brought before the court in the first place. Such delays may undermine the confidence of political parties in the rule of law and their ability to bring future elections dispute(s) to court. Hence, addressing delays and protracted adjudication of justice in the courts remain a concerning challenge that needs the urgent attention of the relevant authorities. Addressing the issue of delayed judgments, the Supreme Court of Appeal of South Africa[38] found that:

> There are some who believe that requests for "hurried justice" should not only be met with judicial displeasure and castigation but the severest censure […] and that any demand for quick rendition of reserved judgments is tantamount to interference with the independence […] judicial office and disrespect for the judge concerned. They are seriously mistaken on both counts. Firstly, the parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer is unsatisfactory, they are entitled to complain. The judicial clock is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that judges are imperious. Secondly, it is judicial delays rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted aphorism, namely that 'Justice delayed is justice denied' will become a mere platitude.

18.7.2 *Itula & Others v Minister of Urban and Rural Development & Others*[39]

On 17 October 2014, the then Minister responsible for regional and local government, Charles Namoloh, published a notice in the Government Gazette putting into operation the Electoral Act 5 of 2014 (the Act). The Minister determined

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38 *Pharmaceutical Society of South Africa and Others v Tsabalala-Msimang and Another NNO: New Clicks South Africa (Pty) Ltd v The Minister of Health and Another 2005* (3) SA 238 (SCA) at 260H to 262A, as highlighted in CL Kavendjii & N Horn (2008) "The independence of the legal profession in Namibia" in N Horn & A Bösl (eds) *The independence of the Judiciary in Namibia,* McMillan Education Namibia, 305.

39 For a full judgment *of the Itula & Others v Minister of Urban and Rural Development & Others* case visit: <https://ejustice.moj.na/Supreme%20Court/Judgments/Pages/default.aspx> or <https://namiblii.org/na/judgment/supreme-court/2020/6>.

that the Act would come into operation on the date of the publication of the notice in the Gazette. However, such promulgation, according to the Minister, excluded the provisions of subsections (3) and (4) of section 97 of the Act. Section 97 makes provision for the use of voting machines in elections. The subsections that were excluded from coming into operation with the rest of the section provide that the use of voting machines was subject to the simultaneous utilisation of a verifiable paper trail and that where the results of the voting machines and the results of the paper trail did not agree, the paper trail results were to be accepted as the election outcome for the polling station concerned. The partial promulgation of the Act meant that elections conducted after the Act came into operation would take place by way of voting machines, but without a verifiable paper trail.

In this case, the applicants[40] were all candidates in the 2019 Presidential election, held together with the election of members of the National Assembly, on 27 November 2019. The election took place without a verifiable paper trail. The applicants approached the Supreme Court with the application for the court to set aside the 2019 Presidential election and order fresh elections 'without undue delay'.

The applicants argued that for the result of the Presidential election to be set aside, the court should first set aside the decision of the Minister to partially put into operation section 97 of the Act. The applicants alleged that the selective implementation of section 97 amounted to a breach of the constitutional principles of separation of powers, democracy and the rule of law. They also asked that the decision of the Electoral Commission of Namibia (ECN) to use electronic voting in the election without a paper trail be set aside.

The applicants also referred to a number of alleged irregularities relating to the use of Electronic Voting Machines (EVMs) during the election and to concerns relating to the safe custody of EVMs before the election.

The respondents opposed the application on the merits and raised certain preliminary points of law. They argued that the court did not have jurisdiction and the competency to set aside the decision of the Minister and to set aside the decision of the ECN to use EVMs without a paper trail. They asserted that section 172 of the Act does not authorise the Supreme Court to grant relief relating to the Minister's decision as a court of first instance and final recourse as such decision is not related to the Presidential election. The applicants should have gone to the High Court, which according to the respondents is the correct place to decide the issues raised by the applicants.

40 The application was brought in terms of section 172 of the Act, which says, in effect, that any challenge relating to the return or outcome in a Presidential election must be decided by the Supreme Court as a court of first and final instance.

The respondents also argued that the applicants unreasonably delayed launching proceedings reviewing the Minister's decision. They said that the decision was made in 2014; the applicants had known about it since then. Some of the applicants participated in the 2014 elections as Presidential candidates, but did not challenge the legality of that election. It was also the respondents' position that the issue of the lawfulness of conducting elections with EVMs but without a paper trail had already been tested and determined by the High Court in Maletzky & Others v Electoral Commission of Namibia & Others 2015 (2) NR 571 (HC). They submitted that this judgment was not appealed against. It remained the law on that issue until such time that it had been set aside by the Supreme Court. The ECN was therefore entitled to rely on it. Having considered the application, the Supreme Court held:

a) That the applicant's challenge falls within the provisions of section 172 of the Act. Therefore, the Supreme Court has jurisdiction to entertain the application;

b) That the narrow approach to the interpretation of section 172 proposed by the respondents was not consistent with the use of the wide word 'any' in the section. The position is also contrary to the constitutional values the electoral law seeks to promote;

c) That although the applicants should have challenged the Minister's decision well before elections, given the important constitutional issues being raised in the application, the matter must be heard and the issues decided;

d) That the Minister's determination was, accordingly, unconstitutional and invalid and was therefore set aside. The use of the phrase 'subject to' in section 97(3) meant that the use of EVMs under section 97(2) is conditional upon complying with section 97(3) and (4) of the Act. The court reasoned that section 97 was a composite and integrated provision and as such, subsections (3) and (4) were required to be put into operation together with the first two subsections;

e) As to the allegations of irregularities, the court held that there was no evidence of irregularities or of the impact the alleged irregularities has had on the Presidential election; and

f) In determining the appropriate relief, the court considered Article 25 of the Namibian Constitution and other relevant factors and <u>declined to set aside the election and direct a rerun</u>.

In this case, the SCN clarified key constitutional issues around the EVMs, which it rules that the use of the machines without a paper trail, as decided on before the 2014 elections, was invalid. The setting aside of the decision of the Minister was equally important as it sent a strong message to Ministers and others holding public

offices to remind and urge them to take decisions in the public interest and avoid abusing power and public offices.

To the credit of the Supreme Court, this case was speedily resolved and judgment was delivered within the stipulated 14 days. The speedy delivery of judgment by the SCN boded well for the court. As in the previous case of Rally for Democracy and Progress and Others, the SCN judgment maintained the *status quo* by declining to set aside the election and direct a rerun.

18.8 WHAT DO THE SUPREME COURT JUDGMENTS INDICATE?

Despite the serious nature of the allegations against the election management body and alleged irregularities in previous elections (especially 2009) in the country, the SCN has so far not been convinced that the credibility of the 2009 and 2019 elections was put in doubt or the outcome was affected to the extent of necessitating a re-run of the elections.[41] Following a petition to challenging the December 2012 elections, Ghana's Supreme Court[42] stated to this effect:

> For starters, I would state that the judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives, in public interest, to sustain it.

The two cases[43] offered the Supreme Court an opportunity to deal with crucial legal and constitutional issues. It addressed general election governance and legislative matters. In that context, this was a victory for democracy and the *rule of law*.[44] However, the two cases upheld the *status quo*, this was a victory for

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41 Examples of elections disputes from other jurisdictions thrown out by the courts on procedural technicalities, thus maintaining the *status quo*: *Atiku Abubakar & Others v Umaru Musa YarsaYa & Others* SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008; *John Opong Benjamin & Others v National Electoral Commission & Others* SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013]; *Mwai Kibaki v Daniel ToroitichiArapMoi* Court of Appeal Civil Application 172 [Election Petition 1of 1998].

42 See the majority judgment of Atuguba JSC in *Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others* J2/6/2013, taken from O'Brien Kaaba (2015) "The challenges of adjudicating presidential election disputes in domestic courts in Africa" Vol. 15 *African Human Rights Law Journal* 335. <https://ghalii.org/gh/judgment/supreme-court/2013/5>.

43 *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012); and *Itula& Others v Minister of Urban and Rural Development & Others* (A 1/2019) [2020] NASC 6 (05 February 2020).

44 The notion of the rule of law implies a judiciary sufficiently independent of the legislature and the executive to ensure that the country is governed according to the principles of the constitution. See, A Boesl, N Horn & A Dupisani (2010) "Introduction" in *Constitutional Democracy in Namibia-A critical analysis after two decades* Mcmillan Education Namibia: Windhoek, iii. Thus, the rule of law is a necessary condition for democracy and sustainable development.

the ruling SWAPO party and the incumbent president Dr Hage G. Geingob. The opposition parties, again, failed in their attempt to have the elections set aside and for the court to order a rerun.

By maintaining the *status quo* in the interest of continuity, political stability and public interest, the SCN has shown a certain amount of reluctance to *"rock the political boat"*. This has left many people questioning the fair and speedy adjudication of election cases and the resulting judgments, delayed in certain instances. Furthermore, it may breed reluctance among contesting parties to approach the court in future to provide legal guidance without its decision being inhibited or predicted with a high degree of certainty. In that regard, the SCN needs to do more to project and enhance positive confidence in the public, in particular as far as addressing internal bureaucracy and delays in such important, sensitive and delicate (elections) matters of high public interest are concerned.

At present, its judgments in elections cases may have dented the confidence of the opposition parties, as they perceive its decisions to be unfair towards them (or that the law is interpreted and applied selectively). Such perceptions have the potential to shake political parties and their supporters' confidence in the SCN and the judiciary in general.[45] Thus, a lot remains to be done by the SCN and the judiciary to regain the confidence of the parties and those that have openly expressed some doubt in the fairness of the court judgments. However, one needs to take cognisance of the fact that courts are a part or segment of a political establishment of any nation, and that this may hinder or put limitations to it.

18.9 THE WAY FORWARD

Given that an independent and functioning judiciary is an important pillar of democracy, the role of the SCN as a key player in the democratic space remains relevant. The laws which guide the SCN and other lower courts in the country are well documented. The Namibian people continue to look to the SCN for legal and constitutional guidance. Justice Shivute, the head of the SCN, reiterated under 3(c) of the Rules of Judicial Conduct in Namibia that, "[…] it is public confidence in the independence of the judiciary, in the integrity of judges, and in the impartiality and effectiveness of its processes that sustain the judicial system of a democratic country". While one concurs with the statement, it is equally crucial that the court does more to win the hearts and minds of the people of Namibia and assert its role as the only place with a final and 'fair' say in all disputes. This remains a target that is still to be achieved. This is why the drafters of the Namibian Constitution afforded the judiciary protection under Article 78(3). It states:

> No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial

45 For example, the conduct of judicial officers (judges) before the delivery of the final judgment in the 2009 election challenge had send mixed signals. It left people asking many questions.

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

As law abiding citizens, it is our collective responsibility to support the judiciary and allow it space to do its work unhindered. However, it is equally our responsibility as citizens who have to live with the consequences of SCN decisions, as a court of final say, to expect fairness and speedy delivery of judgments to represent the wishes, values and principles of a modern and fast changing and diverse society where the fairness of its judgments come under public scrutiny and can cause unhappiness and protracted public debate (including criticisms). Thus, the SCN needs to take urgent action to strengthen internal processes to respond positively to public concerns as this can strengthen our judiciary.

What may weaken the judiciary is the idea of complete denial that the SCN or other courts may adjudicate justice fairly, all the time. Judges are human beings and they are not immune from temptations and possible influence from people who are well placed or powerful. 'The relative but not absolute insinuation of the judiciary means that it is apart from politics but still influenced by political forces. Those forces operate both to protect judges and, at times, to threaten them. The observable result of this is some tempering in the direction of judicial decision making towards public opinion, although the mechanism of this is not entirely clear'.[46] Future generations expect of us collectively to guard against our hard-won independence, and the democratic institutions (the judiciary being one of them) which define our existence in a democracy. Thus, the SCN is central to bringing value to such expectations.

18.10 CONCLUSION

After 30 years of independence, it is safe to state that the administration of justice in Namibia is still filled with challenges that hamper the fair adjudication of difficult electoral cases. How those challenges are addressed would determine how the SCN in particular, and the judiciary in general, respond to the pertinent needs of society and how future electoral disputes and governance are addressed. Ultimately, that may help to safeguard and grow confidence in our young and fragile democracy right into the future for the next generation. Certainly, a lot of work remains ahead for the SCN as the highest court in the country to set a good example in the construct of nation building.

[46] JB Diescho (2010) "The paradigm of an independent judiciary: Its history, implications and limitations in Africa" in N Horn & A Boesl *The independence of the judiciary in Namibia,* McMillan Education Namibia: Windhoek, 27.

CHAPTER 19

Interpreting the right to equality of minorities in Namibia in light of *Ubuntu*: Lessons from South Africa's case law

Kelvin C. Vries

19.1 INTRODUCTION

The adoption of the Namibian Constitution has not ended questions about the legitimacy of the country's supreme law.[1] A critical threat to the realisation of human rights in Namibia is the gradual regression back to formalism and the over-reliance on individualism in constitutional adjudication.[2] It is precisely because of the unchecked loyalty to positivism and formalism that judges could ignore the immorality of apartheid laws.[3] This is especially true with respect to the recognition of equality and non-discrimination of persons. 'One of the greatest challenges to a sound understanding of the right to equality in Namibia concerns claims that the right to equality has been infringed on a ground not expressly enumerated in the Constitution'.[4] According to Zongwe, 'the challenge of enumerated grounds seems unsurmountable as the Supreme Court in *Muller*[5] declared that the prohibited grounds of discrimination is not open-ended, mirroring as it does historical forms of discrimination'.[6]

As will become evident however, that these are not the only grounds upon which persons have been historically and systematically discriminated against. The formal and individualistic orientated reading of the equality and non-discrimination clause still leads to arbitrary outcomes such as non-egalitarian judgements[7] despite the egalitarian aspirations of the Constitution. Based on the experiences in

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1 MO Hinz (2008) "Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world" in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* Mcmillan Education Namibia: Windhoek, 12.

2 JN Horn (2016) *Interpreting the interpreters: A critical analysis of the interaction between formalism and transformative adjudication in Namibian constitutional jurisprudence 1990-2004* KAS: Windhoek, 304.

3 J Dugard (1971) "The judicial process, positivism and civil liberties" Vol. 88 *South African Law Journal* 181-200.

4 DP Zongwe (2010) "Equality has no mother but sisters: The preference for comparative law over international law in equality jurisprudence in Namibia" in M Killander (ed) *International law and domestic human rights litigation in Africa* 130.

5 *Muller v President of the Republic of Namibia (*SA 2-98) [1999] NASC 2, 200(6) BCLR 655 (NmS) (21 May 1999).

6 Zongwe (Note 4 above) 130.

7 *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC) [*Frank case*]; *LM* v Government of the Republic of Namibia 2014 SA 49/2012 NASC 19 [*LM* Case].

South Africa, a value-orientated or substantive reading of the Constitution is likely to produce more progressive outcomes and thus provide the best interpretation of equality. Without an alternative, the Constitution's aspiration to cultivate a truly equal society may find itself in disrepute and potentially underscore the legitimacy of the entire constitutional dispensation and the protection of fundamental human rights in the country.

The case studies in this chapter are limited to two minority groups: HIV positive persons and sexual minorities. The focus on these groups is motivated by two reasons. Firstly, neither is explicitly mentioned as ground of non-discrimination in the equality and non-discrimination clause, thus raising questions about the scope of protection afforded to minorities that fall outside the listed groups in Article 10(2) of the Namibian Constitution.[8] Secondly, the Supreme Court has in two different rulings refused to invoke the equality and non-discrimination clause in favour of the protection of these two minority groups.[9] By reading these two judgments through the lens of *ubuntu*, this chapter provides an opportunity to re-imagine equality jurisprudence in such a way that brings it closer to the achievement of an egalitarian Namibia.

The chapter briefly introduces the concepts and tenets of ubuntu. Thereafter, it combines both theory and practice, demonstrating how *ubuntu* can be construed as a Namibian value, norm and aspiration on the one way, and how it can be elevated to a constitutional value on the other - using constitutional, political and cultural indicators. Inspiring from the South African case law, the chapter shows how the minority rights of HIV positive persons and sexual minorities in Namibia could be better protected against discrimination where *ubuntu* was elevated to a constitutional value.

19.2 THE CONCEPT AND TENETS OF UBUNTU

The concept of *ubuntu* has originated in the Bantu languages of Southern Africa[10] - particularly *Nguni*. It finds meaning from the Zulu expression *'umuntu ngumuntu ngabantu'* or the Sotho expression '*Motho ke motho ka batha ba bang'* which is loosely translated to mean 'a person is a person through others' or 'I am, because we are' respectively.[11] The underpinning idea behind *ubuntu* is that a person cannot exist as a human being in isolation and that the individual's whole existence is relative to a group.[12] It is due to this broad understanding of *ubuntu* that it is argued

8 Article 10(2) of the Namibian Constitution states that 'No persons may be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status'.

9 *Frank* case (Note 7 above).

10 D Kuwali (2014) "Decoding Afrocentrism: Decolonising legal theory" in O Onazi (ed) *African legal theory and contemporary problems*: *Critical Essays* 84.

11 MP More (2004) "Philosophy in South Africa under and after apartheid" in K Wiredu (ed) *A companion to African philosophy* Wiley-Blackwell: Cornwall, 157.

12 JY Mokgoro (1998) "Ubuntu and the law in South Africa" Vol. 1(1) *Potchefstroom Electronic Law Journal* 18.

that a definition is unattainable as 'any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea'.[13] In a set of interviews conducted to find indigenous interpretations of *ubuntu*, many of the participants relied on examples to illustrate their understanding of *ubuntu*.[14] This is perhaps why Justice Mokgoro in her own experience holds that *ubuntu* is 'one of those things that you recognise when you see it'.[15] Nevertheless, *ubuntu* places emphasis on communality and on the interdependence of the members of a community and often associated with group solidarity and collective unity.[16] This denotes communitarianism as a central tenet of *ubuntu.* Communitarianism, however, is not particular to *ubuntu;* it even features in Western discourse which makes it necessary to emphasise the distinctiveness of communitarianism as understood in African societies and as fostered by *ubuntu.*

Communitarianism is commonly understood in moderation with the region you find yourself in. As a contemporary movement, African communitarianism can be traced to the independence of African states beginning in the 1960s under the guardianship of leaders like Leopold Sedar Senghor of Senegal, Kwame Nkrumah of Ghana and Julius Nyerere of Tanzania.[17] It formed part of a broader mission towards self-determination, decolonisation and later the African renaissance.[18] Senghor's emphasis on communitarianism in particular provides insight into the distinction between Negro-African societies and collectivist European societies, as he puts it:

> I would say that the latter is an assembly of individuals. The collectivist society inevitably places the emphasis on the individual, on his original activity and his needs. In this respect, the debate between ''to each according to his labor'' and ''to each according to his needs'' is significant. Negro-African society puts more stress on the group than on the individual, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on their autonomy. Ours is a community society. This does not mean that it ignores the individual, or that collectivist society ignores solidarity, but the latter bases this solidarity on the activities of individuals, whereas the community society bases it on the general activity of the group.[19]

13 Ibid, 19.

14 CBN Gade (2012) "What is ubuntu? Different interpretations among South Africans of African Descent" Vol. 31(3) *South African Journal of Philosophy* 487-493.

15 Mokgoro (Note 12 above) 18.

16 *S v Makwayane* 1995 (3) SA 391 (CC) 224, Langa J.

17 DA Masolo (2004) "Western and African Communitarianism" in K Wiredu (ed) *A companion to African philosophy* Wiley-Blackwell: Cornwall, 488.

18 CG Thomas (2009) "Ubuntu: The missing link in the rights discourse in post-apartheid transformation in South Africa" Vol. 3(2) *International Journal of African Renaissance Studies* 45.

19 M Cook (ed) (1964) *On African socialism* FA Praeger: New York, 93-4.

The Western understanding of communitarianism is generally seen to be the antithesis of individualism.[20] This is because - evident from the writings of Taylor, MacIntyre and the German philosopher Hegel - the development of Western communitarianism was against the brand of individualism.[21] In Germany, the rise of communitarianism was a result of critique and rejection of the liberal ideology of individualism dominant in French and British philosophy in the eighteenth century.[22] Individualism connotes that 'the sovereignty of the individual was the ultimate and only source of group authority, and the community was only aggregate – a mere union, whether close or loose – of the wills and powers of individual persons'.[23] The individual is conceived differently in *ubuntu* societies that harbour African communitarianism. As Bennet puts it, '[t]he Western conception of dignity envisages the individual as the right-bearer, whereas *ubuntu* sees the individual as embedded in a community.'[24]

19.2.1 *Ubuntu* as a moral theory

Scholars that engage *ubuntu* as moral theory tend to rely on its relation to humanness and human dignity. This was the trend on virtually all writings on *ubuntu* prior to the 1960s.[25] 'As a moral or ethical concept, [*ubuntu*] is a point of view according to which moral practices are founded exclusively on consideration and enhancement of human well-being.'[26] Metz's moral theory for *ubuntu* is that 'actions are right, or confer *ubuntu* (humanness) on a person, in so far as they identify with each other, or share a way of life, and exhibit solidarity toward one another, or care about each other's quality of life'.[27] This understanding of the concept is important to develop it as an autocentric principle that is distinctively African.[28] Not all share this view. In the debate about the ambiguity of *ubuntu*, Himonga and Taylor with reference to Mokgoro's J judgement in *Makwanyane* are of the view that describing *ubuntu* as simply 'morality' is unhelpful and raises further question about the ambiguity of *ubuntu.* A closer look at the paragraph to which they refer however, shows that Mokgoro J's description of *ubuntu* as personhood and morality was with respect to *ubuntu* in its '*most fundamental sense';*[29] reinforcing the view that the study of *ubuntu* as moral theory is in fact a metaphysical analysis - a necessary venture if we intend to safeguard the integrity of *ubuntu* in the law.

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20 Masolo (Note 17 above) 483.
21 Masolo (Note 17 above) 487.
22 Masolo (Note 17 above) 485.
23 Masolo (Note 17 above) 487.
24 T Bennet (2011) "Ubuntu: An African Equity" Vol. 14(4) *Potchefstrrom Electronic Law Journal* 48.
25 CBN Gade (2011) "The historical development of the written discourses on *ubuntu*" Vol. 30(3) *South African Journal of Philosophy* 306 - 309.
26 More (Note 11 above) 157.
27 T Metz (2011) "Ubuntu as a moral theory and human rights in Africa" Vol. 11(2) *African Human Rights Law Journal* 559.
28 J van Niekerk (2008) "In defence of an autocentric account of ubuntu" Vol. 26(4) *South African Journal of Philosophy* 364-368.
29 Makwanyane (Note 16 above) 307, Mokgoro J.

19.2.2 *Ubuntu* as a philosophy of life or worldview

The working definition offered by Radebe and Phooko presents *ubuntu* as a philosophy of life. According to Radebe and Phooko, *'ubuntu* is a way of life of the African people [...] [that] permeates every aspect of their everyday existence and interactions with each other and the world at large'.[30] Over centuries ago 'indigenous African people had well developed philosophical views about the worth of human beings and about desirable community relationships. A spirit of humanism called *ubuntu'.* In essence, it is a principle for all forms of social or political relationships.[31] 'It enjoins and seeks for peace and social harmony by encouraging the practice of sharing in all forms of communal existence. *Ubuntu* in this sense expresses an understanding that a societal bond and forms the basis for consensus.'[32] Notwithstanding that the African worldview cannot be neatly categorised and defined;[33] *ubuntu* is nevertheless described as a world view of African societies and as a philosophy of life. [34] It finds parallels in other African concepts such as *Ujamaa* in Tanzania[35] and *Uushiindaism* in Namibia.[36] Cornell agrees that *ubuntu* should be understood as part of the rich intellectual heritage of African Humanism.[37]

19.3 *UBUNTU* AS A CONSTITUTIONAL VALUE

Constitutional adjudication is particularly appealing to infuse in constitutional discourse an indigenous footprint because it allows 'different traditions of interpretation in modern constitutionalism – liberalism, communitarianism and nationalism, among others – [to] compete to control the way' in which the law is understood.[38] This is most likely why the, "indigenous African contribution to

30 SB Radebe & MR Phooko (2017) "Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu" Vol. 36(2) *South African Journal of Philosophy* 240.

31 More (Note 11 above) 157.

32 Ibid.

33 Mokgoro (Note 12 above) 18.

34 Kuwali (Note 10 above) 84.

35 Radebe, & Phooko (Note 30 above) 247. (*Ujamaa* is usually translated as "familyhood," it was a form of African socialism that blended broadly conceived socialist principles with a distinctly "communitarian" understanding of African societies, and a strong commitment to egalitarian societies).

36 PA Mbenzi & SN Ashikuti (2018) "Uushiindaism as a collective poverty alleviation mechanism and social support" Vol. 3(1) *Journal of University of Namibia Language Centre* 131. (*Uushiindaism* refers to the quality of being humane to other people showing kindness, love and compassion. It involves caring for one another, interdependence, brotherhood and fictive kinship by people who live in close proximity).

37 D Cornell (2015) *Law and revolution in South Africa: Ubuntu, dignity and the struggle for constitutional transformation* Fordham University Press: New York, 151.

38 DB Maldonado (2013) "Introduction: Towards a constitutionalism of the Global South" in DB Maldonado (ed) *Constitutionalism and the Global South: The activist tribunals of India, South Africa and Colombia* Cambridge University Press: Cambridge, 1.

constitutional law principles, doctrines and theory... is more often than not, reflected in constitutional interpretation and application rather than constitutional texts”.[39]

Broadly speaking, certain judiciaries in Africa have operationalised *ubuntu* in constitutional adjudication either through constitutional *text* or more commonly via constitutional *interpretation*. South Africa has done both. The Interim Constitution of South African made explicit mention of the term *ubuntu* in the post-amble under the title ‘National Unity and Reconciliation’. It declared that ‘there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation’. For some unknown reason, the explicit reference to *ubuntu* in the Interim Constitution was not translated into the Final Constitution. This omission did not distinguish robust debate about the place of indigenous values in constitutional adjudication; it did most likely however ignite those debates, later transcending to the *Makwanyane* judgment - decided under the Interim Constitution. This may explain why the absence of *ubuntu* from the Namibian Constitution never sparked similar discourse at the time.

While cases in African jurisprudence have referenced *ubuntu* in constitutional adjudication such as in Uganda, Tanzania and Lesotho,[40] it is only in South Africa where it has been explicitly used by the highest court to give content to rights as a constitutional value.[41] In this respect, it would be incorrect to say that the infusion of *ubuntu* into constitutional adjudication in South Africa is exclusively or substantially due to the explicit mention of *ubuntu* in the Interim Constitution as this would be an incomplete reflection of the development of the equality jurisprudence in South Africa. Instead, it would be wiser to attribute this development to constitutional interpretation. There have been deliberate strives by Justices of the Constitutional Court of South Africa to cultivate indigenous jurisprudence beyond the hegemonic standards that persist in human rights discourse. In fact, these ventures have been the legacies of Justices such as Justice Mokgoro and Justice Sachs. Justice Mokgoro ‘argued strongly throughout her time on the Bench that the African value of *ubuntu* be operationalised in legal judgments and discourse’.[42] The advocacy of *ubuntu* as a legal notion at the level of constitutional interpretation has worked as a catalyst to elevate *ubuntu* to a constitutional value.

Using the authority of the South African Constitutional Court, Tshoose is of the view that the ‘range of constitutional values contained in the Constitution does not constitute *numerous clauses,* and that other values can also be elevated

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[39] CM Fombad (2016) “The evolution of modern African Constitutions: A retrospective perspective” in CM Fombad (ed) *Separation of powers in African constitutionalism* Oxford University Press: Oxford, 38.

[40] *Salvatori Abuki & Another v Attorney-General* [1997] UGCC; *Director of Public Prosecutions v Pete* [1991] TZCA 1; Mokoena v Mokoena [2007] LSHC 14 (16 January 2007).

[41] Gade (Note 14 above) 487.

[42] N Bohler-Muller, M Cosser & G Pienaar (2018) *Making the road by walking: The evolution of the South African Constitution* Pretoria University Law Press: Pretoria, 21.

to this status' albeit unwritten ones.[43] Mundia shares similar sentiments in the context of Namibia, stating that Namibian values go far beyond those articulated by the Constituent Assembly.[44] By elevating *ubuntu* to a constitutional value, the Constitutional Court reinforces the fact that the range of constitutional values contained in the Constitution does not constitute an exhaustive list.[45] This interpretation is consistent with Dworkin's constructive interpretation.[46] It further provides that principles are not either applicable or inapplicable, but instead have to be weighed against each other.[47] 'When principles intersect… one who must resolve the conflict has to take into account the relative weight of each'.[48]

Generally, constitutional principles and values are abstract notions that are difficult to define. The fact that they are adaptable, contested, evolving and somewhat open-ended is partly what gives the Constitution its flexibility and transformative power.[49] The advantage that other ethically loaded constitutional concepts such as dignity, freedom and equality have over *ubuntu* is that their theorising over centuries has led to some shared and accepted understanding of the concepts. It would be a premature restriction on its function to demand a precise definition of *ubuntu* at this stage.[50] It is therefore, in the words of Himonga & Taylor, that we must[51]:

> [S]trive towards a shared and accepted understanding of *ubuntu* for the purposes of communication about how to interpret the Bill of Rights and other aspects of a democratic society based on dignity, freedom and equality. This desired understanding may take a long while to emerge concretely. Consequently, when the judiciary applies *ubuntu* as a constitutional value, inevitably it attempts to define it to make its normative content clearer for the context consideration. Explaining the "meaning" of the concept simultaneously involves outlining the values to which it is bound. It is not purely "descriptive" or non-normative task.

In this respect, Kroeze notes that the concept of *ubuntu* is altered in the process of functioning within the rights discourse.[52] This is to suggest that 'once the judiciary begins to interpret a concept within a particular legal setting, its content

43 CI Tshoose (2009) "The emerging role of the constitutional value of ubuntu for informal social security in South Africa Vol. 3 *African Journal of Legal Studies* 17.

44 KF Mundia (2014) "Ronald Dworkin and the Supreme Court of Namibia" unpublished PhD thesis, University of Pretoria, 86.

45 Tshoose (Note 43 above) 17.

46 Mundia (Note 44 above) 86.

47 FC de Graaf (2015) "Dworkin's Constructive interpretation as a method of legal research" Vol. 12 *Law and Method* 4.

48 R Dworkin (1977) *Taking rights seriously* Harvard University Press: Cambridge, 26.

49 C Himonga, M Taylor & A Pope (2013) "Reflections on judicial views of ubuntu" Vol. 16(5) *Potchefstroom on Electronic Law Journal* 386.

50 Bennet (Note 24 above) 47.

51 Himonga & Taylor (Note 49 above) 378.

52 IJ Kroeze (2002) "Doing things with values II: The case of ubuntu" Vol. 13(2) *Stellenbosh Law Review* 252-253.

will inevitably become tied to these interpretations.'[53] In the venture towards indigenous constitutionalism, it is essential that we stay wary of the risks that come with attempts to give legal meaning to a multi-dimensional concept in a foreign language and within a 'foreign' framework. It should further be noted according to Keep and Midgley that *ubuntu* -

> [I]tself has not become a law: it remains no more than one of the values against which laws must be measured. In other words, through the process of reinstitutionalisation, the custom of *ubuntu-botho* has become justiciable.

On another note, English is of the view that constitutional adjudication is about conflict not harmony and that *ubuntu* places disproportionate emphasis on the latter. [54] And so 'bound to fail' are the last three words in her 'Quest for an indigenous jurisprudence'. According to Radebe and Phooko, however, English's view has no merit as she seems to confuse *ubuntu* with the dispute resolution mechanisms in African customary law where the latter is rooted in consensus-seeking, conciliation/ mediation and co-operation.[55] English is also of the view that *ubuntu* as a distinct concept of justice would be useful or enlightening to constitutional discourse only 'if it played more of a role in cases where rival interests – those of the individual and those of the community – collide'.[56] Even proponents of *ubuntu* caution that we must at least be wary of assumptions about the clash between *ubuntu* and liberalism.[57] While this may be useful, this view undermines the potential of *ubuntu*. English's position perceives Western legal thought as contrary to indigenous values and pins the two against one another, suggesting that they cannot be harmonised. By proposing that indigenous values are only relevant to counter individualism, English limits the discourse about indigenous jurisprudence to the liberal framework. In this way, English confuses African communitarianism for Western communitarianism.

Lastly, Bekker views - perhaps the most pragmatic - puts forth that if *ubuntu* were to be operationalised, 'the concept will have to be redefined to link the value systems of both the original indigenous law and Western law with each other'.[58] In other words, Bekker is of the view that *ubuntu*'s best chance of informing constitutional values is when it is *harmonised* with Western law. Keep and Midgley share this view, stating that it is possible 'to harmonise values that arise from diverse and essentially foreign sources' such as 'those from Roman and African legal cultures'.[59]

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[53] Himonga & Taylor (Note 49 above) 376

[54] R English (1996) "Ubuntu: The quest for an indigenous jurisprudence" Vol. 12(4) *South African Journal on Human Rights* 648.

[55] Radebe & Phooko (Note 30 above) 248.

[56] English (Note 54 above) 648.

[57] Himonga & Taylor (Note 49 above) 378.

[58] T Bekker (2006) "The re-emergence of *ubuntu*: a critical analysis" Vol. 21(2) South African Public Law 344.

[59] Keep & Midgley (Note 59 above) 47.

19.4 UBUNTU AS A NAMIBIAN VALUE, NORM AND ASPIRATION

If Namibian Courts are to bring meaning to *ubuntu* as understood by Namibians, the Court cannot rely on Zulu and Sotho maxims to do so. Although it may help, a general discussion about how *ubuntu* forms part of African culture is equally inadequate to consolidate its place as a Namibian value. As Horn correctly states, 'the problem is not bringing values into the process, but the structural way in which values are brought in. Determining the values is often *ad hoc* without substantive justification for the processes'.[60] To achieve this standard, a multidisciplinary interrogation of the notion of *ubuntu* is required, one that is anthropological and borrows from politics, culture and legal studies, to mention but a few. This study alone cannot achieve this but serves as a much-needed starting point. Thereafter, I asses value-based judgments as understood by Namibian Courts. I then turn to two Namibian cases in which Courts have fallen short of recognising the discrimination that persists against persons who are HIV positive persons or belong to sexual minorities, and in this way expose the deficiencies in Namibia's equality jurisprudence.

19.4.1 Constitutional indicators

The precedence by the South African Constitutional Court demonstrates that as long as a particular value permeates the Constitution in general and the Bill of Rights in particular, it is eligible for value status in constitutional interpretation. [61] Mundia is of the view that the implications of a constructive interpretation of the Namibian Constitution is that courts have regards to rights and moral values that may go far beyond what has been posited by the Constituent Assembly.[62]

a) The preamble

According to Wing, 'in addition to incorporating the individualist vision of democracy, the Namibian Constitution contains various provisions acknowledging the country's communitarian heritage'.[63] The Constitution strongly suggests that Namibia could easily be classified as a liberal communitarian state. The first paragraph of the preamble states that: 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 […]

Zaire makes a link between the recognition of humanism in the preamble and the concept of *ubuntu* which has as its basis the essence of the being human. He notes that 'the recognition of a human and reference to the individual as well as the human family is against the realisation that, everything we do as humans, are underpinned

60 Horn (Note 2 above) 57-58.
61 *Makwanyane* (Note 16 above) 237.
62 Mundia (Note 44 above) 86.
63 AK Wing (1992) "Communitarianism vs Individualism: Constitutionalism in Namibia and South Africa" Vol. 11(2) *Wisconsin International Law Journal* 341.

by interrelationships, interconnectedness and reliance on each other'.[64] It is against this background that Zaire argues that the Namibian Constitution is crafted around the concept of *ubuntu.*[65]

b) Recognition of customary law

For Zongwe, an important constitutional provision that may serve to legitimise *ubuntu* as a value is found in Article 66(1) of the Namibian Constitution.[66] The Article recognises customary law at an equal footing to common law, declaring both 'valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.' Zongwe encourages courts to deploy *ubuntu* in cases involving dignity, using Article 66 which recognises the validity of customary law which embodies 'the ethos of *ubuntu'*.[67] However, article 66 as the basis of legitimising the elevation of *ubuntu* to a legal notion may create the impression that *ubuntu* and customary law are synonymous. In this regard, Himonga et al state that:

> While it is obvious that *ubuntu* and customary law are not synonymous, it ought to be equally obvious that as a fundamental value that informs the regulation of African interpersonal relations and dispute resolution, *ubuntu* is inherent to customary law.[68]

The risk nevertheless persists. Using Article 66 as the primary foundation for the recognition of *ubuntu* in the constitution may bear a kind of conservative communitarianism unless qualified some way or another.[69] This conservative communitarianism understanding of *ubuntu* would for example permit the viewing of 'homosexuality as immoral or as a hindrance to the healthy development of sexuality and hence unworthy of state support' as opposed to the egalitarian communitarianism that takes a different approach - 'the more choices, including sexual choices, the better'.[70] Therefore, while harmful customary laws can easily be qualified by the Bill of Rights as suggested by Zongwe, it seems best to clearly disassociate *ubuntu* from the patriarchal baggage associated with many cultural practices. As I have already shown, *ubuntu* is not inherently in conflict with the spirit of the Bill of Rights. An egalitarian understanding of *ubuntu* favours an emphasis on the shared values between *ubuntu* and the Constitution itself – that of communality,

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64 DU Zaire (2014) "Constitutional Democracy in Namibia: 25 years on" in N Horn & M Hintz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* KAS: Windhoek.

65 Zaire (Note 64 above) 75.

66 DP Zongwe & B Tjatjara (2020) "Making dignity supreme: The Namibian Supreme Court's dignity jurisprudence since independence" <https://www.academia.edu/44124974/Making_Dignity_Supreme_The_Namibian_Supreme_Courts_Dignity_Jurisprudence_Since_Independence> 14.

67 Zongwe (Note 66 above) 14.

68 Himonga & Taylor (Note 49 above) 371.

69 W Brugger (2004) "Communitarianism as the social and legal theory behind the German Constitution" Vol. 2 *International Journal of Constitutional Law 39*.

70 Brugger (Note 69 above) 454-455.

equality, dignity and the fabrication of a caring society – as opposed to an emphasis on *ubuntu's* inherency to customary law. This position does not prevent Courts drawing from cultural practices in order to give substantive meaning to the value of *ubuntu* as understood in a particular society; it simply holds those cultures to the account of the highest expression of the values and norms of the Namibian people: the constitution.[71] Nevertheless, the inclusion of Article 66 *itself* is a showcase of inclusiveness, particularly cultural inclusivity - an important attribute of *ubuntu*.

c) The fabrication of a caring society

Professor Horn correctly holds that 'The [Namibian] Constitution has definite elements of a caring society'[72]. Particularly, Article 95 makes provision for principles of state policy. It mandates the state to promote and maintain the welfare of the people by adopting various policies. Such policies, among others, relate to ensuring the health and strength of workers and children; the active encouragement of the formation of independent trade unions; access to pension and social benefits; promotion of justice on the basis of equal opportunity by providing free legal aid and an acceptable level of nutrition and standard of living. As a principle of state policy, the Constitution also refers to third generation rights, stating that the utilisation of living natural resources shall be on a sustainable basis for the benefit of all Namibians, both present and future. While the principles of state policy are not in themselves enforceable in any Court, the Courts are nevertheless entitled to have regard to the said principles in interpreting any laws based on them.[73]

d) The prioritisation of social justice

The Constitutional Court of South Africa has held that the concept of *ubuntu* in it carries the idea of social justice.[74] The affirmative action provision of Namibia is a powerful showcase of the Constitution's communitarian priorities. In my view, Article 23 is the most explicit indication that Namibia is an egalitarian communitarian society - or at least aspires to be. This provision in one sweep prioritises substantive equality and communitarianism above the individual right to equality. Equal opportunity is re-iterated as a principle of state policy.[75] Some have argued that redressing the social, economic or educational imbalances in Namibian society arising out of past discriminatory laws and practices is in fact the backbone of Namibia and forms part of the transformative agenda of the Namibian Constitution.[76] This position is reaffirmed by the language of the preamble and historical context of Namibia often referred to by Courts in justifying their decisions.[77]

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71 Horn (Note 2 above) 128.
72 Horn (Note 2 above) 102.
73 Article 101 of the Namibian Constitution.
74 *Makwanyane* (Note 16 above) 237.
75 Article 95(a) of the Namibian Constitution.
76 Horn (Note 2 above) 98.
77 See for example Bekker J's concurring judgment in *Ex parte Attorney General, Namibia: in re Corporal Punishment by Organs of State 1991 (3) SA 76 Nm SC* [*Corporeal punishment* case].

e) Emphasis on egalitarianism

In the *Muller* case, the Court held that 'the recognition of the equal worth of all human beings lies as the root' of the Namibian Constitution. It is articulated in the preamble and further echoed in the Bill of Rights. [78] Generally, the Bill of Rights applies to everyone inside Namibia and there is no reason to suggest otherwise, except for particular provisions that confer only particular rights onto citizens such the right to property and the right to political participation.[79] Furthermore, in this regard, Article 131 of the Constitution states that the Bill of Rights cannot be repealed or amended in such a way that diminishes or detracts from the fundamental rights contained in the Chapter. In other words, no-one can be stripped of the humanity and equal worth under the new constitutional dispensation, at least theoretically.

19.4.2 Political indicators

In the state of nation address in 2015, President Dr Hage Geingob compared nation-building to that of building a house, 'in our case, building the Namibian house... in which no Namibian will be left out'.[80] Channelling the tenets of *ubuntu,* the President reminded the Namibian nation that 'as with all communities, one house is never safe if other houses in the neighbourhood are burning.'[81] His speech inspired a 'nation-wide response' captured in the publication 'Towards our all-inclusive Namibian house.'[82] The document does not constitute a governmental policy but does represent the views, voices, ideas and contributions of more than 1000 Namibians[83] from 'all regions, walks of life and different backgrounds'.[84] It is a commendable effort that provides some empirical indication of some shared values among a diverse and dispersed population.

With the Constitution as a strong foundation, strong common ethical values are needed to ground all Namibians towards a shared vision.

> As a nation, living together in one House, we need common ethical values, guided by our Constitution and our laws. A society is kept together and prosperous by strong common values and ethical standards that are accepted by all. *It is not enough to include values and standards in our Constitution. They need to be lived out daily by the citizens* [emphasis added]. Ethical values and standards need to be continuously internalised through active interventions at different levels.[85]

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78 *Muller* (Note 5 above) 18.

79 Article 16 and Article 17 of the Namibian Constitution respectively.

80 A Wasserfall (2017) "Towards our all-inclusive Namibian House: How can we build a nation in which no Namibian will be left out?" KAS: Windhoek, 39.

81 Wasserfall (Note 80 above) 52.

82 Wasserfall (Note 80 above).

83 At the back of the book one can find a list of signatures of nearly 1000 Namibians who contributed and added value to the document.

84 Wasserfall (Note 80 above) 1.

85 Wasserfall (Note 80 above) 12.

The strongest indication that endorses the position that *ubuntu* is an important foundation of the 'Namibian House' is referred to in the publication's discussion on the core 'rules' that must govern the Namibian House. One of the rules is that 'all residents should display friendly neighbourliness to each other, assisting and advising each other so that the House remains strong and stable and everyone feels supported and cared for'.[86] By declaring that the 'the spirit of friendly neighbourliness should pervade all other sectors of the Namibian House at all its levels', Namibians are expressing the 'supremacy' of friendly neighbourliness - a tenet of *ubuntu* - as a guiding principle and value in their lives.

19.4.3 Cultural indicators

Like many parts of Africa, Namibia is an ethnically diverse country, with various cultures, languages and people. Any venture to find common values in such diversity seems bound to fail from the outset, but is nevertheless a necessary precondition if we are to sustain harmony and live peacefully among one another. There has only been a few studies with deliberate intent that seek to establish the concept of *ubuntu* as understood in Namibia societies. One such prominent study is by Mbenzi and Ashikuti who unpack *uushiindaism* (neighbourliness) as understood in Oshiwambo - a Bantu language spoken by the Aawambo people, the majority tribe in Namibia. *Uushiindaism* refers to 'the quality of being humane to other people, showing kindness, love and compassion. It further entails caring for one another, interdependence, brotherhood and fictive kinship by people who live in close proximity'.[87] Mbenzi and Ashikuti are of the view that the principles of *uushiindaism* find parallels in other African concepts such as *ubuntu* and *ujamaa*.[88] According to Mbenzi and Ashikuti, similar concepts exist in other indigenous languages of Namibia; including *ouraranganda* in Ovaherero of Okambahe, *buzwale* in Silozi and *musinda* in Rukwangali.[89] As stated before, the articulation of *ubuntu* as a Namibian value and norm will require a multidisciplinary approach. Therefore, a further development of this section falls outside the scope of this study and will need to be substantiated by other relevant disciplines such as humanities.

19.5 *UBUNTU*, DIGNITY AND EQUALITY JURISPRUDENCE

Article 10 of the Namibian Constitution provides for the right to equality and non-discrimination. It states:

> (1) All persons shall be equal before the law.
> (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status

86 Wasserfall (Note 80 above) 3.
87 Mbenzi & Ashikuti (Note 36 above) 131.
88 Mbenzi & Ashikuti (Note 36 above) 132.
89 Mbenzi & Ashikuti (Note 36 above) 135.

In *S v Van Wyk*, Ackermann J held that provisions of the Namibian Constitution demonstrate how deep and irrevocable the constitutional commitment is to, among others, equality before the law and non-discrimination.[90] In a different case, Strydom J makes it clear that our commitment to equality is not only the prevention of inequality and discrimination, but the elimination thereof. Article 10(2) and Article 23 are considered to pursue substantive equality. Article 23(3) of the Namibian Constitution states as follows:

> 23(3) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices [...] it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.[91]

With respect to Article 10(2), the Court held that the enumerated grounds are a closed list. With respect to the grounds in Article 23, however, the Court held that they do not cover all forms of past discrimination. Comparing the South African equality clause with the Namibian one, Strydom in *Muller* held that:

> Section 8(2) and 9(3) and (4) make it clear that the prohibition against discrimination is not limited to the enumerated grounds set out in Section 8(2) and 9(3) of the South African Constitutions. In Namibia, any discrimination based on other grounds than those mentioned in Article 10(2) will have to be dealt with and will have to be brought in under Article 10(1) and/or Article 8(1), which provides that the dignity of all persons shall be inviolable.

The Court further held that:

> Our culture of non-discrimination is only nine years old [now 30] and not yet out of its infancy. We have a background history of discrimination which was rife and which was based on all of the enumerated grounds set out in Article 10(2). The purpose of Article 10 is clearly not only to prevent discrimination and inequality but also, in our context and history, to eliminate them... However, to the extent people were disadvantaged by past discriminatory laws or practices in the social, economical and educational fields... Article 23 covers a wide field; it does not cover all forms of past discrimination...

[90] *S v Van Wyk* 1993 NR (SC) 452.
[91] Article 23(2) and Article 23(30) of the Namibian Constitution.

> the elimination of which may call for a greater tolerance [than in other legal systems].[92]

According to Rapatsa, *ubuntu's* intuitive strength lies in its emphasis on tolerance.[93] The Declaration on the Principles of Tolerance holds tolerance to be a virtue. It is not only a moral duty but also a political and legal requirement. Tolerance connotes 'respect, acceptance and appreciation of the rich diversity of our world's culture, our forms of expressions and ways of being human'.[94] Tolerance is the responsibility that upholds human rights, pluralism, democracy and the rule of law.[95] As held in *Muller,* Namibia's history demands greater tolerance in the new constitutional dispensation. Tolerance is commonly achieved through the recognition of every person's inherent dignity and equal worth. For Sachs J:

> Equality [...] does not imply a levelling or homogenisation of behaviour or extolling one from as supreme, and another inferior, but an acknowledgment and acceptance of difference. At the very least it affirms that difference should not be the basis of exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to society. At issue is a need to affirm the very character of our society is one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practise with which, one feels comfortable, but how one accommodates the expression of what is discomforting.[96]

And so, the South African Constitutional Court has similarly held that 'there can be no doubt that the guarantee of equality lies at the very heart of the Constitution'.[97] The Constitution is often described as 'transformative' with aspirations to 'reengineer South African society from one characterised by systematic inequality to one that is egalitarian and united in its diversity'.[98] In so doing, however, the court has underpinned its equality jurisprudence with the value of dignity; an approach that has been at the centre of debate.[99] In *S v Makwanyane,* O'Regan J held:

> Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of

92 *Muller* (Note 5 above) 11-12.

93 M Rapatsa & M Gaedupe (2016) "Dignity and *ubuntu* epitome of South Africa's socio-economic transformation" Vol. 5(9) *The Scientific Journal for Theory and Practice of Socio-economic Development* 72.

94 UNESCO Declaration of Principles of Tolerance, Article 1.1 (Tolerance Declaration).

95 Tolerance Declaration, Article 1.3.

96 *Minister of Home Affairs v Fourie and another 2006* (1) SA 524 (CC) 60, [*Fourie*].

97 *Fraser v Children's Court Pretoria and Others* [1997] 2 SA 2018 (CC) 20[*Fraser*].

98 DP Zongwe (2016) "The articulation of an African philosophy of equality as legacy of the South African Constitution" Vol. 31(1) *Southern African Public Law* 40.

99 See for example C Alberyn & B Goldblatt (1998) "Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence" Vol. 14 *South African Journal of Human Rights* 248 and D Davis 'Equality: The majesty of legoland jurisprudence' (1999) 116 *South African Law Journal* 398.

> respect and concern. The right therefore is the foundation of many of the other rights that are specifically entrenched in [...] [the Bill of Rights].[100]

The South African equality jurisprudence is also underpinned by dignity as is with other rights, despite it in itself being considered a fundamental value upon which the constitutional order is built.[101] This means that a successful equality challenge 'lies in a finding that a measure that differentiates between classes of people has the effect of impairing dignity'.[102] It is against this background that the Constitutional Court has been criticised as either ignoring equality or rendering equality so subordinate to dignity and freedom that it constitutes as a misreading of the Constitution.[103] The common concern is whether the concept of dignity can guide the equality jurisprudence in a way that serves the transformative ideals, underlying the 1996 Constitution, 'in particular, its commitment to equality'.[104]

For Cowen 'at first sight, the logic of the objection is appealing' but upon a deeper analysis holds that 'equality as a value cannot on its own inform the content of the equality rights' because 'equality is a comparative concept, and this of a different nature from dignity'.[105] For Cornell, the consequence of centring dignity in equality jurisprudence is 'not that persons be treated equally as if equality could be reduced to a mathematical formula... The key is that people must be treated as of equal worth rather than treated equally in some simplistic sense'.[106] Equality as a value on its own does not answer 'what it is that is being distributed or compared'.[107] Dignity informs that enquiry. Therefore, even though equality and dignity are interconnected, it becomes necessary to analyse the jurisprudential difference between equality and dignity case law. Former Constitutional Judge Sachs has articulated the difference well in a lengthy but necessary quote:

> [Equality] is based on the impact that the measure has on a person because of membership of a historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members, it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under Article 10 on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities... such groups not being identified because of closely held characteristics but because of the situation they find themselves in. These would be cases of

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100 *Makwanyane* case (Note 16 above) 328.
101 *Faser* case (Note 97 above) 20.
102 S Cowen (2001) "Can 'dignity' guide South African jurisprudence?" Vol. 17(1) *South African Journal of Human Rights* 34.
103 D Cornell (2008) "Bridging the span towards justice: Laurie ackerman and the ongoing architectonic of dignity jurisprudence" Vol. 1 *Acta Juridica* 34.
104 Cornell (Note 103 above) 35.
105 Cowen (Note 102 above) 48.
106 Cornell (Note 103 above) 35.
107 Cowen (Note 102 above) 48.

> indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.[108]

19.5.1 *Ubuntu* and the right to equality and non-discrimination of HIV positive persons in South Africa

An important lesson that can be learnt from *ubuntu* jurisprudence is that Courts must balance rights and interests in such a way that results in a *compassionate* outcome. If Namibian Courts begin to underpin equality jurisprudence with the value of dignity as has been done in South Africa, it becomes easy to see how a compassionate outlook pillared on the preservation of dignity is only likely to enhance and advance minority rights in the country.

In *Hoffmann v South African Airways,*[109] the Appellant's application for employment was rejected when it was discovered that he was HIV positive. The argument by the respondent was that HIV positive persons were unable to meet some of the health requirements for that job, and that this would disadvantage the airline.[110] The Court found that South African Airways was in violation of the equality clause in the Constitution. Justice Ngcobo argued that the discrimination is an assault on the person's dignity and held that *ubuntu* demands that vulnerable people be treated with compassion and understanding.[111] The Court held that:

> People who are living with HIV constitute a minority. Society has responded to the plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination... In view of the prevailing prejudice and stereotypes against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of discrimination and I consider this to be an assault on their dignity.[112]

The Court held that the Appellant be reinstated. The Court held that, 'people living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them'.[113] In this way, the Court reinforced that persons living with HIV are equally entitled to dignity. In a similar case, the learned judge in a dissenting judgment by the European Court of Human Rights found that the sterilisation of the plaintiff was in violation of Article 14 (right to equality) as provided by the European Convention on Human Rights as she was coerced into being sterilised as a direct result of her 'ethnic origin'.[114] This is perhaps an indication of

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108 *National Coalition of Gays and Lesbians v Minister of justice* 1999(1) SA 6 (CC) 124 [*Minister of Justice*].

109 2000 (11) BCLR 1211 (CC) [*Hoffman* case]

110 M Nyoko & D Cornell (2012) U*buntu and the law: African ideals and postapartheid jurisprudence* Fordham University Press: New York, 168-169.

111 Hoffman case (Note 109 above) 38.

112 *Hoffmann* case (Note 109 above) 23, 24, 28.

113 Hoffman case (Note 109) 38.

114 *VC v Slovakia* application 18968/07, dissenting opinion of Judge Mijovic.

the growing jurisprudence in this area of the law to which *ubuntu* can significantly contribute in the development thereof.

19.5.2 *Ubuntu* and the right to equality and non-discrimination of sexual minorities in South Africa

Epprecht is of the view that it would be wrong to interpret *ubuntu* as inherently and historically 'gay friendly' but nevertheless agrees that it holds great potential as a 'source of strength and solidarity for future activism'.[115] While the history of *ubuntu* is up for lengthy debate, there is no reason to suggest that the inherent humanness associated with *ubuntu* excludes the LGBTQ community. Former Constitutional Justice Cameron J contributed to the inclusion of 'sexual orientation' by the African National Congress (ANC) and other negotiating parties in the South African equality clause to *ubuntu*. He writes that the Constituent Assembly's 'conception of African humanity, which embraces all forms of expressive human flourishing that contribute to society and that do not harm other humans' is captured in the concept of *ubuntu.*[116] According to Cameron J, *ubuntu* finds its practical application:

> [b]y providing constitutional protection not only for the strong and the powerful and for the influential and the popular but also for the weak and the unprotected and the socially vulnerable [...] To rely on popular expressions of distaste, dislike or hatred for unpopular minorities as justification for withholding constitutional protection from them is therefore, to misunderstand the very essence of constitutionalism.[117]

Nevertheless, he does not attribute the *protection* of gays and lesbians to the explicit inclusion of sexual orientation in the equality clause. Instead, he explains that the basis of the jurisprudence of the Constitutional Court in South Africa has been, "the inclusive African concept of humanity' by recognising the humanity in each person and 'granting them their full entitlement to dignity, privacy and equality".[118]

> It is these profound and powerful values, and not the trivial incident of wording or language, that explain the approach of the South African Constitutional Court to gay and lesbian equality. In two decisions, each reached unanimously by eleven judges, the court has given effect to the values of the ubuntu as expounded in Makwanyane.[119]

[115] M Epprecht (2013) *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* Zed Books: London, 109.

[116] E Cameron (2001) "Constitutional protection of sexual orientation and African conceptions of humanity" Vol. 118 *South African Law Journal* 645-646.

[117] Cameron (Note 116 above) 646-647.

[118] Cameron (Note 116 above) 647

[119] Cameron (Note 116 above) 647

One of the cases Cameron J is referring to is *National Coalition for Gay and Lesbians Equality v Minister of Justice*[120] where the court found that the common-law's offence of sodomy was unconstitutional as violating the rights to equality, dignity and privacy. In this regard, it is important to mention that sodomy still constitutes a crime in Namibia.[121] The continued existence of the crime of sodomy has had far reaching consequences. For example, the prohibition of sodomy has been cited by prison officials as justification for refusing to provide condoms to prisoners to prevent the spread of HIV.[122] In the *Minister of Justice* case, Justice Sachs held:

> At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human because being they belong to a particular group... The indignity and subordinate status may flow from [various sources] ... In the case of gays, it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful to of the human personality and violatory of equality.[123]

It seems appropriate to end with the wisdom of Cameron J about the role of judges in the protection of minority rights:

> In testing our commitment to human freedom and dignity under law, judges have to scrutinize not the cases of discrimination already rejected by convention opinion and widespread consensus...The true test comes when a nation faces those stigmas that are not yet unfashionable, those hatred that are still countenanced, those prejudices that are still fostered by those in authority, and those discriminations that are still widely licensed.[124]

19.6 THE PRACTICAL APPLICATION OF *UBUNTU*

In this subsection, I dissect the 'methodology' or approach that Namibian Courts have developed in value orientated adjudication. A proper reflection of the approach is necessary if *ubuntu* is to be smoothly infused into constitutional adjudication without straining the existing precedents' set by the Court.

120 *Minister of Justice* case (Note 108 above).
121 D Hubbard (2015) "Namibian law on LGBT issues" Legal Assistance Centre: Windhoek, 65.
122 Hubbard (Note 121 above) 68.
123 *Minister of Justice (*Note 108 above) 129.
124 Cameron (Note 116 above) 650.

19.6.1 Value based judgments

Superior Courts had not adopted a single and dominant interpretive model to constitutional interpretation by 2004,[125] and post-2004 jurisprudence demonstrates similar indications. Nevertheless, Horn is of the view that the value-based approach has become an 'important cornerstone of constitutional interpretation in Namibia'.[126] While judges seem to agree to the importance of norms, values and aspirations as a hermeneutical key for constitutional interpretation,[127] the source and content of those norms and values remain highly contested.

There are two dominant approaches that Courts have adopted in value based-judgments. With both agreeing that the norms and values must stem from the Namibian people, the first set argues that the values of the Namibian people are captured and expressed in the Constitution itself while the second set argues that the process requires the involvement of actual people. As will become evident below, the first approach risks a formal reading of the Constitution and the second leaves the door open for majoritarianism to creep back in.

In *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State,*[128] the Court for the first time was presented with an opportunity to express itself on the values of Namibian people. The Court had to determine whether the imposition and infliction of corporal punishment by an authority of any organ of state in legislation is in conflict with any of the provisions of the Bill of Rights, in particular Article 8.[129] Mahomed, J held:

> [It is] a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic.[130]

The Court held that state sanctioned corporal punishment as a means of punishment is rejected by the Namibian people and thus unconstitutional. In a subsequent case, Mahomed J held that:

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125 Horn (Note 2 above) 263.

126 Horn (Note 2 above) 121.

127 Horn (Note 2 above) 128.

128 *Corporeal punishment* case (n 77 above),

129 Article 8 entrenches the respect for human dignity stating '(1) the dignity of all persons shall be inviolable. 2(a) In any judicial proceedings in or other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. (b) No person shall be subject to torture, or to cruel, inhumane or degrading treatment or punishment'.

130 *Corporeal punishment* case (Note 77 above),

> No evidential enquiry is necessary to identify the aspirations, norms, expectations and sensitivities of the Namibian people as they are expressed in the Namibian Constitution itself and in their national institution.[131]

The primary critique of Mahomed J's approach is that it in one way or another reverts back to formalism. Formalism sees adjudication as the uncontroversial application of accepted principles to known facts to derive to the outcome.[132] The criticism associated to the judgment is that it 'only looked at the values written in the Constitution and their impact on dignity and ignored the essential part played by other institutions and interested parties.[133] Berker J had the same concerns in his concurring judgment in *Corporeal Punishment* suggesting that an enquiry is necessary to determine the norms and values of the people. For Horn, by referring to an international set of rules as the source of values, the court concentrated on rules 'rather than analysing the meaning and expression of norms and values' and in this way 'moved out of the realm of substantive argument and right back into formal argumentation'.[134] While Mahomed maintained that the judgment represents the values of the Namibian people, 'there are no indications how he came to that conclusion'.[135]

O'Linn J was particularly critical of Mahomed's J judgment in *Corporal Punishment*. 'The cultural values of Namibia, he argues, are generally in favour of corporal punishment both in school and for juvenile and violent offenders.'[136] This is to suggest that the values of the Namibian people endorse corporal punishment – at least in these two institutions. O'Linn forms part of the second school of thought who argues that norms and values must be sourced from the people themselves. Some Courts have interpreted this to mean the views of elected officials[137] while others have suggested surveys or opinion polls.[138] It is easy to see why judges may find such an enquiry necessary, it only makes sense for the people to which the norms and values are said to represent, have 'the last word in ranking the values that shape their society.'[139] Judge O'Linn agrees that a value judgment 'is one not arbitrarily arrived at but which must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms'. [140]

In this light, Horn raises important concerns about majoritarianism, as he writes - 'If norms and values of the Namibian people are really the basic foundation of

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131 *S v Tcoeib* 1999 NR 24 (SC) 398.
132 RA Posner (2010) *How judges think* Harvard University Press: Cambridge, 3.
133 Zongwe (Note 66 above) 25
134 Horn (Note 2 above) 125
135 Horn (Note 2 above) 266.
136 Horn (Note 2 above) 275.
137 *Frank* case (Note 7 above).
138 *S v Vries* 1998 NR 244 (HC) at 260; *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) at 280.
139 Zongwe (Note 66 above) 13.
140 *Namunjebo* (Note 139 above) 12.

constitutional interpretation, there is little or no difference between constitutionalism and majoritarianism'.[141] Horn correctly states that public opinion may be helpful and needed to determine the values and aspirations of society but that constitutionalism protects society against dangerous and illogical public opinion.[142] If the Courts had consulted with traditional leaders, churches and even the majority of the Namibian people, they would have likely found that corporal punishment is a *norm* among Namibian people. However, this does not mean that the Court would have come to a different conclusion, it simply would have been required to further explain why the popular opinion in this case is inconsistent with the highest norms and values of the people as expressed in the Constitution.

It seems as though the Constitution itself as well as the will of the people are both accepted sources of value. The determination of both necessitates substantive reasoning but the difference is that the Constitution constitutes 'the highest expression of the norms and values of the people'.[143] This means that while there can be several indicators for the values of the Namibian people such as elected officials, culture and opinion polls, 'the norms, values and aspirations of the Namibian people are first and foremost found in the Constitution'.[144]

As poetically referred to as a 'mirror reflecting the soul of the nation' by Mahomed in the *Acheson* case,[145] 'the values, norms and aspirations of the people are to be found primarily in the Constitution itself and those values do not necessarily conform to the general accepted norms and values of the majority'.[146]

19.6.2 Interpreting *LM* with *ubuntu*: HIV status as a ground of non-discrimination

In *LM and others v Government of the Republic of Namibia,*[147] the three plaintiffs were all HIV-positive women who claimed that they had been sterilised without their consent. They further alleged that the reason they had been coerced into being sterilised was because they were HIV positive. The High Court had to decide on two issues, firstly whether the three plaintiffs had given their informed consent to the sterilisation procedures; and secondly, whether they were discriminated against due to their HIV status.[148] The Court held that the government was not able to prove that they had provided the plaintiff with sufficient information to make an informed choice and ruled in favour of the plaintiffs with respect to the first issue.

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141 Horn (Note 2 above) 128.
142 Horn (Note 2 above) 266.
143 Horn (Note 2 above) 128.
144 Horn (Note 2 above) 128.
145 *1991 (2) SA 805 (NM).*
146 Horn (Note 2 above) 12.
147 [2012] NAHC 211 (30 July 2012).
148 CJ Badul & A Strode (2013) "LM and Others v Government of the Republic of Namibia: The first sub-Saharan African case dealing with coerced sterilisations of HIV-positive women - Quo vadis?" Vol. 13 *African Human Rights Law Journal* 220.

As often done by the Courts in Namibia, the learned judge glossed over the second issue as if it was irrelevant and insignificant but which in my view, was in fact the crux of this case. The Court held that there was no credible and convincing evidence that the sterilisation procedures had been performed on the plaintiffs simply because they were HIV positive. No further explanation was set out by Hoff J for dismissing the claim. The judgment was confirmed by the Supreme Court upon appeal with respect to both claims, again with no further reasons put forward except that 'there was absolutely no evidence on the record to support the respondent's belief'[149] that they were sterilised based on their HIV status.

Badul and Strode admit that there was no documentary reason for the sterilisation in the women's files.[150] However, the plaintiffs gave their own accounts that should have made out a *prima facie* case for the violation of Article 10 of the Namibian Constitution. According to the first plaintiff, a nurse had stated that 'she will be sterilised since all women who are HIV positive go through that procedure'[151] and the second plaintiff was made to understand that 'there is a policy in place that women who are HIV positive should be sterilised'.[152] According to Badul and Strode, this was ignored by the judgment as 'there is no mention of whether the plaintiff's evidence was subject to cross-examination and found to be plausible or unreliable'.[153] The two authors further demonstrate how some of the proven facts corroborate the versions of the first and second plaintiffs[154] - it is not clear why the Court did not draw any inferences from these proven facts.

In a previous judgment in *Naditume v Minister of Defence,* the Labour Court held that, "no person may be excluded from enlistment into the Namibian Defence Force solely on the basis of such person's HIV status where such person is otherwise fit and healthy".[155] Although the Court used the Labour Act 6 of 1992 and the Guidelines for the implementation of a National Code on HIV/AIDS in Employment to justify its decision; it also recognised the systematic disadvantage, discrimination and prejudice faced by HIV positive persons. The Court held that 'because of the origins of the disease, the way it is transmitted and its rampant magnitude, ignorance and prejudice have shrouded all aspects of the disease including its treatment and control'.[156] The Court further held:

> It is therefore abundantly clear that the sole and only ground for refusing to enlist applicant as a member of the NDF was because he was HIV positive

149 (SA 49/2012) [2014] NASC 19 (03 November 2014) 2.
150 Badul & Strode (Note 148 above) 225.
151 *LM* and Others v Government of the Republic of Namibia [2012] NAHC 211 (30 July 2012) 33 [*LM (HC)]*.
152 *LM* HC (n 151 above) 40.
153 Badul & Strode (n 148 above) 225.
154 Badul & Strode (n 148 above) 225- 226.
155 [2000] NALC 1 (10 May 2000) 40(2) (*Naditume* case).
156 Naditume (Note 155 above) para 16.

> and that he was, nevertheless, at that time fit and able to perform the usual duties and functions in the NDF.[157]

In this way, the Court alluded that the right not to be discriminated against on the grounds of one's HIV status is a violation of the right to equality. This inclusive approach to the interpretation of equality and non-discrimination harbours the basic tenets of *ubuntu*. If the Court in *LM* had drawn the necessarily inferences to conclude that discrimination was in fact at the centre of this case, it could have relied on *ubuntu*'s relation to humanness and inclusiveness to justify its position.

19.6.3 Interpreting *Frank* with *ubuntu:* Sexual orientation as ground of non-discrimination

In the only case that has so far been dealt with the constitutional rights of sexual minorities, the High Court held that the Immigration Board had no reason to reject Ms Frank's application for permanent residency, who had lived and worked in Namibia for a number of years and was co-habiting with her Namibian partner where the two were raising her partner's son together. In this way, the High Court affirmed that same-sex relationships are entitled to the same protection as heterosexual relationships - at least with regards to immigration. The State appealed to the Supreme Court which overturned the judgment arguing that there was no violation of the right to equality.

In the previous section, we discussed O'Linn's approach to value-based judgments and the danger it poses as a possible constitutional endorsement of majoritarianism. These dangers are most evident in the *Frank* case - in which O'Linn wrote the majority judgment. In his interpretation of a value-based judgment, the judge based his decision on the ground that there was no 'legislative trend' of protecting same-sex relationships. However, legislation must only be used to substantiate constitutional values and rights and not to diminish them - otherwise we risk reverting back to parliamentary sovereignty. Furthermore, the Court referred to the President of Namibia and the Minister of Home Affairs who have 'expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships.'[158] In this regard, Hubbard writes:

> This sensitivity to national values is understandable against a pre-independence background... However, this does not mean that the values that the Court considered, and the method it used to discover what they were, are necessarily the most appropriate. The Court cited male-dominated institutions as being the keys sources of national values, and focused on mainstream, majority values to the neglect of minority views. This is highly problematic in a country as diverse as Namibia.[159]

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[157] Naditume (Note 155 above), para 25.
[158] *Frank* case (Note 7 above) 150D-G.
[159] Hubbard (Note 121 above) 33.

Furthermore, she criticised the judgment for not applying the appropriate constitutional test for equality as articulated in the *Muller* judgment. The Court developed the test for the violation of Article 10 as follows:

(a) ARTICLE 10f 11
The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose…
(b) ARTICLE 10(2)
The steps to be taken in regard to this sub-article are to determine -
(i) whether there exists a differentiation between people or categories of people;
(ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
(iii) whether such differentiation amounts to discrimination against such people or categories of people; and
(iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.[160]

For Hubbard, there would be no need to infuse a new lens into equality jurisprudence, but rather a proper application of the standards already set in *Muller*. According to Hubbard the Court's reasoning in *Frank* 'draws on elements of the test which applies to Article 10(2) while applying Article 10(1) failing to discuss the Article 10(1) test of whether the differentiation in question had a rational relation to a legitimate government purpose.'[161] The judgment however, leaves more to desire. The unfortunate consequence of the equality test as set in *Muller* is that it robs cases involving groups that fall outside the stringent grounds of Article 10(2) from a historical interpretation and considerations of how these groups may have been systematically disadvantaged and discriminated against in the past (and present). The interpretation of Article 10(2) demands a focus on dignity which results in an 'emphasis being placed simultaneously on context, impact and the point of view of the affected persons'.[162] Such focus according to Sachs J is the 'guarantor of substantive as opposed to formal equality'.[163] If vulnerable and marginalised group such as persons with disabilities or indigenous persons have to rely on Article 10(1) as oppose to Article 10(2) in their pursuit to evoke substantive equality, it dwindles down minority rights jurisprudence to differentiation as oppose to discrimination; to formal equality as oppose to substantive equality and connotes a formal enquiry based on the rationale of the state as oppose to a value-based enquiry based on the values and principles of the Namibian Constitution. Horn warns that 'the specific application of groups in the *Muller* case can be questioned and the evolutionary

160 *Muller* (Note 5 above) 14-15.
161 Hubbard (Note 160) 32.
162 *Minister of justice* (Note 108 above) 126.
163 *Minister of justice* (Note 108 above) 126.

interpretation of Article 10 to include groups may turn back the constitutional clock rather than transforming society'.[164]

With respect to *Frank,* Mundia criticises the judgment in that 'the Supreme Court ignored the fact that lesbians and gays have often been treated as less human on account of their different lifestyles when compared to those in heterosexual relationships' – and therefore, constitute a minority that 'have endured discrimination in the past and continues to suffer from discriminatory practices to this day'.[165] Cameron J points out that in an attempt to justify the court's reasoning, the judge in *Frank* distinguished South African jurisprudence from Namibian jurisprudence in that the former expressly lists sexual orientation as a prohibited ground of unfair discrimination and the latter does not.[166] But this he refers to as a 'mistake, which undervalues the profundity of the jurisprudence of the Constitutional Court and insufficiently appreciates its reach'.[167] For him, it is not much about constitutional wording but one of approach - premised on the constitutional order which 'commands an encompassing approach to what constitutes humanity'.[168] According to Cameron J:

> The "achievement of equality" is one of the founding values of the South African Constitution. The central importance attached to the value of equality stems from our history as South Africans, which in many respects Namibians share.

An interpretation that centres the equal dignity of all individuals – an interpretation premised on *ubuntu* - is unlikely to result in the monopoly of equality and discrimination that dictates who is *now* worthy of constitutional protection in the new dispensation and who isn't. Nevertheless, and perhaps an oxymoron, it is necessary to note that the Court in *Frank* held that nothing in its judgment 'justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution'[169] - most especially the right to dignity.

19.7 RECOMMENDATIONS

19.7.1 Towards an African jurisprudence to legitimise human rights in Africa

Constitutional interpreters must work towards consolidating an indigenous jurisprudence that will serve to legitimise human rights in Africa and bridge the gap between constitutional principles and norms - often perceived to be Western and imported and indigenous values and aspirations.

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164 Horn (Note 2 above) 243.
165 Mundia (Note 44 above) 70-71.
166 Cameron (Note 116 above) 643.
167 Cameron (Note 116 above) 643.
168 Cameron (Note 116 above) 644.
169 *Frank* case (Note 7 above) 156G-H.

19.7.2 Develop an autocentric understanding of ubuntu

Constitutional interpreters in Africa must harvest *ubuntu* and all it's worth as an additional dimension of the law to catalyse the realisation of equality on the African continent - most especially in a favour of unpopular minorities.

19.7.3 Adopt ubuntu as a constitutional value in constitutional adjudication

Constitution interpreters must adopt *ubuntu* as a constitutional value of the Namibian Constitution in an effort to bring life to the dormant yet essential aspects of the Constitution; those that embrace humanity, social justice, inclusivity and the fabrication of a caring society as envisioned by the Namibian Constitution and people.

19.7.4 Interpret the right to equality and non-discrimination in light of ubuntu in favour of minority rights

Constitutional interpreters must not shy away from using the principles of *ubuntu* to justify the recognition and protection of all persons who have been systematically disadvantaged and discriminated against in the past in the present – not only those documented by the Constituent Assembly.

19.8 CONCLUSION

In *Muller*, Strydom J correctly holds that the new constitutional dispensation is geared towards not only the prevention of discrimination but the *elimination* thereof. It would be gravely insincere however to frame the constitutional dispensation as one that only hopes to eliminate discrimination on the grounds enumerated under Article 10(2) or Article 23 as oppose to against all groups that have been systematically disadvantaged and unfairly discriminated against in the past and in the present. The attainment of equality as a core aspiration of the Namibian Constitution is an all-inclusive one but is one that is especially formulated to protect and advance the right to equality and dignity of vulnerable and marginalised groups where the humanity of these groups have been and continue to be a topic of debate in society. In the new constitutional dispensation, debates of this nature are not only severely frowned upon but should also be considered to be illegitimate. As held in *Makwanyane* by Chaskalson J; 'it is only if there is a willingness to protect the worst and the weakest among us, that all of us can be secure that our own rights will be protected'.[170] This chapter addresses the weakest. In essence, HIV positive persons and sexual minorities are two groups whom Namibian Courts have refused to invoke the equality clause in cases that clearly demonstrated discrimination against them. This can largely be tied to the Courts emphasis on formalism, individualism and its hesitation to preserve the humanity of *all* persons.

[170] *Makwanyane* (Note 16 above) 88, Chaskalson J.

Apartheid and colonisation did not only dehumanise the majority black population, it also diminished the humanity of white South Africans and Europeans respectively.[171] This is what is meant by *ubuntu* - 'a person is a person through others' or 'I am, because we are'. Similarly, it is only when we recognise the humanity of others - especially those against which discrimination is still rife and is widely believed, practiced and reinforced - that we can be sure that our own dignity and humanity will be protected. By recognising the humanity of individuals through their community, *ubuntu* provides an opportunity for a revolutionary interpretation of equality and inclusiveness on the continent. One that is premised on the African worldview and one that recognises the right to *equal worth* of every, single person including HIV positive persons and sexual minorities.

Based on the constitutional, political and cultural indicators discussed, *ubuntu* can be said to amount to a Namibian value, norm and aspiration. The Apex Court has developed a methodology of some sort in which *ubuntu* can be infused into jurisprudence. Coined value-based judgments, the Courts have developed two diverging approaches. For Justice Mahomed, the constitutional indicators would be the most important showcase for *ubuntu.* This is because according to this construction the values and aspirations of the Namibian people can be found in the Constitution as it is the highest expression of Namibian values and aspirations. For Justice O'Linn, the political and cultural indicators would be the best to source from the values of *ubuntu* because according to him, an evaluation of these values must involve actual Namibians.

The construction of value judgments as articulated by Mahomed J is favoured for two reasons. Firstly, it embraces the supremacy of the Constitution. By declaring the Constitution as the highest expression of Namibian values, norms and aspirations, Mahomed J puts forth in fact, the most credible argument for the source of these values. The problem is in the constitutional interpretation of these values. *Ubuntu* elevates these values from *generalised and seemingly imposed* values to *Namibian* values. The application of *ubuntu*, which requires a legal anthropological approach – as framed in this dissertation, - allows for judges to draw from cultural and other sources without undermining the 'supreme' values as articulated in the Constitution. In this sense *ubuntu* bridge's the dichotomy between Mahomed J and O'Linn approach to value-based judgments. Secondly, it offers a better interpretation for the protection and advancement of minority rights; this much is evident with the reinterpretation of *LM* and *Frank,* which is a showcase that there is more to desire in the equality jurisprudence of Namibia - *at least* with respect to the equal protection of HIV positive persons and sexual minorities.

[171] Cornell (Note 103 above) 41.

PAST AND PRESENT JUDGES OF THE SUPREME COURT OF NAMIBIA

PART A - PAST AND PRESENT CHIEF JUSTICES

A Brief Overview of the position of Chief Justice

The position of Chief Justice was created on 21 March 1990, the day of Namibian Independence, along with the foundation of the Supreme Court. The Chief Justice is appointed by the President of Namibia on the recommendation of the Judicial Service Commission.

The Chief Justice presides over the Supreme Court of Namibia which hears and adjudicates upon appeals, including appeals which involve the interpretation, implementation and upholding of the Namibian Constitution and the fundamental rights and freedoms guaranteed in it. The Chief Justice is also responsible for the swearing-in of the President of the Republic of Namibia as well as members of the National Assembly and the National Council. He or she also swears in Ministers and Deputy Ministers.

Below is an outline of some of the Chief Justices that have served in the Supreme Court of Namibia:

NAME OF JUDGE	SUMMARY
1. Hans Joachim Berker	The late Hans Joachim Berker was born on 28 March 1924 in Germany and in 1928 his family moved to South West Africa (now Namibia). He obtained a BA degree from Rhodes University, Grahamstown, South Africa, and later an LLB degree from Oxford University, United Kingdom. On 21 March 1990, the day of Namibia’s Independence, he was appointed Chief Justice at the newly established Supreme Court of Namibia. The late Chief Justice Berker served in that position from 21 March 1990 to 5 July 1992, the date of his passing. After his death, he was succeeded by the late Chief Justice Ismael Mahomed.

2. Ismail Mahomed	Ismail Mahomed was born in Pretoria on 5 July 1931 and died on 17 June 2000, shortly after leaving the Bench. He received his BA degree from the University of the Witwatersrand in 1953 and the following year received his BA (Hons) degree with distinction in political science. He finished his Bachelor of Laws degree in 1957. The late Chief Justice Mahomed was a South African lawyer who served as the Chief Justice of South Africa and of the Supreme Court of Namibia, and co-authored the Namibian Constitution. He was appointed as Chief Justice of Namibia on 15 December 1992 and served in that position until 28 February 1999. The late Chief Justice Mahomed was succeeded by retired Chief Justice Gert Johannes Cornelius Strydom.
3. Johan Strydom	Gert JC (Johan) Strydom was born on 17 June 1938 in Namibia. He obtained a BA degree and later an LLB degree from the University of Stellenbosch, South Africa. He was appointed as Chief Justice of the Supreme Court on 1 March 1999 and served until retirement on 30 June 2003. He also served as Acting Chief Justice of Namibia for the period 1 July 2003 - 30 September 2004, after his retirement at end of June 2003. Retired Chief Justice Strydom also served as the first Chairperson of the Delimitation Commission, responsible for dividing Namibia into Regions, Constituencies and Local Authority areas. He was also appointed as the first Chairperson of the Electoral Commission of Namibia, responsible for the organisation and control of general as well as regional and local authority elections. Retired Chief Justice Strydom was succeeded by the current Chief Justice, Chief Justice Peter S. Shivute.

4. Peter S. Shivute	Peter S. Shivute was born on 25 September 1963 in Namibia. He obtained LLB (Hons) and MA degrees from Trinity Hall, University of Cambridge, United Kingdom and a Master of Laws (LLM) degree from the University of Warwick, United Kingdom. He also has other qualifications in public administration and law. He served as a Magistrate in the judiciaries of both Zambia and Namibia. In the year 2000, he was appointed as an acting Judge of the High Court of Namibia. He became a permanent Judge of the High Court in 2001. In 2003, he was appointed Judge-President of the High Court. As the head of the High Court and most senior Judge at that institution, the Judge President bears the ultimate responsibility of ensuring sound administration and effective service-delivery at the High Court. On 1 December 2004, at the age of 41, Justice Peter Shivute was appointed Chief Justice of the Supreme Court of Namibia. In his capacity as Chief Justice, Chief Justice Shivute is the head of the Judiciary of Namibia, overseeing its administration as well as the over 700 members of the Office of the Judiciary. He is also the Chairperson of the Judicial Service Commission, a constitutional body responsible for recommending appointments of Judges, the Ombudsman and the Prosecutor-General to the President of the Republic and which also deals with disciplinary procedures involving the holders of these judicial offices as well looking after their welfare. He is also the Chairperson of another statutory body, the Board for Legal Education that is responsible for the training of aspirant lawyers in the country. He also served as the Chairperson of the Delimitation Commission. Chief Justice Shivute is a member of the Southern African Chief Justices Forum (SACJF), a body consisting of Chief Justices in the Southern African Development Community (SADC) region as well as the Chief Justices of Uganda and Kenya. He is a past Chairperson of SACJF, a position he held for 3 consecutive terms.

OTHER SUPREME COURT JUDGES	
5. Petrus T. Damaseb	Petrus T. Damaseb was born on 26 June 1962 in Namibia. He obtained an LLB (Hons) degree in 1988 from the University of Warwick, United Kingdom. He also holds other qualifications in Development Studies and Management, with a bias in law. As an admitted legal practitioner, he practised in the superior courts of Namibia (that is the Supreme Court and High Court) from 1997 to 2004. In 1994, he was appointed permanent judge of the High Court. In December 2004, he was appointed Judge President of the High Court, a position he has held to the present. As Judge President, he manages about 20 judges in two divisions and bears responsibility for the expeditious dispatch of the High Court's business in exercise of its original and unlimited jurisdiction in criminal, civil, labour and admiralty matters. On 21 October 2014, he assumed office as Deputy Chief Justice of Namibia. As Deputy Chief Justice he is an ex officio member of the Supreme Court and deputizes the Chief Justice in the performance of his functions as head of the Judiciary. He also serves as ex officio member of the Judicial Service Commission of Namibia. The Deputy Chief Justice also serves as an Acting Judge of the Court of Appeal of the Kingdom of Lesotho.
6. Sylvester S. Mainga	Sylvester S. Mainga was born on 18 August 1955 in Namibia. He graduated from the University of the North (Turfloop), South Africa, with a B Juris degree in 1982. In 1985, Justice Mainga obtained an LLB degree from Rhodes University, South Africa. Justice Mainga also received an LLM degree from Temple University, Philadelphia, Pennsylvania State, United States of America in 1995. On 16 January 1999, he was appointed as Acting Judge of the High Court of Namibia, the position he occupied until 15 October 1999. On 16 October 1999, he was appointed as a Judge of the High Court in a permanent capacity. He served in that capacity until 30 April 2010. On 1 May 2010, Justice Mainga was elevated to the Bench of the Supreme Court of Namibia. He is presently chairing the Public Office Bearers Commission. He has also been a Judge and Chairperson of the African Union Administrative Tribunal since April 2019.

7. David F. Smuts	David F Smuts is a Namibian judge born on 17 November 1954. He received his BA and LLB degrees from the University of Stellenbosch, South Africa in 1975 and 1977 respectively. He also holds an LLM degree which he obtained from Harvard Law School in 1983. Before joining the bench, Justice Smuts was in private practice as an advocate since 1988 after completing pupillage on 30 June 1988 and since 2004, as senior counsel. On 1 February 2011, he was appointed as a judge of the High Court of Namibia. On 1 January 2015, Justice Smuts was elevated to the bench of the supreme court of Namibia. before his appointment as judge, Justice Smuts served in various positions including president of the Society of Advocates of Namibia, member of the Council of the Law Society of Namibia and trustee of the Legal Assistance Trust, governing body of the Legal Assistance Centre and elected as chairperson of the trust in 1996 until appointed as High Court judge in 2011.
8. Elton P.B. Hoff	Elton P.B. Hoff was born on 15 January 1956 in South Africa. He obtained a BA (Law) degree and later an LLB degree from the University of the Western Cape, South Africa. Justice Hoff served as Magistrate from October 1990 to January 2001. On 1 February 2001, he was appointed as acting Judge of the High Court of Namibia and from March 2001 as a Judge of the High Court of Namibia in a permanent capacity. During the period January 2014 to 30 April 2016, Justice Hoff was appointed as ad hoc Judge of the Supreme Court of Namibia. On 1 May 2016, he was appointed as permanent Judge of the Supreme Court of Namibia. He also served as Chairperson of the Magistrate's Commission as well as a member of the Commission for the Prevention of Combating of Intimidation and Election Malpractices (Proclamation AG 11 of 1989).

PART B - ACTING/*AD HOC* JUDGES OF THE SUPREME COURT

NAME OF JUDGE	SUMMARY
1. Yvonne Mokgoro	Yvonne Mokgoro was born on 19 October 1950 in South Africa. She was educated at North-West University from which she graduated with a BJuris degree in 1982, an LLB degree two years later, and an LLM in 1987. She also studied at the University of Pennsylvania Law School in the United States of America, where she was awarded another LLM degree. After completion of the LLB she was appointed maintenance officer and public prosecutor in the then Mmabatho Magistrate's Court. Justice Mokgoro was a judge of the Constitutional Court of South Africa from its inception in 1994 until the end of her 15-year term in 2009. Justice Mokgoro served on a number of committees, including Venda University Council, Advisory Committee of the South African – Canadian Linkage Project, Selection Committee of the Press Council of South Africa and South African Law (Reform) Commission. Justice Mokgoro was appointed as an Acting Judge of Appeal in 2016 at the Supreme Court of Namibia, where she currently serves.
2. Theo J. Frank	Theo J. Frank was born on 4 January 1952 in Namibia. He obtained a Bachelor of Arts (Law) degree - University of Stellenbosch, South Africa and latter an LLB degree – University of Cape Town, South Africa. He also holds other qualifications such as a Diploma in Business Management, Johannesburg, South Africa, and a Certificate in Tax Law from the University of South Africa. Justice Frank began his career as a Barrister (Advocate) of the Supreme Court of South Africa in 1976. In 1983, he began practising as an Advocate and a member of the Society of Advocates in Namibia. He served as President of the Society of Advocates of Namibia from 1998 to 1999. Justice Frank also served as Judge of the High Court of Namibia from 1990 to 1996 and from 1995 he was intermittently appointed as ad hoc Judge of the Supreme Court. Justice Frank was appointed as an Acting Judge of Appeal in 2017 at the Supreme Court of Namibia, where he currently serves.

3. Hosea E.T. Angula	Hosea E.T. Angula was born on 30 September 1956 in Namibia. He graduated from the University of the North (now University of Limpopo) in 1983 with a B. Proc degree. Justice Angula is currently the Deputy Judge President of the High Court of Namibia and an acting judge of the Supreme Court of Namibia. Justice Angula has also served as an Acting Judge of the High Court over varying time periods since 1996 until his permanent appointment in 2016. Justice Angula was vice-president of the law firm Lorentz Angula Incorporated since March 2006 until his appointment on 1 January 2016 and before that he had been one of the senior partners in Lorentz & Bone, the predecessor of Lorentz Angula Inc. He has practised for 31 years and specialised as a commercial law advisor. Justice Angula was appointed as an Acting Judge of Appeal in 2018 at the Supreme Court of Namibia, where he currently serves.
4. Baaitse E. Nkabinde	Baaitse Elizabeth "Bess" Nkabinde was born on 15 May 1959 in South Africa. She obtained a BProc degree from the University of Zululand in 1983. In 1986, she obtained an LLB degree from North West University. She also holds other qualifications in Industrial Relations. Justice Nkabinde acted as State Law Advisor before she was admitted as an advocate. She served acting stints on the Labour Court, Labour Appeal Court, and, in 2005, the Supreme Court of Appeal. In 2006, Nkabinde was appointed to the Constitutional Court of South Africa until the end of her 11-year term in 2017. During her term of office as Justice of the Constitutional Court, she was appointed as Acting Deputy Chief Justice and Acting Chief Justice of the Republic of South Africa. Justice Nkabinde was appointed as an Acting Judge of Appeal in 2018 at the Supreme Court of Namibia, where she currently serves.

PART C - OTHER JUDGES OF WHO HAVE SAT ON THE BENCH OF THE SUPREME COURT OF NAMIBIA

The table below presents other Judges of who have also sat on the bench of the Supreme Court of Namibia from 1990-2010

NAME OF JUDGE	SUMMARY
1. Enoch Dumbutshena	Enoch Dumbutshena (20 April 1920 - 14 December 2000) was a distinguished Zimbabwean judge known for defending the independence of that country's judicial branch. He became Zimbabwe's first black judge in 1980 and served as Chief Justice of Zimbabwe from 1984 to 1990.
2. Lourens Wepener Hugo "Laurie" Ackermann	Lourens Wepener Hugo "Laurie" Ackermann (born 14 January 1934) is a former justice of the Constitutional Court of South Africa, where he served from 1994 to 2004. Ackermann served on the Lesotho Court of Appeal from 1988 to 1992 and as the Namibian Supreme Court's acting judge of appeal from 1991 to 1992. Ackermann was appointed to the newly formed Constitutional Court in 1994 after his nomination by President Nelson Mandela.
3. Gert Johannes Cornelius Strydom	Gert Johannes Cornelius Strydom was born and matriculated at Otjiwarongo, Namibia. He started his career as a state Prosecutor at the Magistrate's Court, Windhoek, and was admitted to the Bar in February 1965. He practised as an advocate in Windhoek until January 1965. He was appointed Acting Judge of the Supreme Court of Namibia on 1 February 1983 and was appointed permanently as a Judge of the Division on 1 March 1988. He also served as acting Judge-President of the High of Namibia. In March 1991, he was appointed Judge-President of the High Court of Namibia. He also served as a member of the Judicial Service Commission of Namibia.

4. Frederick Mwela Chomba	Frederick Mwela Chomba was born on 2 February 1936 in Zambia. He was a Barrister-at-Law, Honourable Society of the Inner Temple, London (1965), and Barrister and Solicitor of the Supreme Court of Zambia, 1967. He was appointed as a Supreme Court Judge in Zambia and served between March 1977 and June 1978. In 1993 he was appointed as a Visiting Judge of the Supreme Court of Namibia before moving to Gambia in November 1993 where he served as the Justice of Appeal in the Gambia Court of Appeal. He later returned as a Visiting Judge of the Supreme Court of Namibia in the year 2000.
5. Nicholas Robin Hannah	Nicholas Robin Hannah's illustrious career dates back to the 1960s when he was first called to the English Bar in 1964 and later lectured law at Liverpool University until 1966. He also practised law in London for 13 years before he was appointed as a Judge of the High Court of Botswana and served in that capacity until his appointed as the Chief Justice of Swaziland in 1985. Judge Hannah joined the High Court of Namibia in an acting capacity in 1991, one year after Independence, and subsequently became a permanent judge until retirement after a long and illustrious career. He passed away in December 2017.
6. Bryan O'Linn	Bryan O'Linn attained senior counsel status in March 1981. He was later appointed as an acting judge of the then South West Africa division of the Supreme Court in 1989, in the run-up to Namibia's independence. He chaired a judicial commission to combat election intimidation and malpractices in that capacity, and was appointed as a High Court judge after Namibia's independence election in November 1989. During his tenure as a High Court judge, O'Linn chaired judicial commissions of enquiry into Namibia's fishing industry and into more effective legislation for the combating of crime in Namibia. O'Linn was part of the judiciary in the High Court until he reached judges' then retirement age of 70 in November 1997. Having been reappointed as an acting judge of the High Court, he continued to serve on the bench in that court until he was appointed as an acting judge of appeal in the Supreme Court from September 1999. He served in that capacity in the Supreme Court for seven years. He passed away on the 19th of July 2015.

7. Simpson Victor Mtambanengwe	Simpson Victor Mutambanengwe (also: Mtambanengwe), was born in and was a Zimbabwean judge. In the Caprivi treason trial, Mutambanengwe along with Judges of Appeal Gerhard Maritz and Johan Strydom ruled in Namibia's Supreme Court (State vs. Malumo and 24 Others) that confessions from 25 accused are inadmissible before the High Court in Windhoek due to the occurrence of "coercive actions" at the hands of police or military to obtain the testimonies. He served on the High Courts of Zimbabwe and Namibia and was the chairperson of the Zimbabwean Electoral Commission. From 1979 onwards, he worked as a lawyer in independent Zimbabwe until 1986 when he was appointed a High Court Judge. In 1994 he was appointed to the Namibian High Court. Mutambanengwe also served on the Supreme Court of Namibia, both as acting Chief Justice of Namibia and after his retirement several times as Acting Judge of Appeal. He passed away on the 10th of May 2017.
8. Johannes Dawid Gerhardus Maritz	Johannes Dawid Gerhardus Maritz served on the Supreme Court bench since the start of 2006. Having previously been a judge of the High Court since August 1999, he was the longest-serving member of Namibia's judiciary at the time of his early retirement. Maritz gained a reputation for a strong streak of perfectionism and for writing outstanding and erudite judgements after his appointment to the High Court bench.
9. Pieter Emilius Streicher	Pieter Emilius Streicher was born on the 19th of June 1944. He is a South African lawyer and retired Judge of Appeal in the Supreme Court of Appeal. He graduated with a Bachelor of Laws degree (cum laude) from the University of Pretoria in 1969 and was appointed a judge in the Transvaal Provincial Division in 1989.

10. Khayelihle Kenneth Mthiyane	Khayelihle Kenneth Mthiyane was born in Ndwedwe, KwaZulu-Natal, on13 September 1944. In 1997, he headed the three-person Mthiyane Commission which investigated corruption, racism and other irregularities in twenty-two provincial hospitals in KwaZulu-Natal with a view to establishing clean governance. The report and the recommendations of the Commission resulted in the abatement of the chaos that had threatened to destabilise service delivery in the province and a number of dismissals and prosecutions followed. In 1997, Mthiyane was appointed as a Judge of the Natal Supreme Court, and in 2000, he served as an Acting Judge of the Supreme Court of Appeal. In 2001, Mthiyane was appointed as a Judge of the Supreme Court of Appeal. In 2002, he was appointed as the Chairperson and Head of the Electoral Court. Since 2006, Mthiyane has served as the Vice-Chairperson of the Rules Board for Courts of Law in South Africa. During May 2008, Mthiyane served as an Acting Judge in the Supreme Court of Namibia. In 2011, Mthiyane was appointed as an Acting Judge of the Constitutional Court of South Africa.
11. F D J Brand	FDJ Brand was appointed as an Acting Judge of the Supreme Court of Namibia in September 2008, together with Justices Strydom and Chomba.
12. Catherine Mary Elizabeth O'Regan	Catherine O'Regan is a former judge of the Constitutional Court of South Africa. From 2013 to 2014, she was a commissioner of the Khayelitsha Commission.
13. Pius Nkozo Langa	Pius Nkonzo Langa (Order of the Baobab) (25 March 1939 - 24 July 2013) was Chief Justice of South Africa, serving on the Constitutional Court. He was appointed to the bench in 1994 by Nelson Mandela, and he became Deputy Chief Justice in 2001 and was elevated as Chief Justice in 2005 by Thabo Mbeki. He retired in October 2009. He passed away on the 23rd of July 2013, aged 74, following a long illness.

14. Sirral Sandile Ngcobo	Justice Sandile Ngcobo was born in Durban on 1 March 1953. From April 1996 to the end of August that year, Ngcobo was an acting judge of the Supreme Court, Cape of Good Hope Provincial Division. In September 1996 he was made a judge of the same division. From January to December 1997, he was an acting judge of the Labour Appeal Court; in November that year he was appointed a judge of the court. In 1999 Ngcobo was appointed the acting Judge President of the Labour Court and Labour Appeal Courts.
15. Vernanda Cecily Ziyambi	Vernanda Ziyambi is a retired Zimbabwean judge and a former justice of the Supreme Court of Zimbabwe. She retired from the Supreme Court on November 30th, 2016 at the age of 70. However, in 2017 she was given a one-year contract by then Chief Justice Godfrey Chidyausiku, to act as a judge of the court. Ziyambi was born and educated in the West Indies. She moved to Zimbabwe upon marriage to the late nationalist Frank Tarisai Ziyambi who served as a Cabinet Minister. After independence in 1980, she worked at the Attorney-General's Office and in private practice. She was appointed as a High Court judge in November 1993. In August 2001, Ziyambi made history when she became the first woman to be appointed a Supreme Court justice. When she retired in November 2016, she was the third most senior Supreme Court justice after Chief Justice Godfrey Chidyausiku and Deputy Chief Justice Luke Malaba.

16. Paddington Shadreck Garwe	Paddington Shadreck Garwe registered as a legal practitioner on 10th May 1979. His career in the judiciary started in the colonial era, as a young assistant magistrate in 1978. Garwe later on worked as a clerk of court and prosecutor before being appointed magistrate in February 1980. From there, Garwe rose through the ranks of the judicial system, and became a regional magistrate when he was just 26 years of age in 1984. He became the chief magistrate, the top position in the lowest division of the judicial system when he was only 31 years of age in 1989. After serving two years as Chief Magistrate, Garwe was appointed to the position of Permanent Secretary for the Ministry of Justice, Legal and Parliamentary Affairs in 1991 after which he was appointed as a judge of the High Court in 1993 at age 35. He was made judge president of the High Court of Zimbabwe in 2001. In 2006 Garwe was promoted to Justice of the Supreme Court of Zimbabwe. In 2013 he became a Justice of the Constitutional Court of Zimbabwe.
17. Ezer Hosea Tala Angula	Ezer Hosea Tala Angula was appointed as Deputy Judge-President of the Windhoek High Court with effect from 01 January 2016.
18. Maruping Dibotelo	Maruping Dibotelo was appointed as an Acting Judge of Appeal for the period 1st October 2018 to 31st October 2019, in Namibia. Prior to his appointment as an Acting Judge of Appeal, Justice Dibotelo served as the Chief Justice of Botswana from February 2010 to April 2018. Justice Dibotelo also served as a High Court Judge from September 1996 to January 2010. Justice Dibotelo has been in the judicial system for almost 20 years.

BIBLIOGRAPHY AND ADDITIONAL REFERENCES

CASE LAW

A v New South Wales and Another (2007) 230 CLR 500 (HCA)

Administrator-General for South West Africa and another v Katofa 1986 (1) SA 800 (SWA)

Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)

Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia (SA 51/2008) [2009] NASC

Afrika v Metzler 1997 (4) SA 531 NM

Afshani v Vaatz 2006 (1) NR 35 (HC)

A-G v Gilliland [1985] IR 643

Agnes Kahimbi Kashela v *Katima Mulilo Town Council* Case No: SA 15/2017

Agnes Kashela v Katima Mulilo Town Council 2018 (4) NR 1160 (SC)

Akuake v Jansen van Rensburg 2009 (1) NR 403 (HC)

Alberts v Government of Namibia and Another 1993 NR 85 (HC)

Alexander v Minister of Justice and Others 2010 (1) NR 328 (SC)

Alieta Elizabeth Wiese t/a Support.com v Pastec Distributors & Training CC Case No: 285/2011 Judgment delivered on 24 February 2016

Alpine Caterers Namibia (Pty) Ltd v Owen & Others 1991 (2) NR 341

Alymbek Bekmanov and Damirbek Egemberdiev v Kyrgyzstan CCPR/C/125/D/2312/2013

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Anudo v United Republic of Tanzania (Application No. 012/2015) [2018] AFCHPR 5; (22 March 2018)

Aonin *Fishing (Pty) v Ministry of Fisheries and Marine Resources* 1998 NR 47

Arrangies t/a Auto Tech v Quick Build 2014 (1) NR 187 (SC)

Asylum Case 1950 ICJ Reports

Atiku Abubakar & Others v Umaru Musa YarsaYa & Others SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008

Attorney General v Lawrence [1985] LRC Const 921 (St Chr & Nevis Ca)

Attorney General v Minster of Justice 2013 (3) NR 806 (SC)

*Attorney-General and Others v Danie*l 2011 (1) NR 330 (HC)

Attorney-General of Namibia v Minister of Justice and Others 2013 (3) NR 806 (SC)

Attorney-General of the Gambia v Jobe [1984] AC 689 (PC) LRC Const 556

Attorney-General v Coote (18 RR 692)

Attorney-General v Moagi 1982 (2) BLR 124

Attorney-General v Yeung & Another [1987] LRC (Crim) 94

Barkhuizen v Napier 2007(5) SA 323 (CC)

Basson v Chilwan 1993 (3) SA 742

Beckenstrater v Rottcher and another 1955 (1) SA 129 (A)

Bell v Director of Public Prosecutions [1986] LRCCC Const 392 (PC)

Biro v Minister of the Interior 1957 (1) SA 234

Brisley v Drotsky 2000(4) SA 1 (SCA

Cabinet for the Territory of South West Africa v Chikane 1989 (1) SA 349 (A)

Cabinet for the Territory of South West Africa v Eins 1988 (3) SA 369 (A)

Carmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22

Case and Another v Minister of Safety and Security and Others, *Curtis v Minister of Safety and Security* 1996 (3) SA 617

Castell v De Greef 1994 (4) SA 408 (C)

Chairperson Council of the Municipality of Windhoek and Others v Roland and Others (2013) NASC 15

Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)

Chairperson of the Immigration Selection Board and Erna Elizabeth Frank and Another 2001 NR 107 (SCA)

Chake Avakian v Mr Artin Avakian Tekemt 13, 1956 E.C. (OCTOBER 24, 1963 G.C

Channel Life Namibia (Pty) Ltd v Otto 2008 (2) NR 432 (SC)

Chenesai Rateiwa v Tsitsi Venge HB 152/11

Chief Lesapo v North West Agricultural Bank and Another, 2000 (1) SA 409 (CC)

China State Engineering Construction Corporation v Namibia Airports Company Ltd, Case No. SA 28/2019 delivered on 7 May 2020

Chomba v The People (1975) ZR 245

Chombo v Minister of Safety and Security (I 3883/2013) [2018] NAHCMD 37 (20 February 2018)

Christian Education South Africa v minister of Education 2000 (4) SA 757 (CC)

Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T)

Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others 2008 (2) NR 753 (SC)

Clarke v Hurst 1992 (4) SA 630 (D)

Coetzee v Government of the Republic of South Africa and Others; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others (1995) 4 SA 631

Collins v Minister of the Interior 1957 1 SA 552 (AD)

Communications Commission of Kenya and others v Royal Media Services and others [2014] eKLR

Constitutional Rights Project, Civil Liberties Organisation & Media Rights Agenda v Nigeria Communication No. 140/94 (1999)

Daniel v Attorney-General 2011 (1) NR 330 (HC)

Daniel v Attorney-General and Others 2017 NASC 21

Dannecker v Leopard Tours Car and Camping Hire CC and Others 2019 (1) NR 246 (SC)

Dawood and Another v. *Minister of Home Affairs and Others*, *Shalabi and Another* v *Minister of Home Affairs and Others*, *Thomas and Another* v *Minister of Home*

Affairs and Others [2000] ZACC 8; 2000(3) SA 936 (OC); 2000(8) BCLR 837 (CC)
DE v RH 2015 (5) SA 83 (CC)
De Wilde v Minister of Home Affairs (A 147/2013) [2014] NAHCMD 160
De Wilde v Minister of Home Affairs (SA 48/2014) [2016] NASC
Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 487 (CC)
Digicore Fleet Management v Steyn (722/2007) [2008] ZASCA 105 (22 September 2008)
Director General Namibia Central Intelligence Service v Haufiku 2018 (3) NR 757 (HC)
Director of Public Prosecutions v Pete [1991] TZCA 1
Director-General of the Namibian Central Intelligence Service & Another v Haufiku & Others SA 33/2018 [2019] NASC 7
Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others 1997 NR (HC)
Du Plessis & Others v De Klerk 1996 (3) SA 850 (CC)
Edwards v Attorney-General for Canada [1930] AC 124 (Judicial Committee of the Privy Council (Canada))
Elizabeth Tanyanyiwa v *Lindiwe Huchu* HH 668-14
ES v AC 2015 (4) NR 921 (SC)
Estate van der Byl v Swanepoel 1927 AD 141
Ex Parte Attorney-General In re: The relationship between the Attorney-General and the Prosecutor-General 1998 NR 282 (SC)
Ex Parte Attorney-General: In re Corporal Punishment by Organs of State 1991 NR 178 (SC)
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 (RSA) 1988 (2) 832 (SWA)
Ex Parte Chingufo in re Efigenia Semente; Semente v Chingufo (A 216/2012) [2012] NAHCMD 2 (25 September 2012)
Ex Parte: Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General 1995 (8) BCLR 1070 (NmS)
Experian South Africa (Pty) Ltd v Haynes Andrew Michael and Transunion Credit Bureau (Pty) Ltd Case No 487/11/2011
F v Minister of Safety & Security & others 2012 (1) SA 536 (CC) (2012 (3) BCLR 244; [2011] ZACC 37)
Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and Another (HC): Nasilowski and others v Minister of Justice (1998 NR 96 (HC)
Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A)
Frank v The Chairperson of the Immigration Selection Board 1999 NR 257 (HC)
Frans v Paschke & Others 2007 (2) NR 520 (HC)
Fraser v Children's Court Pretoria and Others [1997] 2 SA 2018 (CC)
Free Press of Namibia (Pty) Ltd v Nyandoro 2018 (2) NR 305 (SC)
Furman v Georgia 408 US 238 (1972)

Gaingob v S (SA 07/2008 and SA08/2008)
Getachew v Government of the Republic of Namibia 2006 (2) NR 720 (HC)
Glinski v McIver 1962 (1) All ER 696 (HL)
Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Trial 2002 NR 235 (SC)
Government of the Republic of Namibia v Cultura 2000 1993 NR 328 (SC)
Government of The Republic of Namibia v Sikunda 2002 NR 203 (SC)
Green v Fitzgerald 1914 AD 88
Gregory v Portsmouth City Council 2000 1 All ER 560 (HL)
Grootboom v Government of the Republic of South Africa 2000 (1) SA 46
Gule v Commissioner of Correctional Services SZHC 2419/2004
Gunther Kessl & Others v Ministry of Lands and Resettlement 2008 (1) NR 167 (HC)
Harmelin v Michigan [1991] US Supreme Court, 89-7272 US 957
HE v A Hospital NHS Trust and Another [2003] EHWC 1017 (Fam)
Heaney v Ireland [1994] 3 IR 593
Hendricks and others v Attorney General, Namibia, and Others 2002 NR 353 (HC), 358
Heyns v Venter 2004 (3) SA 2000 (T)
Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC)
Immigration Selection Board v Frank 2001 NR 107 (SC)
In re Clark 185 N.E.2d 128
In Re Ex parte Attorney-General: Corporal Punishment by Organs of State 1991 NR 178 (SC)
Independence Catering (Pty) Ltd and Others v. Minister of Defence and Others 2014 (4) NR 1085 (HC)
Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others, 2001 (1) SA 545 (CC)
Itula & Others v Minister of Urban and Rural Development & Others (A 1/2019) [2020] NASC 6 (05 February 2020)
James Sibongo v Lister Lutombi Chaka & another Case No: SA 77/2014
Johannesburg City Council v. Chesterfield House, 1952 (3) SA
John Opong Benjamin & Others v National Electoral Commission & Others SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013
John Roe and Others v Unocal Corporation and Others No. CV-96-06956 RSWL 14187 (395 F.3rd 932b) (9th Cir 2002)
Joseph v Joseph and Joseph v Joseph 2020 NASC 22
JS v LC 2016 (4) NR 939 (SC)
Julius v Commanding Officer Windhoek Prison & others; Nel v Commanding Officer Windhoek Central Prison & others 1996 NR 390 (HC)
Julius v Commanding Officer Windhoek Prison & others; Nel v Commanding Officer Windhoek Central Prison & others 1996 NR 390 (HC)
Kafkaris v Cyprus ECtHR (app 21906/04) 12 February 2008 [GC]

Kahorere v Minister of Home Affairs (A292/2008) [2011] NAHC 44 (22 February 2011)

Kallos & Sons (Pty) Ltd v Mavromati 1946 WLD 312

Kalunga v The People (1975) ZR 72

Kamahere and Others v. Government of the Republic of Namibia and Others 2016 (4) NR 919 (SC)

Kambazembi Guest Farm cc t/a Waterberg Wilderness v Ministry of Lands and Resettlements 2018 NASC 399

Karima Sabirova and Bobir Sabirov v Uzbekistan CCPR/C/125/D/2331/2014

Kashela v Katima Mulilo Town Council 2018 (4) NR 1160 (SC)

Katjaimo v Katjaimo 2015 (2) NR 340 (SC)

Katsumbe v Buyanga 1991 (2) ZLR 256

Kauesa v Minister of Home Affairs & others 1994 NR 102 (HC)

K*auesa v Minister of Home Affairs* (SA 5/ 94) [1995] NASC 3

Kaulinge v Minister of Health and Social Services 2006 (1) NR 377 (HC)

Kerry McNamara Architects Inc and Others v. Minister of Works, Transport and Communication and Others 2000 NR 1 (HC)

Kerry McNamara Architects Inc and Others v. Minister of Works, Transport and Communication and Others 2000 NR 1 (HC)

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

Keya v Chief of Defence Force and Others 2013 (3) NR 770 (SC)

Khumalo and Another v MEC of Education, Kwazulu Natal 2014 (5) SA 579 (CC)

Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002)

Khumalo v Mandishona 1996 (1) ZLR 434

Kim v Minister for Immigration and Board Protection [2016] FCA 959, judgment delivered on 16 August 2016

Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others 2011 (2) NR 437

Koujo v Minister of Mines and Energy 2020 NASC 21

Kruger v Transnamib Ltd (Air Namibia) and others 1996 NR 168 (SC)

Law v Kin 1966 (3) SA 480 (W) 482

Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4)

Le Roux v The Minister of Home Affairs and Immigration and Others 2011 (2) NR 606 (HC)

Lederman v Moharai Investments (Pty) Ltd 1969 (1) SA 190 (A)

Lee v Minister for Immigration and Immigration Citizenship [2011] FCA 1458; (2011) 199 FCR 336 at [89]- [90]

Lesotho High Lands Development Authority v. Sole [1999] JOL 5662 (LesH)

Liechtenstein v Guatemala [1995] ICJ 4

Liectenstein v Liechtenstein 1955 ICJ Reports 4

Likanyi v S (SCR 2 / 2016) [2017]

LM and Others v. Government of the Republic of Namibia [2012] NAHC 211 (30 July 2012)
Lotus Case 1927 PCIJ Reports, Series A no 10
Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 897
Mahupelo v Minister of Safety and Security and Others 2017 (1) NR 275 (HC)
Makoni v Commissioner of Prisons Const application No CCZ 48/15; Judgment CCZ 8/16 on 13 July 2016
Malaysian Bar v Govt of Malaysia (1988) LRC (Const) 428
Mangole v Rapuleng 1990 BLR 450 (HC)
Mapuranga v Mungate 1997 (1) ZLR 64
Mapuranga v Mungate 1997 (1) ZLR 64
Marley v Rawlings, [2014] UKSC 2, [2014] 2 WLR 213, [2014] WTLR 299, 16 ITELR 642, [2014] 1 All ER 807, [2014] WLR(D) 18, [2014] Fam Law 466, UKSC 2012/0057
Mbewe v The People (1977) ZR 41
Medical Association of Namibia and Another v. Minister of Health and Social Services and Others 2017 NASC 1
Meyer v Felisberto 2014 (2) NR 498 (HC)
Miazga v Kvello Estate (2008) 282 DLR (4th) 1 (Sask. CA)
Minister for Justice & Constitutional Development v Moleko [2008] 3 All SA 47 (SCA)
Minister of Defence v Mwandinghi (SA 5/91) [1991] NASC
Minister of Defence v Mwandinghi 1993 NR 263 (HC)
Minister of Health v Goliath 2009 (2) SA 248 (C)
Minister of Health v. Treatment Action Campaign 2002 (10) BCLR 1075 (CC).
Minister of Home Affairs v Fourie and another 2006 (1) SA 524 (CC)
Minister of Justice and Constitutional Development and Others v Moleko [2008] 3 All SA 47 (SCA)
Minister of Safety and Security & Others v Chunga (SA 1/2018) [2020] NASC
Minister of Safety and Security & Others v Kauhano (SA 56/2018) [2020] NASC 16
Minister of Safety and Security & Others v Makapa 2020 (1) NR 187 (SC)
Minister of Safety and Security & Others v Mutanimiye (SA 47/2017) [2020] NASC 5 (05 February 2020)
*Minister of Safety and Security and Others v Mahupelo (SA-2017/7) [2019] NASC 2 (28 February 2019)/*2019 (2) NR 308 (SC)
Moaki v Reckitt & Colman (Africa) Ltd & Another 1968 (3) SA 98 (A)
Moaki v Reckitt and Colman 1968 (3) SA 98 (A) 103-104
Mokoena v Mokoena [2007] LSHC 14 (16 January 2007)
Moolman & another v Jeandre Development CC Case No SA 50/2013
Moulton v Chief Constable of the West Midlands [2010] EWCA Civ 524 (13 May 2010)
Muheto v Namibian Broadcasting Corporation 2000 NR 178 (HC)
*Muller v President of the Republic of Namibia (*SA 2-98) [1999] NASC 2, 200(6) BCLR 655 (NmS) (21 May 1999)
Muller v President of the Republic of Namibia 1999 NR 190 (SC)

Munuma v State Case No: SA 37/2015, Supreme Court Appeal Judgment delivered on 22 August 2016

MW v Minister of Home Affairs 2016 (3) NR 707 (SC)

Mwai Kibaki v Daniel Toroitichi Arap Moi Court of Appeal Civil Application 172 [Election Petition 1of 1998]

Mwandingi v Minister of Defence 1990 NR 363 (HC)

Mwandingi v Minister of Defence 1992 (2) SA 355 NmSC

*Mwoombola v The Master of the High Court (*HC-MD-CIV-MOTGEN-2017/00299) [2018] NAHCMD 103 (20 April 2018)

Naditume v Minister of Defence [2000] NALC 1 (10 May 2000)

Nahole v Shiindi [2014] NAHCNLD 53 (03 October 2014)

Namibia Competition Commission v. Puma Energy Namibia (Pty) Ltd 2020 NASC 33

Namibia Grape Growers and Exporters Association and Others v. Ministry of Mines and Energy and Others 2004 NR 194 (SC)

Namibia National Students' Association & others v Speaker of the National Assembly for South West Africa & others 1990 (1) SA 617 (SWA)

Namibia National Students' Association & others v Speaker of the National Assembly for South West Africa & others 1990 (1) SA 617 (SWA)

Namundjepo & others v Commanding Officer, Windhoek Central Prison & another 1999 NR 271 (SC)

Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others J2/6/2013

Nanditume v Minister of Defence 2000 NR 103 (LC)

National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs 2000 (2) SA 1

National Coalition of Gays and Lesbians v. Minister of justice 1999(1) SA 6 (CC) 124

National Media Limited v Bogoshi 1998 (4) SA 1196 (SCA)

NEF v President of the Republic of Namibia 2020 (NAHCMD) 198

Nghimtina v Trustco Group International Ltd [2014] NAHCMD 11 (23 January 2014)

Njodzi v Matione (HC 11253/14, HH 37-16) [2016] ZWHHC 37 (14 January 2016)

North Sea Continental Shelf Case 1969 ICJ Reports

NS v RH 2011 NR (2) 486 (HC)

Nyakudya v Washaya 2000 (1) ZLR 65 C

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v S v Makwanyane 1995 (3) SA 391 (CC)

Ohorongo Cement (Pty) Ltd v Jack's Trading CC (SCR1-2013) [2020] NASC (19 March 2020)

Pamo Trading enterprises CC and others v Chairperson of the Tender Board of Namibia and 90 others Case No: SA 60/2017

Pharmaceutical Society of South Africa and Others v Tsabalala-Msimang and Another NNO: New Clicks South Africa (Pty) Ltd v The Minister of Health and Another 2005 (3) SA 238 (SCA)

Pohamba Shifeta v Raja Munamava (Unreported judgment of Parker J) case No I 2106/2006, delivered on 5 December 2008

PP v Lin Chien Pang [1993] 2 MLR 37

Prins v Government of Namibia (I 1361/2004) [2013] NAHCMD 259 (18 September 2013)

Prins v Government of Namibia (I 1361/2004) [2013] NAHCMD 259 (18 September 2013)

Prinsloo & Another v Newman 1975 (1) SA 481 (A)

Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11 O A, Pre-Trial Chamber II, Judgment 30 May 2011

Prosecutor v Guus Kouwenhoven Case No. 220043306 (ECLI: NL: GHSGR: 2008: BC6068) Court of Appeal decision delivered on 21 April 2017

Prosecutor v Tihofil Blaskic IT-95-14-T Judgment of 3 April 1996 Decision on the motion of the defence filed pursuant to Rule 64 of the rules of procedure and evidence

Prosecutor-General v Daniel and Others 2017 (3) NR 837 (SC)

Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng, Head of the Department of Health, Gauteng v Public Servants Association obo Ubogu 2018 (2) SA 365 CC

R v Barnet LBC Ex Parte Shah [1983] 1 All ER 226

R v Baumgartner 2013 ABQB 761 (Alberta Court of Queen's Bench)

R v Big M Drug Mart [1985] 1 SCR 29

R v Bourque 2014 NBQB 237 (New Brunswick Court of Queen's Bench)

R v Boutilier 2017 SCC 64 (Supreme Court of Canada)

R v Lyons, [1987] 2 SCR 309

R v Robinson (163) (1985) AC

R v *Salituro* (1992) 8 CRR 2nd 173

R v Salituro [1991] 3 SCR 654

R v Siggins [1984] Imm AR 14

R v Sin Yau Ming [1992] 1 HKCLR 127 (CA)

R v Swanepoel 1945 AD 444

Rally for Democracy and Progress & others v Electoral Commission of Namibia & others 2010 (2) NR 487 (SC)

Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others (A01/2010) [2011] NAHC (14 February 2011)

Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V)

RE B.C Motor Vehicle Act [1985] 2 SCR 486 (Supreme Court of Canada)

Re T (*1992*) 4 All ER 649(CA)

Reddy v Siemens [2006] SCA 164 (RSA)

Relyant Trading (Pty) Ltd v Shongwe and Another [2007] 1 All SA 375 (SCA)

RH v DE 2014 (6) SA 436 (SCA)

Risley v Gough [1953] Tas SR 78

RMD Chamarbaugwalla v The Union of India AIR 1957 SC 628. *Schachter v Canada* (1992) 2 SCR 679

Robinson v Randfontein Estates GM Co Ltd 1925 AD 173
Roland and Others v. Chairperson of the Council of the Municipality of Windhoek And Others 2012 NAHC 216
Roux v Hattingh 2012 (6) SA 428 (SCA)
Rudolph and others v Minister of Safety and Security and another 2009 (5) SA 94 (SCA)
S v Acheson 1991 (2) SA 805 (NM)
S v Acheson 1991 NR 1 (HC)
S v Baartman 1997 (1) SACR 304 (E)
S v Britz (CC 02/2017) [2017] NAHCMD 340 (29 November 2017)
S v Charvulla 2001 (2) SACR 681 (SCA)
S v Chokuramba (Unreported Case No: CCZ 29/15) [2019] ZWCC 10 (3 April 2019)
S v Dausab (CC 32/2009) [2019] NAHCMD 188 (14 June 2019)
S v David (CC 11/2018) [2020] NAHCNLD 82 (6 July 2020)
S v Gaingob 2018 (1) NR 211 (SC)
S v Gerry Wilson Munyama (SA 47/2011) [2011] NASC 13 (9 December 2011)
S v Heita & others 1987 (1) SA 311 (SWA)
S v Holder 1979 (2) SA 70 (A)
S v Kandovazu 1998 NR 1 (SC)
S v Kangandjera (CC 2/2012) [2016] NAHCMD 254 (8 September 2016)
S v Khumalo 1984 (3) SA 327 (A)
S v Lawrence, S v Nigel, S v Solberg 1997 (4) SA 1176 (CC)
S v Likanyi 2017 (3) NR 771 (SC)
S v Likuwa 1999 NR 151 (HC)
S v Makwanyane 1995 (3) SA 391 (CC)
S v Mbemukenga (CC 10/2018) [2020] NAHCMD 262 (30 June 2020)
S v Mharapara 1986 (1) SA 556 (ZS)
S v Mokgiba 1999 (1) SACR 534 (O)
S v Mushwena 2004 NR 276 (SC)
S v Mwinga Case No. SA 1/95 Appeal Judgment of the Namibian Supreme Court delivered on 11/10/1995
S v Nanub (CC 4/2014) [2017] NAHCMD 22 (01 February 2017)
S v Nassar 1994 NR 233 (HC)
S v Ndamwoongela 2018 (2) NR 422 (HC)
S v Negongo 1992 NR 352 and *Venter v R* 1907 TS 910
S v Neidel (CC 21/2006) [2011] NAHC 347 (21 November 2011)
S v Nicodemus (CC 15/2017) [2019] NAHCMD 296 (20 August 2019)
S v Niemand 2002 (1) SA 21 CC
S v Nkosi 2003 (1) SACR 91 (SCA)
S v Rabie 1975 (4) SA 855 (A)
S v Schiefer 2017 (4) NR 1073 (SC)
S v Scholtz 45 1997 (1) BCLR 103 (NmS)
S v Shikunga and Another 1997 NR 156 (SC)
S v Siluale en Andere 1999 (2) SACR 102 (SCA)
S v Sipula 1994 NR 41 (HC)

S v Smith 1997 (1) BCLR 70 (Nm)
S v Sparks and Another 1972 (3) SA 396 (AD)
S v Swartz (CC 48/2007) [2019] NAHCMD 400 (09 October 2019)
S v Tcoeib 1992 NR 198 (HC)
S v Tcoeib 1999 NR 24 (SC)
S v Van den Berg 1995 NR 23 (NHC)
S v Van Wyk (SA 94/2011) [2012] NASC 23 (15 November 2012)
S v Van Wyk (SA 94/2011) [2012] NASC 23 (15 November 2012)
S v Van Wyk 1993 NR (SC)
S v Vries 1998 NR 244 (HC)
S v Xaba 2005 (1) SACR 435 (SCA)
S v Zinn 1969 (2) SA 537 (A)
S v Tjijo 4 September 1991 (unreported but partially reproduced in *S v Tcoeib* 1999 NR 24 (SC))
Salvatori Abuki & Another v Attorney-General [1997] UGCC
Schroeder & Another v Solomon & 48 others 2009 (1) NR 1 (SC)
Secretary of State in Council of India v Kamahee Boye Sahabe (1859) 13 Mbo Pa CC 335
Seyma Türkan v Turkey CCPR/C/123/D/2274/2013
Shaanika and others v The Windhoek City Police and Others 2013 (4) NR 1106 (SC)
Shah v Barnet Borough Council and Other Appeals [1983] 1 ALL ER 226 (House of Lords)
Shikongo v Trustco Group International Ltd 2009 (1) NR 363 (HC)
Sibonga v Chaka & Another SA 77/2014 [2006] NASC 16 (19 August 2016)
Sibongo v Lister Lutombi Chaka &Another SA 77/2014
Singer Manufacturing Co., v Robinow 1971 SC 11
Smit v Windhoek Observer (Pty) Ltd 1991 NR 327
Solem v Helm [1983] US Supreme Court, 82-492 US 277
Sonia Yaker (represented by counsel, Roger Kallas) v France CCPR/C/123/D/2747/2016
South African National Roads Agency v Cape Town City 2017(1) SA 468 (SCA)
South African Poultry Association and Others v. Minister of Trade and Industry and Others 2018 (1) NR 1 (SC)
Speaker of the Senate & Another v Attorney-General & Others [2013] eKLR
Swart v Minister of Home Affairs 1997 NR 268 (HC) at 274-A-B
Takadiini v Maimba 1996 (1) ZLR 737
The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another, 2001 NR 107 (SC)
The Matter of a Special Reference from the Bahama Islands (1893) AC 138
The People (A-G) v Gilliland [1985] IR 643
The State v Gerry Wilson Munyama (SA 47/2011) [2011] NASC 13 (9 December 2011)
Thloro v Minister of Home Affairs (Case No (P) A159/2002) [2008] NAHC 65 (2 July 2008)

Thloro v Minister of Home Affairs 1996 (4) SA 965 (NMS)
Thompson v Minister of Police 1971 (1) SA 371 (E) 373-374
Thudinyane v Edward (SA 17/2005) [2012] NASC 22
Tick v Broude and Another 1973 (1) SA 462 (T)
Tinyefuza v Attorney General [1997] UGCC 3
Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC 2015 (3) NR 733 (SC)
Toumbius v Antoniou 1999 (1) SA 636
Trustco Group International Ltd v Shikongo 2010 (2) NR 377 (SC)
Trustco Limited v. Deeds Registry Regulation Board Case No: SA 14/2010
Tuhafeni Hangula v. Trustco Newspapers (Pty) Ltd [2012] NAHCMD 77 (November 2012)
Tweya and Others v. Herbert and Others case No. SA 76/2014 delivered on 6 July 2016
Union of India v Pratibha Bonnerjea [1996] AIR SC 690
Unity Dow v Attorney-General of Botswana 1992 BLR 119 (CA), 165 (Aguda JA)
Universal Church of the Kingdom of God v Namzim Newspaper t/a The Southern Times 2009 (1) NR 65 (HC)
Van Straten v Bekker (I 6056/2014) [2016] NAHCMD 243 (31 August 2018)
VC v Slovakia application 18968/07
Vinter and Others v. The United Kingdom [2013] ECHR 645
Visser v Minister of Finance (SA 89/2014) [2017] NASC 10
Waterhouse v Shields 1924 CPD 155
West Air Aviation and Others v. Airports Company Limited and Another 2001 NR 256 (HC)
Westcoast Fishing Properties v Gendev Fish Processors Ltd & Another 2013 (4) NR 1036 (HC)/A 228/2012 [2013] NAHCMD 185 (28 June 2013)
Wirtz v Orford & others 2005 NR 175 (SC)
Woji v Minister of Police 2014 (1) SACR 409 (SCA)
Worku v Equity Aviation Services (Namibia) (Pty) Ltd (in Liquidation) and Others 2014 (1) NR 234 (SC)
Yasin v The Town Area Committee, & Ano [1952] SCR 572 (AIR 1952 SC 115)
Zimbabwe Human Rights NGO Forum v Zimbabwe Communication No 245 (2002)
Zimbabwe Ltd and v World Eagle Properties (Pty) Ltd v Bank of Namibia CASE NO: SA 77/2017
Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143
Zondi v MEC for Traditional and Local Government Affairs, 2005 (3) SA 589 (CC)

INTERNATIONAL INSTRUMENTS

African Charter on Democracy, Elections and Governance (ACDEG) which Namibia signed on 10 May 2007
Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 4 February 1985
International Convention for the Suppression of the Financing of Terrorism, 9 December 1999
International Convention for the Suppression of Unlawful Seizure of Aircraft,16 December 1970
International Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948
International Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260, the Convention entered into force on 12 January 1951
International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973
Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, 27 June 1981
Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990
Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights
United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25 of 15 November 2000
United Nations Educational, Scientific and Cultural Organisation, Declaration of Principles on Tolerance, 16 November 1995
United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989
United Nations Security Council Resolution 435 (1978) of 29 September 1978
Universal Declaration of Human Rights, 10 December 1948
African Charter on Human and Peoples' Rights, 21 October 1986
Rome Statute of the International Criminal Court, 1 July 2002
International Covenant on Civil and Political Rights, 16 December 1966

LEGISLATION (ACTS OF PARLIAMENT AND BILLS)

Administration of Estates Act 66 of 1965
Administration of Justice Proclamation 21 of 1919
Agricultural (Commercial) Land Reform Act6 of 1995
Atmospheric Pollution Ordinance 11 of 1976
Botswana Interpretation Act (Chapter 01:04)
British Nationality and Status of Aliens Act 1914
British Nationality in the Union and Naturalization and Status of Aliens Act 18 of 1926
Canadian *Criminal Code* RSC, 1985

Child Care and Protection Act 3 of 2015
Children's Act 38 of 2005
Children's Law Act 1997
Civil Aviation Act 6 of 2016
Combating of Domestic Violence Act 4 of 2003
Combating of Rape Act 8 of 2000
Communal Land Reform Act 5 of 2002
Companies Act 28 of 2004
Competition Act No 2 of 2003
Criminal Procedure Act 51 of 1977
Deeds Registries Act 47 of 1937
Divorce Act, RSC 1985
Domicile and Habitual Residence Act, RSO 1990
Electoral Act 24 of 1992 as amended
Electoral Amendment Act 23 of 1994
Electoral Act 5 of 2014
High Court Act 16 of 1999
Immigration Control Act, Act 7 of 1993
International Cooperation in Criminal Matters Act 9 of 2000
Interpretation of Laws Proclamation Act 37 of 1920
Judicature Statute of 1873
Judicature Statute of 1875
Judicial Service Commission Act 18 of 1995
Kenya Constitution, 2010
Labour Amendment Act 2 of 2012
Law Reform and Development Commission Act 29 of 1991 (as amended)
Local Authorities Act 23 of 1992
Local Authorities Act 23 of 1992 as amended
Magistrates Courts Act 32 of 1944
Married Persons Equality Act 1 of 1996
Matrimonial Causes Act [Chapter 5:13]
Namibian Citizen Amendment Bill [B.11-2016] amending the Namibian Citizen Act 14 of 1990.
National Health Act 61 of 2003
Naturalization of Aliens (South West Africa) Act 27 of 1928
Norway: 10 of 1902, The General Civil Penal Code
Prevention of Organised Crime Act 29 of 2004
Proclamation 25 of 2013
Proclamation R101 of 1985
Protection of Fundamental Rights Act 16 of 1988
Protection of Information Act 84 of 1982
Refugees Act 2 of 1999
Regional Councils Act 22 of 1992
Regional Councils Act 22 of 1992 as amended

Regulations Relating to Medicines and Related Substance published in GN 178 in GG 4088 of 25 July 2008
Rules of the High Court: High Court Act 16 of 1990
Separate Representation of Voter's Act 46 of 1951
South Africa Citizenship Act 88 of 1995, as amended in 2010
South African Citizenship Act 49 of 1949
South West Africa Naturalization of Aliens Act 30 of 1924
Stock Theft Act 12 of 1990
Supreme Court Act 15 of 1990
Supreme Court Rules, 2017
The British Nationality Act of 1981
The Canada Business Corporations Act (the CBCA)
The Canadian *Constitution Act*, 1867
The Canadian Corrections and Conditional Release Act, 1992
The Canadian Criminal Code RSC, 1985
The Constitution of the Republic of Namibia, 1990
The Municipality of Windhoek Building Regulations published in GN 56 GG 2992 of 28 April 1969
United States of America Constitution, 17 September 1787
Wills Act 7 of 1953

BOOKS, BOOK CHAPTERS AND JOURNAL ARTICLES

A Barak & S Bashi (2007) *Purposive Interpretation in Law* Princeton University Press: New Jersey
A Boesl, N Horn & A Dupisani (2010) "Introduction" in *Constitutional Democracy in Namibia-A critical analysis after two decades* Mcmillan Education Namibia: Windhoek
A Cassese (2003) *International Criminal Law* Oxford University Press: Oxford
A Chaskalson (2000) "Human dignity as a foundational value of our constitutional order" Vol. 16 *South African Journal on Human Rights* 193, 204
A Fichtelberg (2008) *Crimes without borders: An introduction to International Criminal Justice* Pearson: New York
A Grahl-Madsen (1996) *The Status of Refugees in International Law, Volume 1: Refugee Character* A.W. Sijthoff: Leyden
A Kaure (2017) "The ICC: When is Namibia Going to Exit?" *The Namibian Newspaper* 28 February 2017
A Kavanagh (2002) "The Idea of a Living Constitution" Vol. 16(1) *Canadian Journal of Law and Jurisprudence* 55-89
A Kok (2010) "Is Law Able to Transform Society" Vol. 127 *South African Law Journal* 58
A Mills (2018) "Connecting Private and Public International Law" in D French; K McCall-Smith & V Ruiz Abou-Nigm (eds) *Linkages and Boundaries in Private and Public International Law* Hart Publishing: Oxford

A Narrain (2014) "Brazil, India, South Africa: Transformative Constitutions and their role on LGBT Struggles" Vol. 20 *International Journal on Human Rights* 152

A Nienaber and KN Bailey (2016) "The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go?" Vol. 9(2) *South African Journal of Bioethics and Law* 74

A Scalia (1988-1989) "Originalism: The Lesser Evil" Vol. 57 *University of Cincinnati Law Review* 849, 852

A Scheller Jr. (1953) "Land Morality" *Maarquette Law Review* Vol. 36(3) <http://scholarship.law.marquette.edu/mulr/vol36/iss3/12>

A Singh & MZ Mbero (2016) "Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of section 39(2) of Constitution" Vol. 19 *PER/PELJ* 11-12 <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1504>

A Viala (2014) "Limitation du pouvoir constituant, la vision du constitutionnaliste" 32 *Civitas Europa* 81 - 91)

A von Bogdandy, E Mac-Gregor, M Antoniazzi, F Piovesan, and X Soley (eds) (2017) *Transformative constitutionalism in Latin America: the emergence of a new* ius commune Oxford University Press: Oxford

A Wasserfall (2017) "Towards our all-inclusive Namibian House: How can we build a nation in which no Namibian will be left out?" KAS: Windhoek

AD Lederman (1995) "Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children" Vol. 45(3) *Case Western Reserve Law Review* 891, 894

Administrative Directive: Certain Guidelines for Government Ministers and Public Servants published in GG No. 583 of 5 February 1993

AK Wing (1992) "Communitarianism vs Individualism: Constitutionalism in Namibia and South Africa" Vol. 11(2) *Wisconsin International Law Journal* 341

AP Cheater (1996) "Citizenship in Neo-Patrilineal States: Gender Mobility in Southern Africa" Vol. 22(2) *Journal of Southern African Studies* 189-200

B Bekink (2008) "The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion - a South African Perspective" Vol. 3 *Journal of South African Law* 481, 481-2

B Flanagan (2010) "Revisiting the Contribution of Literal Meaning to Legal Meaning" Vol. 30 *Oxford Journal of Legal Studies* 255, 269

B Garner (2005) *Black's Law Dictionary* (8th ed) Thomson/West: St. Paul, 201ff

B Kamal (nd) "International cooperation: mutual legal assistance and extradition" 82 <https://www.unafei.or.jp/publications/pdf/GG6/05-4_Malaysia.pdf>

B Manby (2016) *Citizenship Law in Africa: A Comparative Study* African Minds: Cape Town

B Markesinis & J Fedtke (2006) *Judicial Recourse to Foreign Law: A new source of inspiration* Routledge-Cavendish Publishing: London

B Miller (2013) "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" G Huscroft & B Miller *The Challenge of Originalism* Cambridge University Press: Cambridge

B O'Linn (2003) *Namibia: The Sacred Trust of Civilization Ideal and Reality* Gamsberg Macmillan: Windhoek

BA Balassa (1961) *The Theory of Economic Integration* Routledge: Oxford

BA Reardon (1995) *Educating for Human Dignity: Learning About Rights and Responsibilities* University of Pennysylvania Press: Philadelphia

BB Jacobs (2000) "Respect for human rights in nursing: Philosophical and practical perspectives" Vol. 32 *Canadian Journal of Research* 15

C Alberyn & B Goldblatt (1998) "Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence" Vol. 14 *South African Journal of Human Rights* 248

C Daniels (2000) "Press Freedom, the Namibian Constitution and state practice" in Manfred O Hinz, SK Amoo and D Van Wyk (eds) *The Constitution at work: 10 years of Namibian Nationhood* Mcmillan Education Namibia: Windhoek

C Eric Bjornlund (1990) "The Devil's Work? Judicial Review under a Bill of Rights in South Africa and Namibia" Vol. 26 *Stanford Journal of International Law* 391-433, 429

C Fombad (2012) "Internationalisation of constitutional law and constitutionalism in Africa" Vol. 60(2) *American Journal of Comparative Law* 470

C Fombad (2014) "Strengthening constitutional order and upholding the rule of law in central Africa: Revising the descent towards symbolic constitutionalism" Vol. 14 *African Human Rights Law Journal* 414

C Forsyth (1981) *Private International Law - The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* Juta: Cape Town

C Himonga, M Taylor & A Pope (2013) "Reflections on judicial views on ubuntu" Vol. 16(5) *Potchefstroom* 370-429

C Laborde (2003) "Republicanism and Global Justice: A Sketch" Vol. 9(1) *"European Journal of Political Theory* 48-69

C Okpaluba (2013) "Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth" Vol. 37(2) *Journal for Juridical Science* 65-95, 66

C Okpaluba (2016) Vol. 37(2) "Between reasonable and probable cause and malice in the law of malicious prosecution: A Commonwealth update" *Obiter* 265-292

C Okpaluba (2017) "Revisiting the elements of malicious prosecution in the law of delict: The Namibian experience in comparative" Vol. 30(3) *South African Journal of Criminal Justice* 316-338

C Okpaluba (2018) "Damages for wrongful arrest, detention and malicious prosecution in Swaziland: liability issues" Vol. 43 *Journal for Juridical Science* 55-83

C Okpaluba (2019) "Quantification of damages for malicious prosecution: a comparative analysis of recent South African and Commonwealth case law (3) - research" Vol. 32(1) *South African Journal of Criminal Justice* 28-51

C Roederer (2011) "Interpretative Approaches to Legal Theory" in C Roederer and D Moellendorf in Jurisprudence Juta: Cape Town

CA Batchelor (1998) "Stateless and the Problem of Resolving Nationality Status" Vol. 10(1/2) *International Journal of Refugee Law* 159-160

Carpenter G (1989-90) "The Namibian Constitution-ex Africa Aliquid Novi after All?" Vol. 15 *The South African Year Book of International Law*

CBN Gade (2011) “The historical development of the written discourses on *ubuntu*” Vol. 30(3) *South African Journal of Philosophy* 306 - 309

CBN Gade (2012) “What is ubuntu? Different interpretations among South Africans of African Descent” Vol. 31(3) *South African Journal of Philosophy* 487-493

CC Ruby, GJ Chan, NR Hasan & A Enenajor (2017) *Theories of Punishment* (9th ed)

CG Thomas (2009) “Ubuntu: The missing link in the rights discourse in post-apartheid transformation in South Africa” Vol. 3(2) *International Journal of African Renaissance Studies* 45

CI Tshoose (2009) “The emerging role of the constitutional value of ubuntu for informal social security in South Africa Vol. 3 *African Journal of Legal Studies* 17

CJ Antieau (1949) “The Limitation of Religious Liberty” Vol. 18(2) *Fordham Law Review* 221, 221

CJ Badul & A Strode (2013) “LM and Others v. Government of the Republic of Namibia: The first sub-Saharan African case dealing with coerced sterilizations of HIV-positive women - Quo vadis?” Vol. 13 *African Human Rights Law Journal* 220

CJ Botha (2012) *Statutory Interpretation:* An Introduction for Students (5th ed) Juta: Cape Town

CL Hereux-Dube (2004) “Human Rights: A Worldwide Dialogue” in BN Kirpal (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* Oxford University Press: Oxford/India

CL Kavendjii & N Horn (2008) “The independence of the legal profession in Namibia” in N Horn & A Bösl (eds) *The independence of the Judiciary in Namibia* Mcmillan Education Namibia

CM Fombad (2016) “The evolution of modern African Constitutions: A retrospective perspective” in CM Fombad (ed) *Separation of powers in African constitutionalism* Oxford University Press: Oxford

CR Snyman (2014) *Criminal Law* LexisNexis: Durban

D Beresford (2000) “Chief Justice Mahomed” *The Guardian* (21 June 2000) <https://www.theguardian.com/news/2000/jun/21/guardianobituaries.davidberesford>

D Bilchitz, T Metz & O Oyowe (2017) *Jurisprudence in an African context* Oxford University Press: Cape Town

D Brink (2016) “Originalism and Constructive Interpretation” in Will Waluchow and Stefan Sciaraffa, *The Legacy of Ronald Dworkin* Oxford University Press: New York

D Cornell (2008) “Bridging the span towards justice: Laurie Ackerman and the ongoing architectonic of dignity jurisprudence” Vol. 1 *Acta Juridica* 34

D Cornell (2015) *Law and revolution in South Africa: Ubuntu, dignity and the struggle for constitutional transformation* Fordham University Press: New York

D Davis (1999) *Democracy and Deliberation: Transformation and the South African Legal Order* Juta: Cape Town

D Davis 'Equality: The majesty of Legoland jurisprudence' (1999) 116 *South African Law Journal* 398

D Fellman (1973-1974) "Constitutionalism" in PP Wiener (ed) *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* (1st ed) Scribner: New York

D Grimm (2012) "Types of Constitutions" in M Rosenfeld & A Sajo (eds) *The Oxford handbook of comparative constitutional law*, Oxford University Press: Oxford

D Grimm (2019) "What exactly is political about adjudication?" in Christine Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge

D Hubbard (2010) "The paradigm of equality in the Namibian Constitution: Concept, contours and concerns" in A Bösl, N Horn & A Dupisani *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* McMillan Education: Windhoek

D Hubbard (2015) "Namibian law on LGBT issues" Legal Assistance Centre: Windhoek

D Hubbard (2017) "Infusions of the Constitution into the Common Law" in N Horn & MO Hinz, (ed) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* Konrad Adenauer Stiftung: Windhoek

D Kuwali (2014) "Decoding Afrocentrism: Decolonising legal theory" in O Onazi (ed) *African legal theory and contemporary problems*: *Critical Essays*

D Luban (2009) "Human dignity, humiliation, and torture" Vol. 19 *Kennedy Institute of Ethics Journal* 211

D Moseneke (2002) "Bram Fischer Memorial Lecture: Transformative Adjudication" Vol. 18 *South African Journal of Human Rights* 309

D Mudge "The art of compromise: Constitution making in Namibia" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia - A critical analysis after two decades* Mcmillan Education Namibia: Windhoek, 119 - 145

D Nelken (2004) "Using the concept of legal culture" Vol. 29 *Australian Journal on Legal Philosophy* 1-26

D O'Byrne (2012) "On the sociology of human rights: Theorising the language-structure of rights" Vol. 46 *Sociology* 829

D Orentlicher (2018) "Law, Religion, and health Care" Vol. 8 *UC Irvine Law Review* 617, 622

D Robertson (2010) *The Judge as Political Theorist: Contemporary Constitutional Review* Princeton University Press: Oxford

D Schroeder (2012) "Human rights and human dignity: An appeal to separate the conjoined twins" Vol. 15 *Ethical Theory and Moral Practice* 323

D Tutu (1999) *No future without forgiveness* Rider: London

D Tutu (2004) *God has a dream: A vision of hope for our future* Rider: London

D Weissbrodt (2014) "Human Rights Standards Concerning Transnational Corporations and Other Business Entities" Vol.23 *Minnesota Journal of International Law* 135 - 171 at 136

D Zongwe (2019) "The dangers of transplanting transformative Constitutionalism into Namibia" Vol. 11 *Namibia Law Journal* 88-119

DA Masolo (2004) “Western and African Communitarianism” in K Wiredu (ed) *A companion to African philosophy* Wiley-Blackwell: Cornwall

DB Dobbs & PT Hayden (1997) *Torts and Compensation: personal accountability and social responsibility for injury* (3rd ed) West Publishing: New York

DB Maldonado (2013) “Introduction: Towards a constitutionalism of the Global South” in DB Maldonado (ed) *Constitutionalism and the Global South: The activist tribunals of India, South Africa and Colombia* Cambridge University Press: Cambridge

Declaration against Discrimination (UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, <https://www.refworld.org/docid/3b00f02e40.html>

DP (2019) Zongwe *International Law in Namibia* Langaa: Bameda 90-91.

DP Sulmasy (2013) “The varieties of human dignity: A logical and conceptual analysis” Vol. 16 *Medicine, Health Care and Philosophy* 937

DP Zongwe & B Tjatjara (2018) “Strange maths behind the ruling on very long sentences” *The Namibian* 20 November 2018.

DP Zongwe & B Tjatjara (2020) “Making dignity supreme: The Namibian Supreme Court’s dignity jurisprudence since independence” <https://www.academia.edu/44124974/Making_Dignity_Supreme_The_Namibian_Supreme_Courts_Dignity_Jurisprudence_Since_Independence>

DP Zongwe (2010) “Equality has no mother but sisters: The preference for comparative law over international law in equality jurisprudence in Namibia” in M Killander (ed) *International law and domestic human rights litigation in Africa*

DP Zongwe (2016) “The articulation of an African philosophy of equality as legacy of the South African Constitution” Vol. 31 *Southern African Public Law* 32

DS Diekema (2004) “Parental refusals of medical treatment: the harm principle as threshold for state intervention” Vol. 25 *Theoretical Medicine* 243, 250

DU Zaire (2014) “Constitutional Democracy in Namibia: 25 years on” in N Horn & M Hintz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* KAS: Windhoek

Duhaime Law Dictionary (2019) <http://www.duhaime.org/LegalDictionary/I/InternationalCrime.aspx>

E Cameron (2001) “Constitutional protection of sexual orientation and African conceptions of humanity” Vol. 118 *South African Law Journal* 645-646

E Engle (2006) “Extraterritorial corporate criminal liability: A remedy for human rights violation” Vol. 20(2) *Journal of Civil Rights and Economic Development,* 287 at 313

E James (2018) “Winterton Lecture Constitutional Interpretation” 5 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/edelmanj/edelmanj26mar18.pdf>

E Kibet & C Fombad (2017) “Transformative constitutionalism and the adjudication of constitutional rights in Africa” Vol. 17 *African Human Rights Journal* 349

E Mureinik (1994) "A bridge to where - Introducing the interim Bill of Rights" Vol. 10 *South African Journal on Human Rights* 33

E Schmidt-Jortzig (1991) "The Constitution of Namibia: An impressive example of a state emerging under close supervision and world scrutiny" Vol. 34 *German Yearbook of International Law* 341-251

EE Goodsell (2007) "Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa" Vol. 21(1) *Brigham Young University Journal of Public Law* 111, 132-133

EJ Perry (2009) "China since Tiananmen: A new rights consciousness?" Vol. 20 *Journal of Democracy* 17

EN Griswold (1953) "The Demise of the High Court of Parliament in South Africa" Vol. 66 *Harvard Law Review* 864-872

Etienne Mureinik (1994) "A Bridge to Where? Introducing the Interim Bill of Rights" Vol. 10(1) *South African Journal on Human Right*s 31, 32

F !Owoses-/Goagoses (2012) "Reading down words in a statute, the courts' role, and the place of Parliament: The approach of the Namibian courts" Vol. 4(1) *Namibia Law Journal* 3, 4-5

F !Owoses-/Goagoses (2013) *Planning Law in Namibia* Juta: Cape Town

F Ahen (2019) "Globalisolationism and its Implications for TNCs' Global Responsibility" Vol. 4 *Humanistic Management Journal* 33-55 at 34

F Macagno (2010) "Definitions in law" *Bulletin Suisse de Linguistique Appliquée* 2: 199-217 at 200

F Nghiishililwa (2002) 'The constitutional prohibition on torture' in MO Hinz, SK Amoo & D Van Wyk (eds) *The Constitution at Work: 10 Years of Namibian Nationhood* University of South Africa: Pretoria

F Venter (2015) *Fundamental Rights in South Africa: A Brief Introduction* Butterworths: Durban

FB Nyamnjoh (2006) *Insiders & Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* Zed Books: London/New York

FC de Graaf (2015) "Dworkin's Constructive interpretation as a method of legal research" Vol. 12 *Law and Method* 4

FX Bangamwabo (2010) "Constitutional Supremacy or Parliament Sovereignty through back doors: Understanding Article 81 of the Namibian Constitution" in A Bösl, N Horn, and A Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek

G Bhatia (2019) *The Transformative Constitution: A radical biography in nine Acts* Harper: India and sources cited therein; R West (1989/90) "Progressive and Conservative Constitutionalism" Vol. 88 *Michigan Law Review* 641

G Erasmus (2010) "The Constitution: Its impact on Namibian Statehood and Politics" in C Keulder (ed) *State, Society and Democracy - A reader in Namibian politics* Macmillan Education Namibia: Windhoek

G Friedman (1998) *Submission to the Truth and Reconciliation Commission on the Role of the Judiciary* Vol. 115 *South African Law Journal* 56-63, 59

G Hughes (2011) "The concept of dignity in the Universal Declaration of Human Rights" Vol. 39 *Journal of Religious Ethics* 1

G Jasso & M Rosenzweig (1986) Family Reunification and the Immigration Multiplier: U.S. Immigration Law, Origin Country Conditions, and the Reproduction of Immigrants Vol. 23(3) *Demography* 291-311

G Kanyenze, H Jauch, D Kanengoni, M Madzwamuse & D Muchena (eds) (2017) *Towards Democratic Developmental States in Southern Africa* Weaver Press: Harare

G Kateb *Human Dignity* (2011) Harvard University Press: Cambridge

G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg (2012) *Criminal Law in South Africa* Oxford University Press: Southern Africa, 215; B Fisse & J Braithwaite (1993) *Corporations, Crime and Accountability* Cambridge University Press: Sydney

G Naldi (1995) *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* Juta: Kenwyn

G Robertson (1993) *Freedom, the Individual and the Law* Penguin: United Kingdom (7th ed)

G van der Schyff (2002) “Limitation and waiver of the right to freedom of religion” Vol. 2 *TSAR* 376, 379-80

G van der Schyff (2002) “The Right to Religious Objection in South African Law” Vol 119(3) *South African Law Journal* 526, 531

G van der Schyff (2003) “Freedom of religious autonomy as an element to freedom of religion” Vol. 3 *Journal of South African Law* 512, 521

G van der Schyff (2003) “The bearers of the right to freedom of religion in South Africa” Vol. 66 *Journal of South African Law* 19, 28

G van der Schyff (2004) “The historical development of the right to freedom of religion” Vol. 2 *Journal of South African* Law 259, 261

G Werle (2005) *Principles of International Criminal Law* TMC Asser Press. See also KJ Heller (2017) “What is an International Crime? A revisionist History” Vol. 58(2) *Harvard International Law Journal*, 353 354

G Werle (2005) *Principles of International Criminal Law* TMC Asser Press: The Hague

GE Devenish (1998) *A Commentary on the South African Constitution* LexisNexis: Durban

GJC Strydom (1994) “A Bill of Rights and value judgments v positivism: The Namibian Experience Interpreting a Bill of Rights” in J Kruger & B Currin *Interpretation a Bill of Rights* Juta: Kenwyn

GL Croxatto (2016) “The crime of aggression in International Criminal Law: Challenges in jurisprudence and doctrine” Vol. 12(1) *Justicia Juris* ISSN 1692-8571, <http://www.scielo.org.co/scielo.php?pid=S1692-85712016000100001&script=sci_arttext&tlng=en>

H Bielefeldt (2012) “Freedom of Religion or Belief - A Human Rights under Pressure” Vol. 1(1) *Oxford Journal of Law and Religion* 15, 19

H Geingob (2015) “Statement by His Excellency Dr Hage G Geingob, President of the Republic of Namibia” (Third International Conference on Financing for Development, Addis Ababa, 13 July 2015 available at <https://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/2015/07/Namibia.pdf>

H Klug (2000) *Constituting democracy: Law, globalism and South Africa's political reconstruction* Cambridge University Press: Cambridge

H Payne & N Doe (2005) "Public health and the limits of religious freedom" Vol. 19 *Emory International Law Review* 539, 545

HC Du Toit (1998) "The Contribution of Hermeneutics and Deconstruction to Jurisprudence: A Response to Professors Du Plessis and Goosen" in G Bradfield and D Van Der Merwe, in Meaning in Legal Interpretation Juta: Cape Town

HG Gaddamer (1979) *Truth and Method* (2 ed) Continuum: New York

HH Erasmus (1991) "Historical foundations of the South African law of civil procedure" Vol. 108(2) *South African Law Journal* 265-276 at 265

HJ Fischer (2000) *Die Deutsche Kolonien-die Koloniale Rechtsordnung und ihre Entwicklung nach dem ersten Weltkrieg* Duncker & Humblot: Berlin

HR Hahlo & E Kahn (1968) *The South African Legal System and its Background* Cambridge University Press: Cambridge

I Currie & J de Waal (2005) *The Bill of Rights Handbook* (5 ed) Juta: Cape Town

I Marchuk (2014) *The fundamental concept of crime in international criminal law: A comparative law analysis* Springer: Heidelberg

I Shai (2019) "The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections" Vol. 19 *African Human Rights Law Journal* 502

IJ Kroeze (2002) "Doing things with values II: The case of ubuntu" Vol. 13(2) *Stellenbosh Law Review* 252-253

Institute for Security Studies (2019) "Policing alone cannot solve South Africa's violence Press release of 12 September 2019 <https://issafrica.org/about-us/press-releases/policing-alone-cannot-solve-south-africas-violence>

J Bernard (1984) "The historical development of corporate criminal liability" Vol. 22(1) *Criminology* 3

J Coggon & J Miola (2011) "Autonomy, Liberty, and Medical Decision-Making" Vol. 70(3) *Cambridge Law Journal* 523 -547

J Cottrell (2012) "Ensuring Equal Rights in Constitutions: Public Participation in Drafting Economic, Social and Cultural Rights" in J Heymann & A Cassola (eds) *Making Equal Rights Real* Cambridge University Press: Cambridge

J Diecsho (2010) "The concepts of rights and constitutionalism in Africa in Namibia as a Constitutional Democracy" in A Bösl, N Horn, and A Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek

J Donnelly (1984) "Cultural Relativism and Universal Human Rights" Vol. 6(4) *Human Rights Quarterly* 400-419

J Dronkers & MP Vink (2012) "Explaining Access to Citizenship in Europe: How Policies Affect Naturalisation Rates" Vol. 13(3) *European Union Politics* 309-412

J Dugard (1971) "The judicial process, positivism and civil liberties" Vol. 88 *South African Law Journal* 181-200

J Dugard (1978) *Human Rights and the South African Legal Order* Princeton University Press: New Jersey, 397

J Dugard (1981) "*Some Realism about The Judicial Process And Positivism - A Reply"* Vol. 98 *South African Law Journal* 372-387

J Dugard (2011) *International Law: A South African Perspective* Juta: Cape Town

J G McCarthy (199) "The Passive Personality Principle and Its Use in Combatting International Terrorism" Vol. 13(3) *Fordham International Law Journal* 298 - 327 301

J Hainmueller & D Hangartner (2013) "Who gets a Swiss passport? A natural experiment in immigrant discrimination" Vol. 107(1) *American Political Science Review* 159-87

J Klaaren (2004) *South African Citizenship: Past, Present and Future* Cambridge University Press: Cambridge & New York

J Kyriakakis (2008) "Corporations and the International Criminal Court: The complementarity objection stripped bare" Vol. 19 *Criminal Law Forum* 115 120

J Martinez-Torron (2005) "Limitation on religious freedom in the case law of the European Court of Human Rights" Vol. 19 *Emory International Law Review* 587, 597-599

J Modiri (2015) "Law's Poverty" Vol. 18 *Potchefstroom Electronic Law Journal* 223

J Nakuta (2009) "The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations" in N Horn & A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2 ed) Mcmillan Education Namibia: Windhoek

J Neethling J Potgeiter & PJ Andvisser (2010) *Law of Delict* (6th ed) LexisNexis: Butterworth

J Pirjola (2009) "European asylum policy - inclusions and exclusions under the surface of universal human rights language" Vol. 11 *European Journal of Migration and Law* 347

J Ruggie (2008) "Protect, Respect and Remedy: A framework for Business and Human Rights" 7 April 2008, 15 Document A/HRC/8/5

J Thomas (2015) "Parental refusal: legal and ethical considerations" Vol. 21(1) *Southern African Journal of Anaesthesia and Analgesia* 34, 35

J van Niekerk (2008) "In defence of an autocentric account of ubuntu" Vol. 26(4) *South African Journal of Philosophy* 364-368

J Waldron (2012) "Partly Laws Common to All Mankind" in *Foreign Law in American Courts* Yale University Press: London

JB Diescho (2010) "The paradigm of an independent judiciary: Its history, implications and limitations in Africa" in N Horn & A Boesl *The independence of the judiciary in Namibia* Mcmillan Education Namibia: Windhoek

JC Mubangizi (2013) *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2nd ed) Juta: Cape Town

JD van der Vyver (2005) "Limitation of freedom of religion: International law perspectives" Vol. 19 *Emory International Law Review* 499, 500

JD van der Vyver (2007) "The Contours of religious liberty in South Africa" Vol. 21(1) *Emory International Law Review* 95

JD van der Vyver (2012) "Equality and sovereignty of religious institutions: A South African Perspective" Vol. 10(1) *Santa Clara Journal of International Law* 147, 165-167

JG McLeod (2006) "The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context" Family, Children and Youth Section Department of Justice Canada, Canadian Ministry of Justice

JJ Rousseau (1762) *The Social Contract, Book III, para 4 Democracy*; translation by GDH Cole, <https://www.marxists.org/reference/subject/economics/rousseau/social-contract/>

JJ Shestack (1998) "The philosophic foundations of human rights" Vol. 20 *Human Rights Quarterly* 201

JL Hartsell (1999) "Mother May I…Live? Parental Refusal of Life-sustaining Medical Treatment for Children Based on Religious Objection" Vol. 66(2) *Tennessee Law Review* 499*,* 517

JL Neo (2017) "Religious freedom and secularism in anon-liberal state" *Michigan State Law Review* 333, 342-348

JM Potgieter, L Steynberg & TB Floyd (2012) V*isser & Potgieter Law of Damages* (3rd ed) Juta: Cape Town

JN Horn (2016) *Interpreting the interpreters: A critical analysis of the interaction between formalism and transformative adjudication in Namibian constitutional jurisprudence 1990-2004* KAS: Windhoek

JT Gunn (2005) "Deconstructing proportionality in limitations analysis" Vol. 19 *Emory International Law Review* 465, 467-8

JU Kavari (2005) "Estates and systems of inheritance among Ovahimba and Ovaherero in Kaokoland", The Meanings of Inheritance: Perspectives on Namibian inheritance practices <http://www.lac.org.na/projects/grap/Pdf/meaninheri.pdf>

JW Müller (2018) "Homo Orbánicus" review of P Lendvai Orbán: Hungary's Strongman Oxford University Press, 2018: Oxford in *The New York Review of Books*, April 5, 2018 <https://www.nybooks.com/articles/2018/04/05/homo-orbanicus-hungary/>

JW Van Mil & M Herman (2016) "Terminology, the Importance of Defining" Vol. 38(3) *International Journal of Clinical Pharmacy* 709-713 at 710

JY Mokgoro (1998) "Ubuntu and the law in South Africa" Vol. 1(1) *Potchefstroom Electronic Law Journal* 18

K Balakrishnan (2010) "The Role of foreign precedents in a country's legal system" Vol. 22(1) *National Law School of India Review* 5-7

K Daly (2017) "Criminal justice system: Aims and process" in D Palmer, W de Lint & D Dalton (eds) *Crime and justice: A guide to criminology* (5th ed) Thomson Reuters/ Lawbook Company: Pyrmont, NSW

K Iles (2007) "A fresh look at limitations: unpacking section 36" Vol. 23 *South African Journal on Human Rights* 68-92

K Kariseb (2016) “Westcoast Fishing Properties v Gendev Fish Processors Ltd & Another-A tenet of judicial nationalism?” Vol. 8(1) *Namibia Law Journal* 137-147

K Kariseb (2019) “Namibian Supreme Court finds that National Security Concerns do not Automatically Trump Free Speech” *Oxford Human Rights Blog* 1-3. <http://ohrh.law.ox.ac.uk/namibian-supreme-court-finds-that-national-security-concerns-do-not-automatically-trump-free-speech/>

K Klare (1998) “Legal Culture and Transformative Constitutionalism” Vol. 14(1) *South African Journal on Human Rights* 146-188

K Mundia (2014) “Ronald Dworkin and the Supreme Court of Namibia” (Unpublished PhD Thesis, University of Pretoria)

K Mundia (2017) “A Constructive Interpretation of the Namibian Constitution: Transposing Dworkin to Namibia’s Constitutional Jurisprudence” Vol. 31(1) *Southern African Public Law* 73, 81

K Runswick-Cole & N Hodge (2009) “Needs or rights? A challenge to the discourse of special education” Vol. 36 *British Journal of Special Education* 198

K Stamper (2017) *Word by Word: The Secret Life of Dictionaries* Pantheon Books: New York

K Thomas (2011) *Selected Theories of Constitutional Interpretation* (Congressional Research Service February 15, 2011)

K Zaluchi (2015) “Extraterritorial Jurisdiction in International Law” Vol. 17(4-5) *International Community Law Review* 403-412

K Zweigert & H Kötz (1998) *An Introduction to Comparative Law* (3 ed) Oxford University Press: Oxford

K Balakrishnan (2010) “The Role of foreign precedents in a country’s legal system” Vol. 22(1) *National Law School of India Review* 1

KL Diaz (2007) “Refusal of Medical Treatment Based on Religious Beliefs: Jehovah’s Witness Parents” Vol. 16(1) *Journal of Contemporary Legal Issues* 85, 85

KM Lomond (1992) “An Adult Patient’s Right to Refuse Medical Treatment for Religious Reasons: The Limitations Imposed by Parenthood” Vol. 31(3) *University of Louisville Journal of Family Law* 665-684

KM Tani (2012) “Welfare and rights before the movement: Rights a language of the state” Vol. 122 *Yale Law Journal* 314

L Ackermann (2012) *Human Dignity: Lodestar for Equality in South Africa* Juta: Cape Town

L Du Plessis (2011) *Re- Interpretation of Statutes* Juta: Cape Town

L Henkin (1998), “Elements of constitutionalism” Vol. 60 *International Commission of Jurists: The Review* 11-22

L Jordaan (2011) “The legal validity of an advance refusal of medical treatment in South African Law (part 1)” *De Jure* 32, 35

L Linnard-Palmer & S Kools (2004) “Parent’s Refusal of Medical Treatment based on Religious and/or Cultural Beliefs: The Law, Ethical Principles, and Clinical Implications” Vol. 19(5) *Journal of Pediatric Nursing* 351, 352

L Mbingi & J Maree (2005) *Ubuntu: the spirit of African transformation management* Knowledge Resources: Johannesburg

L Nashuuta (2018) "Inequality in Namibia a ticking bomb" *New Era* 20 March 2018 <https://neweralive.na/posts/inequality-in-namibia-a-ticking-bomb>

L Valentini (2017) "Dignity and human rights: A reconceptualization" Vol. 37 *Oxford Journal of Legal Studies* 862

L Wildenthal (1997) "Race, gender and citizenship in the German Colonial Empire" in F Cooper, AL Stoler *Tensions of empire, colonial cultures in a bourgeois world* University of California Press: Berkeley and Los Angeles

LL Fuller (1940) *The Law in Quest of Itself* Beacon Press: Boston. See also LL Fuller (1969) *The Morality of the Law* Yale University Press: New Haven

M Ally (2005) "Blood transfusion and Jehovah's Witnesses: the legal and ethical issues" Vol. 14(5) *British Journal of Nursing* 270-274

M Berman & K Toh (2013) "On What Distinguishes New Originalism from Old: A Jurisprudential Take" Vol. 82(2) *Fordham Law Review* 545

M Buchner-Eveleigh (2019) "Is it a competent child's prerogative to refuse medical treatment?" Vol. 52 *De Jure* 242, 242

M Carnelley (2013) "Laws on Adultery: Comparing the Historical Development of South African Common Law Principles with those in English Law" <http://www.scielo.org.za/pdf/funda/v19n2/01.pdf>

M Carnelley (2016) "The impact of the abolition of the third party delictual claim for adultery by the Constitutional Court in DE v RH (CCT 182/14) [2015] ZACC 18" Vol. 30 *Speculum Juris* 1-14

M Chanock (2004) *The making of South African Legal Culture 1902-1936* Cambridge University Press: Cambridge

M Cherif Bassiouni (2008) "International Crimes: The Ratione Materiae of International Criminal Law" in: M Cherif Bassiouni (ed.), *International Criminal Law Vol. I: Sources, Subjects and Contents* (3rd ed) Martinus Nijhoff Publishers: Leiden

M Cook (ed) (1964) *On African socialism* FA Praeger: New York

M du Plessis (2000) "The legitimacy of judicial review in South Africa's new constitutional dispensation: Insights from the Canadian experience" Vol. 33 *The Comparative and International Law Journal* 227, 247

M Epprecht (2013) *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* Zed Books: London

M Hailbronner (2017) "Transformative Constitutionalism: Not Only in the Global South" Vol. 65 *American Journal Comparative Law* 527

M Janis, R Kay & A Bradley (1996) *European Human Rights Law* Oxford University Press: Oxford

M Kordos & S Vojtovic (2016) "Transnational corporations in the global world economic environment" Vol. 230 *Procedia - Social and Behavioral Sciences*, 150 - 158 at 151

M McConnell (1997) "Textualism and the Dead Hand of the Past" Vol. 66 *George Washington Law Review* 1127

M Mutua (2001) “The Metaphor of Human Rights” Vol. 42(1) *Harvard International Law Journal* 201-209

M Njotini (2018) “Preserving the Integrity of Medical-Related Information How Informed Is Consent” Vol. 21 *Potchefstroom Electronic Law Journal* 1, 4-5

M Nyoko & D Cornell (2012) U*buntu and the law: African ideals and post-apartheid jurisprudence* Fordham University Press: New York

M Phineas (2012) “The doctrine of separation of powers: A South African perspective” Paper delivered at the Middle Temple South Africa Conference, September 2012 <https://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>

M Rapatsa & M Gaedupe (2016) “Dignity and *ubuntu* epitome of South Africa’s socio-economic transformation” Vol. 5(9) *The Scientific Journal for Theory and Practice of Socio-economic Development* 72

M Roesenfeld (2019) “Judicial Politics versus Ordinary Politics - Is the Constitutional Judge caught in the middle?” in C Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge

M Rothhaar (2010) “Human dignity and human rights in bioethics: The Kantian approach” Vol. 13 *Medicine, Health Care and Philosophy* 251

M Shapiro (2019) “Judicial Power and Democracy” in C Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge, 21 - 35, 21

M Ssenyonjo (1995) “The domestic protection and promotion of human rights under the 1995 Ugandan Constitution” Vol. 20(4) *Netherlands Quarterly of Human Rights* 445, 457

M Weichers (2010) “The Namibian Constitution: Reconciling legality and legitimacy” in A Bosl, N Horn & A Du Pisani (eds) *Constitutional democracy in Namibia*: *A critical analysis after two decades* Macmillan Education Namibia: Windhoek

M Wiechers (1989/1990) “Namibia: The 1982 Constitutional Principles and their Legal Significance” Vol. 15 *South African Yearbook of International Law* 1

MA Fouche (2012) *Legal Principles of Contracts and Commercial law* (7th ed) Cape Town: LexisNexis

Malicious Prosecution - Elements of Proof, Damages, Other Considerations <https://law.jrank.org/pages/8407/Malicious-Prosecution.html#ixzz6PkSlBG8G>

MD Forkosch (1969) “The Separation of Powers” Vol. 41 *University of Colorado Law Review* 529, 531

MDA Freeman (2001) *Lloyd’s Introduction to Jurisprudence Sweet* & Maxwell: London

ME Stucke (2013) “Is competition always good?” Vol. 1(1) *Journal Antitrust Enforcement* 165-166

Media Institute of Southern Africa (2000) “Court strikes a victory for media freedom” <https://ifex.org/court-strikes-a-victory-for-media-freedom>

MJ Wreen (1991) “Autonomy, religious values, and refusal of lifesaving medical treatment” Vol. 17 *Journal of Medical Ethics* 124-130

MM Corbett (1998) “*Presentation to the Truth and Reconciliation Commission”* Vol. 115 *South African Law Journal* 17-20, 18

MM DeGuzman (2013) “The international criminal court’s gravity jurisprudence at Ten” Vol. 12(3) *Washington University Global Studies Law Review* 475-486 at 475

MM Shapiro (2019) “Judicial Power and Democracy” in Christine Landfried (ed) *Judicial Power: How Constitutional Courts Affect Political Transformation* Cambridge University Press: Cambridge

MO Hinz (2006) “Legal pluralism in jurisprudential perspective” in MO Hinz (ed) *The shade of new leaves. Governance in traditional authority: A Southern African perspective* <https://books.google.com.na/books?id=OQjr1othDrgC&pg=PA24&lpg=PA24&dq=Hinz,+M.O.+(Ed>

MO Hinz (2007) “Traditional governance and African customary law: Comparative observations from a Namibian perspective” <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf>

MO Hinz (2008) “Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world” in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* Mcmillan Education Namibia: Windhoek

MO Hinz (ed) assisted by A Gairiseb (2013) “Customary law ascertained: Vol. 2, the customary law of the Bakgalagari, Batswana ba Namibia and Damara communities of Namibia” UNAM Press: Windhoek

MO Hinz (ed) assisted by A Gairiseb (2016) Customary law ascertained: Vol. 2, the customary law of the Nama, Ovaherero, Ovambanderu, and San communities of Namibia” UNAM Press: Windhoek

MO Hinz (ed) assisted by NE Namwoonde (2010) “Customary Law Ascertained: Vol. 1, Customary of the Owambo, Kavango and Caprivi communities” Namibia Scientific Society: Windhoek

MO Hinz, S K Amoo & David van Wyk (eds) (2000) *The Constitution at work - 10 years of Namibian nationhood* University of Namibia Press: Windhoek; A Bösl, N Horn & A Du Pisani (eds) (2010) *Constitutional Democracy in Namibia - A critical analysis after two decades* Mcmillan Education: Windhoek

MO Vink (2016) Citizenship and Legal Statuses. Maastricht University/European University Institute Paper presented for the “Conference on the Integration of Migrants and Refugees”, EUI Forum on Migration, Citizenship and Demorgraphy. European University Institute, Florence, 29-30 September 2016

MP More (2004) “Philosophy in South Africa under and after apartheid” in K Wiredu (ed) *A companion to African philosophy* Wiley-Blackwell: Cornwall

MP Todaro and SC Smith (2015) *Economic Development* (12 ed) Pearson: Harlow, 22-23; D Goulet (1971) *The Cruel Choice: A New Concept in the Theory of Development* Atheneum Press: New York

N Barber (2015) “Constitutionalism: Negative and Positive” Vol. 38 *Dublin University Law Journal* 249

N Bohler-Muller, M Cosser & G Pienaar (2018) *Making the road by walking: The evolution of the South African Constitution* Pretoria University Law Press: Pretoria

N Horn (2008) "Religion and Human rights in Namibia" Vol. 8 *African Human Rights Law Journal* 409, 430

N Horn (2010) "The forerunners of the Namibian Constitution" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia - A critical analysis after two decades* Mcmillan Education Namibia: Windhoek

N Horn (2014) "Interpreting the Constitution: Is Transformative Constitutionalism a Bridge too far?" Vol. 2(1) *University of Namibia Law Review* 1

N Horn (2014) "Transformative constitutionalism: A post-modern approach to constitutional adjudication in Namibia" in N Horn & M Hintz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* Konrard Adenaeur Stiftung: Windhoek

N Horn (2016) *Interpreting the Interpreters: A Critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence* KAS: Windhoek

N Horn "State versus Acheson revisited fourteen years later" presented by the Human Rights and Documentation Centre at the University of Namibia, 19 November 2003

N K Chand, HB Subramanya & GV Rao (2014) "Management of patients who refuse blood transfusion" Vol. 58(5) *Indian Journal of Anaesthesia* 658-664

N Ndeunyema (2019) "Reforming the purposes of sentencing to affirm African values in Namibia" Vol. 63 *Journal of African Law* 330

N Ndeunyema (2020) "International Law in the Namibian Legal Order: A Constitutional Critique" Vol. 9(2) *Global Journal of Comparative Law* 271

N Shivute (2015) "Rendering a forum for Legal Discourse in an era of Transformative Constitutionalism" Vol. 2(2) *University of Namibia Law Review* 66

N Tjombe (2008) "Appointing acting judges to the Namibian Bench: A useful system or a threat to the independence of the Judiciary" in N Horn & A Bosl *Independence of the Judiciary in Namibia* Mcmillan Education Namibia: Windhoek

N Van Heerden (1995) *Unlawful Competition* LexisNexis: Butterworths

Namibia Constituent Assembly Debates 21 November 1989 - 21 January 1990 Volume 1 and 2 (Namibia National Archives 1990)

NN Agyeman & A Momodu (2019) "Universal Human Rights Versus Cultural Relativism: The Mediating Role of Constitutional Rights" Vol. 12(1) *African Journal of Legal Studies* 23-46

O Fiss (1982) "Objectivity and Interpretations" Vol. 34 *Stanford Law Review* 739, 744

O Kaaba (2015) "The challenges of adjudicating presidential election disputes in domestic courts in Africa" Vol. 15 *African Human Rights Law Journal* 335

O Lowenheim & O Gazit (2009) "Power and Examination: A Critique of Citizenship Tests" Vol. 40(2) *Security Dialogue* 145-67

O Ruppel & K Ruppel-Schlitchting (2011) “Legal and Judicial Pluralism in Namibia” Vol. 34 *Journal of Legal Pluralism* 37

O Sensen (2011) *Kant on Human Dignity* De Gruyter: Boston

O Tahirli (2017) “Transnational companies: Definition, specification and advantages” Vol. 33 *İstanbul Aydın Üniversitesi Dergisi* 79-92 at 80

O Tshosa (2010) “The status of International law in Namibian national law: A critical appraisal of the constitutional strategy” Vol. 2(1) *Namibia Law Journal* 3-30

O Vilhena, U Baxi, and F Viljoen (2013) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*. Pretoria University Law Press: Pretoria

OC Ruppel (2008) “The role of the executive in safeguarding the independence of the judiciary in Namibia” in N Horn & A Boesl (eds) *The independence of the judiciary in Namibia* Mcmillan Education Namibia: Windhoek

OECD (2011) Naturalisation: A passport for the Better Integration of Immigrants? Paris: OECD

Office of the Ombudsman of Namibia *Annual Report* (2016) 17 <https://www.ombudsman.org.na/sdm_downloads/annual-report-2016/>.

P Abrahamson (2005) “Coping with Urban Poverty: Changing Citizenship in Europe?” Vol. 29(3) *International Journal of Urban and Regional Research* 608-21

P De Vos (2001) “Freedom of religion v drug traffic control: the Rastafarian, the law, society and the right to smoke the ‘holy weed’” Vol. 5(1) *Law, Democracy & Development* 104

P Dubinsky (2010) “International law in the legal system of the United States” Vol. 58 *The American Journal of Comparative Law*, 455-478 at 458

P Farlam (1998) “The ambit of the right to freedom of religion: A comment on *S v Solberg*” Vol. 14(2) *South African Journal on Human Rights* 298, 301

P Katjavivi (2010) “Foreword” in A Bösl, N Horn, and A Du Pisani, *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek

P Langa (2006) “Transformative Constitutionalism” Vol. 17(3) *Stellenbosch Law Review* 357

P Lee & RP George (2008) “The nature and basis of human dignity” Vol. 21 *Ratio Juris* 173

P Rubin (2010) “War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles” Vol. 60 *Duke Law Journal* 167

P Von Doepp (2008) “Context-sensitive inquiry in comparative judicial research: Lessons from the Namibian judiciary” Vol. 41(11) *Comparative Political Studies* 1521

P Von Doepp (2008) “Politics and judicial decision-making in Namibia: Separate or connected realms?” Institute for Public Policy Research Briefing Paper No. 39.

PA Mbenzi & SN Ashikuti (2018) “Uushiindaism as a collective poverty alleviation mechanism and social support” Vol. 3(1) *Journal of University of Namibia Language Centre* 131

PH Masake (2019) "A critical consideration of the exclusion of corporate criminal liability for the atrocity crimes under the Rome Statute of the International Criminal Court" LLD Dissertation, Stellenbosch University, Available at <https://scholar.google.com/scholar?hl= en&as_sdt=0%2C5&q=A+ critical+consideration+of+the+exclusion+ corporate+criminal+liability+for+atrocity+crimes+under+the+ ICC&btnG =>

PM Bekker (2007) *Criminal Procedure Handbook* (8th ed) Juta: Cape Town

PM Lenaghan (2013) "Restoring the 'Historical Deficit': The Exercise of the Right to Freedom of Religion and Culture in Democratic South Africa" Vol. 29 *South African Journal on Human Rights* 294, 303

PP Wiener (ed) (1973) *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas.* Charles Scribner's Sons, Vol. 1, 485

PT Mhodi (2013) "An analysis of the doctrine of constitutionalism in the Zimbabwean Constitution of 2013" Vol. 28(2) *South African Public Law* 383, 385

R Alexy (2006) "Discourse Theory and Fundamental Rights" in AJ Menendez & OE Eriksen (eds) *Arguing Fundamental Rights* Oxford University Press: Oxford

R Andorno (2014) "Human dignity and human rights" in H ten Have & B Gordijn (eds) *Handbook of Global Bioethics* Springer: Dordrecht

R Baubock & C Jopple (ed) (2010) "How Liberal are Citizenship Tests?" EUI Working Paper RSCAS 2010/41

R Blackburn (ed) (1993) *Rights of Citizenship* Mansel Publishing Limited: London

R Christmas (2013) *Canadian Policing in the 21st Century: A Frontline Officer on Challenges and Changes* McGillQueen's University Press: Montreal

R Cranston (1979) "Courts and Social Reform" Vol. 5 *New Zealand Recent Law* 290-296; J Weinberg (1982) "The Courts as Social Reformers" Vol. 6(2) *Law and Human Behaviour* 97-105

R David & J Brierley (1985) *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3 ed) Free Press: New York

R Dworkin (1978) *Taking Rights Seriously* Havard University Press: Cambridge

R Dworkin (1985) *A Matter of Principle* Harvard University Press: Oxford

R Dworkin (1989) *Law's Empire* Harvard University Press: Cambridge

R Ekins (2013) *The Nature of Legislative Intent* Oxford University Press: Oxford

R English (1996) "Ubuntu: The quest for an indigenous jurisprudence" Vol. 12(4) *South African Journal on Human Rights* 648

R Guastini (2015) "A realistic view on law and legal cognition" (PAGE), *Revus* [Online], 27 DOI:10.4000/revus.3304

R O'Keefe (2015) *International Criminal Law* Oxford University Press: Oxford

R Schlenger (1971) "The Role of the Basic Course in the Teaching of Foreign and Comparative Law" Vol. 19 *American Journal of Comparative Law* 618

R. Daniels and J Brickhill (2006) "The Counter-Majoritarian Difficulty and the South African Constitutional Court" Vol. 25 *Pennsylvania State International Law Review* 371, 376-377 <http://elibrary.law.psu.edu/psilr/vol25/iss2/2>

RA Posner (1983) "The Meaning of Judicial Self-Restraint" Vol. 59 *Indiana Law Journal* 1, 1 – 24

RA Posner (2010) *How judges think* Harvard University Press: Cambridge

RB Flowers (1984) “Withholding Medical care for Religious Reasons” Vol. 23 *Journal of Religion and Health* 268, 269-271

RC Blake & L Litchfield (1998) “Religious Freedom in Southern Africa: The Developing Jurisprudence” Vol. 2 *Brigham Young University Law Review* 515-562

Reporters without Borders (nd) “Data of press freedom ranking” <https://rsf.org/en/ranking_table>

Reporters without Borders “Namibia” <https://rsf.org/en/namibia>

RG Holcombe (2018) “Checks and Balances: Enforcing Constitutional Constraints” Vol. 6 *Economies* 57

RH Christie (1991) *The law of Contract in South Africa* (2nd ed) Butterworths: Durban

RN Ntinda (2009) “Customary practices and children with albinism in Namibia: A constitutional challenge” in OC Ruppel (ed) *Children’s Rights in Namibia* Mcmillan Education Namibia: Windhoek

RR Faden, TL Beauchamp & NM King (1986) *A History and Theory of Informed Consent* Oxford University Press: Oxford, 4

RR Parse (2010) “Human dignity: A human becoming ethical phenomenon” Vol. 23 *Nursing Science Quarterly* 257

S Amoo & I Skeffers (2008) “The Rule of law in Namibia” <www.kas.de/upload/auslandshomepages/namibia/HumanRights/amoo_skeffers.pdf>

S Amoo (2008) “The structure of the Namibian judicial system and its relevance for an independent judiciary” in N Horn & A Bosl (Eds) *The Independence of the Judiciary in Namibia* Mcmillan Education Namibia: Windhoek

S Amoo (2008) An introduction to Namibian law: Materials and cases Macmillan Education Namibia: Windhoek

S Amoo (2010) “The Constitutional Jurisprudential Development in Namibia since 1985” in A Bosl (eds), *Human Rights and the Rule of Law in Namibia* Konrad Adenauer Stiftung: Windhoek

S Beaulac (2017) “Constitutional Interpretation: On Issues of Ontology and of Interlegality” in P Oliver, P Macklem & N Des Rosiers (eds) *Oxford Handbook of the Canadian Constitution* Oxford University Press: Oxford

S Calabresi and S Prakash (1994) “The President’s Power to Execute the Laws” Vol.104(3) *Yale Law Journal* 541, 553

S Chirawu (2006) “Till Death Do Us Part: Marriage, HIV/Aids and the Law in Zimbabwe” Vol. 13 *Cardozo Journal Law & Gender* 29

S Cowen (2001) “Can ‘dignity’ guide South African jurisprudence?” Vol. 17(1) *South African Journal of Human Rights* 34

S de Freitas (2012) “Freedom of association as a foundational right: religious associations and *Strydom v Nerderduitse Gereforneerde Gemeente, Moreleta Park*” Vol. 28 *South African Journal of Human Rights* 258, 266

S Fredman (2011) *Discrimination Law* (2nd ed) Oxford University Press: New York

S Fredman (2016) “Living Trees of Deadwood: The Interpretive Challenges of the ECHR” in N Barber, R Ekins & P Yowell (ed) *Lord Sumption and the Limits of the Law* (1st ed) Hart Publishing: Oxford

S Hamdy (2012) *Our Bodies Belong to God: Organ Transplants, Islam, and the Struggle for Human Dignity in Egypt* University of California Press: Berkeley

S Immanuel & W Menges (2016) “Govt defies Supreme Court” The Namibian 27 July 2016 <https://www.namibian.com.na/153650/archive-read/Govt-defies-Supreme-Court>

S K Amoo and I Scheepers (2009) “The Rule of law in Namibia” in N Horn & A Bösl (eds) Human rights and the rule of law in Namibia Mcmillan Education Namibia: Windhoek

S Liebenberg (2010) *Socio-Economic Rights: Adjudication Under a Transformative Constitution* Juta: Cape Town

S Schulz (2000) “Legal Interpretation and the Namibian Constitution” in MO Hinz, SK Amoo & D van Wyk (eds) *The Constitution at work - 10 years of Namibian nationhood* University of Namibia Press: Windhoek

S Schulz (2010) “In Dubio Pro Libertate: The General Freedom Right and the Namibian Constitution” in A Bösl, N Horn, and Du Pisani (eds) *Constitutional Democracy in Namibia; a Critical Analysis after Two Decades* Mcmillan Education Namibia: Windhoek

S Schulz (2012) “*Indubio pro libertate*: The general freedom right and the Namibian Constitution” in A Bösl, N Horn and ADu Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* Macmillan Education Namibia: Windhoek 169, 174

S Sibanda (2011) “Not Fit for Purpose: Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty” Vol. 22(3) *Stellenbosch Law Review* 482

SA Strauss (1989) Doctors Patient and the Law at 31-32, referring to John Stuart Mill’s famous essay On Liberty (1859), Cambridge University Press

SB Radebe & MR Phooko (2017) “Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu” Vol. 36(2) *South African Journal of Philosophy* 240

SFC Milsom (1969) *Historical Foundations of the Common Law*. Butterworth: Heinemann

Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984, E/CN.4/1985/4, <https://www.refworld.org/docid/4672bc122.html>

SK Amoo (2008) “The structure of the Namibian judicial system and its relevance for an independent judiciary” in N Horn & A Bösl (eds) *The Independence of the Judiciary in Namibia* Mcmillan Education: Windhoek, 69, 92

SK Amoo (2008) *An Introduction to Namibian Law: Materials and Cases* Macmillian Education Namibia Publishers (Pty) Ltd: Windhoek

SK Amoo (2014) *Property Law in Namibia* Pretoria University Law Press: Pretoria

SN Subrin (1987) “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective” Vol. 135(4) *University of Pennsylvania Law Review*, 1909-1002

SN Subrin (1987:915) referring to TFT Plucknett (1956) *A Concise History of the Common Law* (5th ed) Liberty Fund Inc: Indianapolis

T Bekker (2006) "The re-emergence of *ubuntu*: a critical analysis" Vol. 21(2) South African Public Law 344

T Bennet (2011) "Ubuntu: An African Equity" Vol. 14(4) *Potchefstroom Electronic Law Journal* 48

T Einarsen (2013) "New frontiers of international criminal law: Towards a concept of universal crimes" Vol. 1(1) *Bergen Journal of Criminal Law and Criminal Justice*, 1-21 at 11

T Groppi & M Pontoreau (2013) *The Use of Foreign Precedents by Constitutional Judges* Hart Publisher: Oxford

T Gurirab (2010) "The genesis of the Namibian Constitution: The international and regional setting" in A Bosl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia: A critical analysis after two decades* Mcmillan Education Namibia: Windhoek

T Hancox & D Hubbard (2016) "A Constitutional Crisis" *The Namibian* 25 July 2016 <https://www.lac.org.na/news/inthenews/archive/2016/news-20160725.html>

T Humphrey (2008) "Children, medical treatment and religion: defining the limits of parental responsibility" Vol. 14(1) *Australian Journal of Human Rights* 141-169 and Hartsell (Note 111 above) 516-519

T Metz (2010) "Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights" Vol. 9 *Journal of Human Rights* 81

T Metz (2011) "Ubuntu as a moral theory and human rights in Africa" Vol. 11(2) *African Human Rights Law Journal* 559

T Roux (2009) "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" Vol. 20(2) *Stellenbosch Law Review* 258

T W Merrill, (2005) "Originalism, Stare Decisis and the Promotion of Judicial Restraint" *Constitutional Commentary* <https://scholarship.law.umn.edu/concomm/1092>

T Ward & K Syversen (2009) "Human dignity and vulnerable agency: An ethical framework for forensic practice" Vol. 14 *Aggression and Violent Behavior* 94

T-B Gurirab (2010) "The Genesis of the Namibian Constitution: The international and regional setting" in A Bösl, N Horn & A Du Pisani (eds) *Constitutional Democracy in Namibia – A critical analysis after two decades* Mcmillan Education Namibia: Windhoek

TRH Davenport (1987) *South Africa: A Modern History*. Toronto. University of Toronto Press: Buffalo

TW Bennet, AR Munro & PJ Jacobs (2018) Ubuntu: An African Jurisprudence Juta: Cape Town

TW Merrill (2005) "Originalism, Stare Decisis and the Promotion of Judicial Restraint" *Constitutional Commentary* <https://scholarship.law.umn.edu/concomm/1092>

U Baxi (2013) "Preliminary notes on transformative constitutionalism" in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the*

apex courts of Brazil, India and South Africa, Pretoria University Law Press: Pretoria

UK Department of Health (2014) Determining if a person is properly settled in the UK in order to establish if they are ordinarily resident here. Department of Health. <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/430967/OR_Tool_1_pdf>

United States Sentencing Commission (2012) "2012 Guidelines Manual" (Report, 2012) <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manualpdf/ 2012_Guidelines_Manual_Full.pdf>

United States Sentencing Commission (2015) "Life Sentences in The Federal System" (Report, February 2015) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-andsurveys/miscellaneous/20150226_Life_Sentences.pdf>

V de Klerk (2008) "Women's Action for Development: 15 years of experience with customary practice in rural Namibia" in OC Ruppel (ed) *Women and Custom in Namibia: Cultural Practice Versus Gender Equality?* Konrad Adenauer Stiftung: Windhoek

V Harphood (2003) *Modern Tort Law* (5th ed) Cavendish: London

V Pacillo (2016) "Free to become martyrs? The Right to refuse medical treatment on religious grounds in a comparative perspective" Vol. 29 *Stato, Chiese e pluralism confessionale* 1*,* 3.

VCRAC Crabbe (2008) *Crabbe on Legislative Drafting* (2nd ed) LexisNexis: Butterworths

VG Curran (2013) "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v Royal Dutch Petroleum Co" Vol. 28(1) *Maryland Journal of International Law* 76-89 at 77

W Brugger (2004) "Communitarianism as the social and legal theory behind the German Constitution" Vol. 2 *International Journal of Constitutional Law* 39

W Freedman (2000) "The right to religious liberty, the right to religious equality, and section 15(1) of the South African Constitution" Vol. 11(1) *Stellenbosch Law Review* 99, 100

W Kamba (1974) "Comparative Law: A Theoretical Framework" Vol. 23 *International and Comparative Law Journal* 491

W Menges (2016) "Lawyers raise alarm over citizenship bill" The Namibian 29 July 2016 <https://www.namibian.com.na/153817/archive-read/Lawyers-raise-alarm-over-citizenship-bill>

W Menges (2016) "NC rejects citizenship bill" The Namibian 4 August 2016 <https://www.namibian.com.na/154023/archive-read/NC-rejects-citizenship-bill>

W Mutunga (2015) "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions" Vol. 1 *Speculum Juris* 6

W Tadd, L Vanlaere & C Gastmans (2010) "Clarifying the concept of human dignity in the care of the elderly" Vol. 17 *Ethical Perspectives* 253

WA Joubert (1991) "Statute law and Interpretation" in WA Joubert & TJ Scott The Law of South Africa Vol. 25 *Sentencing to statute law and Interpretation* 182, 185

WN Ferdinandusse (2006) *Direct application of international criminal law in national courts* TMC Asser Press: The Hague

Y Burns (2013) *Administrative Law* (4th ed) LexisNexis: Butterworths

Y Dausab & K Pinkoski (2017) "Visser v Minister of Finance: A Missed Opportunity to Clarify the Equality Provision within a Namibian Disability Rights Paradigm" in DP Zongwe & Y Dausab *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry* Law Reform and Development Commission: Windhoek

Y Ergas (2013) "Babies without borders: Human rights, human dignity, and the regulation of international commercial surrogacy" Vol. 27 *Emory International Law Review* 117

Y Mupangavanhu "The Relationship between Restraints of Trade and Garden Leave" Vol. 21(1) *PER/PELJ* 2017(20) 1-22

Z Kameeta (2009) "Foreword" in C Haarmann & D Haarmann (eds) *Making the Difference! The BIG in Namibia* Basic Income Grant Pilot Project Assessment Report, April 2009, Windhoek, Namibia: Desk for Social Development

Z Motala (1989) "Human Rights in Africa: A Cultural, Ideological, and Legal Examination" Vol. 12(2) *Hastings International and Comparative Law Review* 373-410

ZM Yacoob (2004) "Issues and debates in the South African Constitutional negotiations in the context of the apartheid evil and the struggle for democracy" Paper delivered by ZM Yacoob, Justice of the Constitutional Court of South Africa University of Chicago Law School, January 2004

ZM Yacoob (2013) "Reflections of a retired judge" in O Vilhena, U Baxi, F Viljoen *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* Pretoria University Law Press: Pretoria

ZM Yacoob (2014) "Separation of powers in a democratic South Africa: An evolving process" Contribution by retired Justice Zak Yacoob at the 2nd Stellenbosch Annual Seminar on Constitutionalism in Africa 17-19 September 2014

EDITORS

Dr. Tapiwa Victor Warikandwa
Doctor of Laws, Senior Lecturer, School of Law, Faculty of Commerce, Management & Law, University of Namibia
Professor John Baloro
Professor of Law, School of Law, Faculty of Commerce, Management & Law, University of Namibia

Project Director & Project Coordinators

Peter S. Shivute (Project Director), Chief Justice, Supreme Court of the Republic of Namibia

Sebastiaan Shampapi Kandunda (Project Coordinator), Chief Legal Officer within the Office of the Judiciary, stationed at the Supreme Court of Namibia

Kemanya Ndapewa Amkongo (Project Coordinator), Senior Legal Officer (research assistant) at the Supreme Court of Namibia

Et lux in tenebris lucet – and the light shines in the darkness!

NAMIBIA'S SUPREME COURT AT 30 YEARS

This book is a project of the Office of the Judiciary in the Republic of Namibia, in collaboration with the Faculty of Law (now School of Law) of the University of Namibia. This book project is to celebrate the Supreme Court of Namibia's 30th anniversary. It describes the Namibian Supreme Court's structure and powers, and thus focuses on the Court's work in deciding leading cases of constitutional law, civil rights, criminal law, delict, administrative law, labour law, commercial law, amongst other areas of law. The book therefore objectively examines how the Supreme Court has informed the development of Namibia's judiciary system and the country's developmental aspirations since independence. Furthermore, the book critically interrogates how the Supreme Court and its justices have shaped life and law in Namibia. In this regard, the book highlights how the Supreme Court of Namibia has shaped legal rules in pursuit of the country's developmental aspirations. For this reason, the book addresses amongst others, the following questions: 1) Has the Namibian Supreme Court interpreted the law in Namibia in pursuit of the country's developmental goals? 2) To what extent has the Namibian Supreme Court contributed to legislative development in Namibia? 3) Are Supreme Court judges sensitive to Namibia's traditional practices and developmental aspirations? 4) Is the Supreme Court working together with other arms of government to unyoke Namibia from the post-independence effects of apartheid? 5) Is transformation of the Namibian judiciary and the general society a key feature of the Namibian Supreme Court's rulings? This book interrogates these questions with precision.

ISBN: 978-99916-39-64-2 (epub)

KONRAD
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