Amendments to the Namibian Constitution: Objectives, motivations and implications

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Introduction

The members of the Constituent Assembly\(^1\) that drew up the Namibian Constitution foresaw the need to wire into the text the possibility of amendments being made in the future as times change and as circumstances require. As a wise man in a far away land once said, \(^2\)

\[\text{[n]o organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor [can] any document of reasonable length contain express provisions for all possible questions.}\]

Even the courts, in interpreting the Namibian Constitution, have recognised the need for it to “continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation”\(^3\) and “in the articulation of the values bonding its peoples”\(^4\). The Supreme Court has stated that regard must be had to \(^5\)

\[\ldots\text{contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution} \ldots\text{It is a continually evolving dynamic.}\]

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1. On 12 July 1982, the Western Contact Group (Canada, France, Germany, the United Kingdom and the United States of America) wrote to the Secretary General of the United Nations (UN), proposing that an elected Constituent Assembly of Namibians should “formulate the Constitution for an independent Namibia”, and submitted the Principles concerning the Constituent Assembly and the Constitution for an independent Namibia, referenced as Document S/15287 in the UN Document System. The UN Security Council implicitly approved the report of the Secretary General containing the Western Contact Group proposals in Security Council Resolution 632 on 16 February 1989 (refer to Document S/INF/45). The Frontline States (Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe) and SWAPO, together with the Western Contact Group, then drew up the Constitutional Principles to guide the process for the election of the Constituent Assembly and the drafting of the Namibian Constitution.

2. Inaugural Speech by President Abraham Lincoln, 16th President of the United States of America, delivered on 4 March 1861.


4. (ibid.).

5. Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State 1991 (3) 76 (NmSC) at 86.
Notwithstanding the powers of the courts in relation to deciding constitutional matters, provision is made for elected representatives to make amendments to the Constitution. Chapter 19, aptly titled “Amendment of the Constitution”, details how it can be amended, with what majorities this can be done, and where it can and cannot be amended.

Hitherto, the Namibian Constitution has been amended twice: once by the Namibian Constitution First Amendment Act, allowing for the first President of Namibia, Dr Sam Shafiishuna Nujoma, to serve another term of office as President; and then by the Namibian Constitution Second Amendment Act, allowing for more amendments to the Constitution relating to the following, inter alia:

- Extension of the period required for the acquisition of Namibian citizenship by spouses of Namibians and for naturalisation
- Alignment of the period of tenure of members of the National Council with those of members of the National Assembly
- Subjecting the appointment of foreign judges to a fixed-term contract
- Removal of the function of investigating corruption matters from the Ombudsman’s powers and functions
- Establishment of the Anti-corruption Commission as an institution of state
- Decreasing the term of office of members of the Management Committees of Regional Councils to two years and six months
- Redefinition of prison service as correctional service
- Elevation of the head of the Prison Service to the rank of Commissioner-General of Correctional Service, and
- Provision for incidental matters relating to the amendments.

India, the world’s largest democracy, has amended its Constitution 94 times; and in the United States of America, the oldest democracy, they have gone back to their founding fathers’ text 27 times. Namibia is still a young nation: it has only been 20 years since its Independence on 21 March 1990. There can be no doubt that, in the future, further amendments will be made to the Constitution.

Per Articles 79(2) and 80(2) of the Constitution, the Supreme Court and the High Court have jurisdiction to hear and adjudicate upon the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder. This notwithstanding, even the highest court of the country can have its decisions reversed by an Act of Parliament lawfully enacted, pursuant to Article 81 of the Constitution.

No. 34 of 1998. This is popularly known as the third term amendment, referring to Dr Sam Nujoma’s last term of office as a result of the said amendment.

No. 7 of 2010.

The 94th amendment provides for a Minister of Tribal Welfare in the Jharkand and Chattisgarh States. The Indian President assented to the amendment on 12 June 2006.

The 27th amendment prevents laws affecting Congressional salaries from taking effect before the beginning of the next session of Congress. It was passed on 7 May 1992.

According to Article 130 of the Namibian Constitution, it came into force on the date of Independence, 21 March 1990.
Amending the Namibian Constitution

As indicated earlier, the process of amending the Namibian Constitution is self-contained in Chapter 19 of its text. The Chapter contains only two but very necessary Articles which, perhaps understandably, do not get as much attention as others. Yet their significance is such that any constitutional amendment is obliged to comply with them to the letter.

It is important to note that every single part of the Constitution is capable of being amended, including Chapter 3 on fundamental human rights and freedoms. However, in respect of Chapter 3, any proposed amendment and/or repeal can only add to and embellish the existing fundamental rights and freedoms contained therein. Any repeal and/or amendment that seeks to diminish or detract from such fundamental rights and freedoms is not only impermissible under the Constitution, it is also invalid and has no force or effect. The fundamental rights and freedoms are, therefore, inviolably “entrenched” and cannot be detracted from and/or diminished unless a new Constitution replaces the current one. Thus, the existing Constitution survives or falls with Chapter 3.

Chapter 19, “Amendment of the Constitution”, provides as follows:

**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.

**Article 132 Repeal and Amendment of the Constitution**
1. Any bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.
2. The majorities required in Parliament for the repeal and/or amendment of any of the provisions of this Constitution shall be:
   (a) two-thirds of all the members of the National Assembly; and
   (b) two-thirds of all the members of the National Council.
3. Notwithstanding the provisions of Sub-Article (2) hereof, if a bill proposing a repeal and/or amendment of any of the provisions of this Constitution secures a majority of two-thirds of all the members of the National Assembly, but fails to

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12 Articles 131 and 132(5), Namibian Constitution.
14 (ibid.). Naldi uses the example of the reintroduction of the death penalty, popularised by O’Linn J in *S v Tcoeib* 1993 (1) SACR 274 (NmHC), to conclude that only a “revolution” can see the reintroduction of such detraction from the fundamental rights and freedoms. I concur entirely with him. In fact, the suggestion from the bench can at best be termed bizarre if one has regard for Article 63, which imposes upon members of the National Assembly the function of upholding and defending the Constitution. A new Constitution would have to be brought into being.
secure a majority of two-thirds of all the members of the National Council, the
President may by Proclamation make the bill containing the proposed repeals and/
or amendments the subject of a national referendum.

(b) The national referendum referred to in Sub-Article (a) hereof shall be conducted
in accordance with procedures prescribed for the holding of referenda by Act of
Parliament.

(c) If upon the holding of such a referendum the bill containing the proposed repeals
and/or amendments is approved by a two-thirds majority of all the votes cast in
the referendum, the bill shall be deemed to have been passed in accordance with
the provisions of this Constitution, and the President shall deal with it in terms of
Article 56 hereof.

(4) No repeal or amendment of this Sub-Article or Sub-Articles (2) or (3) hereof in so far as it
seeks to diminish or detract from the majorities required in Parliament or in a referendum
shall be permissible under this Constitution, and no such purported repeal or amendment
shall be valid or have any force or effect.

(5) Nothing contained in this Article:

(a) shall detract in any way from the entrenchment provided for in Article 131 hereof
of the fundamental rights and freedoms contained and defined in Chapter 3 hereof;
(b) shall prevent Parliament from changing its own composition or structures by
amending or repealing any of the provisions of this Constitution: provided always
that such repeals or amendments are effected in accordance with the provisions of
this Constitution.

A number of observations can be made from Article 132. It is clear that any attempt
to repeal and/or amend the Constitution has to be direct and point to the Articles and
Sub-Articles sought to be repealed and/or amended: there can be no lack of clarity in
expression in the text of the Article in ordaining the how of repealing and/or amending
any constitutional provision.

Twenty years on, there is still no referendum framework provided for by an Act of
Parliament. Therefore, the President would not be exercising his discretion any time soon.
One can enquire in the abstract whether National Council members would have given the
two constitutional Amendment Bills the required majority if referendum legislation had
existed –particularly with reference to the popular/infamous\textsuperscript{15} ‘third term’ amendment.

Also, the National Assembly and the National Council, collectively as Parliament,
cannot amend the Sub-Articles dealing with the requisite majorities. These Sub-Articles
join Chapter 3 in their unique protection under the Constitution. That notwithstanding,
Article 136(1)(c) permits the National Assembly to act as if the National Council does
not exist in a case where a constitutional amendment arises and the National Council
is not yet composed of membership due to pending elections. However, due to section

\textsuperscript{15} The choice depends on which side of the debate one found oneself. Given the public interest
in the matter, could they have opted to peer into the mind of the nation – or had the preceding
SWAPO Congress done so adequately? The Parliament \textit{Hansard} dated 15 October 1998 reveals
a very vivid discussion, led by the then Prime Minister, Dr Hage G Geingob, who moved the
amendment.
6 of the Namibian Constitution Second Amendment Act,\textsuperscript{16} this may now have become an academic matter, as both the National Assembly and the National Council now have similar terms of office.\textsuperscript{17}

However, the most important part of Chapter 19 are Sub-Articles 2(a) and (b) of Article 132 dictating the majorities for the repeal and/or amendment of any of the provisions of the Constitution, namely where it states that “two-thirds of all of the members of the National Assembly [or National Council, as the case may be]”.\textsuperscript{18} This means that all of the members of the house in question are obliged to participate in the vote. The Namibian Constitution First Amendment Act was passed with 51 members of the National Assembly voting for it and 13 against.\textsuperscript{19} What, one might ponder, would have been the impact of a walkout staged during the first amendment to the Constitution?

**The First Constitutional Amendment**

The first amendment to the Constitution was made possible by the Namibian Constitution First Amendment Act. The amendment was embroiled in controversial discussion, both in the National Assembly and in the public realm, due to its purport: to permit Dr Sam Nujoma, as first President of an independent Namibia, to serve a third term of office as President of the Republic of Namibia. The text of the amendment reads as follows:

**Amendment of Article 134 of the Namibian Constitution**

1. Article 134 of the Namibian Constitution is amended by the addition of the following Sub-Article:

   (3) Notwithstanding Article 29(3), the first President of Namibia may hold office as President for three terms.

The necessity of this amendment stems from Article 29(3) of the Namibian Constitution, which provides as follows:

A person shall hold office as President for not more than two terms.

Article 134 of the Constitution provides the following:

\textsuperscript{16} It amends Article 70(1) of the Namibian Constitution on the term of office for National Council members.

\textsuperscript{17} The National Council is composed of two Regional Councillors from each of the regions of Namibia. Article 106(1) and (2) of the Namibian Constitution stipulates that every region shall have a minimum of six constituencies (one councillor per constituency). With 13 Regions, it means that there should be 26 members of the National Council. There are 107 constituencies countrywide, therefore 107 councillors. Is it really possible that there will be no composed National Council?

\textsuperscript{18} Emphasis added.

\textsuperscript{19} By virtue of Article 46 of the Namibian Constitution, the National Assembly should have a total of 78 members, 72 of such voting members and 6 non-voting members.
Article 134 Election of the First President
(1) 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.
(2) The first President of Namibia shall be deemed to have been elected under Article 28 hereof and upon assuming office shall have all the powers, functions, duties and immunities of a President elected under that Article.

The first President’s term of office commenced on Independence Day, 21 March 1990, and his first term of office would, therefore, be calculated from 21 March 1990 to 20 March 1995, and his second term from 21 March 1995 to 20 March 2000.

The Namibian Constitution First Amendment Act paved the way for the first President to serve from 21 March 2000 to 20 March 2005, which he did. This amendment did not suspend the holding of elections. The elections took place as scheduled in 2004, although they were not without drama. The first President, Dr Sam Nujoma, defeated his opponents and won comfortably.

Dr Geingob advanced a number of arguments in support of the Namibian Constitution First Amendment Bill, most poignant of them being the following:

Even some of our white compatriots have also whispered to me that: “We are with you, we support our President to be given one more five year term presidential [sic] term of office to consolidate national reconciliation and peace and stability … as for the few minority newspaper editors, and professors who are engaging in sophistry, I must say, I did not see any thing [sic] of rational substance or logic that can make me think that the Swapo Party is not doing the right thing in tabling this proposed constitutional amendment to enable our founding father to seek re-election in the 1999 Presidential elections. None of the editors, nor professors, have pointed out any concrete fact that demonstrates that what we are proposing is undemocratic, unconstitutional or illegal in any way … Furthermore, I would like to restate that any Constitution is a living document, and is not a document cast in stone, and therefore it must change with changing times or circumstances.

The Opposition did not accept the amendments lying down. None other than Honourable Katuutire Kaura, President of the Democratic Turnhalle Alliance (DTA) of Namibia, was able to match the linguistic mettle of Dr Geingob when he said the following in opposition to the amendment:

20 By virtue of Article 133, Namibian Constitution.
21 Ballot papers were found in a river bed in the District of Okahandja. The High Court ordered a recount. See Republican Party of Namibia & Another v Electoral Commission of Namibia & 7 Others NmHC (2005) Case No. A 387/2005. It also needs to be mentioned that every National Assembly election since the election of members of the Constituent Assembly has been occasioned with an election challenge, merits notwithstanding. Could it be symptomatic of the ideological interpretation of the exercise of democratic rights?
23 (ibid.:45, 28 October 1998).
What has been said thus far, as a means of justifying a third term for His Excellency Mr Nujoma, borders on deification … I concur with those who say the Constitution is amendable. It is a dynamic living document which is not cast in concrete, that is true. The *sine quo [sic] non* for the amendment of any Constitution is public interest, not the interest of an individual. The clear example is the Fifth Amendment of the American Constitution … This proposed amendment to the Namibian Constitution, on the other hand, is immoral, illogical, myopic, self-serving and a lot of supercilious palaver.

The Namibian Constitution Second Amendment Bill was passed with fewer theatrics in the National Assembly, perhaps due to its less controversial objects. The National Council, however, made certain changes to it and referred it back to the National Assembly in terms of Article 74(5)(a) of the Constitution.

**The Second Constitutional Amendment**

Both the first and the second constitutional amendments have commonality in their introduction having been done by the Prime Minister of the day. In casu, the Namibian Constitution Amendment Act was moved by the Right Honourable Nahas Angula. The Bill introducing the amendment was summed up by the Prime Minister in the following words:

In order to refresh your minds, the Bill aims at amending the Namibian Constitution so as to:

- extend the waiting period required for acquiring Namibian citizenship by marriage from a period of not less than two years to a period of not less than ten years ordinarily residing in Namibia as spouse subsequent to such marriage;
- extend a waiting period required for non-Namibian citizens who may apply for Namibian citizenship by naturalization from a period of not less than five years to a period of not less than ten years of continuous residence in Namibia;
- decrease the limit of tenure of members of the National Council from six years to five years;
- subject the appointment of non-Namibian citizens as Judges to a fixed term contract of employment;
- delete the word “corruption” from the functions of Ombudsman;
- insert an Article on Anti-Corruption Measures;
- increase the term of office of members of Management Committee from the three years to two years and six months;
- substitute the terms “correctional service” and “Commissioner General of Correctional Service” for the terms “prison Services” and “Commissioner of Prisons[”.

Other technical amendments have been effected on Articles 115 and 123 for improved sequencing of Forces in terms of command authority, namely by rearranging the order: Defence, Police and Correctional Services.

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24 In his capacity, Dr Geingob was the leader of government business in Parliament by virtue of Article 36 (“Functions of the Prime Minister”) of the Constitution. Discussion resumed in the National Assembly on 11 March 2010, according to the *Hansard*, p 4.

25 (ibid.:4–5). The apparent mistakes are in the text of the *Hansard* itself.
As I mentioned in my introduction last year, these amendments are technical in nature and I believe this House will approve them accordingly.

The lacklustre public interest that met the Bill was matched (or even outdone) by the quality of debate that eventuated in the National Assembly. Once cannot glean with certainty the rationale for the amendment of Article 4 of the Constitution, namely extending the periods from two to ten years in respect of subparagraph (bb) of paragraph (a) of Sub-Article (3), and from five to ten years in respect of paragraph (b) of Sub-Article (5). The war in neighbouring Angola is over, and as a result, one would assume that the number of refugees flocking in has abated. The same applies in relation to the Democratic Republic of Congo. Perhaps it was the economic situation in these countries along with Zimbabwe drawing economic refugees that prompted the Minister of Home Affairs and Immigration to request this amendment.26

The above notwithstanding, the new text of Sub-Article (3) of Article 4 of the Constitution now reads as follows:27

The following persons shall be citizens of Namibia by marriage:

(a) those who are not Namibian citizens under Sub-Article (1) or (2) hereof and who:
   (aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force; and
   (bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than ten (10) years; and
   (cc) apply to become citizens of Namibia;

(b) for the purposes of this Sub-Article (and without derogating from any effect that it may have for any other purposes) a marriage by customary law shall be deemed to be a marriage: provide that nothing in this Constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognized as such for the purposes of this Sub-Article.

Sub-Articles (1) and (2) of Article 2 deal with citizenship by birth and descent, respectively. Sub-Article (3) deals with citizenship by marriage. While the amendment left the principle of the Sub-Article intact and only raised the time frames therein, it would be of interest to repeat here from the text the purport of it, namely that, if a person in good faith marries a person who would have qualified for citizenship when the Namibian Constitution came into being, that person has ordinarily resided in Namibia for over ten years, and such person has in the appropriate manner applied for citizenship, then that person can become a citizen, marriages of customary law being recognised in this respect.

Sub-Article (5) of Article 4 now reads as follows:

26 One thankfully relies on the understanding of the staff of the National Assembly to access the Hansard. Perhaps when the Hansard becomes available online, one can research freely, in more depth, and with more enthusiasm.

27 Per section 1 of the Namibian Constitution Second Amendment Act.
Citizenship by naturalization may be applied for by persons who are not Namibian citizens under Sub-Articles (1), (2), (3) or (4) hereof and who:
(a) are ordinarily resident in Namibia at the time when the application for naturalization is made; and
(b) have been so resident in Namibia for a continuous period of not less than ten (10) years; and
(c) satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law.

Sub-Article (5) was initially intended to deal with naturalisation, and it, too, has retained its purport that any person not a citizen by birth, descent, marriage, or those who have not filed for admission 12 months after Independence can become a citizen if such person ordinarily resided in Namibia at the time of the application – and that period should not be less than ten years, and has satisfied all other statutory requirements (health, morality, security or residence).

The other object of this Act is to redefine the Prison Service as a Correctional Service, elevate the rank of the head of the said service to Commissioner General, and make the necessary lexicon changes in the text of the Constitution to achieve the said objects. Chapter 15 is realigned to achieve sequencing along the authority of the Defence Force, Police Force and Correctional Service.

The alignment of the terms of office of the National Council members with those of the National Assembly is aimed at having those members’ offices vacant for elections later this year, alongside the elections of members of local authorities. The purport of this amendment is that, in the year after the Presidential and National Assembly elections, the Regional Council and Local Authority elections occur, bringing a smoother alignment between the respective terms of office. Section 17(2) of the Namibian Constitution Second Amendment Act applies the amendments to Articles 70 and 109 to the current term of office of such members.

The debate in the National Assembly homed in on the freedom of ministerial drivers to buy bread when the other object of the Act was discussed – to remove all matters relating to corruption away from the Ombudsman, and to insert a new chapter on anti-corruption measures in the Constitution between Article 94 and Chapter 11 ("Principles

28 (ibid.:sections 2, 3, 4, 5, 9, 13, 14 and 15).
29 This is achieved by section 6, which amends Article 70 of the Constitution, and by section 12, which amends Article 109 of the Constitution, to provide for a five-year term of office for members of the National Council, and a 2.5-year term of office for members of the Management Committee of Regional Councils.
30 Per Article 29 of the Constitution, the Presidential term of office is five years. The term of office for members of the National Assembly is also five years, as per Article 50.
31 It should be noted that members of the National Council are derived from the Regional constituencies.
32 Refer to page 11 of the Hansard of 16 March 2010 and the discussion that ensues between the Speaker and the Deputy Minister of Justice.
of State Policy”). The result is Chapter 10A (“Anti-corruption Measures”), which provides the following:

**Article 94A Anti-corruption Measures**

1. The State shall put in place administrative and legislative measures necessary to prevent and combat corruption.
2. There shall be established by an Act of Parliament an Anti-Corruption Commission with its powers and functions provided for in such Act.
3. The Anti-Corruption Commission shall be an independent and impartial body.
4. The Anti-Corruption Commission shall consist of a Director, a Deputy Director and other staff members of the Commission.
5. The National Assembly shall appoint the Director of the Anti-Corruption Commission and the Deputy Director upon nomination by the President.
6. The Director of the Anti-Corruption Commission and the Deputy Director shall be appointed for a period of five years and their qualifications for appointment and conditions and termination of service shall be determined in accordance with an Act of Parliament.

It is common cause that an Act of Parliament established the Anti-Corruption Commission in 2003. The effect of this amendment is, firstly, to make the Anti-Corruption Commission an institution of state, independent and impartial. Secondly, the amendment imposes upon the “State” the obligation to take measures to prevent and combat corruption. Thirdly, it validates all action done by the Anti-corruption Commission, given that it existed before this amendment was passed by Parliament. The lawmaker then added section 16 to the Namibian Constitution Second Amendment Act, which provides as follows:

**Savings and transitional provisions**

16. The Anti-Corruption Act, 2003 (Act No. 8 of 2003), is deemed to have been enacted pursuant to Article 94A, and –
   a. the Anti-Corruption Commission established by that Act and which exists at the commencement of this Act is deemed to have been established as contemplated in that Article and continues to exist;
   b. the Director of the Anti-Corruption Commission and the Deputy Director holding office at the commencement of this Act by virtue of their appointment under that Act continue to so hold office and are deemed to have been appointed in terms of that Article;
   c. anything made or done in terms of or under that Act continues as such and is not affected by this Act.

Given what is contained in Article 132(1) of the Constitution, it follows that one would enquire whether or not the insertion of section 16 in the Namibian Constitution Second Amendment Act was not erroneous: was it not required that a separate General Law or Anti-corruption Commission amendment legislation be passed, and if so, what then is the effect of section 16 of the said Act?

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34 One wonders why the word Government was deemed undesirable here.
The other and last object of the amendment was to cap the ages of permanent judges to 70 in the first instance, and in the second instance, to ensure that foreign judges were all put on a fixed term of contractual employment. However, the amendment excludes acting judges, who can be appointed above the age of 70, and who need to be contracted for a fixed term of employment if they are foreigners – whether before or after the retirement age of 70. The amendment reads as follows:

All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any judge to seventy (70): provided that non-Namibian citizens are appointed as Judges under a fixed term contract of employment.

The first question that comes to the fore is whether foreign judges are now employees under the Labour Act. If so, who is their employer? Also, does this amendment in any way affect the independence of the judiciary pronounced in Article 78(2) of the Constitution?

**A peek into the future: Issues arising from constitutional provisions**

At the present day students of the constitution wish neither to criticize, nor to venerate, but to understand; and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of an expounder; his duty is neither to attack nor to defend the constitution, but simply to explain its laws.

The above dictum forms the basis upon which a cursory discussion can be conducted on issues arising from the constitutional Articles, most of them not yet subjected to the scrutiny of a court.

35 Although not in the particular order of the discussion here. Section 7 of the Namibian Constitution Second Amendment Act amends Article 82(4) of the Constitution.
36 Previously, an Act of Parliament could extend the age of retirement and the age up until which a judge could hold office.
37 See also the High Court Act, 1990 (No. 16 of 1990), particularly sections 6–8.
38 No. 11 of 2007.
39 “The Courts shall be independent and subject only to this Constitution and the law”. See also Hannah v Government of the Republic of Namibia 2000 NR 46 (LC). Refer to R v Valente 1985 24 DLR (4th) 161 SCC, which laid the foundation for three essentialia for the independence of the judiciary in Canada: security of tenure and removal only on good cause; financial security; and institutional independence in judicial functions. In the case Re Judges of the Provincial Court of Newfoundland et al: Newfoundland Association of Provincial Court Judges v Newfoundland 1998 160 DLR (4th) 337, it was found that government’s reduction of contributions to the judges’ pensions were unconstitutional to the extent that they affected the financial security of the Provincial Judges without recourse to an independent commission. Even the reclassification of the judges’ salary scale on a civil service pay scale was found to violate judicial independence.
40 Dicey (1956:3).
Establishment of the Republic of Namibia and Identification of its Territory

Article 1(1) states the following:

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.

How does this interrelate with Article 27(2), which vests executive power in the President and the Cabinet, if regard is had to Article 108, which provides the following?

**Article 108  Powers of Regional Councils**

Regional Councils shall have the following powers:

(a) to elect members of the National Council;
(b) to exercise within the region for which they have been constituted such executive powers and to perform such duties in connection therewith as may be assigned to them by Act of Parliament and as may be delegated to them by the President;
(c) to raise revenue, or share in the revenue raised by the central Government within the regions for which they have been established, as may be determined by Act of Parliament;
(d) to exercise powers, perform any other functions and make such by-laws or regulations as may be determined by Act of Parliament.

The question begs an answer: Is Namibia a quasi-federal state? Regional governments can raise revenue, exercise executive powers, and are certainly independent – if for a moment the political dispensation is not one of uniformity.

One another point flowing from Article 1 is the issue of secularism. If that is indeed what the text of the Constitution intended, what is the justification for the prayers at the commencement of the sessions of the National Assembly or the inclusion of religious leaders in official programmes of state functions?

**National symbols**

Article 2 provides for a national flag and other national symbols. Pursuant to this Article, the National Coat of Arms of the Republic of Namibia Act\(^{42}\) was promulgated. Also in force is the Merchandise Marks Act,\(^{43}\) the Trade Marks in South West Africa Act,\(^{44}\) the Heraldry Act,\(^{45}\) and certain portions of the Patents and Designs Proclamation.\(^{46}\)

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\(^{41}\) This revenue, by virtue of Article 125(2) of the Constitution, is separate from central government revenue. This begs a further question: Does the State Finance Act, 1990 (No. 31 of 1990) apply to Regional Council finances?

\(^{42}\) No. 1 of 1990.

\(^{43}\) No. 17 of 1941.

\(^{44}\) No. 48 of 1973.

\(^{45}\) No. 18 of 1962.

\(^{46}\) No. 17 of 1923.
One would have thought that, with the passing of the Copyright and Neighbouring Rights Protection Act, the consolidation of all matters relating to the issuance of permission to utilise parts of the national symbols would have been sorted out. Instead, individuals may even copyright content that ought to be in the public realm. Movement on this Article is needed, even if only to elaborate on the crimes relating to the unlawful use of the coat of arms in a better context than the common law crimes of fraud or uttering currently prosecuted in the courts.

**Language**

Although many Namibians cannot proficiently converse in English, and notwithstanding the imposition of English as the only official language by Article 3, the same Article read together with Article 23 – titled *Apartheid and Affirmative Action* – makes it possible for the enactment of a law to advance persons if the object of that law is to make another language (i.e. their native language) the official language in a particular region or area. Why has this not been utilised thus far?

**Citizenship**

Undoubtedly, the most provocative matter arising in relation to citizenship stems not from Article 4 itself, but from section 26 of the Namibia Citizenship Act, which prohibits Namibians from bearing dual citizenship. Particularly in a globalised perspective of the world, a child born in the United Kingdom of a Namibian (by birth) and a North American parent is entitled at least to British, US/Canadian and Namibian nationalities. This discussion can, however, get deeper than it first appears possible. Perhaps the time has come to have that discussion.

**Life**

Abortion – otherwise known as the debate we never had but should have – continues to be ignored by all politicians, irrespective of party affiliation, while young teenagers continue to be arraigned before the courts for having dumped babies. Debate around this subject should be one of the most vivid, yet it fails to attract a serious reaction from Namibians.

**Family**

Is it a foregone conclusion that the issue of gays and lesbians is settled in Namibia? With no definition of *family* in Article 14, how can it still be possible that the Rainbow Coalition – together with the Mauritians and Palestinians – the only remaining freedom fighters?

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47 No. 6 of 1994.
48 No. 14 of 1990.
Property rights

Known to some as the Achilles heel of land reform, but championed by others as the most important ingredient to stability in our economy: whatever the case may be, Article 16 and its in-built just compensation criterion needs to be considered against the backdrop of the deprivation that occurred against the ‘natives’ in the first place – or at least in the context of Article 19 on culture and ancestral rights\(^\text{49}\) that ought to have survived colonisation.

Education

The right to education is currently being put to the test in South Africa in the Bhisho High Court. The question is, given the unqualified nature of Article 20, can one challenge the government as having breached its constitutional obligations if regard is had to the quality of such education? How about the facilities?

Fundamental freedoms

With regard to the freedom to practise any religion, is Namibia prepared for a Muslim student in a public school – needing a Halaal menu, prayer time not impinged by the curriculum, etc.?

With regard to practising any profession, or occupation, trade or business, when will a mature discussion on the profession of commercial sex workers commence?

Black economic empowerment

Is it not legible that Article 23 on apartheid and Affirmative Action already caters for Parliament to pass laws providing, directly or indirectly, for the advancement – a synonym for empowerment – of persons socially, economically or educationally disadvantaged by past discriminatory laws or practices, as well as, at the same time, providing for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances arising as a result of past discriminatory laws or practices?

Therefore, the ongoing debate on black economic empowerment can be solved. Those that seek empowerment and those that seek to deal socially with the disadvantaged need not fight: the two objectives are not mutually exclusive. However, the acquisition of wealth needs to be achieved in accordance with the law, transparently, and on the basis

\(^{49}\) The courts could adopt the approach taken in *Mabo & Others v Queensland (No. 2) [1992] HCA 23; (1992) 175 CLR 1 FC 92/014*. The Australian High Court ruled that the traditional title of the Meriam people of the Murray Islands survived annexation to Queensland, and it was not extinguished by subsequent legislation or executive act. The High Court also held that it could only be extinguished with compensation or damages to the traditional titleholders of the Murray Islands, and concluded, therefore, that the Murray Islands were not Crown land in the meaning of section 5 of the Australian Land Act, 1962.
of equal access to opportunity, since the blanket aggrandisement of a few at the expense of the deprived majority will not achieve the purport of Article 23. In any event, the acquisition of wealth is obliged to be accompanied by social welfare programmes. When will the debate cease and actions commence, one asks? Is this a case for paralysis by analysis?50

**Powers of the President**

Was it intended that –

- executive powers be split between the President and his Cabinet (and, to a certain extent, Regional Councils)
- the President’s executive powers only be exercised in consultation with Cabinet, and
- the above treatment be made in relation to the President’s powers as Commander-in-Chief?51

What is a Cabinet?52 What is the effect of failure on the part of the President to announce his/her actions in the *Gazette*?53

**Functions of Cabinet**

Perhaps the greatest injury54 to the common law was committed when the State-owned Enterprises Governance Act55 was promulgated, possibly in the belief that it advances the purport of Article 40(a) of the Constitution. Instead, a Minister for Public Entities could have sufficed. The function of the State-owned Enterprise Governance Council and its secretariat remains a convenient mystery.

**Election of members of the National Assembly**

The election of members of the National Assembly is subjected to both principles and to procedures.56 The principles are contained in Article 49 and Schedule 4 of the Namibian

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51 Refer to Articles 27 and 115(2).

52 Do Cabinet Committees suffice?

53 Required by Article 32(8) of the Constitution. What if all the judges ever appointed are not gazetted? Perhaps regularity will be assumed, given the Supreme Court ruling in *Rally for Democracy and Progress & 17 Others v Electoral Commission of Namibia & 8 Others* Case No. SA 6/2010 NmSC. The Supreme Court remitted the matter for adjudication by the High Court.

54 The State-owned Enterprise Governance Council directs, approves and disapproves investments and budgets, yet the Council occupies the enviable position of having no fiduciary duty towards the companies and entities: that remains the responsibility of the directors.

55 No. 2 of 2006, as amended.

56 Article 46(2), Namibian Constitution.
Constitution, while the procedures are contained in the Electoral Act.\(^{57}\) Again, if one refers to Article 132(1) of the Constitution, is it possible that section 85(10) of the Electoral Amendment Act\(^ {58}\) is unconstitutional? The relevant text of section 85(10) reads as follows:

If, in the case of an election of members of the National Assembly or of members of a local authority council two or more political parties have received –

- (a) after the counting of votes …; or
- (b) after the recounting of votes …,

an equal number of surplus votes and the result of the election cannot by virtue thereof be determined, –

- (i) the Chairperson of the Commission, in the case of an election of members of the National Assembly, shall determine by lot the result of the election;
- (ii) the returning officer, in the case of an election of members of a local authority council, shall determine by lot the result of the election.

Should there not have been a specific amendment to Schedule 4? There is perhaps a need to deal more thoroughly with Schedule 4 in terms of how seats are allocated in accordance with a formula in which all votes cast\(^ {59}\) are relevant, and in relation to surpluses which have been used erroneously to grant seats to parties that never made the quota/threshold in the first place. Also, it is important to detail what should occur if a political party disappears from the scene after it has secured seats in the National Assembly.\(^ {60}\)

**The Prosecutor-General and the Attorney-General (and, for that matter, the Minister of Justice)**

Is it not time that this function is amalgamated and prosecutorial code adopted? After all, the fear was unfounded that SWAPO would prosecute the former leaders of the ethnic (“Bantu”) governments since, as 20 years on, a plethora of institutions has mushroomed. Was it really necessary to have an Anti-corruption Commission when there was already an Ombudsman? Who prosecutes the Prosecutor-General, or is this constitutional office above the law? What is left of the Ministry of Justice once the Legal Drafters fall under the Attorney-General? Law Reform\(^ {61}\) is separate in function, so is the magistracy\(^ {62}\).
the prosecutors, legal aid and the Government Attorney. Perhaps only matters of international cooperation remain with the clerks and cleaners?

**Conclusion**

Normally, conclusions shed light and educate the reader on what s/he has just consumed. This conclusion is different: it continues to ask, curiously, perhaps provocatively, as evinced in the discussion, yet all for the purpose of a better constitutional discourse out of the classroom, out of the courtroom, and out of the offices where – with difficulty, more often than not – the administrators are confronted with the need to take action in accordance with the Constitution.

The following questions should also be answered:

- Is the Preamble part of the text of the Constitution? Is it part of the Constitution at all, or was this a separate declaration by the Constituent Assembly?
- Given that Schedule 5(1) of the Namibian Constitution vests property in the Namibian Government, what is the legal consequence of the non-production of a title deed before the Registrar of Deeds, as envisaged under Schedule 5(4) of the Constitution?
- Where are the ancestral rights of the indigenous peoples protected under the Namibian Constitution? Do such assertions of indigenous rights stand up to the property rights contained in Article 16?
- Is the recognised international boundary of Namibia with the Republic of South Africa positioned in the middle of the Orange River?
- Since the judiciary is not part of central Government, why is the High Court at Windhoek the main office and the High Court at Oshakati a “satellite court”? After all, there are more citizens up there than the number residing in Windhoek.

As Namibian nationhood grows, so will its constitutional law and jurisprudence, hopefully fanned by academics, researchers and commentators who eagerly await the pronouncements of the courts to critique, analyse and expound upon. Only in their written form will such robust opinions be captured and shared with the next generation of eager thinkers.

63 Refer to Article 88, Namibian Constitution. See also the case of Ex Parte: Attorney-General In Re: Constitutional Relationship between Attorney-General and the Prosecutor-General (SA 7/93) [1995] NASC 1; 1995 (8) BCLR 1070 (NmSC) (13 July 1995).

64 Refer to the Legal Aid Act, 1990 (No. 29 of 1990), as amended. See also Government of the Republic of Namibia & 2 Others v Geoffrey Kupuzo Mwilima & 127 Others, Case No. SA 29/2001 NmSC.

65 Refer to the Government Attorney Proclamation, 1982 (R161 of 1982), albeit that the interpretation of Article 87 of the Constitution places the Office of the Government Attorney under the aegis of the Attorney-General.

66 The Department of International Cooperation in the Ministry of Justice dealing with extradition matters, cooperation in judicial matters, reciprocal enforcement of judgments, etc.

67 Even then, the Magistrates’ Commission and the Minister of Justice may in future find themselves discussing their positioning vis-à-vis the independence of the magistracy as part of the judiciary.

377
References
