

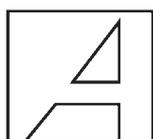
The Independence of the Judiciary in Namibia

Edited by Nico Horn and Anton Bösl

2008

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.



**Konrad
Adenauer
Stiftung**

Konrad Adenauer Foundation
P.O. Box 1145
Windhoek
info@kas-namibia.org
www.kas.de/namibia

© **Konrad-Adenauer Stiftung and the Authors 2008**

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission. No paragraph of this publication may be reproduced, copied or transmitted save with written permission. Any person who does any unauthorised act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

Cover design: Anton Bösl and John Meinert Printing

Content editors: Nico Horn and Anton Bösl

Language editor: Sandie Fitchat

Publication design: Anton Bösl

Layout and printing: John Meinert Printing (Pty) Ltd

Publisher

Macmillan Education Namibia

PO Box 22830

Windhoek

Namibia

Tel. (+264 61) 225568

ISBN 978-99916-0-807-5

Table of contents

Contributors	5
Foreword Peter Shivute	10
Introduction Nico Horn and Anton Bösl	12
List of abbreviations	14
SECTION I: The paradigm of an independent judiciary	
The paradigm of an independent judiciary: Its history, implications and limitations in Africa Joseph B Diescho	17
SECTION II: The independence of the judiciary in pre-independent Namibia	
The independence of the judiciary in pre-independent Namibia: Legal challenges under the pre-independence Bill of Rights (1985–1990) Nico Horn	45
SECTION III: The structure of the Namibian judicial system	
The structure of the Namibian judicial system and its relevance for an independent judiciary Sam K Amoo	69
SECTION IV: The independence of the prosecutorial authority	
The uniqueness of the Namibian Prosecutor-General Lovisa Indongo	99
The independence of the prosecutorial authority of South Africa and Namibia: A comparative study Nico Horn	113

SECTION V: The independence of the Lower Courts of Namibia

The Magistrates Act of Namibia and the independence of magistrates 137
Kaijata NG Kanguuehi

Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice 149
Manfred O Hinz

SECTION VI: The independence of the Superior Courts

Politics and judicial decision-making in Namibia: Separate or connected realms? 177
Peter VonDoepp

The role of the executive in safeguarding the independence of the judiciary in Namibia 207
Oliver C Ruppel

Appointing acting judges to the Namibian bench: A useful system or a threat to the independence of the judiciary? 229
Norman Tjombe

The right to an independent and impartial tribunal: A comparative study of the Namibian judiciary and international judges 243
Francois-Xavier Bangamwabo

SECTION VII: Beyond the Namibian Judiciary

The independence of the Ombudsman in Namibia 271
Katharina G Ruppel-Schlichting

The independence of the legal profession in Namibia 291
Clive L Kavendjii and Nico Horn

Legal education and academic freedom in Namibia 311
Isabella Skeffers

Contributors

Amoo, Sam K

Head of Department and Senior Lecturer
Private and Procedural Law Department, Faculty of Law, University of
Namibia
LLM, University of Toronto
BA LLB, University of Zambia
BBA, University of Ghana
Last/latest publication: Amoo, SK. 2008 [Forthcoming]. "Introduction
to law, materials and cases". Windhoek: Macmillan Education
Namibia.
skamoo@unam.na
(+264 61) 246 141

Bangamwabo, Francois-Xavier

Lecturer
Faculty of Law, University of Namibia
LLM, National University of Ireland
LLB, University of Zimbabwe
Registered Attorney, Zimbabwe
Last/latest publication: Bangamwabo, F-X. 2006. *The independence and
the impartiality of ad hoc international criminal tribunals: The case
study of the International Criminal Tribunal of Rwanda*. Dublin:
University of Ireland.
fbangamwabo@yahoo.co.uk
(+264 61) 206 3766

Bösl, Anton

Resident Representative
Konrad Adenauer Foundation
PhD in Philosophy, Ludwig Maximilian University, Munich
PhD in Theology, Albert Ludwig University, Freiburg
Last/latest publication: Horn, N & Bösl, A (eds). 2008. *Human rights
and the rule of law in Namibia*. Windhoek: Macmillan Namibia.
info@kas-namibia.org
(+264 61) 225568

Diescho, Joseph Brian

Honorary Professor of Government and Political Studies, Nelson Mandela
Metropolitan University, Port Elizabeth
Director and Head of International Relations and Partnerships, University
of South Africa (UNISA), Pretoria
BA (Law), BA (Hons), MA, DLit et Phil (Fort Hare University)
MA, MPhil, PhD (Columbia University)
Last/latest publication: A series of articles on Afrikan leadership
(+27 12) 337 6005

Hinz, Manfred O

Professor, Faculty of Law, University of Namibia
UNESCO Chair for Human Rights and Democracy, Human Rights and
Documentation Centre, Faculty of Law, UNAM
PhD in Law, University of Mainz
Habilitation completed with appointment as professor at the University
of Bremen
Last/latest publication: Hinz, MO & Patemann, HK (eds.). 2006. *The
shade of new leaves. Governance in traditional authority: A southern
African perspective*. Münster: Lit Verlag.
okavango@mweb.com.na

Horn, Nico

Dean, Faculty of Law, University of Namibia
William Paton Fellow, University of Birmingham
Visiting Scholar, International Human Rights Clinic, Public Interest and
Clinical Education, Stanford Law School
PhD, University of the Western Cape
MA, Nelson Mandela Metropolitan University
LLM, University of South Africa
BTh (Hons), University of South Africa
BProc, University of Johannesburg
Last/latest publication: Horn, N & Schwikkard, PJ. 2008. *Commentary
on the new Namibian Criminal Procedure Act*, Volumes 1 and 2.
Windhoek: Orumbonde Press.
Co-drafter, with renowned scholars such as Ron Sider and Glen Stassen,
of the recent *Confession against nuclear armament: Evangelicals
for National Security through International Cooperation*.
Horn, N & Bösl, A (eds). 2008. *Human rights and the rule of law in
Namibia*. Windhoek: Macmillan Namibia.
nhorn@unam.na
(+264 61) 206 3622

Indongo, Lovisa

Legal Practitioner
MSc, University of Wales
LLB, University of Namibia
B Juris, University of Namibia
Last/latest publication: Contributor to Horn, N & Schwikkard, PJ. (eds).
2008. *Commentary on the new Namibian Criminal Procedure Act*,
Volume 1. Windhoek: Orumbonde Press.
lindongo@namfisa.com.na
(+264 61) 290 5000

Kangueehi, Kaijata

Head of Department and Lecturer
Department of Commercial Law, University of Namibia
Member, Magistrate's Commission
Member, Board for Legal Education
Legal Practitioner, High Court of Namibia
BA, LLB, PG Dip (Tax), University of Cape Town
kaijata@iway.na / kkangueehi@unam.na
(+264 61) 257351
(+264 61) 206 3651

Kavendji, Clive

Lecturer, Faculty of Law, University of Namibia
Legal Practitioner, High Court of Namibia
B Juris and LLB, University of Namibia
Last/latest publication: *Access to the criminal justice system through
legal aid*. Unpublished LLB dissertation, University of Namibia.
lkavendjii@unam.na
(+264 61) 257351 / 206 3737

Ruppel, Oliver C

Director, Human Rights and Documentation Centre, Faculty of Law,
University of Namibia
Senior Lecturer, Faculty of Law, University of Namibia
LLD, University of Pressburg
LLM, University of Stellenbosch
MM, University of Hagen
PG Dipl Phil, University of Munich
LLB Hons (German State Law Exams)

Last/latest publications: Hinz, MO & Ruppel, OC (eds.). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society
Ruppel, OC. 2007. *Interdisziplinäre Schlüsselqualifikation Mediation*. Hamburg: Schriftenreihe Außergerichtliche Konfliktbeilegung Verlag Dr Kovac.
ocruppel@unam.na or ruppel@mweb.com.na
(+264 61) 206 3664

Ruppel-Schlichting, Katharina

Business Manager and Senior Legal Researcher, Legal Research and Development Trust of Namibia
LLD, University of Bratislava
LLM, University of Stellenbosch
LLB Hons (German State Law Exams)
Last/latest publication: Kanganje, A & Ruppel-Schlichting, K. 2008. *Manual Do Delegado De Lista/Angola – Election observer manual. For the parliamentary elections 2008*. Luanda: Konrad-Adenauer-Stiftung /Instituto de Desenvolvimento e Democracia.
kruppel@mweb.com.na
(+264 61) 305 045

Shivute, Peter

Chief Justice of the Supreme Court of Namibia
MA LLB, University of Cambridge
LLM, University of Warwick
Last/latest publication: Shivute, P. 2008. *The rule of law in sub-Saharan Africa – An overview*. In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia.
cjudge@iway.na
(+264 61) 279901

Skeffers, Isabella

Programme Officer, Konrad Adenauer Foundation
Candidate legal practitioner
LLM candidate, University of Namibia
LLB, University of Namibia
B Juris, University of Namibia
Last/latest publication: Amoo, SK & Skeffers, I. 2008. *The rule of law in Namibia*. In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia.
skeffers@kas-namibia.org
(+264 61) 225568

Tjombe, Norman

Human rights lawyer

Director, Legal Assistance Centre

B Juris and LLB, University of the Western Cape

Member of various NGO boards (e.g. Open Society Foundation of Southern Africa, the Namibia Democracy Support Centre, the Namibia Nature Foundation, the Namibia Development Trust, the Nyae Nyae Development Foundation, Katutura Community Radio)

Last/latest publication: Tjombe, N. 2008. *Water ... A human right?*. Windhoek: Legal Assistance Centre.

ntjombe@lac.org.na

(+264 61) 223356 / 81 122 3356

VonDoepp, Peter

Assistant Professor

Department of Political Science, University of Vermont, USA

Research Affiliate, Institute for Public Policy Research, Namibia

MA and PhD, University of Florida

BA, University of New Hampshire

Last/latest publication: VonDoepp, P. 2008. *Context-sensitive inquiry in comparative judicial research: Lessons from the Namibian judiciary*. *Comparative Political Studies*, 41(11):1515–1540.

Villalon, Leonardo & VonDoepp, P (eds). 2005. *The fate of Africa's democratic experiments: Elites and institutions*. Bloomington, Indiana: Indiana University Press.

Peter.VonDoepp@uvm.edu

(+1 802) 656 4451

Foreword

Peter Shivute

The doctrine of the separation of powers is largely credited to the French jurist Montesquieu, who held that a democratic system of governance, where the will of the people reigns supreme, should be entrenched. In other words, a situation where power is concentrated in any one entity should be avoided. He therefore propounded that the state should be divided into three branches, namely the legislature, judiciary and the executive. Each branch would then have its own role, a veritable division of labour as it were. Attendant to that system of separation of powers are the necessary checks and balances among the three branches. The system is commendable; while dividing state power into three distinct branches, it fetters the power of each branch through necessary power control mechanisms.

In terms of the separation of powers, the executive is responsible for making government policies; the legislature is the law-making branch, while the judiciary is responsible for interpreting the laws made by the legislature. The existence of an independent and impartial courts and tribunal is essential to any judicial system that seeks to guarantee the enforcement and protection of human rights.

The framers of the Namibian Constitution, conscious of the benefits of a state based on the Montesquieu model of governance, inserted in the Constitution Sub-articles (2) and (3) of Article 1, which respectively state the following:

- (2) *All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.*
- (3) *The main organs of the State shall be the Executive, the Legislature and the Judiciary.*

Furthermore, the independence of the Namibian judiciary is specifically protected by Article 78 of the Constitution in very broad terms, which unambiguously include protection from interference by members of the executive or legislative branches of state or any other person.

The book *The Independence of the Judiciary in Namibia* is an important contribution to this topic, about which there has hitherto not been much public debate in the country. The publication examines some of the nuances that the principle of independence of the judiciary can take. The treatment of the subject

is specific as it highlights the Namibian judiciary by providing both a historical setting and analysing the scope and extent of its independence.

I have no doubt that, because of its quality of scholarship, the book will find greater appeal to legal practitioners, academics and researchers. Students, policy-makers, the business community and the general public will also find it a useful reference.

Peter Shivute
Chief Justice of Namibia

Introduction

Nico Horn and Anton Bösl

Independence of the judiciary is an important paradigm and a loaded phrase. It stems from the doctrine of the separation of state powers into three branches, namely the legislature, the executive and the judiciary. Having state power divided into three distinct branches implies a meaningful division of labour and, more importantly, a mechanism of power control through checks and balances is in place to prevent absolutist and totalitarian regimes. Legal theorists and practitioners are in agreement that an independent judiciary is the foundation of the rule of law, and an important and indispensable building block – or even cornerstone – of a justice and democratic state.

This book takes the importance of an independent judiciary as a given, and does not intend to defend or debate the issue. Rather, cognisance is taken of the constitutional and other relevant statutory provisions to ensure an independent judiciary in Namibia. The commendable pioneering work of the Namibian judiciary in protecting the fundamental rights and freedoms of the Namibian people is also recognised.

Experiences in other countries in all parts of the world have shown that a good legal framework and an honourable bench are a necessary but not sufficient condition for an independent judiciary. There are heterogeneous factors that can have an effect on such independence, including historically or culturally inherited practices, the socio-economic and ethnic contexts of judicial officers, as well as the procedure of appointment and tenure of office of those that are tasked with upholding the law.

This book offers an insight into the inner life of Namibia's judicial system: its structure and the mechanisms inherent in the system to ensure the independence of the judiciary. It discusses the implications and limitations of an independent judiciary in the country, and debates the independence and uniqueness of the Namibian prosecutorial authority. A section on the independence of the Lower Courts concentrates on magistrates' courts and traditional courts. In view of the enactment of the new Labour Act, special attention will be given to the labour courts in a forthcoming publication. The superior Courts – the High Court and the Supreme Court – and their independence are deliberated upon, as is the system of appointing judges through the Judicial Service Commission. The role of the executive branch of the state in safeguarding the independence of the

judiciary in Namibia is critically scrutinised as well. Moreover, a comparative study on the endangered independence of some international tribunals versus the Namibian judiciary serves to alert the reader to take nothing for granted.

Although not being immediate parts of the judiciary, the legal fraternity and the Office of the Ombudsman play an important role in the context of the judiciary; hence, their independence is also discussed. In addition, to ensure that Namibia has a judiciary that acts professionally and independently, the current system of legal education in Namibia is analysed and recommendations are made on how it can be improved. The chapter questions whether a culture of academic freedom exists, and whether independent and critical thinking and decision-making have been nurtured among judicial officers.

These are all significant questions in determining the real independence of the judiciary. In their quest, the contributors' intention has not been to minimise or deny the tremendous efforts and achievements of the judiciary in Namibia; rather, these studies aim to contribute to sustaining its independence.

Nonetheless, it is important to be critical of the status quo at all times in order to guard against potential dangers that threaten the judiciary's independence in the long term. Too many respected judiciaries have sunk into mediocrity because their independence was eroded over time. Thus, respect for the Namibian judiciary – as amply illustrated in this volume – demands that we take a strong stand against anything that might compromise its independence. This book is meant to challenge our thinking, expand our understanding, and consolidate our commitment to the independence of the judiciary in Namibia.

Any final errors of fact or interpretation remain the sole responsibility of the various authors.

Nico Horn and Anton Bösl
November 2008

List of abbreviations

ANC	African National Congress (South Africa)
ECHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JTC	Justice Training Centre
LSN	Law Society of Namibia
NDPP	National Director of Public Prosecutions
NGO	non-governmental organisation
NLA	Namibian Law Association
SADC	Southern African Development Community
SCSL	Special Court of Sierra Leone
SWA	South West Africa
SWAPO	South West African People's Organisation (today <i>SWAPO Party of Namibia</i>)
TGNU	Transitional Government of National Unity
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations

SECTION I

The paradigm of an independent judiciary

The paradigm of an independent judiciary: Its history, implications and limitations in Africa

joseph b diescho

Introduction

The inevitability of human error, especially when human interest (which includes the exercise of power as an end in itself) comes into conflict with the claims of others, requires that a judiciary should interpret the law, and the assumptions, which underlie it, which is as far as possible independent of the Executive and the Legislature.¹

There is hardly any society on the planet today that does not, in one or other fashion, cherish or call for more independence of the judicial organ of state. This is so because there is a growing recognition and acceptance that, in order for people – as individuals, communities, organisations and even nations – to live in harmony, there ought to be a set of rules and regulations that are agreed upon, accepted and adhered to uniformly and with a fair degree of predictability. In addition, it is accepted that, in order for peace and equilibrium to exist, which in turn guarantee fairness and justice, there ought to be an arm of society that is equipped to interpret the rules without fear or favour. This reality recognises and calls for the institutions of justice, the courts, to assume an independence to interpret the rules without fear or favour.

The judiciary is that part of the government system which encompasses –

- the structure and jurisdiction of the courts and the officers of the courts
- the judges and their tenure, and
- judicial processes, by means of which the constitution and the laws of the country are interpreted, their implications adjudicated, and disputes between citizens scrutinised and mitigated under accepted rules and by duly qualified people, whose findings are respected by all concerned.

The independence of the judiciary from the influence and control of political actors is one of the hallmarks of a constitutional democratic system. Yet there are contradictions and challenges in all systems that aspire to adhere to the principles of an independent judiciary. The challenges are there due to –

1 Marsh, Norman S. 1959. *The rule of law in a free society: A report on the International Congress of Jurists, New Delhi, India, January 5–10, 1959*. Geneva: International Commission of Jurists, p 279.

The paradigm of an independent judiciary

- the interlocking of state organs and their functions
- the human factor, since judges and juridical officials remain part of the community with all its vicissitudes, and
- systems not all being the same in terms of what they hold dear, and in terms of their attitudes towards the law when it matters to them directly.

The independence of the judiciary is an integral part of a constitutional democracy. As hinted above, the first difficulty associated with establishing this independence involves the judiciary inevitably being part of the political process: the political environment produces the leaders, who in turn appoint the members of the judiciary. In this sense, it is to be expected that there are fundamental relationships between the political actors and those who are assigned by these actors to execute the responsibility of interpreting the laws independently.

The second difficulty is the human factor. Although professionally trained jurists pledge to be impartial in their interpretation of the laws, and to be true to the intentions of the lawmakers of old, their human bias and preference may stand in the way of true impartiality.

The third difficulty comprises historical, traditional, cultural and experiential differences towards the concept of the law and its bearing upon all, without exception. In other words, there are cultures where the law is supreme, whereas in others, the person in the leader is more supreme than the law.

A cardinal feature of a democratic system is the doctrine that the judicial branch is independent, and that judges, as officers of the courts, are protected from political influence or other pressures that might affect their judgements. Hence the saying that judges hold office “during good behaviour”, meaning that they can be removed from office only if found guilty of serious offences, which is a difficult process indeed. The remuneration packages of judges and the attendant social prestige that accompanies their jobs are meant to give them financial independence cum immunity from economic and social temptations. Hence, in real democracies, members of the judiciary, especially of the higher courts, are held in higher esteem than their peers in the political branches of the system. In this context, a *democratic system* is to all intents and purposes that government which is informed by laws and not so much by the whims of people.

What is *judicial independence*?

Peter Russell opines that –²

... the judiciary's essential function derives from two closely related social needs. First, in a civil society we want some of our relations to be with each other and without government to be regulated by reasonably well-defined laws setting out mutual rights and duties. Second, when disputes arise about these legal rights and duties, we want a mutually acceptable third-party adjudicator to settle the dispute.

Constitutional democracy, as a system of government where the governor derives his/her power to rule from the governed, exhibits built-in problems. The very essence of such a democracy inheres in its assumption that human beings are prone to failure and power is prone to be abused. The human being, if left unchecked, can become a beast towards others. In the first place, democracy assumes that order can be created and sustained in a situation where human interactions are at play – but only when there is a composite of views and perspectives agreed to by the greatest number of participants.

A constitutional democracy is, therefore, fundamentally predicated upon the acceptance of reasonable precepts, as follows:

- The first precept is that there is no set of rules that is known to and accepted by all members in a uniform manner, to be adhered to by all in a similar fashion at all times, as had arguably been the case with traditional patterns of authority where the ruler attained such authority and power by hereditary right or by some unquestionable supernatural decree that in turn enjoyed the same respect by all concerned.
- Second, people living in a so-called modern society where standards of avarice rule do not necessarily maintain the consanguine relations that used to bring and bond together people into relationships, in such a way that they were all related and held a similar perspective on their happiness and well-being with respect to one another, as used to be the case with *ubuntu* in African communities.
- Third, as philosophers warn us, human beings, by virtue of who they are, are political animals with a strong motivation regarding survival and self-preservation that ought to be mitigated through agreed-upon and reasonable rules and regulations that protect all uniformly, fairly and predictably. These realities did not exist previously, or when they did, not to the same extent as they do nowadays, and

2 Russell, Peter H & David M O'Brien (eds.). 2001. *Judicial independence in the age of democracy: Critical perspectives from around the world*. London: University Press of Virginia, p 3.

The paradigm of an independent judiciary

- Fourth, the effective functioning of a society requires a clear separation of powers in accord with the tasks that spheres of power have to exercise. Those spheres ought to respect and be respected by others – just as they, in their turn, enjoy relative autonomy from others. This division of labour, as it were, is to be observed in a transparent, equitable and predictable manner by all. It is in this context that the language of the independence of the judiciary emerges and assumes prominence: such an independence of the judiciary did not feature cardinally in previous societies where all powers, whether legislative, executive and interpretive, were not part of the common existential struggle for survival.

To be sure, the role of the judiciary, not to speak of its independence, arises only in the context of a constitutional democracy, which sets in motion a host of new problems and challenges that only occur with democracy. Put simply, democracy mitigates the problems of democracy. In the old traditional fiefdoms in Africa and arguably elsewhere, there was only one ruler: with unfettered powers to make laws, interpret them and apply them as s/he deemed fit at a given time. The ruler was the legislator, the prosecutor, the judge and the spiritual high priest at the same time, and the ruled were treated as subjects – not citizens. The subjects were at the ruler's beck and call. To larger and lesser degrees, many colonial administrations in Africa possessed similar powers over their colonial subjects: hence the struggle for freedom, self-rule and political independence by Africans, who wanted to rid themselves of the shackles of both the uncontrolled traditional powers of their rulers (who became the conduits of colonial abuse and subjugation) on the one hand, and the foreign rulers that strode over the African landscape on the other.

The paradigm of an independent judiciary

Some of the cornerstones of judicial independence follow, for consideration:³

- Judges are free to evaluate, objectively, the facts of the disputes placed before them by applying the constitution, existing laws and ordinances objectively and without duress from other organs of government
- The judicial arm of the state operates independently vis-à-vis the legislative and executive spheres of the same socio-political system which created them all
- Officers of the courts are independent from one another, and seniority in terms of the judicial hierarchy does not affect their judgement in relation to one another
- All matters of a judicial nature are attended to by competent members of the legal fraternity
- Assignment of judges to handle cases is undertaken by senior officials of the court solely on clear and convincing evidence of their ability to perform the required tasks
- Tenure of judges lasts until retirement in terms of conditions established by appointed members of the legal enterprise
- The state allocates sufficient financial and other resources to the judiciary to obviate temptations that arise as a result of financial insecurity
- Disciplinary action against judges is taken solely on convincing grounds of inability to perform, and
- The selection and appointment of judges is purely on selective criteria in accordance with the merit system.

3 The United Nations Universal Declaration on Human Rights of 10 December 1948 lays the foundation for the fundamentals that must be observed by all member states of the United Nations with respect to the independence of the judiciary. Many states in Africa have adopted these requirements in their own constitutions. Article 78(2–3) of section 165(2–3) of the South African Constitution; Section 103(1) of the Constitution of Malawi; Section 118(2) of the Constitution of Lesotho; Section 128 of the Constitution of Uganda; Section 91(2) of the Constitution of Zambia; Section 127 of the Constitution of Ghana; and Article 78(2–3) of the Constitution of Namibia, to mention but a few, make commitments to the independence of the judicial branch of government. Cf. also UNHCHR/United Nations High Commission for Human Rights. 1985. UNHCHR/United Nations High Commission for Human Rights. 1985. *Basic Principles on the Independence of the Judiciary, Adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.* Available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm; last accessed 14.10.2008.

A history of the doctrine of judicial independence

The genesis of the doctrine of judicial independence is to be found in the evolution of a constitutional democratic state in Europe. It is accompanied by the development of the rule of law, with the attendant prerequisites of the separation of powers and the existence of checks and balances. The debate about the role of the courts in general and the judges in particular evolved in the context of the history of the exercise of unfettered power by political rulerships, mainly in Great Britain, but also later in the United States and Europe.

Historically, the institutional and normative conditions that precipitated the evolution of a constitutional or democratic system operated in Europe in two distinct ways: as a product of the yoke of absolutism, and as the antithesis of unfettered power. The collapse of the feudal system and the unification of nation states based on large political territories under absolutist monarchs generated national economies and political systems that needed a different type of law and order. Conditions arose that led to the emergence of a new mercantile bourgeoisie. At the same time, the interference of absolute monarchs in trade created conflict with this emerging bourgeois society which nurtured new expectations of its own. Importantly, this context of struggle by the bourgeoisie against the old doctrines, such as that of divine rights which justified absolutist rule and unlimited powers, generated a slew of political and constitutional debates that in turn set the pace for constitutional systems.

The rule of law emerged to limit the whims of rulers by subordinating their acts to the law. In its general application, it ensured that citizens, the state and its institutions – including, of course, the monarch – were all subjected to the supremacy of the law. The rule of law formed the basis of a state strong enough to secure order and free commercial activity, but one limited in its competence by the restrictions of the law.

In its political sense, the rule of law signified a landmark transformation of the absolutist state to a liberal constitutional state. This was a state born of the political victory of the bourgeoisie against the exclusive political power of the monarchs. Economically, the laissez-faire spirit was replaced by a new state of affairs wherein a power derived from a contract, and power was to be shared between the upper and middle ranks of society together with the ruler. This was to become the constitutional system in a democratic system of governance.

It is against this background, therefore, that traditional scholars of constitutional theory regard the original edifice of constitutionalism as the subordination of the exercise of governmental power to legal rules.

The paradigm of an independent judiciary

Most constitutional law experts would concur that the independence of the judiciary is only possible in a constitutional democracy that involves the proposition and appreciation that the exercise of governmental power is bounded by rules: rules that prescribe the procedures according to which legislative and executive acts are to be performed, and delimit their permissible content.⁴

In simple terms, this background was as follows: the King of England did not hear cases himself; therefore, he depended upon certain people to do so on his behalf, and in his name. The King's representatives did not have their own minds, so to speak, but stood in for the King and reported directly to him. The decisions they made were his decisions, which, once he was satisfied with them, could not be questioned. Over a period, the role of the interpretive courts evolved into a separate institution altogether.

The struggle to limit monarchical powers in the history of Great Britain continued for a long period since the issue of separating legislative, executive and judicial powers in England was not an easy one, particularly because the British have never developed a written constitution. It was only with the seizure of power from King William in a coup d'état in 1668, when legislative powers were stripped away from the absolute monarch, that it became possible to wrest power away from the one person who had until then been the maker, interpreter and enforcer of the law. The settlement – which allowed him to return to the throne – was the agreement that Parliament would henceforth make the laws, albeit in the name of the King. From then onwards, the British King became more and more of a figurehead, functionally speaking.

The country whose constitutional history has a more direct bearing on the modern judicial independence debate is the United States of America (USA). The American experience commenced as a rebellion from the established British and other European systems of absolute power in the hands of one person or a system. The USA as we know it was predicated upon the desire to establish and commit itself to creating a constitutional system with clear checks and balances among the three organs of government.

Alexander Hamilton, one of the framers of the American Constitution, wrote the following in defence of the independence of the judiciary in the constitutional system:⁵

4 Le Sueur, AP & Herberg, JW. 1995. *Constitutional and administrative law*. London: Cavendish Publishing Ltd; Parpworth, Neil. 2002. *Constitutional and administrative law*. London: Butterworths LexisNexis; Yardley, DCM. 1964. *Introduction to British Constitutional Law*. London: Butterworths.

5 *The Federalist*, No. 78.

The paradigm of an independent judiciary

... there is no liberty, if the power of judging be not separated from the legislative and executive powers ...

American President Woodrow Wilson (1913–1921) argued that government –⁶

... keeps its promises, or does not keep them, in its courts ... The struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent and impartial courts ...

Following this, and in subsequent court rulings and political utterances, American opinion-makers have been consistent in their defence of the judiciary. In *Brown versus the Board of Education* (1954), a landmark decision, the United States Supreme Court declared that the existing separation of education facilities for children of different race groups was inherently unequal and unconstitutional. Other countries, arguably to lesser degrees, have made strides in advancing the independence of the judiciary in the promotion of mature constitutional democracies.

Doctrinal independence in the American system requires that Congress not reduce judicial salaries directly or indirectly, remove judges during good behaviour, nor usurp the judicial power by modifying court judgments. *Functional* independence refers to the freedom from interference that flows naturally from the judicial office in the absence of regulation in terms of a congressional delegation of authority to the courts. Put another way, in the absence of congressional or intra-judicial regulation, judges enjoy the functional independence to do whatever they are not prohibited to do.

Customary independence refers to the zone of independence – norms, if you will – that Congress respects when exercising its constitutional powers over courts and judges. It is derived from time-honoured interpretations of the constitutional limits on congressional power, notably as Congress has defined them, together with closely related notions of inter-branch comity that courts and Congress have traditionally respected as a permanent fixture of government in a system of separated powers. Customary independence differs from functional independence in that such independence – like doctrinal independence – is in significant part a product of constitutional interpretation. Unlike doctrinal independence, however, customary independence concerns political or quasi-political constitutional questions in which the interpreter of primary, if not final, resort is Congress rather than the courts.

6 “Importance of Judicial Independence: Remarks by Sandra Day O’Connor, Associate Justice, Supreme Court of the United States before the Arab Judicial Forum”, Manama, Bahrain, 15 September 2003.

Democracy and the rule of law

The struggles for freedom from colonial rule in Africa were, without exception, waged for self-rule and democracy. Yet the connection between democracy and the rule of law was not made by freedom-seekers, as it ought to have been. The understanding of *democracy* during the liberation struggle was restricted to the desire to end racial and colonial oppression and to take over power. In political terms, *democracy* in the minds of the liberation leaders echoed what the first President of Ghana, Kwame Nkrumah, so strikingly expressed:⁷

Seek ye first the political kingdom, and all things will be added unto you.

Democracy without the rule of law is just as empty as the rule of law without democracy. Democracy concerns the rule of law and the rule of law deals with the independence of the judiciary. In other words, the rule of law is a necessary condition for democracy and sustainable development. If Africa is in dire need of democracy, as both a necessary as well as a sufficient need for sustainable socio-economic development, then the actual cardinal need is for a system where citizens play a meaningful role in the affairs of the state. This relationship between the system of government and the citizens must be characterised by a clear understanding and appreciation, by both parties, of the separation of powers, protection of human rights, and due process. After all, development is about human progress and enhanced quality of life – which is a consequence of a mature network of communications and relationships, including the manner in which disputes that are bound to occur from time to time are settled.

It has to be emphasised that absolute deference to the rule of law in any given society is more of a theoretical concept than a practical reality, even in systems that can claim to be advanced in democratic practice and economic development. In fact, all systems, even those that are not in a position to boast of real democracy and development, have some semblance of respect for human rights and the rule of law. The degrees of this respect vary with time and administrative circumstance: mature democracies usually show greater respect for the rule of law than newly emerging democracies, a category in which most African countries find themselves. However, violations of human rights exist even within mature democracies, since abiding by the rule of law is never comprehensive, and there will always be the possibility of violations, to varying degrees.

⁷ Melady, Thomas P. 1961. *Profiles of African leaders*. New York: Macmillan, p 133; Kwame Nkrumah's famous political dictum as regards independence in Africa.

The paradigm of an independent judiciary

Many African countries, at least at the level of the popular demands for participatory systems of governments, are, at the level of discussions, committed to the rule of law and the observance of judicial independence. Therefore, the transition of Africa's emerging democracies into mature systems of governance that will in turn facilitate real stability and peace will not only take time, but will also require African governing elites to commit themselves to and guarantee more rights and freedoms to their citizens, just as they must remain congruent in their promotion of democratic processes in the societies they purport to govern.

The recognition and effective application of the principle of the separation of powers is essential for achieving judicial independence. This principle is, however, not a self-enforcing one; nor are the categories of public power which are to be separated entirely clear-cut, completely self-contained, or mutually exclusive. There is always the possibility that one branch of government will deliberately or unwittingly encroach upon another branch's powers. In Africa, invariably, the strong executive branch devours the available space and interferes as a matter of course in the legislative and judicial functions of government, being two of the readily available instruments with which to pursue and fulfil political ambition.

It is important to emphasise that, in essence, the separation of powers concerns a coordination of functions more than their real or absolute separation. As much as the division of labour between the branches is to be delineated, they must still know what the others are doing in order for equilibrium in or cohesion of government to occur. This represents a call for constant review and communication.

While the separation of powers between the judicial branch and the other two branches of government, particularly the executive, is the most essential aspect of judicial independence in every democratic system of government, the existence and role of a department of justice (or, in some countries, a ministry of justice), and its relationship to the judiciary constitute central issues that have to be dealt with concisely. Wherever such departments exist, however, they inevitably have ties to the judicial branch – no matter how democratic the system of government. The strength or weakness of these ties has to be measured in the light of the said department's ability to infiltrate the judiciary. This ability may result in interference with, and at times the domination of, the judicial function in countries where the executive exercises de facto control over the other branches of government.

For reasons of political economy it may be easier to sustain an independent judiciary once it is established than it is to establish it in the first place. It takes

The paradigm of an independent judiciary

time for a judiciary to prove that it is in the universal self-interest (or self-interest of those with political power) to set such an institution in place. But, once in place, the gates of a veto over ordinary and extraordinary legislation protect the judges.

The relative, but not absolute, insulation of the judiciary means 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 toward public opinion, although the mechanism of this is not entirely clear.

Finally, differing retention systems for judges will have an influence on the politics that effect judicial supremacy and judicial independence. It might well be that the more insulated judges are, the less willing the public is to accord them great authority. By the same token, the more vulnerable judges are, the more likely it is that attacks will be directed at individual judges rather than at the courts as a whole, providing greater authority to the judiciary.

Social justice

Democracy – and, for that matter, development – is about justice: political justice, socio-economic justice and, indeed, juridical justice. Democracy denotes a system wherein all citizens feel protected by the same standards or rules, to be interpreted by the same principles at all times, and as fairly as possible. In its historical sense, *justice* is about giving everybody his/her due and setting right wrongs.

In the Hobbesian notion, *justice* is about respecting the covenant that is the constitution; that those entrusted with power are there to serve, and when they fail to serve, that is unjust, for they have deviated from the contract. In this sense, the political system is there to serve the needs of the people and combat the ills that beset citizens such that they do not enjoy the rights of joy and happiness. There can be no social justice where poverty is rampant, where a few get richer at the expense of the majority: and this threatens democracy.

The African experience

There is very little debate about the rule of law in studies concerning African politics prior to and after the attainment of political independence. Indeed, many authoritative treatises on African traditional and political systems make almost

The paradigm of an independent judiciary

no mention of the rule of law at all.⁸ This indicates that the rule of law as such has never been a major issue in the conceptualisation of democracy in Africa: hence the many problems at present that are associated with the reluctance of African leaders, however well-educated or informed they may be on the tenets of democracy, to accept the rule of law. Neither nationalist nor liberation leaders in Africa have internalised its significance.

It seems that, once in power, African leaders revert to the African traditional modes of doing politics. Africanists⁹ are unanimous in their conclusion that rules in the African traditions they studied were accepted by custom and tradition as having emanated from the exhaustive deliberations between men of speaking age and the ruler:¹⁰

All the people were entitled to express their opinion on affairs and they did this through the heads of their kinship groups and then their immediate political officers.

The rules governing African communities were unpredictable and often subject to the whim of the incumbent holder of power. Subjects, often referred to by the ruler as slaves, were obliged to negotiate their own relationships with the ruler – the owner of people who was, throughout his reign, above the law. As noted earlier, he was the accuser, prosecutor, the judge and the high priest – assisted by a personally assembled jury of senior councillors who served at his mercy and were at his beck and call. The councillors were accountable to the king, not the people. At times, they would convey intercessions to the monarch. What is sometimes referred to as the ‘prototypical African democracy’ took the form of intercessions and lively deliberations when the king approved of such: however, these interventions occurred without any hard and fast rules of engagement.

African kings and rulers, by virtue of their special place in their societies, occupied unique roles in socio-political and economic life. It must immediately be stated that not all African peoples and localities were governed by traditional rulers in the form of kings, queens or chiefs. Generally, Africa is as dissimilar as it is similar. However, the position of the traditional African ruler, where

8 AR Radcliffe-Brown (1978), in the seminal book by Fortes and Evans-Pritchard, makes scant mention of the rule of law when referring to the mechanism by which African communities would use communal sentiments as mechanisms to punish those who were seen to have violated common understandings (Fortes, M & EE Evans-Pritchard (eds). 1978. *African political systems*. London: Oxford University Press, p xviii).

9 Cf. Diop, Cheik Anta. 1974. *The African origin of civilization: Myth or reality?*. Westport: Lawrence Hill and Co.; Mutwa, Credo. 1964. *Indaba my children*. Johannesburg: Blue Crane Books.

10 Fortes & Evans-Pritchard (1978:29).

The paradigm of an independent judiciary

one existed, was invariably the same in character and content. Rulers in Africa were not simply political heads: they were mystical and religious figures, divine symbols of their people's health, cohesion and welfare.

Often, individual rulers did not possess outstanding leadership qualities or abilities, yet they remained the link between their people's human existence and spiritual world. They were divine or sacral heads, perceived as a shadow reflection of a Supreme Being's rule over human existence. As mediators and mitigators between the world and God, rulers were highly elevated, being accorded titles such as Saviour, Protector, Child of God, Chief of Divinities, Lord of Earth and Life. The people, as their subjects, believed and accepted that rulers could do what they pleased, even controlling rainfall, for instance, and remained their permanent link with God. Rulers were expected to intercede for the people in times of grief and uncertainty. Simply put, rulers were not ordinary folk.

The hereditary ruler in most African societies assumed a semi-divine significance and performed roles in national ceremonies as the priest, rainmaker, intermediary, diviner and/or mediator between people and God. Rulers maintained shrines, temples, sacred groves, personal priests and diviners in or near their palace. Their spirit never departed from their people. Narratives abound that such rulers were reincarnated to continue to preside over their successors, who in turn offered sacrifices or gifts in concert with other earth dwellers still living. The graves of rulers were sacred places, with servants, guards and sometimes priests; in some societies, they acted as a sanctuary for animals and human beings as well, so that none would be killed there. People were expected to speak well of them, bow or kneel before them, let them enjoy sexual rights over their wives and daughters, pay them dues, obey them at all times, refrain from copying their clothes or coming into direct contact with them, and even render them acts of reverence.

When a ruler died, it was said that "The season's air was evil towards the kings", "He has returned to the sky", or "He has gone up to higher powers". Such a passing on invariably brought the rhythm of the people's life to a standstill: work stopped and mourning was almost automatic and national. In some societies, sexual intercourse and even mating amongst animals was stopped as a sign of respect.¹¹

11 Mbiti offers an in-depth analysis of the African world view, which, for the purposes of this discussion, is an impediment to the rule of law and judicial independence in Africa (Mbiti, John S. 1990. *African religions and philosophy*. London: Heinemann). The African context that Mbiti offers does not augur well for equality under the law as the person – the ruler who makes the law – cannot be beneath the laws that s/he makes.

The paradigm of an independent judiciary

This background is presented to illustrate that the rule of law as we know, understand and appreciate it today was not part of the African mind of old. Signs of this reality are visible and discernible everywhere on the continent, where citizens continue to live as subjects who are deemed not worthy of enjoying life and holding opinions under their postcolonial leaders.

The only area where we may discern the rudiments of what could have been the rule of law generally and the independence of the judiciary in the African context is in the societal understanding of the issue. As stated above, the ruler's power to appoint and depose chiefs and other subordinates was buttressed by the mystic qualities that surrounded his seat as king. This militated against the perception that he wielded absolutist or tyrannical power. Within the indigenous knowledge systems, it was sufficiently understood that there were sacerdotal officials who possessed certain powers as regards the investitures of the ruler and his/her family, so that in the final analysis it was understood that the king was subject to other opinions as he was merely a *primus inter pares*, a first among equals.

The paradox of African traditional legal administration

In his seminal book, *The black man's burden*, Basil Davidson¹² laments the manner in which post-independence African political leaders have inherited the Western-conceived concept of the *nation state*, but were unable to adapt it to the circumstances of Africa. The colonial state was created for Western conditions of change and transformation, and when imported into Africa, was used as a mechanism with which to oppress, suppress and subjugate the African people. One method of doing this was to divide and rule – by employing traditional chiefs as tools of the colonial system.

After independence, there was a sense in which the new political elite developed its own idea of how to work with traditional patterns of authority, invariably with almost the same sinister motives as the former colonialist administrations: to reach the common people for the purpose of control rather than to give power back to the people. Therefore, there is a degree of return to the use of traditional law and tribal courts to administer justice.

As indicated above, African traditional legal systems do not deal with the rule of law or the independence of the judiciary as a separate entity from the political establishment. In other words, if African traditional justice is to be followed,

12 Davidson, Basil. 1992. *The black man's burden: Africa and the curse of the nation-state*. New York: Times Books.

The paradigm of an independent judiciary

then there will be a conflict in the context of the rule of law. Most traditional leaders would not consider themselves to be beneath anybody or any authority. For instance, when Nelson Mandela was President of South Africa, he did not consider himself above the King of Zululand, Goodwill Zwelithini, to whom he was so obsequious, and who was not elected by South Africans as Mandela was. The latter referred to the king as “my king”.¹³ In the African context, the traditional ruler is the final authority and arbiter, and there is no appeal. This means that a matter could be resolved in a Western magistrate court, yet the real finality would only arrive with the traditional ruler’s closure of the matter.

The case of Namibia

In specific terms, Namibia can boast of the existence of the independence of the judiciary in the context that it is spoken of today. Article 78(2–3) of the Constitution make specific reference to the independence of the courts and that no member of the executive or legislature should interfere with the functions of the judicial branch of the state. In the African and developing world contexts, Namibia has done extremely well in respecting its Constitution, even when it was hard for the executive do so. One of the moments when Namibia’s executive showed respect for the legal fraternity was in 1996, when President Nujoma appointed an Ombudsman and reversed his decision on the advice of the Judicial Service Commission. Acknowledging that he had erred, and acting on the recommendations of the Judicial Service Commission, the President appointed the first woman to the post of Ombudsman in Namibia.

Any attempt to argue that Namibia waged the same struggle for this doctrine as Britain and the United States had done would at best be fanciful. In precolonial Namibia, communities lived side by side as independent and self-reliant entities.

At the same time, it must be stated that the rule of law remains an ideal worth striving for. A major challenge Namibia faces is the transformation of the liberation movement, now the ruling party, into a true democratic political party that sees itself and functions as a political party contesting, against other equally competing parties, governmental functions. A Namibian state under the rule of law is one where it would not matter who is in political power, as long as that party wins in a free and fair election whose outcome is accepted by winner and loser alike. At the moment, we cannot say Namibia is there yet: there is a paradox that the very people who liberated the country have internalised, namely

13 Any time Mandela referred to King Zwelithini, he referred to him as such.

The paradigm of an independent judiciary

that they are special citizens to whom everyone owes a debt of gratitude that can only be demonstrated by keeping them in power and perpetually treating them as being above the law; indeed, questioning them is labelled as unpatriotic.

The second major challenge is to develop a leadership across the board that cares more about the nation than parochial partisan interests. This is critical against the background that the project of nation-building ought to be an ongoing one. Namibians of different backgrounds are not yet as united as they could be, and when anxiety strikes, many Namibians return to their primordial tribal and/or ethnic bases for support. The notion of a nation operating under the same set of rules and laws – fair, predictable and justifiable – did not exist or did not constitute part of the people’s understanding of their peace and stability in relation to one another. Before independence, each community, tribal or ethnic, operated as an independent unit with a sovereign system of power relationships. The ruler of such a unit was considered the father of all, young and old, male and female, rich and poor. S/he was perceived as the provider of peace and security for all subjects, and as the final arbiter in all cases.

The third challenge is to translate the old heroic history of the struggle for justice into a national character that will propel current and future generations to refuse to be oppressed by others, from outside or from within Namibia. As in 1904, when Samuel KaMaharero, the Supreme Chief of the *Ovaherero*, wrote a letter to Hendrik Witbooi, Chief of the Nama, urging him to forget whatever differences they had had and to unite against foreign rule. In his letter, KaMaharero urged Witbooi to set aside their differences and rather “*die fighting*” together.¹⁴

It is important for Namibians to build upon the foundations of independence in a manner that imbues all to look at one another as equal citizens with equal rights and obligations, regardless of any differences they might have had in the past. Therefore, this calls for some kind of information management that would chronicle and inform citizens of the good things that the country has achieved since independence as well as those not so good from the past.

14 Drechsler, Horst. 1980. *Let us die fighting: The struggle of the Herero and Nama against German imperialism (1884–1915)*. London: Zed Press.

Limitations of the independence of the judiciary

The judicial system is part of a dynamic political system of a particular nation or time, influenced by cultural and historical circumstances that are not static. People change, times change, situations change, feelings change and attitudes that influence judgements change. Different epochs in history and political experiences that people go through have an effect on their understanding of the law, and influence their roles in society. The courts are but a segment of a system with which people who are qualified to use it shed light on the general life of a nation at a given time. Thus, like any other organ of a big machine called *the state*, the judiciary has limitations.

Limited power of the courts

Courts of law are meant to adjudicate on the constitutionality of laws within the framework of the constitution and the precedents of previous cases, especially in common law jurisdictions. This greatly limits the court's discretion to write into a decision anything it sees fit. Consequently, it can be argued that the power of the courts is fettered in that it is essentially a mechanical one. In other words, judges hardly apply discretion of their own: they merely compare the clear statements of the relevant constitution against Acts of Parliament or the local legislature in question, merely in order to ascertain congruence.

It ought to be highlighted that a constitution, as the basis for adjudication, is itself hardly clear or unambiguous. In fact, constitutions survive the test of time largely by being as ambiguous as they are, so as to offer room for succeeding generations to interpret them in accord with their own existentialist preferences and changes over time. In this manner, a constitution remains a living document that moves on – so much so that interpretations and decisions serve as mere precedents for new generations.

Political limitations

As has been commented, politics clearly could place a major limitation on the powers of the judiciary. To be sure, justices are appointed by presidents and commanders-in-chief who are anxious to promote certain policy and ideological agendas.

Once again, it cannot be overemphasised that members of the legal fraternity are citizens of nations and, thus, live in the same circumstances as their fellows.

The paradigm of an independent judiciary

Their opinions are influenced not only by what they hear when in session, but also by their own experiences, hopes, frustrations, and even concerns about the possible repercussions of their judgements at a given time.

Self-imposed restraints

By virtue of the fact that judges are human, there are times when they may restrain themselves from doing certain acts. For instance, in times of war and instability in a country, courts may decide in ways that are clearly a consequence of the goings-on at the time, and may be too restrained to criticise a president as the commander-in-chief and main player in foreign affairs. Often, the state apparatuses might convey messages that will in turn influence judges to formulate their conclusions so as not to add to a sense of uncertainty, insecurity, or even danger. In the apartheid days, the courts invariably endorsed the fear-mongering of the state when dealing with political opponents who were agitating for democratic rights but who, in the eyes of the oppressive state, were terrorists and agents of communism. In this sense, self-imposed limitations were viewed as a form of patriotism and might even have been the consequence of ambition on the part of the judge who wished to gain favour from the political leadership.

Invariably, judges, like any other members of a professional fraternity, are motivated in their conduct by ambitions of success and their own jurisprudential legacy. This ambition might limit the extent to which their verdicts might stretch the independence of the courts over which they preside and even in the judges' quest for due process in their legal praxis.

Constitutional amendment by lawmakers

The courts are there to interpret the laws; therefore, they have no direct arm to enforce their rulings. It could happen that, after the highest court had finally ruled on a matter – let alone declared an act unconstitutional, it could still be overruled through the process of constitutional amendment by the legislature, even though, admittedly, this process is invariably onerous and cumbersome in a democratic setting. It is also true that even though governments are not always known for openly disobeying court decisions, they devise ways in which they avoid compliance.

Court-packing

At different times and under different circumstances, new political leaders and administrations consider it necessary either to stem the directions of the tides of the previous administrations or set the course for the new leader's directions

The paradigm of an independent judiciary

by using the courts to influence events. In previous times, rulers would appoint counsellors who would direct affairs in their small spheres of influence in accord with the wishes of their appointing master; popes and archbishops would consecrate subordinate clergymen who would further the dictates of the pontiff; dictators would marshal their lackeys to use the law to further their ends; and even in modern times, some heads of state would pack courts of law with jurists on whom they could rely to interpret the law to fit their agendas.

In most of post-independent Africa, judges have been political appointees with a direct mission to follow the agenda of their incumbent leaders. In apartheid South Africa, courts were packed with judges and state prosecutors who understood their brief to serve a beleaguered state which had invented the enemies of communism and/or black majority rule. The courts' independence was curtailed in this way as well.

American presidents are known to have a proclivity to steer the judicial system in a particular direction in anticipation of the important interpretive function of the Supreme Court, the decisions of which could frustrate the agenda of the Administration in many reform programmes.

Furthermore, it is common in Africa that the president or the executive appoint under- or unqualified persons to fill the bench with the intention of manipulating them to direct the justice system in the interests of their appointing masters. It is common that many judicial service commissions in Africa are at the beck and call of the politicians, their minister of justice or even the president in question, such that the appointment of judges, prosecutors and attorneys-general are not based on merit but on political grounds of loyalty and/or simple timidity.

After all, as stated earlier, judges do not live in a vacuum, but are part and parcel of the body political mainstream of society, with the same worries and concerns as those facing the whole community. As such, judges, as family and community members, hold to the same understanding of the threats and risks facing the collective, and can make decisions that could be explained in terms of what obtains on the ground. The recent spate of court judgements in South Africa during the political fights in the ruling party illustrates how unpredictable the readings of the law are by individual judges in particular situations.

Historical contexts

Laws are contextual. Thus, their study and interpretation are also contextual. It would be incorrect to assume that laws in all situations and/or their interpretations are similar and universal. What is universal, however, is that laws exist and need

The paradigm of an independent judiciary

to be interpreted by people who are trained to understand them and give effect to what they intend. Firstly, laws are made in accordance with prevailing human experiences and in order to mitigate circumstances; only later are circumstances themselves used to influence behaviour and other circumstances. Secondly, laws are regulations intending to minimise human conflict and address what may or may not happen to citizens if they deviate too far from the established norms and standards that are meant to guarantee the biggest number of people the highest form of happiness. Thirdly, laws are by no means static: they change with circumstances and experiences over time. Thus, as generations change, so does their understanding of what the laws were originally about and how to use them for the common good. Therefore, as later generations take over the three functions of state, their perspectives cannot be the same; consequently, they are likely to reinterpret the laws.

Personal/family relationships

It is not uncommon for African leaders to appoint their friends and relatives to judicial positions with a desire to influence the outcome of matters that reach their attention. This is acutely problematic in the African context, where the son of a president who becomes the minister of justice, attorney-general or the like is expected to treat the legal fraternity in a particular manner. This situation is exacerbated by the reality that, in many cases, those appointed to serve in the judiciary often use the legal profession as a stepping stone towards political leadership positions.

Challenges in the pursuit of judicial independence in Africa

It would be unfair to create the impression that the state of affairs in Africa in so far as the independence of the judiciary is concerned is only bad and negative. Africa has made great strides in spite of so many difficulties and contradictions. What is fair to say is that the road ahead is just as arduous for African nations as the road they have already traversed. The contradictions are myriad and the challenges manifold. Here are some of the challenges on the road towards a true rule of law with judicial independence.

Sed quis custodiet ipsos custodes? (“But who watches the watchers?)

And who will judge the judges? This is without doubt one of the major challenges in the pursuit of judicial independence. Good management always requires some measure of oversight, that is, that there is always accountability on the part of those who exercise decisions.

Plus ça change, plus c'est la même chose (“The more it changes, the more it stays the same”)

Referring to a changing Europe in 1849, French critic Alphonse Karr warned that the more things changed, the more they stayed the same. The study of law largely concerns developing objectivity of discernment when interpreting complex matters in the realms of human life and behaviour. Yet, there is cause to worry about the extent to which judges maintain objectivity. As suggested, judges, like any other human beings, do not always succeed in being pristinely objective. If they were, there would be no need for an appeal or a judicial precedent. Hence, the old story changes by remaining the same: the more judges try to be objective, the more they reinforce their humanness by not being so.

The need for education and literacy in democracy and the constitution

To all intents and purposes, democracy – with a built-in component regarding the role of an independent judiciary in Africa – will require a process of socialisation, starting with the school-going population, so that they internalise the tenets of real democratic states. In his influential book, *Democracy and education*, John Dewey cautions as follows:¹⁵

Democracy is more than a form of government – it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory, which kept men from perceiving the full import of their activities.

Arguably, part of the difficulty of achieving true democracy in Africa is that most of the members of the political elite have not received an education that could adequately prepare them to appreciate the paradoxes of democracy. Indeed, the current crop of leaders invariably pays lip service to democracy, and is inclined to respect democracy only when it suits them. When the rules of democracy no longer suit their political ambitions, they turn to undemocratic behaviour; and by doing so, they destroy the very rules they themselves have authored. It is incumbent upon African policy planners, therefore, to deliberately introduce educational curricula that elaborate on democratic rules and practices from very early on in young citizens' lives. This will ensure that, when they become participants in their bodies politic, they will have internalised the precepts of democracy, and especially that it is sustained by strong institutions and functioning civil society formations, not just the big men and women in positional power.

15 Dewey, John. 1916. *Democracy and education*. New York: Free Press, p 88.

Judicial activism

The role of the judge as a lawmaker cannot be overemphasised. Often, the law comes alive in the manner in which a particular judge interprets and or calls for the law to be enforced. Through judicial activism, judges influence the direction of the law. This happens when their interpretation of the law goes beyond the mere words of the texts at hand and beyond the matters mentioned: when they interpret the law purposefully, and say the unsaid through their interpretation.

Certain examples in jurisprudence attest to the fact that a court's interpretation of the law and/or a constitution could set in motion a dramatic course of events that might have far-reaching implications on the efficacy of the law, as in the 1954 case already mentioned.

More recently, in South Africa, the leadership battle in the ruling African National Congress (ANC) was accorded a dramatic turn of events by just a few remarks in a judgement by Justice Chris Nicholson of the Pietermaritzburg High Court on 12 September 2008, which led to the recall of President Thabo Mbeki.¹⁶ The repercussions of an inference made by the judge in a clearly activist mode are undoubtedly major for South Africa's constitutional democratic history.

The Ombudsman

One critical component of the administration of justice is the existence and role of the Ombudsman who, by virtue of the powers vested in his/her office, has the freedom to investigate any complaints with respect to the violation of human rights and freedoms and abuse of power brought to his/her attention by members of the citizenry. The Ombudsman, who is protected by law from interference by any state functionary, has the space, standing and obligation to be a judicial activist, mainly in the furtherance of judicial understanding by officials who do not necessarily possess sufficient knowledge of the law in so far as rights and obligations of all citizens are concerned.

Judicial review

One of the vexing issues in a constitutional democracy is the judicial review: the power of the judiciary to review actions of the legislature and the executive in

¹⁶ See "Zuma ruling fightback looms", *The Star*, 16 September 2008, p 1; "Is Mbeki recall a coup d'etat?", *The Star*, 23 September 2008, p 19; *The Mail and Guardian*, 19–26 September 2008 and 26 September–3 October 2008.

The paradigm of an independent judiciary

the light of the supreme law of the land and/or the fundamental Bill of Rights. *Judicial review* refers to the institutional arrangements whereby courts of law exercise the power to invalidate or declare null and void the acts of the legislature, the executive and administrative officials when such courts find such organs conflict with or violate the written and unwritten constitution or other superior body of existing law.

One of the outcomes of a judicial review may be to invalidate specific legislation that is inconsistent with human rights conventions or the country's constitution. Either way, the courts, while conducting such a review, may be seen to interfere with the powers of elected officials; judges, on the other hand, are appointed officials, i.e. they are not directly elected by the people. This poses a major democratic challenge in any situation, since what is obvious to the judges is not necessarily the preoccupation of the politicians, who would tend to worry more about their political tenure.

Also, judges, by virtue of their own security, are more capable of interpreting the fundamental laws coldly and blindly, whereas the politician happens to be more seasonal and pedestrian by nature. This calls for judicial activism on the part of judges: to be conscientious and far-sighted in their interpretation of the regulations, be they the constitution or Acts of Parliament.

Return to respect for the social contract

It would appear that, for Africa to embrace the tenets of the rule of law and appreciate the necessity of judicial independence, more of a premium ought to be placed on the concept of a *social contract* with the governed. More importance should be accorded to the parallel between moral reasoning and political justification, as was expounded by the great social contract theorist, Thomas Hobbes, who cautioned that human beings left to their own devices without a moral compass would be hurtful to others.¹⁷ According to this theory, we are constantly at war (*Bellum omnium contra omnes*, "The war of all against all"). The argument here is that people need social pacts to guide their conduct vis-à-vis one another in order to achieve mutual advantage.

17 Hobbes (1651; cited by Tuck, Richard (ed.). 1996. *Companion to Hobbes*. Cambridge: Cambridge University Press.

Conclusion

Scholars of constitutional theory concur that the edifice of constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules such as the constitution and acts of legislation.

Central to this concept of government under the rules is the need to secure space for citizens' liberties through the establishment of a legal cordon around that space. The concept is rooted in the need to keep the state at bay in this way, in the belief that the scope of arbitrariness is drastically reduced and the autonomy of the individual preserved by a constitutional regime in which acts of government are based on predetermined rules. These measures aim to curb arbitrariness of discretion, and are to be observed consistently by the wielders of political power in a given socio-political and legal system. Constitutional democracy, such as the one African peoples pray for, is the –¹⁸

... antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.

At stake for most African states today is the uncoupling of executive from legislative powers, and judicial powers from both. In laying the tenets for this school of thought, the 18th-century French philosopher, Montesquieu, advocated in the strongest terms that the three distinct spheres of power contained in one person or body of persons would breed tyranny. Montesquieu argues as follows:¹⁹

When a legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically ...

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.

This understanding is in essence lays the foundation of administrative justice and constitutes the basis for the government of the people, for the people and by the people. Africa needs an order wherein the rule of law, checks and balances,

18 Nwabueze, Ben O. 1973. *Constitutionalism in the emergent states*. London: C Hurst & Co. Publishers, p 1.

19 Cited in Cohler, Anne M, Basia C Miller & Harold S Stone (eds). 1989. *The spirit of the laws*. Cambridge, Cambridge University Press, p 157.

The paradigm of an independent judiciary

and an independent judiciary are not only enshrined in the constitutions of states, but appreciated and observed at all times. At the very least, this is essential for creating both necessary as well as sufficient conditions for the sustainable socio-economic and political development of this great yet not altogether happy continent.

The principle of an independent judiciary is the call for the courts to carry out their agreed-upon functions in an atmosphere of freedom from interference by the executive or the legislature, yet without giving the officers of the courts impunity to act in an uncontrolled and arbitrary fashion. Put differently, the call is for independence from political influence, whether exerted directly or indirectly by the political organs of government, by the public, or even by judges themselves through their involvement in politics. Judicial independence is the antithesis of arbitrary rule: it is the opposite of a despotic system of governance; it is governance through and in accord with the law.

The challenges are immense, but the desire to develop and sustain the independence of the judiciary in Africa is even greater and becoming more intense. It is in the interest of all – the ruler as well as the ruled – to deepen the commitment to the doctrine of the rule of law and to strengthen the institutions that allow the judiciary to execute its function of interpreting the law independently. This calls for a fundamental paradigm shift in African politics and administration of justice. This new paradigm is the only way to usher into Africa a culture of governance by the law and its institutions. Most of Africa has embraced constitutional democracy as the only way forward. Albeit with immense difficulty, great strides have indeed already been taken across the African continent to build upon the fundamental rules of democratic freedoms and liberties of citizens. One of the legs for striding into this desired future state is the rule of law. The independence of the judiciary, as part of the rule of law, is desired in Africa not only for purposes of the administration of justice, but also as a guarantor of justice and equality: the cornerstones of peace and sustainable economic development.

SECTION II

The independence of the judiciary in pre-independent Namibia

The independence of the judiciary in pre-independent Namibia: Legal challenges under the pre-independence Bill of Rights (1985–1990)

Nico Horn

Introduction

When Namibia became independent in 1990, the Constitution provided that all existing laws – many enacted by either the South African Parliament, the South African Administrator-General, or Namibian authorities legalised by South Africa – remained intact.¹ The Constitution's legal history as part of the greater southern African Roman Dutch legal system dates back to 1919. After World War I, Namibia became a Class C mandate of the League of Nations.² It mandated *His Britannic Majesty to be exercised on his behalf by the government of the Union of South Africa*.³

Proclamation 1 of 1921 gave the Administrator of South West Africa (SWA) legislative powers. Act No. 42 of 1925 of the South African Parliament instituted a Constitution for the territory.⁴ In 1919, South Africa established the High Court of SWA and Roman Dutch law as the common law of the territory under Administration of Justice Proclamation 21 of 1919. Although the wording of Proclamation 21 is not clear, it seems its objective was also to place the High Court of SWA under the supervision of the High Court in the Province of the Cape of Good Hope.⁵

If Proclamation 21 of 1919 left some doubt as to the independence of the High Court of SWA, the Appellate Division Act, 1920 (No. 12 of 1920) established the Appellate Division of the Supreme Court of South Africa as the court of appeal for the SWA court. Consequently, the highest court of the Union of South Africa gained jurisdiction over the SWA legal system.

1 Article 140, Namibian Constitution.

2 The Mandate Commission of the League of Nations, decision dated 17 December 1920.

3 Carpenter, G. 1987. *Introduction to South African International Law*. Durban: Butterworths, p 23; Dugard, J. 1973. *The South West Africa/Namibia dispute*. Berkeley: University of California Press, p 68.

4 Carpenter (ibid.:22).

5 Roman Dutch common law was applicable in SWA as existing and applied in the Province of the Cape of Good Hope.

The independence of the judiciary in pre-independent Namibia

The Appellate Division of the Supreme Court of South Africa ruled in 1924 in *Rex versus Christians* that South Africa held sovereign power over SWA.⁶ The South African government nevertheless accepted its status as the sovereign of SWA after the *Christians* case. The case dealt with a leader of the Bondelswartz community in southern SWA, who was charged with high treason. He alleged that, in terms of the law, he could not be prosecuted since the League of Nations – and not South Africa – was the sovereign authority in SWA.

Post-World War II developments

In 1948, the National Party won the general elections in South Africa. The new government immediately started to administrate SWA as a fifth province, and accordingly implemented the policy of apartheid. In South Africa and in the mandated territory of SWA, the South African government maintained the policy of an integrated southern Africa.⁷

As part of this integration plan, the High Court of SWA was transformed into the South African Provincial Division of the Supreme Court of SWA.⁸ The name says it all: the SWA Court gained the same status as its counterparts in the four provinces of South Africa. At the same time, the legal system was logged into the legal system of the apartheid government and subjected to the jurisprudence of its Supreme Court of Appeal.

In 1975, South Africa set up structures for an internal settlement (excluding the United Nations and the liberation movements). The so-called internal parties were to draw up a new constitution and lead Namibia to independence in 1976. The Turnhalle Consultation, named after the historic Turnhalle building where the consultation took place, eventually led to the so-called Transitional Government of National Unity, excluding only the South West Africa People's Organisation, SWAPO, this time.⁹

In 1977 South Africa empowered the State President of the Republic of South Africa to promulgate legislation by proclamation to prepare for SWA's independence. Simultaneously, the Administrator-General, the South African government's representative in what was by then called SWA/Namibia, was given extensive legislative powers.¹⁰

6 *R v Christians* 1924 AD 101.

7 See D'Amato, A. 1966. "The Bantustan proposals for South West Africa". *The Journal of Modern African Studies*, 4(2):177–192.

8 Supreme Court Act, 1959 (No. 59 of 1959).

9 Carpenter (1987:23).

10 (ibid.).

The independence of the judiciary in pre-independent Namibia

In 1978, the Security Council of the United Nations (UN) adopted Resolution 435, which provided for South Africa to withdraw from the territory, for UN-supervised elections and, finally, for independence.

Between 1978 and 1985, South Africa experienced several failures in its attempt to establish an internationally acceptable internal settlement without including the liberation movements, SWAPO and the South West Africa National Union (SWANU). In 1985, the State President of South Africa, acting in terms of section 38 of the South West Africa Constitution Act, 1968 (No. 39 of 1968), issued South West Africa Legislative and Executive Authority Establishment Proclamation R101 to establish a so-called Transitional Government of National Unity (TGNU).¹¹ The Proclamation made provision for a Legislative Assembly and a Cabinet.

Proclamation R101 included a Bill of Fundamental Rights and Objectives in an annexure, as well as an article providing for the review of laws that contradicted the Bill of Rights.¹² As we shall see, the Supreme Court of SWA approached the Bill of Rights in a liberal, purposive manner. Despite the political pressure of the armed struggle and a transitional government which still operated in the spirit of its colonial masters, the court protected the rights of citizens in the spirit of a constitutional democracy in the making.

It is unfortunate that the South African Appellate Division, which remained the final legal authority in Namibia, did not deviate from their stance on parliamentary sovereignty.¹³ It ignored the challenge of the SWA Supreme Court to evaluate the values and aims of the Bill of Rights and followed the traditional, rigid approach by looking primarily to the intention of the legislator and the legal interpretation surrounding the issues.

Neither the interim government nor the highest court in South Africa gave any indication to the international world or to SWAPO that they were serious about the implementation of a Bill of Rights. The international community had to wait

11 The TGNU was a creation of the South African government. Its aim was to work towards a negotiated settlement with the so-called internal parties – mostly those groups who were part of the Turnhalle negotiations. The TGNU operated in the country between June 1985 and March 1989. The real political power and sovereignty, however, remained in South African hands. The Administrator-General, as the South African government's representative, remained the main representative of the sovereign in Windhoek.

12 See article 34, Proclamation R101 of 1985.

13 See later herein under "Constitutional developments after Katofa" for a discussion of the Appeal Court's judgments in cases involving SWA/Namibia constitutional issues.

several more years for the interim government and the internal parties to catch up with the insights of the High Court.

Civil society and the Churches, by and large, did not support the efforts by the South African government, the Democratic Turnhalle Alliance (DTA) and other internal parties to establish independence from South Africa without including SWAPO. They also did not see the reforms of the interim government as a significant development. Yet, with the promulgation of Proclamation R101 of 1985 and its Bill of Rights, Namibians did not hesitate to claim those rights and to approach the court to enforce them.

Proclamation R101 was not a constitution per se: Namibia was not a sovereign state at the time, and the Bill of Rights was only an annexure. However, it was a significant piece of legislation. While still excluding SWAPO from the process, the South African government intended to put Namibia on the path of independence with the Proclamation. And the courts interpreted it as if it were a constitution.

The transitional government, on the other hand, constantly used its right of appeal to limit the application of their own initiative: an interim constitution, with an entrenched Bill of Rights.

Katofa: The first challenge for the interim government

It did not take long for the transitional government to be confronted with human rights issues. The first case did not initially deal with the Bill of Rights of Proclamation R101, but with another notorious Administrator-General Proclamation: AG 26 of 1978.¹⁴ The latter Proclamation severely restricted the rights of people detained without trial or access to a court of law.¹⁵ The *Katofa*

14 Section 2 of the Proclamation was the heart of the restriction upon the individual's personal freedom:

2 (1) *If the Administrator-General is satisfied:*

(a) *that the peaceful and orderly constitutional development of South West Africa is obstructed, hindered or threatened by violence against or intimidation of, or the threat or promotion of violence against or intimidation of, any particular person or persons who are members of any particular class, group or organisation, or persons generally; and*

(b) *that any person committed or attempted to commit, or in any manner promotes or promoted the commission of such violence or intimidation, he may issue a warrant for the arrest and detention of such person.*

15 *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA); *Katofa v Administrator-General for South West Africa and Another* 1986 (1) SA 800 (SWA).

The independence of the judiciary in pre-independent Namibia

case was heard shortly before the enactment of Proclamation R101. The legality of Proclamation AG 26 of 1978 in the light of the Bill of Rights was later argued before the Supreme Court of Appeal.

Katofa¹⁶ was the brother of Josef Katofa, a detainee under Proclamation AG 26 Of 1978. The applicant brought a typical habeas corpus writ,¹⁷ requesting the Administrator-General to produce the person of Josef Katofa to the court, and to furnish information to the court as to whether the latter was under arrest, on what charges he had been arrested, why he was being detained, and granting him access to a legal practitioner.

While there is nothing in the Proclamation preventing a detainee access, Josef Katofa's attorney was not allowed to see him. Since the detainee also did not see a magistrate or a medical practitioner as prescribed by the Proclamation, his attorney wrote a letter to the Administrator-General, stating that the detention was illegal and demanding his client's release.

In his answering affidavit, the Administrator-General insisted that since the Proclamation gave him the authority to lay down conditions of detention, he had the discretion to allow or disallow visits by a lawyer. He was also obliged to give reasons for the detention to the detainee, but not to anyone else. The Administrator-General stated that the detainee had not asked for these reasons, and neither had he requested that he be visited by an attorney.

This fundamentalist reliance on textual nuances was typical of the South African authorities. Even the long detention of Joseph Katofa was concealed by detaining him under different Proclamations: he was initially detained in terms of section 4(2) of Proclamation AG 9 of 1977, and on 30 May 1984 in terms of section 5 bis of Proclamation AG 9 of 1977.

On 14 November 1984, Katofa was arrested and detained in terms of section 2 of Proclamation AG 26 of 1978. The Administrator-General stated that he was convinced that the detainee was a person as provided for in the stated section, without referring to any specifics that confirmed this conviction.¹⁸

16 The applicant, Katofa, is identified in the case record as the brother of Josef Katofa, the detainee on whose behalf the application was made. See *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA), p 213.

17 The court made no distinction between *habeas corpus* and the Roman Dutch remedy of *homine libero et exhibendo*. It seems as if the court used the terms interchangeably, without referring to the differences between them at all. See also footnote 21.

18 1985 (4) SA 211 (SWA), pp 215–216.

The independence of the judiciary in pre-independent Namibia

The Supreme Court of SWA would have nothing of this, however. While not referring specifically to the annexed Bill of Rights of Proclamation R101, since the Proclamation only came into operation a month later, it concentrated on the rights of the individual. The court used very specific constitutional language. It referred to liberty and the right to see an attorney as fundamental rights, with Judge Berker referring to the problem as “one of the most basic constitutional importance”.¹⁹

The court insisted that the authorities comply with all the conditions set for depriving the detainee of his liberty in the Proclamation. In answer to a point *in limine* by the respondent that the case was not a matter of urgency since the detainee had been arrested more than a year earlier, the court responded that –²⁰

... the present case concerned the liberty of the subject. As such it involved the infringement of a fundamental right and it was of necessity one of urgency.

The court made it clear that the habeas corpus writ or the Roman Dutch remedy of *de homine libero et exhibendo*²¹ intend to protect the liberty of subjects. Quoting *Principal Immigration Officer and Minister of Interior v Narayansamy*,²² the court stated that every individual –²³

... is entitled to ask the Court for his release, and the Court is bound to grant it, unless there is some legal cause for his detention.

The fact that a court does not have jurisdiction “to pronounce upon the functions or recommendations of the review committee”²⁴ does not mean that a detainee cannot approach the court if it desires a remedy other than reviewing a recommendation of the review committee.

In this particular case, the court found that the ipse dixit of the Administrator-General that, at the time of the arrest and the time of the application, he was convinced the detainee was a person as provided for in section 2 of the Proclamation, was not good enough to relieve him of the burden to prove that

19 (ibid.:224).

20 (ibid.:216).

21 Following *Principal Immigration Officer and Minister of Interior v Narayansamy* 1916 TPD 274, the court makes no difference between the two remedies. In the Supreme Court of Appeal, the differences became a bone of contention.

22 1985 (4) SA 21 (SWA) at 216.

23 (ibid.:222).

24 Proclamation AG 26 of 1978, section 4(d).

The independence of the judiciary in pre-independent Namibia

the detainee had been legally detained. Since the Proclamation provided for the Administrator-General to furnish the detainee with reasons for the detention, why should a court be deprived of that information?²⁵

Under the circumstances, the court could not find that the detainee had been legally detained. Since there had not been strict and punctual compliance with the provisions of sections 5(1) and 6(1) of the Proclamation, which allowed the detainee to be visited by a magistrate and a medical practitioner for specifically prescribed intervals, although not conclusive, this was an indication that the detainee had been detained illegally.

Access to legal representation, a fundamental right in liberal constitutional democracies, was also taken seriously by the court and interpreted in a broad manner. The fact that the Administrator-General was enabled to lay down conditions for the detention of the detainee did not imply that he could refuse the detainee his fundamental right to legal representation. In an almost prophetic manner, the court relied heavily on *Mandela v Minister of Prisons*²⁶ to underline the fact that the right of access to one's legal advisor survived incarceration, even under security legislation, unless it was attenuated by legislation. In the case before the court, the advice of an attorney was not excluded and, in a sense, was implied.

Furthermore, by necessary implication, one cannot find that any of the provisions would be defeated if a detainee consulted with his attorney. Indeed, the opposite seems to be the case:

[S]ection 7(2) makes provision for a detainee to submit his case in writing for investigation by a review committee. Who better to prepare his case, even if he can write, than his own attorney? Section 7(4) seems to indicate that this in fact was in the lawgiver's mind because that section provides that no person, "other than a person in the service of the State whose presence is considered necessary by the chairman", shall attend proceedings of the review committee. In other words, while the documentation for the attention of the review committee can be prepared by the attorney, there is specific provision that he may not attend the committee proceedings.

Consequently, the application was granted. The Administrator-General was ordered to grant Katofa access to his attorney, and a rule nisi (interim order) was granted.

25 *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA) at 222.

26 1983 (1) SA 938 (A) at 957D.

The independence of the judiciary in pre-independent Namibia

On 17 June 1985, a mere seven days after the judgment, Proclamation R101 of 1985 came into effect. The functions of the Administrator-General were transferred to the Transitional Government, more specifically the Cabinet of the Executive Authority. Consequently, the affidavit in reply to the rule nisi is made by the Chairman of the Cabinet of SWA, Mr Dawid Bezuidenhout. Mr Bezuidenhout again made only an *ipsi dixit* statement to the effect that, after familiarising himself with all the documents, he was satisfied that the release of the detainee “at this time is not advisable”.²⁷ The court rejected his plea:²⁸

... in the interests of the security of the State and of the public interest, he is entitled to refuse to give reasons or to place the necessary information before this Court is sound in law [*sic*].

In terms of the Proclamation, the court stated, the Administrator-General or the Cabinet had no privilege to withhold reasons for a detention: such privilege was only to withhold information.²⁹

As a result, the rule was made final. The Cabinet was not satisfied with the result and appealed. The appeal was a huge blow for the recognition of the new quasi-constitutional development in Namibia. While the Supreme Court of Appeal rejected the appeal on the grounds that Mr Bezuidenhout did not relieve the burden of proving that the detainee was in legal detention, it also addressed the review powers of the courts in terms of Proclamation R101.³⁰

The respondent held that, since section 2 of Proclamation AG 26 of 1978 was in conflict with the Bill of Fundamental Rights and Objectives of Proclamation R101 of 1978, the former ceased to exist as a law. However, section 34 of Proclamation R101 of 1985 did not make provision for legislation that was in clear contradiction of the Bill of Rights. Thus, the court of Appeal ruled that existing legislation remained in place after the enactment of Proclamation R101 –

... if it was constitutionally enacted by a competent authority.

It falls outside the scope of this paper to go into the interpretation of section 34 of Proclamation R101. Suffice it to quote counsel for Katofa on this point:³¹

27 *Katofa v Administrator-General for South West Africa and Another* 1986 (1) SA 800 (SWA), p 805.

28 (*ibid.*).

29 Section 4(2) of the Proclamation.

30 *Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A).

31 (*ibid.*:710).

The independence of the judiciary in pre-independent Namibia

The absurdity (and tautology in this respect) is two-fold: if it was not enacted by a competent authority, or was not “constitutionally enacted” for any other reason, it could hardly be an “existing law”. ... In the second place, the Court’s approach requires it to be accepted that at the same time as a new test for statutory validity was introduced (“met sy strenger vereistes”), the lawgiver provided that any existing law survived if it either met the stringent substantive requirements thus imposed or if it met the anodyne procedural requirement of being “constitutionally enacted”. ... [T]his approach ... fails to adopt the correct approach to interpreting constitutional provisions ... The proclamation remains a constitutional, right-giving statute, ... and is to be interpreted in accordance with the special rules which apply to such provisions.

The *Katofa* case was to be repeated time and again in the years between 1985 and 1989, when the transition to an independent Namibia started under UN supervision.

Constitutional developments after Katofa

Two cases – one initiated by the Council of Churches when the transitional government refused South African clergyman Frank Chikane entrance into Namibia, and the other initiated by Namibian-based community activist Uli Eins³² – set the scene for constitutional interpretation in Namibia.

Both cases dealt with applications attacking the constitutionality of section 9 of the Residence of Certain Persons in South West Africa Regulation Act, 1985 (No. 33 of 1985). The Act empowered the transitional government to deny people who were not born in SWA/Namibia residence and entrance rights under certain circumstances. In the *Eins* case, the applicant approached the court because, in terms of an Act of the Legislative Assembly, he could be unconstitutionally removed from the territory.

Eins was born in Germany. Since 1973, he had lived unrestrictedly in SWA as a South African citizen since SWA was not a sovereign country. Eins alleged that section 9 of the said Act was unconstitutional since it unreasonably discriminated against residents not born in the territory vis-à-vis people born in the territory, members of the Defence Force, and South African public servants living and working in the territory.³³

32 In both cases, the transitional government appealed against the judgments. See *Chikane v Cabinet for the Territory of South West Africa* 1990 (1) SA 349 A and *The National Assembly for the Territory of South West Africa v Eins* 1988 (3) SA 369 A. The cases in the court a quo were not reported.

33 Section 9(1) makes provision for prohibiting persons from entering the territory, or ordering some already in the territory to leave if their presence endangers the security of the territory or is likely to engender a feeling of hostility between members of the different population groups of the territory. The Act excludes persons born in the territory (section 9(1)(a)),

The independence of the judiciary in pre-independent Namibia

Eins³⁴ attacked section 9 of the Act on the grounds that it was in conflict with Articles 3, 4, 9 and 10 of the Bill of Rights.³⁵ The Cabinet opted to dispute Eins's locus standi rather than the constitutionality of an Act that ignored the constitutional developments in the territory.

Following the precedent of the *Katofa* case, the Supreme Court of SWA was serious in developing a constitutional dispensation for Namibia. It was not willing to be tied down by technical questions, but wanted to get to the crux of the matter: did the Act infringe on the constitutional rights of a vast number of people in the territory? Or, to put it in a more constitutional framework, was the court obliged to exercise its powers in terms of article 19 of Proclamation R101 and declare section 9 of Act 33 of 1985 unconstitutional?

The court refused to answer the question of locus standi in the abstract. Locus standi depends on the nature of the litigation, in this case an application based on constitutional rights that were severely limited by the same people who had given the territory Proclamation R101 and its annexed Bill of Rights.

persons "rendering active service in the territory in terms of the Defence Act, 1957" (section 3(2)(d)), and persons employed in the territory in the service of the Government of the Republic of South Africa or the Government of Rehoboth or in the Government service of the territory (section 3(2)(e)).

34 *The National Assembly for the Territory of South West Africa v Eins* 1988 (3) SA 369 A, p 387.

35 Article 3 is a general equality clause:

Everyone shall be equal before the law and no branch or organ of government nor any public institution may prejudice nor afford any advantage to any person on the grounds of his ethnic or social origin, sex, race, language, colour, religion or political conviction.

Article 4 deals with the right to a fair trial. Article 9 is a non-discriminatory clause including categories such as ethnic, linguistic and religious groups and their right to enjoy, practise, profess and promote their cultures, languages, traditions and religion. Article 10 allows everyone lawfully present within the borders of the country the right to freedom of movement and choice of residence.

The independence of the judiciary in pre-independent Namibia

The Supreme Court of SWA used its powers in terms of article 19(1)³⁶ of Proclamation R101 and declared section 9 of Act 33 of 1985 –

... unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in Proclamation R101 of 1985.

On the day that Justice Hendler declared section 9 unconstitutional, the Council of Churches in Namibia attacked section 9 of Act 33 of 1985 after the Cabinet refused the South African clergyman and activist, Frank Chikane, entrance into Namibia, on the grounds that it was incompatible with the Declaration of Fundamental Freedoms. While the Declaration embodied a fundamental rule against discrimination, section 9 differentiated between two categories of people. The Supreme Court of SWA dealt with the issue in a progressive manner. The *Eins* judgment was made applicable in the *Chikane* case and the notice prohibiting Chikane entrance into the territory was declared invalid and of no legal effect.

However, the transitional government was more interested in restricting their political opponents than serving their own Constitution. They appealed against both the Chikane and the Eins judgments. Although the appellant in the Chikane case did not rely on the unconstitutionality of section 9 of Act 33, both parties and the court agreed that the Appeal Court should also consider the judgment of the *Eins* case, ruling that the said section 9 was unconstitutional. The court made the issue a legal one by asking if the classification was reasonable. The reasonableness again had to be determined by the intention of the Act, and by whether the differentiation had a rational relation to the result that was to be attained by the classification.

On the question as to whether section 9 was unconstitutional since it excluded the audi alteram partem rule (the right of a party to be heard), the court again begins with the intention of the legislation. As a point of departure, it also works with the rule of ut res magis valeat quam pereat, i.e. that the legislator is presumed to have made a valid and effective provision.

36 The article reads as follows:

- 19 (1) *The Supreme Court of South West Africa shall be competent to inquire into and pronounce upon the validity of an Act of the Assembly in pursuance of the question -*
- (a) *whether the provisions of this proclamation were complied with in connection with any law which is expressed to be enacted by the Assembly; and*
 - (b) *whether the provisions of any such law abolish, diminish or derogate from any fundamental right.*

The independence of the judiciary in pre-independent Namibia

From here, the court attempts to make section 9 compatible with a Bill of Rights by departing from the position that it would prefer a construction in which the Act and the Rule of Law are not necessarily incompatible if a minimum allowance for the *audi alteram partem* is included in the Act.

The court approached Eins's challenge in the same manner. Justice Rabie restricted the application of the Bill of Rights by pointing out that Eins, a South African citizen living in SWA/Namibia, had always been restricted in his residence rights. Section 9 of Act 33 of 1985 was just a repetition of earlier proclamations, he pronounced, and Eins could have faced deportation in terms of the security legislation. He further ruled that, since restrictions to the enjoyment of certain residential rights had always been part of Namibian law, the categorisation of section 9 could not be seen as unreasonable and, therefore, a derogation from the Bill of Rights was permissible.

Hence, the Supreme Court of Appeal of South Africa ignored the basic rule of constitutional interpretation: to interpret fundamental rights in a broad and purposive manner. Instead, the explicit rights given by the Bill of Rights were subjected to old colonial proclamations, notably the oppressive security laws.

The political context of the Chikane and Eins judgments was, however, the invisible subtext. While the SWA/Namibian court prepared itself for an independent constitutional democracy, the Appellate Division was still trapped within the limited scope given to it by the apartheid government. And the 'total onslaught',³⁷ which needed special measures, seems to be the unwritten agenda behind the court's strictly textual interpretation. On the restrictions of rights, the judge had the following to say:³⁸

*Daarbenewens is 'n persoon soos die respondent, ingevolge art[.] 5 van die Wet op Oproerige Byeenkomste 17 van 1956, onderworpe aan verwydering uit die gebied indien hy skuldig bevind word aan 'n misdryf in art[.] 2 van daardie Wet bedoel (wat, onder andere, betrekking het op die verwekking van 'n gevoel van ernstige vyandigheid tussen verskillende dele van die inwoners van die gebied. . . . Daarbenewens kan 'n persoon wat 'n gevoel van ernstige vyandigheid tussen die verskillende dele van die inwoners van die gebied verwek ingevolge voormelde art[.] 5 uit die gebied verwyder word. 'n Persoon beskik slegs oor regte vir sover dit nie deur die een of ander Wet ingeperk of weggeneem is nie. [Emphasis added]*³⁹

37 The term was used by the South African government and the ruling party to define what they called the communist onslaught against South Africa.

38 *Eins v The National Assembly for the Territory of South West Africa*, p 371.

39 "Besides, a person defined like the respondent is, in terms of section 5 of Act 17 of 1956, subjected to removal from the territory if he is convicted of a crime in terms of section 2 of the said Act (which includes the creation of a feeling of serious enmity between different

The independence of the judiciary in pre-independent Namibia

Both examples in the quotation refer to government action against apparent political activism. And here the South African Court missed an important issue: the Bill of Rights was included in the Proclamation to end discrimination and to prevent history from repeating itself. The mere fact that the rights of the applicant had been restricted before was a good reason why the Bill of Rights should have been interpreted in a broad, non-restrictive manner.

The ‘total onslaught’ mindset of the ruling National Party in South Africa resulted in a series of legislation aimed at restricting the powers of the prosecutorial authority and judiciary in SWA/Namibia. The new Criminal Procedure Act, 1977 (No. 51 of 1977) is a case in point. Acting Supreme Court of Namibia Judge AJA Leon (as he then was) later made the following observation regarding the implementation of section 3 of the Act to SWA/Namibia:⁴⁰

It was made applicable by an apartheid government bent on domination[,] no doubt determined to enforce its political will on the independence of the prosecuting authority in South West Africa. I cannot for one moment believe that that would be in accordance with the ethos of the Namibian people.

More legal challenges after the Chikane case

In *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa*⁴¹ the court set aside an order in terms of section 6 bis of the Internal Security Act, 1950 (No. 44 of 1950), which required the applicant, *The Namibian* newspaper, to deposit an amount of R20,000 as a condition of registration. The respondents admitted in their affidavit that the Cabinet had taken issue with the editor because she had written critical articles of Cabinet members while working for another newspaper. They nevertheless used their power in terms of draconian security legislation since they believed that criticism of Cabinet members would eventually endanger state security.

The court emphasised the right to freedom of expression in the Bill of Rights and found no way in which it perceived the criticism to be a danger for state security. It is interesting that the Minister of Home Affairs in South Africa used the same tactics against the Afrikaans newspaper, *Vrye Weekblad*.⁴²

sections of the population of the territory). ... Besides, a person who creates a feeling of serious enmity between different sections of the population of the territory can be removed from the territory in terms of the mentioned section 5. An individual only has rights in as far as they have not been limited or removed by an Act.” Emphasis added; translation NH.

40 *Ex Parte Attorney-General: In re The Constitutional Relationship Between The Attorney-General and The Prosecutor-General*, 1998 NR 282 (SC) (1), p 301.

41 1987 (1) SA 614 (SWA)

42 See Du Preez (2003:171ff).

The Supreme Court of SWA and oppressive South African legislation

The South African government often used laws to manipulate prosecutions in the territory. A case in point is the well-known brutal murder of SWAPO activist and former Robben Island detainee, Immanuel Shifidi.⁴³

Shifidi was killed at a political rally in Windhoek on 30 November 1986. The Attorney-General for SWA instituted criminal proceedings against five members of the South African Defence Force. However, the case was stopped when a certificate was issued under section 103 ter (4) of the Defence Act, 1957 (No. 44 of 1957) by the Administrator-General and authorised by State President PW Botha. The section in question gave the State President the right to authorise a certificate and stop any prosecution against Defence Force members for acts committed in the operational area.

In the *Shifidi* case, no operational action of the Defence Force was involved and the killing took place on a football field in Windhoek. The court held that the Minister of Defence or State President, or anyone else, could not exercise their discretion to decide where an operational area was located for the purpose of section 103 ter. In this case, it could not be said objectively that a football field in Windhoek was an operational area. To overcome the shortcomings of the certificate, the Administrator-General issued a proclamation declaring Windhoek an operational area.

Section 103 ter empowered the State President to terminate proceedings against members of the SADF if –

- (i) *[h]e is satisfied after being informed by the Minister of Defence (in South West Africa by the Administrator-General) that the members acted in good faith to prevent or suppress acts of terrorism in an operational area; and*
- (ii) *[i]f it is not in the national interest that the proceedings before court should continue.*

The daughter of the deceased then applied for a court order declaring the Administrator-General's certificate invalid.⁴⁴ A full bench of the Supreme Court considered the case and concluded that the documentation presented to the court did not justify the issuing of the certificate. While Justice Levy said in his judgment that the State President had been misled, then SWA Supreme Court

43 See *S v JH Vorster*, unreported case of the Supreme Court of SWA, where the prosecution was stopped on 1 March 1988 by the handing in of a certificate in terms section 103 ter of the Defence Act, 1957 (No. 44 of 1957); and *Shifidi v Administrator-General for South West Africa and Others* 1989 (4) SA 631 (SWA).

44 *Shifidi v Administrator-General for South West Africa*, supra.

The independence of the judiciary in pre-independent Namibia

Justice Strydom based his judgment on the fact that the discretion exercised by the State President was so unreasonable that interference by the court had been necessary. Thus, the President did not apply his mind when he found that the act the accused had committed was a bona fide attempt to combat terrorism. In his judgment, on the other hand, Justice Levy not only withdrew the certificate, but also set aside the decision of the Attorney-General not to proceed with the prosecution against Vorster.

Again, this was a brave decision. Justice Bryan O'Linn, a lifelong opponent of apartheid and, at the time of the transitional government, an activist advocate critical of the Supreme Court Bench, made the following observation:⁴⁵

The South West African Supreme Court in this decision upheld the high traditions of the Courts. The South African State President and Minister of Defence[,] on the other hand, by this act betrayed the values of a Christian and civilised people by covering up a heinous crime ... In doing that they became party to murder and public violence by association and collusion.

The members of the Defence Force were never prosecuted. Soon after the case had been heard by the Supreme Court, the process of Namibia's independence started. Their deeds were eventually covered by the blanket amnesty that initially applied only to returnees, but was later extended to members of the security forces.⁴⁶

Even more blunt and aggressive was the conduct of the South African government during the trial of Heita, a SWAPO member, under the vicious section 2 of the Terrorism Act, 1967 (No. 83 of 1967), which had been repealed in South Africa.⁴⁷

The defence objected to the indictment on the grounds that section 2 of the Terrorism Act⁴⁸ was not valid in SWA since it was in conflict with the Bill of Rights. On 5 September 1987, before the due date of the hearing of the objection but after the objection had been filed, the State President of South Africa promulgated Proclamation R157 of 1986. The Proclamation prohibited the court from enquiring into or pronouncing upon the validity of any Act of the South African Parliament that had been enacted before or after the Proclamation.

Despite submissions by the state that the amendment was only procedural and could, therefore, have retrospective application, the court found that Proclamation

45 O'Linn, B. 2003. *Namibia. The sacred trust of civilization*. Windhoek: Gamsberg Macmillan, p 278.

46 Proclamation AG 13 of 1989.

47 *State v Heita and others* 1987 (1) SA 311 (SWA).

48 The section created presumptions that affected the presumption of innocence.

The independence of the judiciary in pre-independent Namibia

157 was a substantive amendment to prevent the court from reviewing the validity of South African Acts, and had no retrospective application. The change in law did not affect the case before court, therefore.

The court found the provisions of section 2 of the Terrorism Act to be in conflict with article 4 of Annexure 1 to Proclamation R101 of 1985 (the Bill of Fundamental Rights). Although SWA was not a sovereign state, the court nevertheless found that Proclamation R101 ought to be seen as a Constitution, holding a place of pride in relation to other legislation:⁴⁹

For the reasons set out earlier in this judgment, Proc[.] R101 of 1985 is certainly no ordinary enactment and should be accorded pride of place amongst existing enactments. It has been enacted as a stepping stone towards independence (s 38 of Act 39 of 1968). The National Assembly is given wide powers, which include the power to repeal Acts of the Parliament of South Africa and, for the first time in the legislative history of South West Africa, the fundamental rights of the inhabitants are spelt out and entrenched. This is the existing constitution of SWA/Namibia and the fact that certain organs have retained legislative rights does not and cannot alter the character and importance of the proclamation.

Consequently, the court found that section 2 of the Terrorism Act was repealed by Proclamation R101. While the State President attempted to stop the Supreme Court of SWA from striking down unconstitutional acts of the South African Parliament after 5 September 1986, the *Heita* case confirmed the drastic change in the power structures of government in SWA/Namibia with the implementation of a Constitution containing an entrenched Bill of Rights. Justice Levy did not answer the question as to whether the State President did indeed close the gap.⁵⁰

As far as the Supreme Court of SWA was concerned, a new dispensation had begun with the implementation of Proclamation R101. It is understandable that the review powers of the court created tremendous problems for South Africa. If all the security laws made applicable in SWA/Namibia could theoretically have come under scrutiny by the Supreme Court of SWA, the chances were good that the court would have declared them unconstitutional.

49 1987 (1) SA, p 324.

50 Justice Levy did not follow Justice Strydom's judgment in *S v Angula en Andere* 1986 (2) SA 540 (SWA), where the court found a conflict between the Bill of Rights and certain security legislation. Judge Strydom, however, found that section 2 of the Terrorism Act, 1967 (No. 83 of 1967) was still in place.

The independence of the judiciary in pre-independent Namibia

And the Supreme Court of SWA did not waiver. The constitutionality of the Terrorism Act came around again in 1989 when a full bench confirmed a judgment of the Supreme Court of SWA ordering the release of six prominent internal SWAPO members detained without trial in terms of section 6(1) of the Terrorism Act. The appellant was once again the Cabinet of the interim government.⁵¹

Although the applicants did not rely on the Bill of Rights to substantiate their application for an interdictum de homine libero et exhibendo, the judgment of the full bench follows the constitutional lines of previous decisions. Emphasising the importance of a strict compliance with the provisions of the law when the liberty of an individual is concerned, Justice Levy comments that –⁵²

... [s]ince time immemorial the safety of the State, social unrest and warlike conditions have been invoked by enthusiastic executives as reasons for the Courts to overlook the executives' non-compliance with the provisions of the law.

Even more fascinating is the contribution by Acting Justice Henning, who relied primarily on the *Rechtsstaat* (the rule of law) concept.⁵³ He acknowledged that SWA/Namibia at the time could not be classified as a *Rechtsstaat* (a state governed by law), but still operated as a *Wetstaat* (a state based on laws) because of its captivity by the Appellate Division in South Africa. He quotes the *Katofa* case⁵⁴ to point out that the SWA/Namibian court did not have the power to review Acts of the South African Parliament made applicable in SWA/Namibia, even if they contradicted the Bill of Rights.⁵⁵ He nevertheless suggested that, on the road to a justice state, power had to be limited by power: *le pouvoir arrête le pouvoir*.⁵⁶

And since it was not possible to strike the Terrorism Act down because of its obvious contradiction of section 3 of the Bill of Rights, which prohibited detention

51 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger and Others* 1989 (1) SA 618 (SWA).

52 (ibid.:622).

53 The judge quotes both German and Dutch legal philosophers to state his case (ibid.:631): “*Der Staat soll Rechtsstaat sein: ... Er soll die Bahnen und Grenzen seiner Wirksamkeit wie die freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen ...*” [Friedrich Stahl] and “*Hoe meer de rechtsstaatsidee tot werkelijkheid wordt, destemeer zal de Overheid volgens regels van recht handelen*” [Stellinga].

54 *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A). The ridiculous result of the judgment was that oppressive legislation could remain on the books and be enforced even when it contradicted the rights of Namibians protected by the Bill of Rights.

55 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger and Others* 1989 (1) SA 618 (SWA), p 631.

56 (ibid.).

The independence of the judiciary in pre-independent Namibia

without trial, the court would nevertheless take the rights of individuals seriously by assuring that the procedures of the security legislation were adhered to before allowing the loss of liberty.⁵⁷

In yet another case⁵⁸ with strong political undertones, the full bench of the Supreme Court of SWA/Namibia declared parts of an Act ironically called the Protection of Fundamental Rights Act, 1988 (No. 16 of 1988) unconstitutional since it contradicted entrenched rights such as freedom of expression and freedom of assembly. As Justice Hendler commented, –⁵⁹

[i]t is clear that it creates criminal offences for activities which in democratic societies have been perfectly acceptable and legal.

In another brave decision the full bench declared the notorious Proclamation AG 8 of 1980 unconstitutional.⁶⁰ The South African-appointed Administrator-General had legislative powers to make proclamations. AG 8, as this particular proclamation was known, laid the foundation for a segregated future Namibia. It divided the people of Namibia into 11 ethnic groups, and created a so-called second-tier government for each such group. Every Namibian was obliged to belong to one of these groups, even if he or she did not belong to one in an ethnic sense.

57 (ibid.:632). It is interesting that the Supreme Court of SWA considered striking down the Terrorism Act despite the *Katofa* case:

In passing I should point out that many of the other provisions of Act 83 of 1967 are also in clear conflict with the provisions of the Bill of Fundamental Rights and Objectives. This has already been authoritatively laid down by the Appellate Division in S v Marwane 1982 (3) SA 717 and repeated by this Court in S v Heita 1987 (1) SA 311 in October last year. Marwane's case dealt with a provision in the Constitution of Bophuthatswana which is similar to the corresponding provision in our Bill of Rights. Under the circumstances one is filled with dismay that our Legislative Assembly has still not made use of its powers under Proc[.] R101 of 1985 to repeal or amend the Terrorism Act. It is incomprehensible that citizens of South West Africa should still be subject to the Draconian [sic] provisions of a South African Act of Parliament which was repealed in South Africa 15 years ago and which is moreover in conflict with our Bill of Rights.

This Court has in the past refrained from adopting the procedure of American Courts of "striking down" legislation which conflicts with fundamental constitutional rights. We have done so because the Court hoped and indeed expected that the National Assembly would itself take the necessary steps to repeal or amend such laws, but the time might come when the Supreme Court of South West Africa has to reconsider its attitude in this regard.

58 *Namibia National Students' Organisation and Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA.

59 (ibid.:627).

60 *Ex Parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proclamation R101 of 1985 (RSA) 1988 (2) SA 832 (SWA).*

The independence of the judiciary in pre-independent Namibia

The budget allocation to each group was not based on the numbers of the group, but the taxes paid by members of the group. Consequently, the whites – with less than 10% of the total population – received a budget substantially higher than that for any other group.

The court took cognisance of the fact that –⁶¹

... articles or provisions laying down fundamental rights were, by their very nature, drafted in a broad and ample style which laid down principles of width and generality, and ought to be treated as sui generis.

Therefore, the interpretation of the said articles or provisions should not be subjected to rigid literalism. Consequently, when the court had to interpret the word *advantage* in the Bill of Rights, they concluded that it should also include material advantage, even if the rights enshrined in the Bill of Rights were civil and political, and not social or economic.⁶² The court found that AG 8, in its entirety, was in conflict with the Bill of Rights.

The judgment is important not only because it challenged the principle of racially separated development in South African-occupied Namibia, but also because it laid the foundation of the constitutional pillars framed by the South African Parliament for a future independent Namibia. While the tenability of a segregated state based on race or ethnicity had been rejected by both the SWAPO and SWANU liberation movements, the Supreme Court declared that it was also impossible to reconcile an ethnic-based state with a Bill of Fundamental Rights. Or to use Justice Henning's terminology in the *Bessinger* case, a *Rechtsstaat* cannot be built on the pillars of a *Wetstaat*.

Conclusion

The Supreme Court of SWA had a constant battle with both the transitional government and the South African Appellate Division. In doing so, the judiciary prepared the way for a new dispensation in Namibia, where the courts would play a much more significant role in enforcing constitutional rights against oppressive legislation. The interim government, however, opted to take refuge at the South African Appellate Division rather than strengthen its Supreme Court in the making.

61 (ibid.).

62 (ibid.:835).

The independence of the judiciary in pre-independent Namibia

The judgments of the Appellate Division are typical of the fundamentalist approach of courts in South Africa before 1994. This is a typical example of what Dyzenhaus calls “the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation”.⁶³

However, the political influence on the judgments cannot be ignored. Justice Rabie’s examples in the *Eins* case are anything but neutral.⁶⁴ The judge also took it for granted that Proclamation R101 of 1985 (including the Bill of Rights) was subject to the laws of the South African Parliament.⁶⁵

One seeks in vain for any indication in the judgments that the Appellate Division had any vision whatsoever of the birth of a nation. The Supreme Court of SWA, on the other hand, took the Bill of Rights and the protection of the people of Namibia extremely seriously.

The legal fraternity gave little – if any – attention to the paradigm shift that took place in the Supreme Court in Windhoek between 1986 and 1990. Scholars often refer to the post-independent 1991 judgment of *State v Acheson* as the turning point in Namibian jurisprudence, ignoring the radical stance of the Supreme Court of SWA in the 1980s.

In South Africa, Kruger and Curren⁶⁶ only took notice of the positive constitutional interpretations after Namibia’s independence. And Nico Steytler took it for granted that the white judges of the Namibian High Court would be the protectors of the old order.⁶⁷

While the judges may not have expressed support for SWAPO during the struggle, their relationship with the transitional government was anything but friendly. On the contrary, the Supreme Court of SWA bench proved to be a thorn in the flesh of the transitional government. Looking at their track record in protecting the rights of Namibians during the struggle, they can hardly be seen as part of the governing elite.

63 Dyzenhaus, D. 1998. *Truth, reconciliation and the apartheid legal order*. Cape Town: Juta and Co., p 16ff.

64 See *Eins v The National Assembly for the Territory of South West Africa*.

65 Cf. his words:

Artikel 2 van die Handves handel met die persoonlike vryhede (“liberty of person”) van die individu wat nie deur die bepalings van art[.] 9 van die Wet in gedrang gebring word nie. (“Article 2 of the Bill of Rights deals with personal liberties [liberty of person] of the individual not dealt with in the stipulations of section 9 of the Act”; translation NH).

66 Kruger, J & B Curren. 1991. *Interpreting a Bill of Rights*. Cape Town: Juta and Co.

67 Steytler, N. 1991. “The judicialization of politics”. *South African Journal of Human Rights*, 9:488.

The independence of the judiciary in pre-independent Namibia

O'Linn criticises the judges in the interim period for their over-enthusiastic evaluation of Proclamation R101 of 1985.⁶⁸ The criticism is justified. It should have been clear at the time that there would be no settlement in Namibia without SWAPO's presence. However, the bench was not a political party and it did not have a power base in politics. Even if Proclamation R101 was not a Constitution and Namibia was not a sovereign state, the Proclamation gave the court a tool that enabled them to take Namibian jurisprudence out of the rigid, oppressive thinking of the South African Supreme Court of Appeal.

The fact that Proclamation R101 was so closely linked to the transitional government and the latter's lukewarm commitment to the rule of law clearly undermined the status of the Bill of Rights. The exclusion of SWAPO from the so-called constitutional process also alienated the majority of the people. However, despite these shortcomings, the SWA/Namibian court played an important role in laying the foundations of a culture of constitutional supremacy in Namibia.

One must remember that, before independence, the courts operated under a system of Parliamentary supremacy, which limited them in respect of applying human rights principles. Moreover, the Administrator-General had legislative powers. Successive Administrator-Generals did not hesitate to use these powers to enact draconian proclamations during the struggle for liberation. O'Linn justifiably softens his criticism of the Supreme Court of SWA by concluding that they maintained a high legal standard, especially after the implementation of Proclamation R101.⁶⁹

68 O'Linn (2003:264).

69 (ibid.:280).

SECTION III

**The structure of the
Namibian judicial system**

The structure of the Namibian judicial system and its relevance for an independent judiciary¹

Sam K Amoo

Introduction

Prior to the attainment of nationhood in 1990 and the promulgation of the Constitution of the Republic of Namibia, which created an independent judiciary and a Supreme Court for the sovereign nation, the courts of Namibia were an extension of the judicial system of South Africa. Following the imposition of South African administration over South West Africa, after the League of Nations granted South Africa a mandate over the territory, one obvious historical fact was the assumption of legislative powers over the territory by South Africa and the resulting extension of the South African legal system. The Administration of Justice Proclamation 21 of 1919 established the High Court of South West Africa, and the Appellate Division Act, 1920 (No. 12 of 1920) granted the Appellate Division of the Supreme Court of South Africa jurisdiction over decisions of the High Court of South West Africa to hear appeals from the judgments and orders from the court. By virtue of the provisions of the Supreme Court Act, 1959 (No. 59 of 1959), the judiciary of South West Africa was amalgamated into that of South Africa, resulting in the High Court of South West Africa being constituted as the South West Africa Provincial Division of the Supreme Court of South Africa. Logically, this meant the Appellate Division of the Supreme Court of South Africa maintained jurisdiction over the decisions of the South West Africa Provincial Division of the Supreme Court of South Africa to hear and finally determine matters brought before it on appeal from the South West Africa Division or any other provincial or local division.

With the promulgation of the Constitution of the Republic of Namibia in 1990, the Supreme Court of Namibia became the highest court of appeal for the country.² It should also be added that by Proclamation 21 of 1919, which inter alia provided that Roman-Dutch law was to be applied in the territory “as existing and applied in the Province of the Cape of Good Hope“, Roman-Dutch law became the common law of the territory. The overall impact of all these

1 This article builds on and modifies slightly a section in Amoo, SK. 2008. *Introduction to law: Materials and cases*. Windhoek. Macmillan Education Namibia.

2 See also Hosten, WJ, AB Edwards, Francis Bosman & Joan Church. 1997. *Introduction to South African law and legal theory* (Second Edition). Durban: Butterworths, p 398.

The structure of the Namibian judicial system

proclamations on the judicial and legal systems of South West Africa was that the decisions of the Supreme Court of South Africa and the Roman-Dutch law developed by the South African courts became binding on the courts of Namibia until independence. This position was affirmed by Article 66(1) of the Namibian Constitution, which provides that both the customary law and the common law of Namibia in force on the date of independence remain valid to the extent to which such customary law or common law does not conflict with the Constitution or any other law.³

Establishment

The establishment of the judiciary, as one of the main organs of state, is provided for by the Constitution, but there are also other pieces of legislation that deal with the jurisdiction of the courts and other related matters. Article 78(1)(2) and (3) of the Constitution provide for the establishment of the judiciary and its independence, as follows:

- (1) *The judicial power shall be vested in the Courts of Namibia, which shall consist of:*
 - (a) *a Supreme Court of Namibia;*
 - (b) *a High Court of Namibia;*
 - (c) *Lower Courts of Namibia.*
- (2) *The Courts shall be independent and subject only to this Constitution and the law.*
- (3) *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.*

There are existing legal and extralegal measures designed to protect and maintain the independence of the judiciary. Article 21(a) of the Constitution provides for and protects freedom of speech and expression, subject to the restrictions under paragraph (2).⁴ Contempt of court proceedings is part of the laws of Namibia, and

3 See also Amoo, SK & Skeffers, I. 2007. "The rule of law in Namibia". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 25.

4 Article 21(2) of the Constitution provides 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 the rights and freedoms conferred by the said Sub-Article, which are necessary in a

it is mentioned in particular under paragraph (2) of Article 21 of the Constitution. All persons in Namibia have the constitutional right to express their opinions on the judgments and decisions of the courts. Such opinions or criticisms, however, should not be made when the matter is sub judice, which literally means “under a judge”, i.e. in course of trial, or that the matter has not been finally disposed of by the court. Furthermore, such criticisms should not be scurrilous, male fide, or calculated to intimidate or influence the courts in the performance of their judicial functions. Any measure calculated to interfere with the independence of the judiciary is subject to contempt of court proceedings.⁵

The extralegal measures meant to protect and maintain the independence, impartiality and dignity of the judiciary include their conditions of service, i.e. remuneration, security of tenure, pension, and manner of appointment. The manner of appointment relates to the maintenance of the judiciary’s independence; if appointments are driven or motivated by political patronage, the independence and impartiality of the judiciary will be greatly compromised.

The Supreme Court

Composition

Article 79(1) of the Constitution provides that the Supreme Court should consist of a Chief Justice and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine, while Article 79(2) adds that the Supreme Court is to be presided over by the Chief Justice. It should also be mentioned that no judge is permitted to sit as a judge of the court over a case to whose decision s/he was a party in a lower court. All appointments of judges to both the Supreme Court and the High Court are to be made by the President on the recommendation of the Judicial Service Commission.⁶ In the case of *S v Zemburuka*,⁷ the court ruled that the appointments of acting judges should be subjected to the same procedure as their tenured counterparts. All judges so appointed are to hold office until the age of 65, but the President is entitled to extend the retiring age of any judge until 70.⁸ A judge

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.

5 See also *S v Heita* 1992 3 SA 785 (NmHC), and *Alfonso Ngoma v Minister of Home Affairs* High Court Case No. A. 206/2000.

6 Article 82(1), Namibian Constitution.

7 2003 NR 200.

8 Article 82(4), Namibian Constitution.

can be removed from office prior to the expiry of his/her tenure, but only by the President acting on the recommendation of the Judicial Service Commission, and only on the grounds of mental incapacity or gross misconduct.⁹

Jurisdiction¹⁰

Appellate jurisdiction of the Supreme Court

The general jurisdiction of the Supreme Court is provided for by the Constitution.¹¹ It vests in the Supreme Court the inherent jurisdiction which vested in the Supreme Court of South West Africa immediately prior to the date of independence, including the power to regulate its own procedures and to make court rules for that purpose.¹² The Supreme Court is primarily a court of appeal and its appellate jurisdiction covers appeals emanating from the High Court, including appeals which involve interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder.¹³ It is the highest court of appeal in Namibia and its decisions are final.¹⁴ It should also be added, however, that in the exercise of the prerogative of mercy, the President is empowered to pardon or reprove offenders, either unconditionally or subject to such conditions as he/she may deem fit.¹⁵ The Supreme Court is not bound by any judgment, ruling or order of any court that exercised jurisdiction in Namibia prior to or after independence.¹⁶

The Constitution further vests in Parliament the power to make legislation providing for the appellate jurisdiction of the Supreme Court.¹⁷ Under the relevant provisions of the Supreme Court Act, 1990 (No. 15 of 1990), the Supreme Court is vested with unlimited¹⁸ appellate jurisdiction over appeals from any judgment

9 Article 84(1) and (2), Namibian Constitution.

10 Article 78(4), Namibian Constitution.

11 (ibid.).

12 Article 79(2), Namibian Constitution.

13 (ibid.).

14 Section 17(1), Supreme Court Act, 1990 (No. 15 of 1990).

15 Article 33(2)(d), Namibian Constitution.

16 Section 17(2), Supreme Court Act of 1990.

17 Article 79(4), Namibian Constitution.

18 Section 14(2)(a), Supreme Court Act of 1990. Section 14(2) states that the right of appeal to the Supreme Court –

... shall –

- (a) *not be limited by reason only of the value of the matter in dispute or the amount claimed or awarded in the suit or by reason only of the fact that the matter in dispute is incapable of being valued in money; and*
- (b) *be subject to the provisions of any law which specifically limits it or specifically grants, limits or exceeds such right of appeal, or which prescribes the procedures which have to be followed in the exercise of that right.*

or order of the High Court; and any party to any such proceedings before the High Court, if dissatisfied with any such judgment or order, has a right of appeal to the Supreme Court.¹⁹ In the exercise of its appellate jurisdiction, the Supreme Court has the power to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case for further hearing to the court of first instance or to the court whose judgment is the subject of the appeal, with such instructions relating to the taking of further evidence or any other matter as the Supreme Court may deem necessary. The Supreme Court is also empowered to confirm, amend or set aside the judgment or order that is the subject of the appeal, and to give any judgment or make any other order which the circumstances may require.²⁰ Records indicate that the Supreme Court's jurisdiction to amend or set aside a judgment or order of a lower court is used sparingly and on very compelling grounds.

As a rule, in determining civil appeals from a decision of the High Court, an appeal should take the form of a re-hearing of the record, but not a retrial. However, if it appears to the court that there was insufficient evidence before the trial judge, a retrial will be ordered.

Jurisdiction of the Supreme Court as Court of First Instance

The Supreme Court has original jurisdiction over matters referred to it for decision by the Attorney-General under the Constitution, and with such other matters as may be authorised by Act of Parliament.²¹ In this sense, therefore, it can be concluded that the Supreme Court indeed has original jurisdiction over constitutional matters, but that this original jurisdiction is not exclusive to the Supreme Court because the High Court is also vested with original jurisdiction over constitutional matters.²² Unlike, for example, in the case of the judicial structure in South Africa, where there is a Constitutional Court, the Namibian Constitution does not create a separate Constitutional Court per se, but the Supreme Court can constitute itself into a Constitutional Court in the cases mentioned earlier. By virtue of the provisions relating to the original jurisdiction of the Supreme Court under the Supreme Court Act of 1990,²³ whenever any matter is referred for a decision to the Supreme Court by the Attorney-General, the latter is entitled to approach the Supreme Court directly, without first instituting any proceedings in any other court, on application to it, to hear and determine the matter in question.²⁴

19 Section 14(1), Supreme Court Act of 1990.

20 Section 19(a) and (b), Supreme Court Act of 1990.

21 Article 79(2), Namibian Constitution.

22 See footnote 112 below.

23 Section 15, Supreme Court Act of 1990.

24 Section 15(1), Supreme Court Act of 1990. See also *Ex Parte: Attorney-General. In re:*

The structure of the Namibian judicial system

In the exercise of its original jurisdiction, as stated above, the Supreme Court has the power to receive evidence either orally or on affidavit or by deposition before a person it appoints, or to direct that the matter be heard by the High Court. The Supreme Court is also empowered to grant or refuse the application or to confirm, amend or set aside the proceedings that are the subject of the hearing, and to give any judgment or make any order which the circumstances may require.²⁵

Review jurisdiction of the Supreme Court

The Supreme Court also has review jurisdiction over the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.²⁶ The Supreme Court may exercise this jurisdiction *ex mero motu* (of the court's own accord) whenever it comes to the notice of the court or any judge of that court that an irregularity has occurred in any proceedings, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court. This review jurisdiction, however, does not confer upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.²⁷

Sessions of the Supreme Court

The Supreme Court is obliged to hold not less than three sessions during each calendar year. The seat of the court is in Windhoek.

Binding nature of decisions of the Supreme Court

A decision of the Supreme Court is 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 enacted²⁸ in conformity with the principles of legislative sovereignty.

Corporal Punishment by Organs of State 1991 NR 178 (SC); 1991 (3) SA 76, and *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS).

25 Section 20(a)(b), Supreme Court Act of 1990.

26 Section 16(1), Supreme Court Act of 1990.

27 Section 16(2), Supreme Court Act of 1990.

28 Article 81, Namibian Constitution.

The High Court

Composition

The High Court shall consist of the Judge-President and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.²⁹ The Constitution is silent on the qualifications for appointment as High Court judges or acting judges, but section 3 of the High Court Act, 1990 (No. 16 of 1990) contains detailed provisions relating to such qualifications.

Section 8 of the High Court Act provides for the retirement of judges of the High Court as follows:

- (1) *Any judge of the High Court holding office in a permanent capacity –*
 - (a) *shall retire from office on attaining the age of 65 years;*
 - (b) *may retire from office if he has attained the age of 65 years and has completed at least eight years pensionable service as defined by any law relating to pensions of judges;*
 - (c) *may at any time with the approval of the President retire from office if he or she becomes afflicted with a permanent infirmity of mind or body disabling him or her from the proper discharge of his or her duties of office or if any other reason exists which the President deems sufficient.*

The constitution of a court of High Court is provided for by section 10 of the Act, as follows:

- (1) (a) *Subject to the provisions of this Act or any other law, the High Court shall, when sitting as a court of first instance for the hearing of any civil matter, be constituted before a single judge: Provided that the Judge President or, in his or her absence, the senior available judge may, at any time[,] direct that any matter be heard by a full court.*
- (b) *A single judge may at any time discontinue the hearing of any matter being heard before him or her and refer it for hearing to the full court.*
- (2) *Any appeal from a lower court may be heard by one or more judges of the High Court, as the Judge-President may direct.*

As a rule, the judgment of the majority of the judges of the full court constitutes the judgment of the court, but where the judgments of a majority of the judges of any such court are not in agreement, the hearing is adjourned and commenced de novo before a new court constituted in such manner as the Judge-President or, in his or her absence, the senior available judge may determine.³⁰

29 Article 80(1), Namibian Constitution.

30 Section 14(1), High Court Act.

The structure of the Namibian judicial system

If at any stage during the hearing of any matter by a full court or by a court consisting of two or more judges, any judge of such court dies or retires or becomes otherwise incapable of acting or is absent, the hearing is, if the remaining judges constitute a majority of the judges before whom it was commenced, to proceed before such remaining judges, and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing is to be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or of such one remaining judge, as the case may be, as the decision of the court.³¹

Jurisdiction

The High Court is a superior court of record and its jurisdiction is provided for by both the Constitution and the High Court Act. The Constitution vests the High Court with both original and appellate jurisdiction,³² and all proceedings in the High Court are to be carried on in open court,³³ provided that the court may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security.³⁴ It is situated permanently in Windhoek, and goes on circuit to Gobabis, Grootfontein, Oshakati, Swakopmund etc.³⁵ The jurisdiction of the High Court is provided for by section 16 of the High Court Act, as follows:³⁶

The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power –

- (a) to hear and determine appeals from all lower courts in Namibia;*
- (b) to review the proceedings of all such courts;*
- (c) [The rule here under the original subsection has been abolished]*
- (d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*

As stated earlier, the Supreme Court has the jurisdiction to hear appeals from a judgment or order of the High Court. However, in some cases, these appeals

31 Section 14(2), High Court Act.

32 Article 80(2), Namibian Constitution.

33 Section 13, High Court Act.

34 Article 12(1)(a), Namibian Constitution.

35 Section 4 of the High Court Act provides that the seat of the High Court is to be in Windhoek, but if the Judge-President deems it necessary or expedient in the interests of the administration of justice, he or she may authorise the holding of its sitting elsewhere in Namibia.

36 Section 16, High Court Act.

The structure of the Namibian judicial system

need not go directly to the Supreme Court. Section 18(1) of the High Court Act provides that an appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal is to be heard by the Supreme Court.

Section 18(2) of the High Court Act provides as follows:

An appeal from any judgment or order of the High Court in any civil proceedings shall lie –

- (a) in the case of a single judge sitting as a court of first instance –*
 - (i) to the full court³⁷, as of right, and no leave to appeal shall be required; or³⁸*
 - (ii) directly to the Supreme Court –*
 - (aa) if all parties to the proceedings concerned agree thereto in writing; or*
 - (bb) in the event of no such agreement, leave to appeal has been granted by the court which has been given the judgment or has made the order; or*
 - (cc) in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.*
- (b) in the case of a full court or two or more judges, sitting as a court of first instance, to the Supreme Court, as of right, and no leave so to appeal shall be required.*
- (c) in the case of a full court, or one or more judges sitting as a court of appeal, to the Supreme Court if leave to appeal has been granted by the court which has given the judgment or has made the order or, in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.*

Under the provisions of sections 32 and 37 of the Legal Practitioners Act, 1995 (No. 15 of 1995), the Court has the power to discipline legal practitioners who have been found guilty of unprofessional, dishonourable or unworthy conduct.

Original jurisdiction

Under its original jurisdiction, the court shall have the power to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder,³⁹ including the power to overrule legislation where legislation is inconsistent with or ultra vires either the Constitution or enabling legislation.⁴⁰ The inherent jurisdiction to overrule applies

³⁷ A *full court* is defined in the High Court Act as a court consisting of more than two judges.

³⁸ It is doubtful whether full bench appeals have been removed from practice.

³⁹ Article 80(2), Namibian Constitution.

⁴⁰ Article 25(1)(a), Namibian Constitution; *Fantasy Enterprise CC t/a Hustler Shop v The Minister of Home Affairs and Others* (High Court of Namibia Case No. A 159/96). See also the cases of *Kauesa v Minister of Home Affairs* 1995 (1) BCLR 1540 (NmS); *Ex Parte*:

also in the case of subsidiary legislation where it is uncertain or unreasonable, or it contains an improper delegation. As a rule, the inherent jurisdiction of the superior courts means that they may do anything that the law does not forbid, in contradistinction to the lower courts, such as magistrates' courts, which are creatures of statute in that they cannot claim any authority which cannot be found within the four corners of the Magistrates' Courts Act.⁴¹ With regard to the court's original jurisdiction over cases involving the fundamental rights of the individual, special mention needs to be made of the provisions of Article 18 of the Namibian Constitution and Rule 53 of the High Court Rules that vest in the court the jurisdiction to review administrative action. The importance of this lies in the development of the law relating to administrative justice by the Namibian courts.⁴²

When the High Court sits as a court of first instance for the hearing of any civil matter, it is to be constituted before a single judge; but the Judge-President or, in his or her absence, an available senior judge may at any time direct that any matter be heard by a full court.⁴³ However, with criminal appeals from a lower court, the High Court has to be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters.⁴⁴

Appellate jurisdiction

The High Court derives its appellate jurisdiction to hear and adjudicate upon appeals from lower courts primarily from the Constitution,⁴⁵ but there are other provisions in the High Court Act that also deal with its appellate jurisdiction. One or more judges may constitute the High Court as a court of appeal,⁴⁶ but the Judge-President or, in his or absence, an available senior judge has the discretion to direct that a matter be heard by a larger number of judges.⁴⁷

Attorney-General. In re: Corporal Punishment by Organs of State 1991 (3) SA 76 (NmS); *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR 671 (NmS); and *Muller v The President of the Republic of Namibia and Another* 2000 (6) BCLR 655 (NmS).

41 Hosten et al. (1997:393).

42 See *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Elizabeth Khaxas*, Case No. SA 8/99; *The Government of the Republic of Namibia v Ngeve Raphael Sikunda*, Case No. SA 5/2001.

43 Section 10(1)(a), High Court Act.

44 Section 10(4), High Court Act.

45 Article 80(2).

46 Section 10(2), High Court Act.

47 Section 10(3), High Court Act.

The structure of the Namibian judicial system

The powers of the High Court as regards the hearing of appeals are provided by section 19 of the High Court Act, as follows:

- (1) *The High Court shall have power –*
 - (a) *on hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case to the court of first instance or the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the High Court may deem necessary;*
 - (b) *to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.*

Review jurisdiction

The High Court has review or supervisory jurisdiction over all proceedings from inferior courts. Under this jurisdiction, the High Court has the power to call for and review the record of any proceedings determined by an inferior court and, if necessary, to revise any judgment or order contained in any such record. As indicated hereunder, the High Court may also either on its own motion, or on application from an interested party, transfer any proceedings pending before any inferior court to another inferior court of competent jurisdiction or to itself for trial and determination, to ensure that the proceedings are determined expeditiously, conveniently, fairly and authoritatively.

The grounds of review of the proceedings of Lower Courts are stated under section 20 of the High Court Act, as follows:

- (a) *absence of jurisdiction on the part of the court;*
- (b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
- (c) *gross irregularity in the proceedings;*
- (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

After review of the proceedings, the court has the power to confirm, alter or set aside the conviction and/or sentence.

The Labour Court

Establishment

The Labour Court, which belongs to the Superior Courts of Namibia, is established under section 15 of the Labour Act, 1992 (No. 6 of 1992). The Act establishes two types of labour court, namely the Labour Court⁴⁸ and the District Labour Court⁴⁹ for each district in respect of which a magistrate's court is established. In terms of Namibia's judicial hierarchy, therefore, the District Labour Court belongs to the Lower Courts.

Composition

The Labour Court consists of a judge or acting judge of the High Court of Namibia designated by the Judge-President for such purpose for the period of the hearing of, or for, such cases as may be determined by the Judge-President.⁵⁰ The President of the Labour Court may on his or own motion or on the request of any party to the proceedings in the Labour Court appoint two or more assessors to advise the court on any matter to be adjudicated upon by the court in the proceedings in question.⁵¹ As in the case of the Labour Court, the District Labour Court may also sit with two assessors.⁵²

The District Labour Court consists of a magistrate designated by the Minister of Justice, or any officer in the Ministry of Justice designated by the Minister.⁵³

Jurisdiction

Jurisdiction and powers of the Labour Court

Section 18(1) of the Labour Act provides for the jurisdiction of the Labour Court as follows:

- (1) *The Labour Court shall have exclusive jurisdiction –*
 - (a) *to hear and determine –*
 - (i) *any appeal from any district labour court;*
 - (ii) *any appeal noted in terms of section 54(4), 68(7), 70(6), 95(4), 100(2) or 114(6);*

48 Section 15(1)(a), Labour Act.

49 Section 15(1)(b), Labour Act.

50 Section 16(1), Labour Act.

51 Section 16(2)(a), Labour Act.

52 Section 17(2)(a), Labour Act.

53 Section (17)(1), Labour Act.

The structure of the Namibian judicial system

- (b) *to consider and give a decision on –*
 - (i) *any application made to the Labour Court in accordance with the provisions of this Part in terms of any provisions of this Act;*
 - (ii) *any application to review and set aside or correct any decision taken by the Minister or the Permanent Secretary, the Commissioner, any inspector or any officer involved in the administration of the provisions of this Act;*
- (c) *to review the proceedings of any district labour court brought under review on the grounds mutatis mutandis referred to in section 20 of the High Court Act, 1990 (Act 16 of 1990);*
- (d) *to grant any application referred to in paragraph (b) or (c) any urgent interim relief until a final order has been made in terms of the said paragraph (b) or (c);*
- (e) *to issue any declaratory order in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment;*
- (f) *to make any order which it is authorised to make under any provision of this Act or which the circumstances may require in order to give effect to the objects of this Act;*
- (g) *generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.*
- (2) *A party to any proceedings before the Labour Court may appear in person or be represented by a legal practitioner admitted to practise as an advocate in terms of the Admission of Advocates Act, 1964 (Act 74 of 1964), or as an attorney in terms of the Attorneys Act, 1979 (Act 53 of 1979).*
- (3) *Subject to the provisions of this section and sections 16 and 22, the Labour Court shall, in the exercise or performance of its powers and functions, have all the powers of the High Court of Namibia under the High Court Act, 1990 (Act 16 of 1990), as if its proceedings were an order of, the said High court of Namibia.*

Jurisdiction and powers of District Labour Courts

Section 19 of the Labour Act provides for the powers of the District Labour Courts as follows:

- (1) *A district labour court shall have jurisdiction -*
 - (a) *to hear all complaints lodged with such district labour court by an employee or employer (hereinafter referred to as the complainant) against an employee or employer (hereinafter referred to as the respondent) for an alleged contravention of, or alleged failure to comply with, any provision of this Act or any term and condition of a contract employment or a collective agreement;*
 - (b) *to make any order against, or in respect of, the respondent or the complainant, as the case may be, which it is empowered to make under any such provision of this Act.*

The structure of the Namibian judicial system

- (2) (a) *A district labour court may on the request of the respondent and with the consent of the complainant, or on its own motion, if it is of the opinion that the subject matter of the complaint relates to a dispute of interests, refer the complaint to the Commissioner.*
- (b) *A complaint referred to the Commissioner in terms of paragraph (a) shall be deemed to be a dispute reported to the Commissioner in terms of section 74.*
- (c) *If a complaint is referred to the Commissioner in terms of paragraph (a) the complainant shall, within a period of 14 days as from the date on which the complaint has been so referred or such longer period as the Commissioner may on good cause shown allow, comply with the provisions of subsection (2) of section 74.*
- (3) *Any complainant, if he or she desire, may be represented in a district labour court by a person who shall be designated by the Permanent Secretary generally or in every particular case for such purpose, and any such complainant and any respondent may appear in person in such district labour court or be represented by his or her own legal practitioner admitted to practise as an advocate in terms of the Legal Practitioners Act.*
- (4) *Subject to the provisions of this section and sections 17 and 22, a district labour court shall, in the exercise or performance of its powers and functions, have all powers of a magistrate's court under the Magistrates' Courts Act, No. 32 of 1944, as if its proceedings were proceedings conducted in, and any order made by it were a judgment of, a magistrate's court.*

Appeals against judgment or orders of the Labour Court or the District Labour Court

Any party to any proceedings before the Labour Court may appeal, with the leave of the Labour Court, or, if such leave is refused, with the leave of the Supreme Court of Namibia granted on application by way of petition to the Chief Justice, to a full court of the High Court of Namibia, on any question of law against any decision or order of the Labour Court or any judgment or order of the Labour Court given on appeal from a judgment or order from a District Labour Court, as if such judgment or order were a judgment or order of the High Court of Namibia.⁵⁴

Similarly, any person to any proceedings before any District Labour Court may appeal to the Labour Court against any judgment or order given by such District Labour Court, as if such judgment or order were a judgment or order of a magistrate's court.⁵⁵

54 Section 21(1)(a), Labour Act.

55 Section 21(1)(b), Labour Act.

The Lower Courts

Establishment

The Lower Courts are established under Article 78(1) of the Namibian Constitution. Currently, the Lower Courts in Namibia comprise the magistrates' courts and the community courts which are specifically established by the Magistrates' Courts Act, 1944 (No. 32 of 1944) and the Community Courts Act, 2003 (No. 10 of 2003), respectively. The District Labour Court discussed above is also classified as a *lower court*.

The magistrates' courts

Composition

Magistrates' courts in Namibia may be classified into *regional, district, sub-district divisions*,⁵⁶ and *periodical courts*.⁵⁷ Magistrates' courts are courts of record,⁵⁸ and their proceedings in both criminal cases and the trial of all defended civil actions are carried in open court.⁵⁹ The courts are presided over by judicial officers,⁶⁰ and advocates or attorneys of any division of the Supreme Court may appear in any proceeding in any court.⁶¹ The Act also permits articulated clerks to appear instead and on behalf of the attorney to whom s/he has been articulated.⁶²

Under the provisions of section 19 of the Legal Practitioners Act, 1995 (No. 15 of 1995), a candidate legal practitioner to whom a certificate has been issued by the Justice Training Centre, certifying that such candidate legal practitioner has completed a period of six months' training under a course of postgraduate training, has the right of audience –

- in any Lower Court in any matter, and
 - in Chambers in any High Court proceedings,
- but not after the expiration of a period of two years after his or her Board registration as a candidate legal practitioner.

56 Section 2(f)(2)(a)–(iv), Magistrates' Courts Act.

57 Section 26, Magistrates' Courts Act. The periodical courts are meant to serve the more remote areas of the country and as the name suggests they are only held at intervals when the volume of work in the area requires a court sitting.

58 A court of record is a court whose acts and judicial proceedings are written on parchment or in books for a perpetual memorial which serves as the authentic and official evidence of the proceedings of the court.

59 Section 5, Magistrates' Courts Act.

60 Section 8, Magistrates' Courts Act.

61 Section 20, Magistrates' Courts Act.

62 Section 21, Magistrates' Courts Act.

Jurisdiction

Civil jurisdiction

All magistrates' courts have equal civil jurisdiction, except the regional magistrates' courts, which have only criminal jurisdiction.

Territorial jurisdiction

The territorial jurisdiction of a magistrate's court is the district, sub-district or area for which such court is established, and a court established for a district has no jurisdiction in a sub-district.⁶³ Similar provisions apply to the jurisdiction of the periodical courts, except that their territorial jurisdiction is subject to the provision that the court of a district within which the said area or any part thereof is situate retains concurrent jurisdiction with the periodical court within such portions of such area as are situate within such district.⁶⁴

Jurisdiction in respect of persons

A magistrate's court shall have jurisdiction over the following persons:

- (a) *any person who resides, carries on business or is employed within the district;*
- (b) *any partnership which has business premises situated or any member whereof resides within the district;*
- (c) *any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person or himself;*
- (d) *any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district;*
- (e) *any party to interpleader proceedings, if –*
 - (i) *the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district; or*
 - (ii) *the subject-matter of the proceedings has been attached by process of the court; or*
 - (iii) *such proceedings are taken under sub-section (2) of section sixty-nine and the person therein referred to as the "third party" resides, carries on business, or is employed within the district; or*
 - (iv) *all the parties consent to the jurisdiction of the court;*
- (f) *any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;*
- (g) *any person who owns immovable property within the district in actions in respect of such property or in respect of mortgage bonds thereon.⁶⁵*

63 Section 26(1) and (2), Magistrates' Courts Act.

64 Section 27(a), Magistrates' Courts Act.

65 Section 28, Magistrates' Courts Act.

The structure of the Namibian judicial system

The magistrates' courts have civil jurisdiction over matters in which the state is a party.⁶⁶

Jurisdiction in respect of causes of action

In respect of causes of action, the magistrates' courts have jurisdiction in –⁶⁷

- [(1)] (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding N\$25 000 in value;
- (b) actions of ejectment against the occupier of any premises or land within the district: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed N\$25 000 in clear value to the occupier;
- (c) actions for the determination of a right of way, notwithstanding the provision of section 46;
- (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed N\$100 000;
- (e) actions on or arising out of any credit agreement as defined in section 1 of the Credit Agreement Act, 1980 (Act 75 of 1980), where the claim or the value of the matter in dispute does not exceed N\$100 000;
- (f) actions other than those already mentioned in this subsection, where the claim or the value of the matter in dispute does not exceed N\$25 000.
- (2) In subsection 1 'action' includes a claim in reconvention.

Administration orders

Under section 74 of the Magistrates' Courts Act, where a judgment has been obtained for the payment of money and the judgment debtor is unable to pay the amount forthwith, or where a debtor is unable to liquidate his liabilities and has not sufficient assets capable of attachment to satisfy such liabilities or a judgment which has been obtained against him, the court may upon the application of the judgment debtor or the debtor make an order on such terms with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec or otherwise as it thinks fit, providing for the administration of his estate, and for the payment of his debts by instalments or otherwise.

*Granting of protection orders under the Combating of Domestic Violence Act*⁶⁸

Under section 4(1) of the Combating of Domestic Violence Act, 2003 (No. 4 of 2003), any person in a domestic relationship may apply to a magistrate's court, excluding a regional court, for a protection order.

⁶⁶ Section 28(2), Magistrates' Courts Act.

⁶⁷ Section 29, Magistrates' Courts Act, as amended by the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997).

⁶⁸ Act No. 4 of 2003.

Section 5(1) of the Act provides as follows:

A court of a district where the –

- (a) complainant permanently or temporary resides, is employed or carries on business;*
- (b) respondent resides, is employed or carries on business; or*
- (c) cause of action arose,*
has jurisdiction to grant a protection order under this Act.

*The granting of maintenance orders under the Maintenance Act*⁶⁹

Every magistrate's court, other than a regional magistrate's court, is within its area of jurisdiction a magistrate's court⁷⁰ and as such has the jurisdiction for the following:⁷¹

- (a) in the case where no maintenance order is in force, to make a maintenance order against the person who has been proved to be legally liable to maintain a beneficiary;*
- (b) in the case where a maintenance order is in force –*
 - (i) substitute that maintenance order by another maintenance order; or*
 - (ii) discharge such maintenance order; or*
 - (iii) suspend such maintenance order on such conditions which the maintenance court determines;*
- (c) make no maintenance order.*

Matters beyond the jurisdiction of Magistrates' Courts

The magistrates' courts have no jurisdiction in the following:⁷²

- (1) in matters in which the dissolution of a marriage or separation from bed and board or of goods of married persons is sought;⁷³*
- (2) in matters in which the validity or interpretation of a will or other testamentary document is in question;*

⁶⁹ Act No. 9 of 2003.

⁷⁰ Section 6, Maintenance Act.

⁷¹ Section 17(1), Maintenance Act.

⁷² Section 46(c), Magistrates' Courts Act, as amended by section 2 of the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997). Section 45(1) provides as follows:

Subject to the provisions of section 46, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section 28 shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter.

⁷³ Section 46(1), Magistrates' Courts Act.

The structure of the Namibian judicial system

- (3) *in a matter in which is sought specific performance without an alternative of payment of damages, except in –*
- (i) *the rendering of an account in respect of which the claim does not exceed N\$25,000;*
 - (ii) *the delivery or transfer of property, movable or immovable, not exceeding N\$25,000 in value; and*
 - (iii) *the delivery or transfer of property, movable or immovable, exceeding N\$25,000 in value where the consent of the parties has been obtained in terms of section 45.*

Removal of actions from the magistrates' courts to the High Court

Under section 50 of the Magistrates' Courts Act, as amended by section 3 of the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997), any action in which the amount of the claim exceeds N\$5 000, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the High Court.

Criminal jurisdiction

All magistrates have criminal jurisdiction, but this is subject to certain limitations in respect of the seriousness of the offence, the nature of punishment, and territorial jurisdiction. As stated earlier, magistrates' courts are the creation of a statute and, therefore, can only exercise powers and impose punishments provided for by the Act. Any exercise of jurisdiction outside the Act will be null and void. (Contrast this with the inherent jurisdiction of the superior courts.)

Jurisdiction in respect of offences

All magistrates' courts, other than the court of a regional division, have jurisdiction over all offences except treason, murder, and rape. The court of a regional division has jurisdiction over all offences except treason and murder.⁷⁴

Jurisdiction in respect of punishment

The jurisdiction of the court is limited with respect to the punishment it may impose. Under section 92 of the principal Act, as amended by section 6 of the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997), the court may impose a sentence of imprisonment for a period not exceeding five years where the court is not the court of a regional division, or not exceeding 20 years, where the court

⁷⁴ Section 89, Magistrates' Courts Act.

The structure of the Namibian judicial system

is a court of a regional division. In the case of fines, the court may impose a fine not exceeding N\$20 000, where the court is not a court of a regional division, or not exceeding N\$100 000, where the court is the court of the regional division.

Apart from these general provisions relating to the jurisdiction of the court in respect of punishment, a magistrate's jurisdiction is sometimes increased or reduced by particular legislation. A particular statute that creates and prohibits a certain offence may also impose the sentence or the statutory offence. In this case, a magistrate may impose any fine or any sentence as it is prescribed so long as it is not beyond the prescribed penalty in the Act. As a rule, certain enactments provide for a mandatory minimum sentence, in which case any convicted person is obliged receive that minimum sentence irrespective of the peculiar circumstances of the case, including any mitigating circumstances.

Confirmation of punishment in excess of jurisdiction

The High Court has both express and inherent review jurisdiction over the proceedings of the magistrates' courts. Consequently, if a magistrate in a certain matter is of the opinion that the peculiar circumstances of the case are such that a punishment beyond jurisdiction is warranted, the court may either impose such punishment and transfer to the High Court (as indicated above) or a regional court, as the case may be, for confirmation or to the superior court for sentencing.

Territorial jurisdiction/local limits of jurisdiction

The local limits of jurisdiction or the territorial jurisdiction of the magistrates' courts are provided for under section 90 of the principal Act, as amended by the Magistrates' Courts Amendment Act, 1985 (No. 11 of 1985), as follows:

- (1) *Subject to the provision of section 89, any person charged with any offence committed within any district, district division or regional division may be tried by the court of that district, district division or regional division, as the case may be.*
- (2) *When any person is charged with any offence –*
 - (a) *committed within the distance of four kilometres beyond the boundary of the district, district division or regional division; or*
 - (b) *committed in or upon any vehicle on a journey which or part whereof was performed in, or within the distance of four kilometres of, the district, district division or regional division; or*
 - (c) *committed on board any vessel on [a] journey upon any river within the Republic or forming the boundary of any portion thereof, and such journey or part thereof was performed in, or within the distance or four kilometres of, the district, the district division or regional division; or*

The structure of the Namibian judicial system

- (d) *committed on board any vessel of on a voyage within the territorial waters of the Republic (including the territory of South West Africa), and the said territorial waters adjoin the district, district division or regional division; or*
- (e) *begun or completed within the district, district division or regional division,*
such person may be tried by the court of the district, district division or regional division, as the case may be, as if he had been charged with an offence committed within the district, district division, or regional division, respectively.
- (3) *Where it is uncertain in which of several jurisdiction[s] an offence has been committed, it may be tried in any of such jurisdictions.*
- (4) *A person charged with an offence may be tried by the court of any district, district division or regional division, as the case may be[,] where in [sic] any act or omission or event which is an element of the offence took place.*
- (5) *A person charged with theft of property or with obtaining property by an offence or with an offence [involving] the receiving of any property by him, may also be tried by the court of any district, district division or regional division, as the case may be, wherein he has or had part of the property in his possession.*
- (6) *A person charged with kidnapping, child stealing or abduction may also be tried by the court of any district, district division or regional division, as the case may be, through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.*
- (7) *Where by any special provision of law a magistrate's court has jurisdiction in respect of an offence committed beyond the local limits of the district, district division or regional division, as the case may be, such court shall not be deprived of such jurisdiction by any of the provisions of this section.*
- (8) *Where an accused is alleged to have committed various offences within different districts in the territory, the attorney-general may in writing direct that criminal proceedings in respect of such various offences be commenced in the court of any particular district in the territory whereupon such court shall have jurisdiction to act with regard to any such offences as if such offence has been committed within the area of jurisdiction of that court, and the court of the district division or regional division within whose area of jurisdiction the court of such district is situated, shall likewise have jurisdiction in respect of any such offence if such offence is an offence which may be tried by the court of a district division or regional division.*

Appellate jurisdiction

Magistrates' courts have the jurisdiction to hear and determine any appeal against any order or decision of a community court.⁷⁵

Community Courts

Establishment

Community courts are the creation of a statute, the Community Courts Act, 2003 (No. 10 of 2003), which also provides detailed procedure and requirements for the establishment and recognition of community courts in a particular traditional community.⁷⁶ The Community Courts Act was promulgated, inter alia, to give legislative recognition to and formalise the jurisdiction of the traditional courts that render essential judicial services to members of traditional communities who subject themselves to their jurisdiction and the application of customary law. Formal recognition also brings the proceedings of the erstwhile traditional courts within the mainstream of the judiciary in Namibia, and subjects their proceedings to formal evaluation and review by the superior courts.

Every community court is to be a court of record, and the proceedings are to be recorded in writing by the clerk of the court.⁷⁷ This is an important provision not only in terms of review and appeals, but also for purposes of precedents and the authoritative ascertainment of customary law.

Composition

A community court is to be presided over by one or more justices appointed by the Minister of Justice. A justice of the community court is required to be conversant with the customary law of the area of his/her jurisdiction, and is not permitted to be a member of Parliament, a regional council, or a local authority council. A person will also not be eligible for appointment as a justice of a community court if he or she is a leader of a political party, regardless of

⁷⁵ See section 27, Community Courts Act, 2003 (No. 10 of 2003).

⁷⁶ *Traditional community* is defined in the Community Courts Act as –
an indigenous, homogenous, endogamous social grouping of persons comprising families deriving from exogamous clans which share a common ancestry, language, culture heritage, customs and traditions, recognises a common traditional authority and inhabits a common communal area: and includes the members of that community residing outside the common communal area.

⁷⁷ Section 18(1) and (2), Community Courts Act.

whether or not that political party is registered under section 39 of the Electoral Act, 1992 (No. 24 of 1992).⁷⁸ The Minister of Justice has the power to remove from office any justice of a community court if such justice becomes subject to any disqualification mentioned above, but only after consultation with the traditional authority concerned and after the Minister has afforded the justice concerned the opportunity to be heard. This removal is required to be published in the *Gazette*.⁷⁹

A justice of a community court may appoint one or more assessors to advise the court on any matter to be adjudicated upon by the court in the proceedings in question,⁸⁰ but the opinion of the assessor(s) is not binding on the court: it is only advisory.⁸¹

Jurisdiction in respect of cases and persons

The jurisdiction of community courts is provided for under section 12 of the Community Courts Act, as follows:

A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by the customary law, but only if –

- (a) the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or*
- (b) the person or persons to whom the matter relates in the opinion of that community court are closely connected with the customary law.*

The importance of this provision is that the community courts' jurisdiction is not limited to civil matters. These courts have both civil and criminal jurisdiction, provided that they do not impose custodial sentences. Their jurisdiction is limited to that extent, therefore.

Application and ascertainment of customary law

Since the community courts have traditionally administered justice over persons and in jurisdictions where the operating and functional law was/is customary law, this practice was taken cognisance of when the Act was being promulgated, and provisions were accordingly incorporated therein for community courts to

78 Section 8(1) and (2)(a)(b)(c), Community Courts Act.

79 Section 8(3), Community Courts Act.

80 Section 7(2), Community Courts Act.

81 Section 7(7), Community Courts Act.

The structure of the Namibian judicial system

apply customary law. Sections 13 and 14 of the Community Courts Act provides as follows:

13. *In any proceedings before it[,] a community court shall apply the customary law of the traditional community residing in its area of jurisdiction: Provided that if the parties are connected with different systems of customary law, the community court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter.*
14. *The community court may rely on any submissions on customary law made to it and if it entertains any doubt thereafter, it is permissible and lawful for the court to consult decided cases, text books and other sources, and may receive opinions, either orally or in writing[,] to enable it to arrive at a decision in the matter: Provided that such sources are made available to the other parties.*

Representation

Under section 16 of the Community Courts Act, a party to any proceedings before a community court is obliged to appear in person and may represent himself or herself or be represented by any person of his or her choice. It will appear from this provision that legal practitioners may be able to represent their clients in community courts. If this is the correct interpretation of the Act, then the Namibian situation is a departure from the positions obtaining in some jurisdictions, where legal practitioners cannot represent clients in similar courts.

Appeals against orders or decisions of community courts

A party to any proceedings in a community court, who is aggrieved by any order or decision of that community court, may appeal to the magistrate.⁸² Furthermore, an appeal against an order or decision made or given by a magistrate's court is to lie to the High Court.⁸³

Conclusion

The foregoing represents the judicial structure of Namibia as an independent organ of state. The independence of the judiciary as embodied in the letter and spirit of the Namibian Constitution and the new dispensation is a sine qua non for the dispensation and administration of justice. Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States of America, in her address to the Arab Judicial Forum in Manama, Bahrain, on 15 September 2003, on the role of the judiciary in an independent sovereign state, had the following to say:

82 Section 28, Community Courts Act.

83 Section 29(1), Community Courts Act.

The structure of the Namibian judicial system

Alexander Hamilton, one of the Framers of the United States Constitution, wrote in The Federalist No. 78 to defend the role of the judiciary in the constitutional structure. He emphasised that “there is no liberty, if the power of judging be not separated from the legislative and executive powers. ... [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.” Hamilton’s insight transcends the differences between nations’ judicial systems. For only with independence can the reality and the appearance of zealous adherence to the Rule of Law be guaranteed to the people. As former U. S. President Woodrow Wilson wrote, government “keeps its promises, or does not keep them, in its courts. For the individual, therefore, ... the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts.” Let us keep in mind the importance of independence to the effective functioning of the judicial branch.

An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent: its sphere of authority protected from the influence, overt or insidious, of other government actors.

The principle that an independent judiciary is essential to the proper administration of justice and the promotion of liberty and the rights of the individual is recognised in the jurisprudence on democratic government. But the task of an independent judiciary is not only to dispense justice according to the law and promote and maintain the rights of the individual against the onslaught of state power: it includes the development of the law. It involves the maintenance of the integrity of the institution. This is essential for the predisposition of the members of the judiciary towards the performance of the well-known traditional tasks and, more importantly, the development of the law. In a jurisdiction such as Namibia’s, which operates under a written Constitution as the supreme law of the land, the achievement of this role involves the performance of judicial functions with regard to the anticipated objectives of the Constitution. This means that the interpretative function needs to aim at ensuring both the legislation and the common law comply with the precepts of the Constitution. The necessary prerequisites for the achievement of this goal are the personal integrity of the judge (probity and impartiality of judges) and the independence of the judiciary. By *independence of the judiciary* one is not referring to structural independence alone, but also that cultural and institutional independence which grants the judiciary in the common law jurisdiction that peculiar characteristic of judicial activism necessary for the development of the law. The Namibian Constitution and the legal system grant the judiciary this jurisdiction, and this point is better illustrated with the institutional constraints imposed on the country’s pre-independence judiciary.

The structure of the Namibian judicial system

The judiciary of South West Africa was constrained by its integration into the South African legal system, operating as it did under the political and constitutional framework of legislative supremacy and analytical positivism. It is in the light of these obvious constraints that one cannot but acknowledge the fortitude of the judiciary in its attempt to integrate human rights values in their judgments, especially after the enactment of Proclamation R101 of 1985.

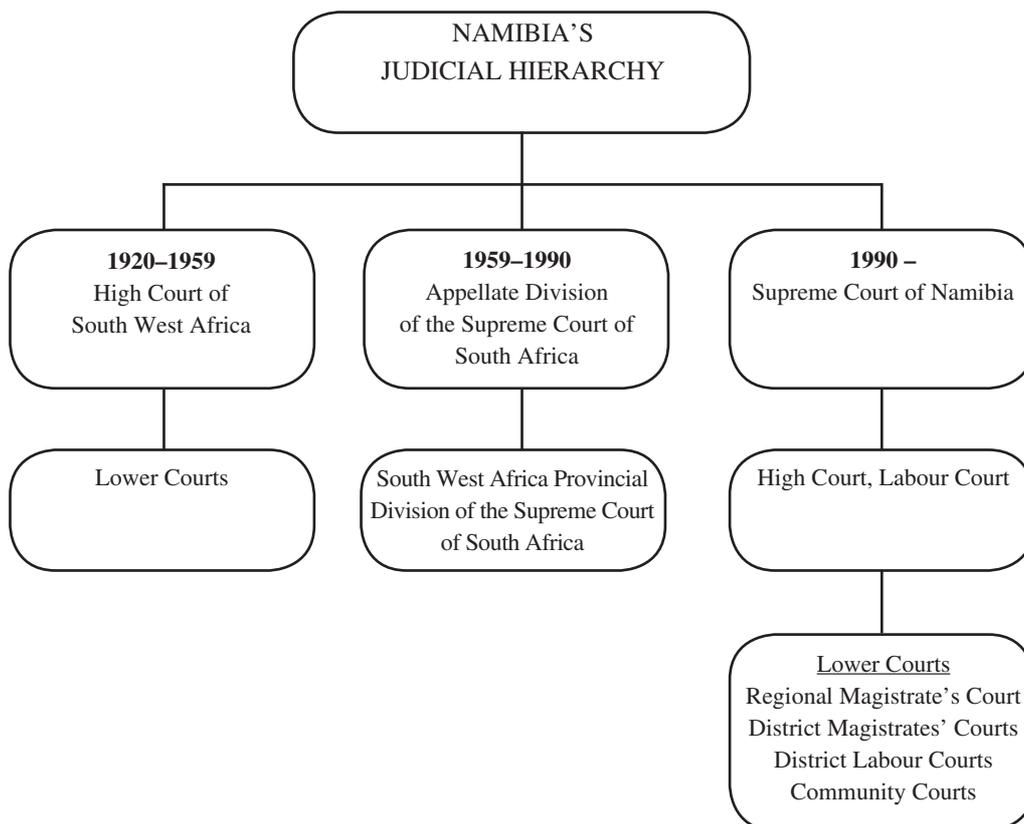
As indicated earlier, after it had attained independence and sovereignty, Namibia adopted a Constitution with an entrenched Bill of Rights and a provision that elevated the Constitution to be the supreme law of the land. This effectively replaced the doctrine of legislative sovereignty – which, from the history of the legal systems of both South Africa and Namibia, was equated with legislative supremacy – with the doctrine of constitutional supremacy, which has provided the Namibian judiciary with the necessary 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, since independence, the Namibian courts have adopted a values-oriented approach to such interpretation and have thereby developed home-grown jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people. GJC Strydom, the then Chief Justice, in his address to judicial officers at the first retreat of the Office of the Attorney-General at Swakopmund from 20 to 22 November 2002, stated the following:

It is trite that ordinary presumptions of interpretation will not independently suffice in interpreting such a document [the 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 ... [I]n interpreting the Constitution, especially 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 decision to encompass both aspects of constitutional interpretation and judicial independence[.]

This approach of exercising constitutional interpretation and judicial independence guarantees the development of the home-grown jurisprudence that is required for development of the law. But the growth of home-grown jurisprudence should not be seen as the sole responsibility of the judiciary: academia and legal practitioners also play a role. This calls for research, the constructive review of judgments in local law journals, assistance in editing judgments for law reports, the appointment of members of academia to the bench as auxiliary judges, and the provision of a forum for regular interactions of all role players in the legal system.

The structure of the Namibian judicial system

Finally, it must be reiterated that the maintenance of the independence of the judiciary depends on prerequisites other than those mentioned earlier in this article. For the judges and magistrates to carry out their roles effectively, both the Judicial Service Commission and the Magistrates' Commission are obliged to ensure that the courts have sufficient and well-trained staff, as well as the necessary infrastructural resources and facilities sufficient and necessary for the effective and efficient operation of the courts. Other branches of government are entreated to work in partnership with the judiciary to support judicial decisions in order to instil in the public that confidence in the legal system and the judiciary of Namibia necessary to ensure the individual's fidelity to law.



SECTION IV

**The independence of the
prosecutorial authority**

The uniqueness of the Namibian Prosecutor-General

Lovisa Indongo

Introduction

The office of the Prosecutor-General in Namibia is a constitutional establishment in terms of Article 88 of the Namibian Constitution, which declares that –

[t]here shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission.

The Judicial Service Commission, in turn, is a body constituted of the Chief Justice, a judge, the Attorney-General, and two members of the legal profession elected by their peers. The Constitution dictates that no person is eligible for appointment as Prosecutor-General unless such person is legally qualified and entitled to practice in all courts in Namibia and is a fit and proper person, by virtue of their experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office. The Prosecutor-General is not a political appointee. The Constitution is silent on the Prosecutor-General's term of office. However, other officers that are appointed in the same manner as the Prosecutor-General, i.e. judges (Article 82) and the Ombudsman (Article 90), hold office until the age of 65 with the option for the President to extend that age to 70. In Articles 84 and 94, the Constitution makes provision for the removal of judges and the Ombudsman from office. There are no similar provisions for the Prosecutor-General.

The powers of the Prosecutor-General

The Constitution

Under Article 88(2), the Prosecutor-General has the powers –

- (a) *to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;*
- (b) *to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;*
- (c) *to perform all functions relating to the exercise of such powers;*
- (d) *to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;*
- (e) *to perform all such other functions as may be assigned to him or her in terms of any other law.*

The uniqueness of the Namibian Prosecutor-General

In the matter of *Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order and Others*,¹ it was held that the discretion to decide whether to proceed with a prosecution or to withdraw it is one of the fundamental functions in exercising a duty to prosecute. The Constitution makes the exercise of prosecutorial powers subject to its provisions in Article 88(2)(a). The Prosecutor-General, therefore, does not have the power to act contrary to constitutional provisions, and any such contrary action is invalid. Article 5 in Chapter 3 of the Constitution, which sets out fundamental human rights and freedoms, reads as follows:

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.

Fundamental rights and freedoms include the protection of life and liberty, respect for human dignity, protection from slavery and forced labour, equality and freedom from discrimination, protection from arbitrary arrest and detention, fair trial, the protection of privacy as well as the family, children’s rights, property, political activity, and culture. Article 18 imposes a duty on all administrative bodies and officials to act fairly, reasonably and within the requirements imposed upon them by common law and/or statute. The Article further provides that persons aggrieved by the exercise of administrative acts and decisions have the right to seek redress from the courts and or a tribunal. Similarly, Article 25 provides for the enforcement of fundamental rights and freedoms by a competent court. It also provides for legal assistance to any aggrieved person by the Ombudsman.

The Criminal Procedure Act, 1977 (No. 51 of 1977)

The Prosecutor-General derives his/her powers and legitimacy from the above constitutional provisions, which are complemented by the Criminal Procedure Act. Section 2(1) of the Act gives the Prosecutor-General the prerogative to institute criminal prosecutions over all offences that fall within the jurisdiction of Namibian courts. All such prosecutions are to be instituted on behalf of the Namibian people and in the name of the state, save for private prosecutions as provided for in section 13(1) of the Act. The Prosecutor-General has the power to take over private prosecutions and continue with the prosecution. Section 6 of the Act sets out the Prosecutor-General’s powers to withdraw charges before the accused has pleaded, and to stop proceedings thereafter. A prosecution can only be stopped with the written consent of the Prosecutor-General or any other

¹ 1994 (1) SA 387 (C).

The uniqueness of the Namibian Prosecutor-General

person authorised to do so. Section 61 of the Act sets out the Prosecutor-General's powers to summon an accused person and stipulate an admission-of-guilt fine. The Prosecutor-General also has the power to authorise an accused's release on bail as provided for by section 68 of the Act.

Article 88(2)(b) of the Constitution stipulates that the Prosecutor-General has the right to prosecute appeals. The right of appeal by the Prosecutor-General has always been a recognised right. Prior to the amendment of sections 310 and 311 of the Criminal Procedure Act by the Criminal Procedure Amendment Act, 1993 (No. 26 of 1993), the Prosecutor-General had a right of appeal, but this right was confined to appeal decisions of the High Court in favour of a convicted person, and then only on a question of law. The 1993 Amendment Act, being an express statutory provision, established the Prosecutor-General's general right of appeal, and gave wide powers of appeal to the office. In the matter of *S v Delie (2)*,² it was held that the legislature had intended to grant wide powers of appeal to the Prosecutor-General. The Amendment Act gave the Prosecutor-General the power to appeal against any decision given in favour of an accused by a magistrate's court or the High Court (sections 347 and 354 of the Criminal Procedure Act). These powers are almost equal to the rights accorded exclusively to accused persons prior to 1993. These provisions empower the Prosecutor-General to appeal against the granting of bail, a decision on admissibility of evidence in favour of the accused, etc. Such appeals can be taken as far as the Supreme Court in terms of section 348 of the Criminal Procedure Act. In the matter of *S v Van Den Berg*,³ it was held that the amended section 310 of the Criminal Procedure Act was only aimed at lower court decisions and resulting orders given after the amendment of the section. The fact that proceedings were instituted before the amendment of the section has no effect on the applicability of the section, provided the decision appealed against was given after the amendment. In terms of section 4 of the Criminal Procedure Act, the Prosecutor-General can delegate his/her powers to any person assigned to the office in terms of the Public Service Act, 1995 (No. 13 of 1995) or any other law.

The Prosecutor-General's independence and accountability

In Article 87(a), the Constitution states that the Attorney-General exercises final responsibility for the office of the Prosecutor-General. It is because of this provision that, in August 1993, the Attorney-General instructed the Prosecutor-General to withdraw the prosecution in a certain matter. The Prosecutor-General

2 2001 NR 286 (SC).

3 1995 NR 23 (HC).

The uniqueness of the Namibian Prosecutor-General

refused to follow this instruction and the Attorney-General successfully applied for a postponement of the trial in order to seek an interpretation of the relationship between the two offices from the Supreme Court.

In the matter of *Ex Parte: Attorney-General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,⁴ the court was asked to determine the constitutional relationship between the Attorney-General and the Prosecutor-General in respect of whether the Attorney-General had the authority to do the following:⁵

- i. *To instruct the Prosecutor-General to institute a prosecution, decline to prosecute or terminate a pending prosecution in any matter;*
- ii. *To 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;*
- iii. *To require the Prosecutor-General to keep 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 or prosecutorial authority.*

In its deliberations, the court considered different models in the Commonwealth of how the functions of the Attorney-General and the Prosecutor-General were arranged, as follows:

- **Model 1:** The attorney-general is a public servant whose office is combined with the public functions of a director of public prosecutions and is not subject to the directions or control of any other person or authority. (The Bahamas, Botswana, Cyprus, Kenya, Malta, Pakistan, the Seychelles, Sierra Leone, Singapore, South Africa, Sri Lanka, Trinidad and Tobago, and Western Samoa)
- **Model 2:** The attorney-general is a political appointee and member of the government holding ministerial office, but does not sit regularly as a member of the cabinet. (England and Wales)
- **Model 3:** The attorney-general is a member of the government and normally included in the ranks of cabinet ministers. In some jurisdictions (e.g. most Canadian provinces as well as the federal government of Canada; Australia; Ghana; and Nigeria), the office of the attorney-general is combined with the minister responsible for justice. Where a separate office is responsible for public prosecutions, in the ultimate analysis, this office is subject to the direction and control of the attorney-general.

4 1998 NR 282 (SC).

5 (ibid.:285).

The uniqueness of the Namibian Prosecutor-General

- **Model 4:** The director of public prosecutions is a public servant who is not subject to the direction or control of any other person or authority. (Guyana and Jamaica)
- **Model 5:** The director of public prosecutions is a public servant subject to the directions of only the president in the exercise of his/her powers. (Tanzania)
- **Model 6:** The director of public prosecutions is a public servant, generally not subject to the control of any other person. However, if s/he is of the view that a case involves general considerations of public policy, s/he is obliged to bring the case to the attention of the attorney-general, who is empowered to direct him/her. (Zambia)

The court then held that the Namibian Attorney-General's appointment was a political one and that his/her functions were executive in nature. It also held that the Prosecutor-General, on the other hand, was not a political appointee and exercised a quasi-judicial function. The court further held that fundamental human rights and freedoms would not be protected if a political appointee were allowed to dictate which prosecutions were initiated or terminated, or how they should be conducted. In addition, the court held that such a position would not be in accordance with the ideals and aspirations of the Namibian people, taking into account the nation's historical background. Acting Judge of Appeal Leon finally decided that –⁶

[t]here is nothing in the Namibian Constitution that makes the office of the Prosecutor-General subject to the superintendence or direction of the Attorney-General”

“[T]he office [of the Prosecutor-General], appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter can exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor.

The court held that the Constitution created an independent Prosecutor-General on the one hand, while enabling the Attorney-General to exercise responsibility for the office of the Prosecutor-General on the other. The above conclusion was viewed as the only one which reflected the spirit of the Constitution. By this decision, the Supreme Court clearly defined the relationship between the Prosecutor-General and the Attorney-General. This decision also cemented the fact that the Prosecutor-General was independent and not subject to any superintendence or direction by any body or organ. This puts the Namibian

6 (ibid.:293B, 302A–B).

Prosecutor-General on par with his/her counterparts in Guyana and Jamaica (Model 4). However, the decision did not shed any clarity on the role of the Prosecutor-General as regards what exactly the role entailed, and how it was to be performed. For example, are there any other considerations in the exercise of prosecutorial powers, or is the Prosecutor-General duty-bound to prosecute every criminal case that meets the prima facie case test? Furthermore, the court did not elaborate on what was meant by the Prosecutor-General exercising a “quasi-judicial”⁷ function.

A quasi-judicial function

Baxter (1984) argues against the labelling of acts as *judicial*, *quasi-judicial*, *legislative*, etc., stating that such labelling is confusing.⁸ Wiechers (1985) defines a *quasi-judicial* act as one performed by a non-judicial body that resembles the court’s model of conduct. For an act to be classified as *quasi-judicial* it must be performed while exercising discretion. The general rule is that the principles of natural justice have to be complied with in the exercise of quasi-judicial functions.⁹ However, there is no requirement that the principles of natural justice be complied with in all cases involving the exercise of quasi-judicial functions. These principles also do not have to be complied with when they are expressly or by necessary implication excluded either by statute and/or common law. The nature of the act determines whether or not the principles of natural justice have to be complied with. There are further requirements that the act should not only involve the exercise of discretion, but should also affect a person or a person’s existing rights, powers, or privileges.¹⁰ Furthermore, the body is obliged to exercise its powers for the purpose such powers were conferred upon it. As Wiechers (1985) points out, the application of the principles of natural justice simply means that the decision-maker has to obtain as much information as possible about the circumstances in each case, and serve a wider, public interest in a wholly unbiased and honest manner.

The principles of natural justice have generally been summed up in the maxim *audi alteram partem* (“hear the other side”).¹¹ According to Wiechers (*ibid.*), the maxim includes a range of duties, including the following:

7 (*ibid.*:289).

8 Baxter, L. 1984. *Administrative law*. Cape Town: Juta.

9 Wiechers, M. 1985. *Administrative law*. Durban: Butterworths.

10 Judge Steyn in *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A).

11 (*ibid.*).

The uniqueness of the Namibian Prosecutor-General

- The duty to give all involved parties the opportunity to state their cases
- The duty to communicate all potentially prejudicial facts and considerations to the person so affected so they can answer thereto
- The duty to provide reasons for decision taken, and
- The duty that the organ exercising the discretion acts impartially.

The courts have acknowledged that failure to comply with the requirement to provide reasons for decision taken does not in itself amount to a breach of the rules of natural justice, but could indicate the presence of bad intentions or ulterior motives on the side of the actor.¹² This is because some organs of state have what is termed *free discretion* and, as such, need not give reasons for their decisions; indeed, this appears to be the Prosecutor-General's position.¹³ Wiechers (ibid.) concludes that the rules of natural justice serve to ensure that administrative organs that perform judicial and quasi-judicial functions duly apply their minds to matters before them. Baxter (1984) also points out that quasi-judicial decisions are less easily reversible than other administrative actions.

The Prosecutor-General's position can be summarised in the following terms. S/he has absolute independence or free discretion in the exercise of prosecutorial powers, provided the following constitutional requirements are met:

- The Prosecutor-General acts within the powers conferred on the office to prosecute on behalf of the Namibian people and in the name of the state
- The Prosecutor-General exercises such powers subject to constitutional provisions and keeps the Attorney-General properly informed on relevant matters, and
- The Prosecutor-General duly applies his/her mind to the case before him/her, acts honestly and impartially, and discloses to the accused all facts on which the charges are based.

These are the only requirements in the exercise of the Prosecutor-General's discretion. As was remarked in the *Ex Parte: Attorney-General* matter,¹⁴ the Prosecutor-General's discretion – even though exercised by an independent organ – is not exercised in a lawless sphere: in a state founded on the principles of law, like Namibia, the state and administrators are bound by law.

The above provisions clearly indicate that the Prosecutor-General is independent in every sense of the word and is not subject to any outside influence and/or review. However, the provisions fall short of setting out what the role of the Prosecutor-General entails, and how s/he is to perform it.

12 (ibid.).

13 *Ex Parte: Attorney-General*, 1998 NR 282 (SC).

14 (ibid.).

The uniqueness of the Namibian Prosecutor-General

The above provisions also mean that the Prosecutor-General is not accountable to any body or person for prosecutorial decisions. The only challenges that can be brought against him/her are those directed at the office-holder personally. For example, that s/he acted with malice or ulterior motives or is incompetent. The Judicial Service Commission is the only body that exercises authority over the Prosecutor-General, and can recommend his/her removal from office to the President. Even though the Commission has no powers to interfere with the Prosecutor-General's decisions, it has the power to look at the latter's personal conduct. The Commission will examine the Prosecutor-General's bona fides and consider his/her intentions; if found to be malicious, s/he will be found guilty of gross misconduct and can be removed from office. In terms of Article 84(1) of the Constitution, a Prosecutor-General can only be removed from office by the President acting on the recommendation of the Judicial Service Commission. It can be argued, however, that a wide and general accountability to Parliament, through the Attorney-General – who has no effective powers over prosecutions, does not ensure that individual decisions by Prosecutors-General are made fairly and equitably.¹⁵

It may be argued that the Prosecutor-General exercises power without responsibility since there is no review procedure. Indeed, the Prosecutor-General's decisions cannot be judicially challenged unless they are unconstitutional – and even then, only a party who has been affected and aggrieved directly by a Prosecutor-General's decision can lodge a challenge against it. In Article 18, the Constitution makes provision for people aggrieved by the acts of administrative bodies and administrative officials to seek redress before a court. Does this right extend to prosecution decisions? Are there other grounds upon which prosecution decisions can be challenged? Does the current position offer enough protection to the public against the extensive powers of the Prosecutor-General?

All the powers, none of the responsibilities?

There are no policies regulating the exercise of the Prosecutor-General's powers. The very few guidelines that exist include instructions from the Prosecutor-General to prosecutors to whom the power to prosecute has been delegated, as contained in circulars issued by the Prosecutor-General. Such circulars, which are directives issued by the Prosecutor-General to all prosecutors, deal either with specific crimes or a specific class of suspects. For example, one such circular directs that prosecutors forward all cases involving police officers of

¹⁵ Mansfield, G & J Peay. 1987. *The Director of Public Prosecutions: Principles and practices for the Crown Prosecutor*. London: Tavistock Publications.

The uniqueness of the Namibian Prosecutor-General

the rank of Deputy Commissioner and above as suspects to either the Deputy Prosecutor-General in the region or the regional court prosecutor for a decision. Similarly, all dockets involving political office-bearers are to be forwarded to the Prosecutor-General for a decision. These circulars are not legal rules guiding the decision-making process: they are not legally binding. They are issued on a needs basis only, as a response to specific incidents, and not as a regular exercise. For example, three circulars were issued during 2000, one during 2001, and none in 2002.

Another form of guidance on the exercise of prosecutorial powers can be found in moratoria that the Prosecutor-General issues from time to time. Moratoria have been used twice since the office's inception in 1990. The first, being on prosecutions under the Casinos and Gambling Act, 1994 (No. 32 of 1994), was imposed pending a High Court decision; the second was on prosecutions under the Combating of Immoral Practices Act, 1980 (No. 21 of 1980), which was also imposed awaiting a High Court decision.

The only legally binding guideline for the exercise of prosecutorial powers can be found in the objective common law principle, which requires a *prima facie* case to be present for the institution of a prosecution. That is, there should be sufficient admissible evidence providing a reasonable prospect of a successful prosecution.¹⁶ An important factor of this principle is that the decision should be based on admissible evidence, not just any evidence. Where there is no *prima facie* case, the prosecutor should not prosecute; should s/he nonetheless do so, the prosecution will be unfounded; it may also be malicious, and may lead to a delictual action of malicious prosecution.

Malicious prosecution is a common law intentional tort whose elements include intentionally (and maliciously) instituting or pursuing, or causing such institution or pursuit, of a legal action (either civil or criminal) brought without probable cause and dismissed in favour of the victim of the malicious prosecution. In some jurisdictions, the term *malicious prosecution* denotes the wrongful initiation of criminal proceedings, while the term *malicious use of process* denotes the wrongful initiation of civil proceedings.¹⁷ These delictual actions can only be brought after the criminal proceedings are completed and the accused acquitted. The person suing for malicious prosecution has to prove that there was no case set out in the docket from the outset.

16 As defined in National Prosecuting Authority of South Africa. 1999. *Manual for the National Prosecuting Authority of the Republic of South Africa*. Pretoria: NPA.

17 White, G Edward. 2003. *Tort law in America: An intellectual history*. Available at http://en.wikipedia.org/wiki/Malicious_prosecution; last accessed 20 August 2008.

The uniqueness of the Namibian Prosecutor-General

The Prosecutor-General – and prosecutors – have complete discretion on how they handle cases that come before them, subject only to the prima facie principle and the fact that only the Prosecutor-General has the power to decline to prosecute in cases where a prima facie case is set out. The provisions of Article 88(2)(a) of the Constitution appear to oblige the Prosecutor-General to take prosecutorial action in all cases where a prima facie case is set out. Such action can be court proceedings, fixing an admission-of-guilt fine, or deciding to take no further step. An admission-of-guilt fine gives the accused the option of accepting his/her guilt and resolving the matter without going through the court process. In fixing an admission-of-guilt fine, the prosecutor is bound by the determination made by the district's magistrate, which sets a limit on the amount of the fine that may be stipulated. In deciding what action to take, prosecutors are guided by the legal principle of *de minimus* (i.e. the law does not concern itself with trivialities). This principle has considerable influence in a decision to take no further prosecutorial steps in trivial cases.

Prosecutorial discretion is essential for democratic prosecutorial services and the proper exercise of prosecutorial functions. However, there is consensus amongst writers on criminal justice that prosecutorial practice should be based on legal criteria and set policies to allow for supervision and accountability. The United Nations Guidelines on the Role of Prosecutors¹⁸ require countries where prosecutors are vested with discretionary functions to provide guidelines for the exercise of such powers in order to enhance fairness and consistency in prosecutorial decision-making. It is suggested that these guidelines be in the form of legislation or published rules or regulations. Another argument for having a legally binding prosecution policy is the protection it affords the public. When a prosecution policy is transparent and applied fairly, equally and consistently, it dispels the notion of bias. It is also important that such policy be enforceable by the courts in order to offer adequate protection.

We now look at some aspects of the exercise of prosecutorial powers by the Prosecutor-General.

18 United Nations. 1990. *Guidelines on the role of prosecutors: Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*. Available at <http://www2.ohchr.org/english/law/pdf/prosecutors.pdf>; last accessed 19 October 2008.

Consistency

Prosecutor-General circulars are used as a means of ensuring consistency and uniformity in prosecutorial decision-making. High and Supreme Court judgments are also regularly circulated to all prosecutors for the same reason. Prosecutors are meant to study these materials and, in so doing, become acquainted with the law and practice. However, there is no specific measure to ensure consistency and uniformity, and all prosecutors have full discretion in making prosecutorial decisions. But can there in fact be consistency and uniformity in such a system?

Transparency

There is no obligation or legal duty on the Prosecutor-General to give reasons for his/her decisions to any person, including crime victims. Furthermore, the manner in which prosecutorial decisions are made remains a mystery. There is also no established policy giving the public a right to know the reasons for prosecutorial decisions or a right to disclosure of the factors that impact upon prosecutorial decision-making. But again, can such a process actually be transparent?

Challenging the decision

The powers vested in the Prosecutor-General by the Constitution are absolute, and there is no review or oversight over prosecutorial decisions. As was confirmed in the Supreme Court matter of *Ex Parte: Attorney-General*,¹⁹ there is no review over the Prosecutor-General's decisions. The only requirement is that the Prosecutor-General keep the Attorney-General properly informed of all prosecutions or intended prosecutions that might arouse public interest, or of any high-profile cases, so that the Attorney-General can answer to Parliament and the Cabinet. The total independence of the Prosecutor-General can be viewed as a safeguard, as the Prosecutor-General needs to exercise his/her powers in terms of the law, having due regard to the facts of each case, and not falling prey to the whim or will of outsiders.

Private prosecution

The only mechanism that might be viewed as a remedy against a prosecutorial decision not to prosecute is the power provided for by section 5 of the Criminal Procedure Act. According to this section, where the Prosecutor-General has declined to prosecute a criminal matter, a private person with substantial interest

¹⁹ *Ex Parte: Attorney-General*, 1998 NR 282 (SC).

in the trial arising out of some injury suffered by that person as a result of such offence or the spouse of that person, or in cases where the death of a person is alleged to have been caused by the offence, the spouse or child of the deceased or the legal guardian or curator of a minor or lunatic may personally or with a legal practitioner institute and conduct a prosecution in respect of that offence in any competent court. This section also gives an interested party the right to request a certificate of *nolle prosequi* from the Prosecutor-General where s/he has declined to prosecute. This certificate enables the interested party to bring a private prosecution, thus ensuring that a case goes to court even when the Prosecutor-General has declined to prosecute. If proceedings are still not instituted within six months of its issue, the certificate of *nolle prosequi* lapses. Section 5 of the said Act also empowers an interested person to obtain a court order compelling the Prosecutor-General to make a decision to prosecute or not, in cases where such decision has been outstanding for more than six months.

The right to a private prosecution, however, is not a review of the Prosecutor-General's decision not to prosecute. In no way is the Prosecutor-General's decision not to prosecute questioned, examined or assessed. But as indicated earlier, the Prosecutor-General still has the power to take over a private prosecution instituted upon the issuing of a certificate of *nolle prosequi*.

Judicial review

The only prosecution decision that can be said to be open to review occurs in instances where the Prosecutor-General decides to appeal against a court decision given in favour of the accused person. Here, the respondent (the *accused* in the initial proceedings) can raise a challenge against the decision to appeal, in which case the court dealing with the appeal can consider the issue of whether the Prosecutor-General acted correctly in appealing. Here, the court has the power to examine the decision to appeal and the legal ground upon which the appeal is based. As a result, the court can find that the Prosecutor-General acted wrongly in appealing, and can dismiss the appeal – awarding costs to the respondent if deemed fit.

There is no mechanism in Namibian law to compel a prosecutor to reach a decision to prosecute or not, save for purposes of getting a certificate of *nolle prosequi* in terms of section 5 of the Criminal Procedure Act. This position leaves the public at the mercy of the Prosecutor-General. The law offers them no protection in this regard because decisions by prosecutors stand – whether they are right or wrong – and there is no recourse for the public to challenge them. Even prosecution decisions that leave much to be desired cannot be challenged.

Conclusion

The current lack of transparency and consistency in the Office of the Prosecutor-General leads to unequal application of the law and a poor understanding of the prosecution process. There should be some degree of review of prosecution decisions: ideally, a judicial review. However, the existence of a legally binding policy is a necessity for judicial review, as the courts can only review decisions to ensure that the body concerned acted within its powers and according to the prescribed manner.

Some comfort can be derived from the fact that, for as long as the courts are independent and the Judicial Service Commission functions properly, and in view of the practice of compulsory docket disclosure, where the accused is protected from unfounded or malicious prosecution, the peculiar complete independence and vast powers of the Prosecutor-General should cause no problems. The current position is to be preferred to one where executive influence can impact on prosecutorial decision-making and functioning. Such influence can be far more dangerous than an individual prosecutor pursuing some ideology or personal belief.

The independence of the prosecutorial authority of South Africa and Namibia: A comparative study

Nico Horn

Introduction

Prosecution and prosecutorial authority did not receive much attention in South African constitutional jurisprudence.¹ In Namibia, on the other hand, it was one of the first constitutional questions that the Supreme Court had to deal with. The Namibian Supreme Court opted for a radical separation between the executive and the prosecutorial authority. South Africa had the opportunity to follow the Namibian example, but rejected it radically.²

Prosecutorial independence is closely related to the independence of the judiciary. If controversial prosecutions can be stopped before they get to the courts, even the most independent tribunal cannot guarantee equal treatment for all. This paper compares the two authorities in the light of their common history.

The legal history of the independence of the prosecuting authorities in South Africa and Namibia³

The histories of South Africa and Namibia have been interwoven for centuries. Long before the colonisation of Namibia by Germany in 1884, people from South Africa moved to and from Namibia. Nama leader Jan Jonker Afrikaner and his tribe moved from Winterhoek in the Cape Colony to central Namibia; the Basters moved from the northern Cape Colony to Namibia; and even a group of Calvinist Afrikaners, the Dorslandtrekkers, (or *Boere*, as they were known) traversed Namibia on their way to Angola.⁴

1 *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC) (1). Also reported in 1995 (8) BCLR 1070 (NmSC).

2 *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), par. 141 G.

3 I am indebted to the Heads of Argument on behalf of the Prosecutor-General by PJ van R Henning, SC and CHJ Badenhorst, Counsel for the Prosecutor-General in *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1) for the structure of this section and some valuable information.

4 The Dorslandtrekkers were (white) Afrikaner Calvinists who left the Transvaal Republic in reaction to the political and theological liberalism of President Burgers. They approached

When South Africa took over the administration of *Deutsch-Südwestafrika* (“German South West Africa”) during World War I in 1918, the prevailing South African common law was made applicable to the occupied territory. After WWI, the connection between the Union of South Africa and *Deutsch-Südwestafrika* became formal. On 17 December 1920, the Mandate Commission of the League of Nations approved the administration of the territory by South Africa under a so-called Class C mandate. The wording of the mandate was controversial from the outset. It mandated *His Britannic Majesty to be exercised on his behalf by the government of the Union of South Africa*.⁵

Proclamation 1 of 1921 gave the Administrator legislative powers over what was then known as *South West Africa*. Act 42 of 1925 of the South African Parliament instituted a constitution for the territory.⁶

From 1919 onwards, several South African laws were enforced in Namibia. In some cases, proclamations by the Administrator were brought in line with South African legislation, with minor adaptations. In practice, it meant that South Africa could implement its law in the territory. It had the effect that South West Africa was governed from Pretoria as an integral part of the Union of South Africa.

The mandate had very specific restrictions. General Jan Christiaan Smuts, the then prime minister of the Union of South Africa, was instrumental in including a section preventing the mandate holders from occupying the mandated areas. This was contrary to the wishes of Australia and New Zealand, who, in respect of Papua New Guinea, the German colony in the South Seas, saw occupation as the only solution. The mandate holders also had to exercise their mandates for the benefit of the indigenous people of the mandated countries.⁷

Nevertheless, in *R v Christians*,⁸ the Appellate Division of the Supreme Court of South Africa ruled that South Africa held sovereign power over South West Africa. Wiechers (1972:450) points out that the court was not compelled to go

the young Paul Kruger to lead the trek, but he declined. He later became the President of the Republic and led the Republic into war against England in 1899.

5 Carpenter, G. 1987. *Introduction to South African International Law*. Durban: Butterworths, p 23; Dugard, J. 1973. *The South West Africa/Namibia dispute*. Berkeley: University of California Press, p 68.

6 Carpenter (1987:22).

7 Wiechers, M. 1972. “South West Africa: The background, content and significance of the opinion of the World Court of June 1971”. *Comparative and International Law Journal of Southern Africa*, 5(1972):123.

8 1924 AD 101.

The independence of the prosecutorial authority of South Africa and Namibia

into the issue of sovereignty since the much wider *maiestas* was an element of high treason, and not sovereignty. The South African government nevertheless accepted its status as the sovereign of South West Africa after the *Christians* case.⁹

The United Nations Organisation (UN) was formed in 1945, after the end of WWII. Following this, the League of Nations was disbanded in 1946. The issue of the mandated territories was not resolved at the League of Nations' final meeting. The League accepted a resolution that the mandate holders would administer the mandated territories in the same spirit as before, until a new arrangement was reached between such mandate holders and the UN.¹⁰

A long and often bitter struggle soon developed between South Africa and the UN. It is not important for this paper to go into the detail of the legal battle between South Africa and the international community; suffice it to say here that, from a legal perspective, Namibia was governed as if it were part of South Africa's sovereign territory. The government of the Union of South Africa was of the opinion that all obligations of the mandate holders lapsed when the League of Nations dissolved, and that South Africa had the right to integrate South West Africa into South Africa.

From then on, the greatest majority of South African Acts were also made applicable to South West Africa over a period of time until 1985. In 1919, South Africa established the High Court of South West Africa as the judicial authority for the territory, with the Appellate Division of the Supreme Court of South Africa as the final Court of Appeal.

Prior to the formation of the Union of South Africa in 1910, the prosecution authority, at least in the Transvaal, vested absolutely in the Attorney-General.¹¹ With the formation of the Union of South Africa, section 139 of the South African Act of 1909 basically confirmed the independence of the prosecuting authorities.

The formulation of section 139 was confirmed in the Criminal Procedure and Evidence Act of 1917, as follows:¹²

This right and duty of prosecution vested in and entrusted to such Attorneys-General or Solicitor-General (as the case may be) is absolutely under his management and control.

9 Wiechers (1972:452).

10 (ibid.:453).

11 *Gillingham v Attorney-General and Others* 1909 TS 572, at 573.

12 Section 7(2).

The independence of the prosecutorial authority of South Africa and Namibia

Prosecutions in South West Africa were in the hands of the Attorney-General of South West Africa. Like his South African counterpart, the South West African Attorney-General was independent and free from political oversight. The Administrator of South West Africa issued Proclamation 5 of 1918 to make the Criminal Procedure and Evidence Act of 1917 effective in the Protectorate of South West Africa, with minor special conditions. The special conditions of the Proclamation did not affect section 7(2) of the said Act.

The Administrator's Proclamation 20 of 1919 repealed Proclamation 5 of 1918, but confirmed the independence of the Attorney-General. Only the title was changed to *Crown Prosecutor*. Section 7 of the Criminal Procedure and Evidence Act of 1917 was substituted by the following:

- 7 (1) *The Crown Prosecutor of the Protectorate is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of His Majesty the King in respect of any offence which is alleged to have been committed within the jurisdiction of the High Court of South West Africa.*
- (2) *That right and duty of prosecution vested in and entrusted to such Crown Prosecutor is absolutely under his own management and control.*

Consequently, the position of the prosecutorial powers in South Africa and Namibia were practically the same: both prosecuting authorities had absolute autonomy and were free from political control. However, in 1926, their ways parted. The South African Criminal and Magistrates' Courts Procedure Amendment Act, 1926 (No. 39 of 1926) amended section 139 of the South African Act and sections 7(1) and (2) of the Criminal Procedure and Evidence Act of 1917. Sections 1(3) and (4) placed the Attorney-Generals under the control and directions of the minister.

The 1926 Act was not made applicable in South West Africa, so the Crown Prosecutor of South West Africa remained independent and free of political control. In 1935, the Criminal Procedure and Evidence Proclamation 30 of 1935 repealed Proclamation 20 of 1919. The Crown Prosecutor was renamed *Attorney-General*. Section 7(2) of the Proclamation confirmed that –

... the right of prosecution vested and entrusted to such Attorney-General is absolutely under his own management and control.

The Criminal Procedure Ordinance 34 of 1963 repealed Proclamation 30 of 1935. Although the exclusive authority of the Attorney-General is not stated as explicitly as in the earlier proclamations, the South African practice of placing the Attorney-General under political control was not followed, as section 5(1) shows:

The independence of the prosecutorial authority of South Africa and Namibia

The Administrator shall, subject to the laws relating to the public service, appoint an Attorney-General to the territory who is vested with the sole right and with the duty of prosecuting in the name of the State, in any court in respect of any offence which is alleged to have been committed within the jurisdiction of the Supreme Court.

In South Africa, the trend of political control was firmly established by the General Law Amendment Act, 1935 (No. 46 of 1935). In this vein, a new section 7(4) was added to Act 31 of 1917, and read as follows:

Every Attorney-General and Solicitor-General shall exercise their authority and perform their functions under this Act and under any other Act subject to the control and direction of the Minister who may, if he thinks fit, reverse any decision arrived at by an Attorney-General or a Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function.

Thus, from 1935, the prosecuting authority became part of the authority and power of the minister of justice. The minister had the legal right to take over the role of the Attorney-General and solicitor-generals at his own discretion! The 1935 formulation also found its way into the Criminal Procedure Act, 1955 (No. 51 of 1955), which repealed Act 31 of 1917.

As a consequence of these different developments, the Attorney-General in South West Africa had greater authority and much wider powers than his counterparts in South Africa. However, in South West Africa, political intervention was complicated; and whenever it happened, it was subtle – unlike its blunt counterpart popular in South Africa during the apartheid years.

On 22 July 1977, the Attorney-General of South West Africa lost his autonomy when the new Criminal Procedure Act, 1977 (No. 51 of 1977), was made applicable in South West Africa. Section 3(5) of the said Act made political control mandatory.¹³

13 The sections read as follows:

- (1) *The State President shall, subject to the laws relating to the public service, appoint in respect of the area of jurisdiction of each provincial division an Attorney-General, who, on behalf of the State and subject to the provisions of this Act –*
 - (a) *shall have authority to prosecute, in the name of the Republic in criminal proceedings in any court in the area in respect of which he has been appointed, any person in respect of any offence in regard to which any court in the said area has jurisdiction; and*
 - (b) *may perform all functions relating to the exercise of such authority.*
- (2) *The authority conferred upon an Attorney-General under subsection (1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings within the area of jurisdiction of the Attorney-General concerned.*

The independence of the prosecutorial authority of South Africa and Namibia

Thus, from 22 July 1977, the Attorney-General of South West Africa was in the same subservient position as his South African counterparts. Although the integrity of South West Africa was anything but respected by the consecutive South African governments, the legislature acknowledged the integrity of the prosecuting authority until 1977.

The distinction between South Africa and South West Africa was the last vestige of judicial independence in and recognition of the Mandate C status of the latter territory. It confirmed, at least in principle, that South West Africa was not part of South Africa. As a Mandate C territory, a South African minister could not control the Attorney-General. With Act 51 of 1977, this last bastion of judicial independence was stripped from the people of South West Africa. The South African Supreme Court of Appeal executed final authority over the Supreme Court of South West Africa, and its minister of justice controlled prosecutions.

The tight control of the prosecutorial authority was closely related to the political situation in South Africa. In the aftermath of the 1976 student revolt, the government of John Vorster was adamant they would control all spheres of society. The new Criminal Procedure Act was but one of a series of oppressive pieces of legislation emanating from that period.

The time of the implementation of political control over the South West African Attorney-General is likewise not without political significance. The South African-backed Turnhalle Conference in 1976 did not lead to an internationally accepted independence because SWAPO were not part of the talks. International pressure was mounting against South Africa and, in 1978, i.e. only a year later, the UN accepted Resolution 435, providing for UN-supervised elections that would lead to an independent Namibia.

-
- (3) *The Minister may, subject to the laws relating to the public service, in respect of each area for which an Attorney-General has been appointed, appoint one or more deputy attorneys-General, who may, subject to the control and directions of the Attorney-General concerned, do anything which may lawfully be done by the Attorney-General.*
 - (4) *Whenever it becomes necessary that an acting Attorney-General be appointed, the Minister may appoint any competent officer in the public service to act as Attorney-General for the period for which such appointment may be necessary.*
 - (5) *An Attorney-General shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister, who may reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.*

The independence of the prosecutorial authority of South Africa and Namibia

Acting Supreme Court of Namibia Judge AJA Leon (as he then was) makes the following observation regarding the implementation of section 3 of Act 59 of 1977 in Namibia:¹⁴

It was made applicable by an apartheid government bent on domination [–] no doubt determined to enforce its political will on the independence of the prosecuting authority in South West Africa. I cannot for one moment believe that that would be in accordance with the ethos of the Namibian people.

In the same tone, Henning, SC, and Badenhorst, Counsel for the Prosecutor-General in the mentioned case, point out that the government who implemented section 3 of the Criminal Procedure Act was not a *Rechtsstaat* (a state governed by the rule of law), and the political control over the prosecuting authority was not a *Grundnorm* (basic legal principle) of a constitutional dispensation.

In the period following the implementation of political authority and control from South Africa over the South West African Attorney-General, the minister of justice did not hesitate to use his authority when he deemed it necessary.

When the power and authority of the minister of justice over the Attorney-General were not adequate to manipulate prosecutions in the territory, the South African authorities used other laws. A case in point is the well-known brutal murder of SWAPO activist Immanuel Shifidi.

Shifidi was killed by five members of the South African Defence Force (SADF) at a political rally in Windhoek. The Attorney-General for South West Africa instituted criminal proceedings against the five members of the SADF. However, section 103 ter of the Defence Act, 1957 (No. 44 of 1957) gave the State President authority to issue a certificate to stop any prosecution against SADF members for acts committed in the operational area. The State President, acting on the recommendation of his minister of defence, issued such certificate, after which the Administrator-General of South West Africa issued a separate certificate to halt the prosecution.

The son of the deceased then applied for a court order declaring the Administrator-General's certificate invalid,¹⁵ on the grounds that no operational action of the SADF had been involved, and the killing had taken place on a football field in Windhoek. The court held that neither the minister of defence nor the State President, or anyone else, had the discretion to decide where an operational area

¹⁴ *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1), at 36f.

¹⁵ *Shifidi v Administrator-General for South West Africa* 1989 (4) SA 631 SWA.

was located for the purpose of section 103 ter. In this case, it could not be said objectively that a football field in Windhoek was indeed an operational area, so the application was granted.

To overcome the shortcomings of the certificate the President had issued, the Administrator-General issued a proclamation declaring Windhoek an operational area.

From 1977 until 1990, the judicial independence was compromised by political control over the prosecutorial authorities. The independence of Namibia and the democratisation of South Africa opened the door 13 years later to reconsider the independence of the prosecutorial authority.

The new dispensation

Namibia

The Namibian Constitution introduced a new dispensation. The prosecutorial authority is placed in the hands of a new office, that of the Prosecutor-General.¹⁶ Article 141(2) states that –

... any reference to the Attorney-General in legislation in force immediately prior to the date of Independence shall be deemed to be a reference to the Prosecutor-General, who shall exercise his or her functions in accordance with this Constitution.

However, it is not merely a change of name. The Constitution also makes provision for an Attorney-General.¹⁷ The Attorney-General follows the pattern of England and Wales, where s/he is to “... exercise the final responsibility for the office of the Prosecutor-General”¹⁸ and be “... the principal legal adviser to the President and Government”.¹⁹ S/he is also responsible “... for the protection and upholding of the Constitution”.²⁰

There is also a difference between the appointment of the Prosecutor-General and the Attorney-General. Article 86 of the Constitution states that the Attorney-General is appointed by the President in accordance with the provisions of Article 32. In particular, Article 32(3)(i) provides for the appointment of –

16 Article 88, Namibian Constitution.

17 Articles 86 and 87, Namibian Constitution.

18 Article 87(a).

19 Article 87(b).

20 Article 87(c).

The independence of the prosecutorial authority of South Africa and Namibia

- (aa) *the Prime Minister;*
- (bb) *Ministers and Deputy-Ministers;*
- (cc) *the Attorney-General;*
- (dd) *the Director-General of Planning;*
- (ee) *any other person or persons who are required by any other provision of this Constitution or any other law to be appointed by the President.*

Thus, although the Constitution states nowhere that the Attorney-General is part of the Cabinet, his/her appointment is provided for in the same manner and under the same Article as that of prominent members of Cabinet.

The Prosecutor-General, however, is appointed by the President on the recommendation of the Judicial Service Commission.²¹ Other offices appointed in the same way are judges²² and the Ombudsman.²³

From the above it is clear that the Prosecutor-General is a quasi-judicial appointment, while the Attorney-General is a political appointment. By creating the two posts, the mothers and fathers of the Namibian Constitution already made a distinction between the political official and the Prosecutor-General as a free agent.

The composition of the Judicial Service Commission has a ring of independence around it. It consists of the Chief Justice, a judge appointed by the President, two members of the legal profession, and the Attorney-General. Since judges are also appointed by the President upon recommendation of the Judicial Service Commission, one can assume that the judges on the Commission will be independent in their thinking and conduct. And since the representatives of the profession are appointed by the Law Society in terms of the Constitution,²⁴ they have no direct relationship with political powers and, thus, are not accountable to political officials. Consequently, the only political appointee on the Commission is the Attorney-General. In terms of this composition, political manipulation will be extremely difficult.²⁵

21 Article 88(1).

22 Article 82(1).

23 Article 90(1).

24 Article 85(1).

25 This does not mean that the government has no power to determine the composition of the Judicial Service Commission. The second judge does not have to be a Supreme Court judge or the Judge-President. The President has the discretion to appoint any serving judge. Since judges are independent, this does not really constitute a threat to judicial independence. A more serious threat to the Commission's independence is the way in which the members of the profession are appointed. In terms of the Legal Practitioners Act, the Law Society

Nico Steytler (1991) has criticised the influence and role of a small minority of unelected and, at independence, predominantly middle-aged white men in the judiciary and on the Judicial Service Commission. Referring to the powerful role of the judiciary in terms of the Constitution, he has the following to say:²⁶

The result is that a small, unrepresentative elite, dominated by whites who have traditionally had little sympathy with SWAPO, will be able to wield a considerable amount of power. Moreover, their professional interests link them further to this propertied elite; the legal profession – its form, objectives and sources of income – is predicated on the continuance of the status quo. In the “specialized third legislative chamber” the minority parties have thus achieved a limited but effective veto over the legislature and the executive through an “independent” judiciary interpreting a rigidly entrenched bill of rights.

Steytler’s criticism of unrepresentative white males undoubtedly had some merit at independence, and may have some merit today in the majoritarian/contermajoritarian debate. It falls outside the scope of this paper to go into that debate; but as far as the composition of the bench and Law Society is concerned, it has been overtaken by time. By 1999, there were only three white judges on the bench.²⁷ By 2004, both the Chief Justice and Judge-President were black Namibians.

The meaning of the words “on the recommendation of the Judicial Service Commission” has not yet been tested in a competent court. However, the principle was tested in 1997 after the death of the first Ombudsman. The President appointed the then acting Ombudsman, Adv. Kasutu, as Ombudsman

of Namibia is the only legally recognised body representing legal practitioners. Initially after independence, the Law Society appointed a practising lawyer and a member of the Bar Association to represent the profession on the Judicial Service Commission. Even after the fusion of the legal profession removed the separate roles of lawyers and advocates, the de facto operational division between lawyers (practising with a fidelity certificate) and advocates (receiving briefs from lawyers rather than clients) remained intact.

Soon after the enactment of the said Act, the then Minister of Justice, Dr N Tjiriange, replaced the representative of the Bar Association with a member of the Namibian Lawyers’ Association. The NLA is a predominantly black lawyers’ association without a legal foundation in the Legal Practitioners Act. The Minister’s intention was possibly to replace the representative of a small elite body with a person who represented a bigger constituency. However, it opens the door for political manipulation. While the Bar Association is small and unrepresentative of the broader legal fraternity, it never appointed its own representative on the Commission: the appointment was done by the Law Society.

26 Steytler, N. 1991. “The judicialization of politics”. *South African Journal of Human Rights*, 477:488.

27 See Bukurura, S. 2002. *Essays on constitutionalism and the administration of justice in Namibia, 1990–2002*. Windhoek: Out of Africa, p 162.

without waiting for the Commission's recommendation. After a massive uproar from both the public and the judicial profession, the President withdrew the appointment. The Commission forwarded a priority list with three names to the President with Adv. Gawanas being at the top of it, and Adv. Kasutu being on the list. The President appointed Adv. Bience Gawanas, creating a strong precedent for future appointments made upon the Commission's recommendation.

The division of powers between the Attorney-General and the Prosecutor-General seems to be based on a relationship of equals: one with a political mandate, and one with a quasi-judicial mandate. However, the Constitution leaves some doubt as to this relationship. One of the functions of the Attorney-General, according to Sub-Article 87(a) of the Constitution, is "to exercise the final responsibility for the office of the Prosecutor-General". This Sub-Article was the ground of a bitter conflict between the Attorney-General and the Prosecutor-General shortly after independence.

The independence of the Prosecutor-General

The fact that the positions of Attorney-General and Prosecutor-General were vaguely based on the English/Welsh system, without the specific boundaries of the two positions being spelled out, soon led to an intense conflict between them that was eventually settled by the Supreme Court.

The conflict centred on the function of the Attorney-General "to exercise the final responsibility for the office of the Prosecutor-General".²⁸ In the Heads of Argument on behalf of the Prosecutor-General,²⁹ counsel quotes a letter dated 27 March 1992 from the Prosecutor-General to the Judicial Service Commission, after the Attorney-General had laid a complaint of insubordination against the Prosecutor-General.

In the letter, the Prosecutor-General complained, inter alia, that his staff received instructions from the office of the Attorney-General without his knowledge, that advocates in his office were appointed as investigators – which he considered to be undesirable, and that he considered an instruction from the Attorney-General to withdraw a specific case as an attempt to defeat the ends of justice. The Prosecutor-General referred to a dragged-out case of racial discrimination

28 Article 87(a), Namibian Constitution.

29 Heads of Argument on behalf of the Prosecutor-General, p 119ff. *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1). Heads of Argument do not form part of the reported case.

against the public broadcaster, the Namibian Broadcasting Corporation (nbc). The conflict reached a climax when the Attorney-General informed the Prosecutor-General that he had decided that prosecution should be withdrawn, and instructed the Prosecutor-General to inform the High Court and counsel for the defendant accordingly. The Prosecutor-General informed the Attorney-General on the same day that he did not regard himself bound by the instruction.³⁰

Thereupon, the Attorney-General brought a petition to the Supreme Court in terms of section 15(1) of the Supreme Court Act, 1990 (No. 15 of 1990) to determine the following questions:

Whether the Attorney-General, in pursuance of Article 87 of the Constitution and in the exercise of the final responsibility for the Office of the Prosecutor-General, has the authority:

- (i) *to instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter;*
- (ii) *to instruct the Prosecutor-General to take on or to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;*
- (iii) *to 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 or prosecutorial policy.*

The Attorney-General based his case on three points:

- He conceded that final responsibility meant that the *ultimate prosecuting discretion* or *ultimate superintendence* vested in the Attorney-General.
- The Attorney-General also submitted that section 3(5) of the Criminal Procedure Act, 1977 (No. 59 of 1977) was still Namibian law and that the Prosecutor-General was obliged to exercise his authority and perform his duties under the Act, subject to the control and directions of the Attorney-General (as the previous Attorneys-General since 1977 had done under the control and direction of the South African minister of justice), and
- The Attorney-General alleged that Article 87(a) accorded with the situation in the United Kingdom and the Commonwealth, where the prosecuting authority was generally known as the *Director of Public Prosecutions*.³¹

The Prosecutor-General adopted the stance that the real question that needed to be answered was this: Is the Prosecutor-General truly independent under the Constitution? Counsel's arguments for the Prosecutor-General were all attempts

30 (ibid.:127).

31 *Petition of the Attorney-General* in the *Ex Parte* case, p 2ff.

to point to the inherent independence underlying the constitutional position of the Prosecutor-General.

The reliance on England, Wales and the Commonwealth did not assist the Attorney-General, however. After a thorough discussion of the position in England and Wales, the court concluded that while the phrase used in the 1879 Act, namely “under the superintendence of the Attorney-General”, was strong in its implication that the Director of Public Prosecutions was a subordinate position, and even allowed the Attorney-General to intervene in prosecutorial decisions, it seldom if ever happened in practice. The court also noted that there was no common practice in the Commonwealth to rely on.

The Court then made the following observation:³²

Unless s 3(5) of Act 51 of 1977 applies, the position of the Prosecutor-General is an a fortiori one in the sense that there is nothing in the constitution which expressly places his office under the superintendence or direction of the Attorney-General.

The court observed with reference to *Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order and Others*³³ that one of the fundamental functions in the duty to prosecute was the discretion to proceed with a prosecution or to withdraw it. The court also confirmed the general notion that the Attorney-General was a political office with executive functions, while the Prosecutor-General was quasi-judicial and his/her appointment non-political.³⁴

Instead of looking for foreign guidance, the by then standard practice adopted by the Namibian courts to deal with the Constitution was followed by considering the presumptions of the Attorney-General (i.e. that section 3 of the Criminal Procedure Act still applies to Namibia, and that the words *final responsibility* also implied “final authority”) in the light of the spirit of the Namibian Constitution. The court affirmatively quotes *State v Van Wyk* —³⁵

I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity; ...

– and *State v Acheson*³⁶ in its decision:

32 *Ex Parte: Attorney-General*, 1998 NR 282 (SC) (1), p 295.

33 1994 (1) SA 387 (c) at 393H–394H.

34 *Ex Parte: Attorney-General*, 1998 NR 282 (SC) (1), p 290.

35 1992 (1) SACR 147 (NmSC), p 174.

36 1991 (2) SA 805 NmHC, p 4.

The independence of the prosecutorial authority of South Africa and Namibia

The Constitution of a nation 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 over and permeate the process of the judicial interpretation and judicial direction.

The position on the ground seemed to dictate a strong Attorney-General to introduce a human rights philosophy of prosecution. The Attorney-General was a direct presidential appointee and a defender of human rights during the struggle for independence, while the Prosecutor-General was a middle-aged white male who had spent most of his professional career operating under the apartheid system. However, the court would not consider practical politics in determining the question of an independent prosecutorial authority. In affirming the independence of the Prosecutor-General, Judge Leon made the following statement:

I do not believe that those rights and freedoms can be protected by allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted. Nor do I believe that that would be in accordance with the ideals and aspirations of the Namibian people or in any way represent an articulation of its values.

The court also concludes that there need not be a conflict between an independent Prosecutor-General and an Attorney-General that has final responsibility. *Final responsibility* then means more than financial responsibility, and includes the Attorney-General’s duty to account to the President, the executive and the legislature.

The judgment of the Supreme Court of Namibia cleared up any uncertainty on the relationship between the Attorney-General and the Prosecutor-General, as well as on the independence of the Prosecutor-General. In terms of the Namibian Constitution, the Prosecutor-General is totally independent as far as his/her mandate to prosecute is concerned.

In its judgment, the court made a strong point that the basic difference between the two offices lay in their functions within the three branches of government. The Attorney-General, the Court pointed out, carried an executive function.³⁷ If prosecution were also an executive function, this reference would make no sense. However, if the court’s argument is that the Prosecutor-General is better placed as part of the judicial function of government, the arguments fall in place.

³⁷ *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1), p 292.

The old theory of an Attorney-General controlling the entire machinery of criminal prosecutions, namely the initiation and the withdrawal of criminal proceedings, is no longer accepted uncritically. In its judgement, the court relied on a paper presented at a meeting of Commonwealth Law Ministers in August 1977,³⁸ stating that the trend was towards an independent non-political Director of Public Prosecutions.³⁹

While the court did not declare outright that prosecution was a judicial function, reference to the appointment of the Prosecutor-General as well as his/her functions being defined as *quasi-judicial* indicates a strong sense of alignment between the judiciary and the prosecutorial authority. To put it differently, the functions of the prosecutorial office do not fit into the political functions of the executive.

By the time of the certification of the final Constitution of South Africa, the Namibian position had been settled.

The independence of the South African prosecutorial authority

The South African Constitution

The final Constitution is somewhat ambiguous. On the one hand, it dictates that “[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”,⁴⁰ while on the other, it regulates that the “Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority”.⁴¹

There is a subtle yet important difference between the wording in section 179(6) of the South African Constitution and Article 87(a) of the Namibian Constitution. The South African minister executes final responsibility over the prosecuting authority, while the Namibian Attorney-General exercises the final responsibility for the office of the Prosecutor-General. The synonyms of the authoritative preposition *over* do not include the preposition *for*. Instead, the Thesaurus uses phrases such as *in excess of* and *on top of*, and *more than*, *greater than*, *larger than*, *above*, *more* and *on*. Synonyms of the preposition *for* include *intended for*, *in favour of*, *on behalf of*, *in lieu of*, *in place of*, *instead of*, *representing*, *in support of* and *pro*. None of the synonyms for *for* carry the authoritative, commanding meaning of the preposition *over*.

38 Edwards, J. 1977. *Emerging problems in defining the modern role of the office of the Attorney-General in Commonwealth countries*. Unpublished paper presented at the Annual Meeting of Commonwealth Law Ministers, August 1977.

39 *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1), p 295.

40 Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), section 179(4).

41 Section 179(6), South African Constitution.

The independence of the prosecutorial authority of South Africa and Namibia

Since the South African Constitution was written after the Namibian Supreme Court case, one can assume that the drafters considered the Namibian option, but decided to stay closer to the wording of the notorious section 3(5) of the Criminal Procedure Act, 1977 (No. 59 of 1977):

An Attorney-General shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister, who may reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.

While section 3(5) was repealed in South Africa, and although the words *control* and *direction* do not appear in the Constitution, the element of political control was maintained in the Constitution. The Constitution did away with the minister's right to take over the functions of the National Director of Public Prosecutions (NDPP), but the minister maintained strong control over the prosecutorial authority.

When Adv. Wim Tregrove, advocate for suspended National Director of Public Prosecutions Adv. Vusi Pikoli, cross-examined the then Deputy Minister of Justice, Johnny de Lange, the latter stated that political control was indeed built into subsection 179(6).⁴² De Lange called the South African minister of justice and constitutional development the "champion" of the NDPP, adding that –⁴³

[w]e tried to create a structure where the NPA and the executive work closely together, with, of course, a degree of autonomy.

The independence of the NDPP is further undermined by the fact that s/he is appointed by the President. In the *Ex Parte: Attorney-General* case,⁴⁴ the Namibian Supreme Court pointed out that direct presidential appointments were an indication of executive functionality. This is also true of the South African Constitution. The deputy president, ministers and deputy ministers are appointed by the South African president without consultation or recommendation from any constitutional body.⁴⁵

42 The cross-examination took place on 8 May 2008, after the testimony of Adv. De Lange before the Ginwala Commission of Inquiry into the National Prosecuting Authority boss Vusi Pikoli's fitness to hold office.

43 Maughan, K & B Webb. 2008. "Pikoli slams 'fabricated' accusations". *The Star*, 9 May 2008.

44 *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1).

45 Sections 91–93, South African Constitution.

The independence of the prosecutorial authority of South Africa and Namibia

Judges in South Africa, however, are appointed by the president after consultation, upon recommendation, or on the advice of the Judicial Service Commission or the political parties represented in the National Assembly, depending on the specific court.⁴⁶ Even the Public Protector and Auditor-General as well as members of the South African Human Rights Commission, the Commission for Gender Equality, and the Electoral Commission are appointed by the South African president at the recommendation of the National Assembly.⁴⁷ Thus, in the South African Constitution, the NDPP finds him-/herself categorised with the cabinet and deputy ministers, rather than with the judges and the section 193 constitutional bodies.

The South African position is not exceptional. In the Commonwealth, the Attorney-General often wears two hats. It is not exceptional for the Attorney-General to have the final say in prosecutions and to serve in cabinet as well.⁴⁸

When the Constitution of the Republic of South Africa was certified, someone complained that the Director of Public Prosecutions was not independent since s/he was appointed by the president as head of the national executive.⁴⁹ It was argued that –⁵⁰

... the provisions of NT 179 do not comply with CP VI, which requires a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

The Constitutional Court was not impressed with the argument, however:⁵¹

There is no substance in this contention. The prosecuting authority is not part of the Judiciary and CP VI has no application to it. In any event, even if it were part of the Judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers.

46 See section 174, South African Constitution.

47 See section 193(4). Since the ruling ANC holds an overwhelming majority in the National Assembly, this recommendation does not ensure independent appointments; nevertheless, it places them on a different level to political appointments.

48 See the court's comments in *Ex parte Attorney-General*, supra, 1998 NR 282 (SC) (1), p 287ff.

49 Section 179(1)(a), South African Constitution.

50 *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), par. 141 G.

51 (ibid.).

The position of the Constitutional Court on this point is clear: public prosecutions are not a judicial function. If the prosecutorial function of the state is not part of the judicial functions, and the NDPP is appointed by the South African president as head of the national executive, there can be no doubt where the prosecutorial function of the state fits into the puzzle of the three powers of the state: prosecution is part of the executive functions.

This contention is further strengthened by the fact that the NDPP is obliged to determine prosecution policy “with the concurrence of the Cabinet member responsible for the administration of justice”,⁵² and the minister of justice and constitutional development “must exercise final responsibility over the prosecuting authority”.⁵³

The Pikoli saga and the Zuma case

The Pikoli saga is a good example of the vulnerability of the South African NDPP. His/her Namibian counterpart can only be suspended on the recommendation of the Judicial Service Commission. The NDPP, however, may be provisionally suspended by the South African president, pending a final decision by that country’s Parliament.⁵⁴

The then South African President Thabo Mbeki suspended NDPP Adv. Vusi Pikoli on 23 September 2007 and appointed his deputy, Mokotedi Mpshe, as acting NDPP. According to the official communiqué of the President’s office, Pikoli was suspended because of “an irretrievable breakdown in the working relationship” between the National Prosecuting Authority chief and the Minister of Justice and Constitutional Development, Brigitte Mabandla.

Since neither the Constitution nor the National Prosecuting Authority Act, 1998 (No. 32 of 1998) mention a prerequisite relationship of trust between the minister of justice and constitutional development and the NDPP for the functioning of the National Prosecuting Authority, and since a breakdown of relationships is not listed in the said Act as a ground for suspension, the government submitted new allegations and reasons to the Ginwala Commission appointed to decide on the matter of the National Director’s suspension.

52 Section 179(5)(a).

53 Section 179(6).

54 Section 6 of the National Prosecuting Authority Act, 1998 (No. 32 of 1998). The *Pikoli* case was never referred to Parliament in terms of section 6(b), but to a one-person commission constituted by Dr Frene Ginwala, a former Speaker of Parliament.

Dr Frank Chikane, Director-General in the presidency, alleged that Pikoli's bad management of politically sensitive cases was the reason for his suspension.⁵⁵ This was followed by the Justice Department's Director-General Menzi Simelane alleging that the NDPP had failed to report to him. In a strange interpretation of the National Prosecuting Authority Act and the Constitution, Simelane believed that the final responsibility for the National Prosecuting Authority lay with the Director-General. He maintained this view before the Ginwala Commission, despite having received a legal opinion to the effect that his responsibility was restricted to financial matters.⁵⁶ Deputy Minister De Lange raised the issue of plea bargains as the reason for the suspension,⁵⁷ while the National Intelligence Agency Director-General Manala Manzini maintained it was Pikoli's handling of the intelligence clearance of his staff and other aspects of national security that made the incumbent National Director incompetent and, therefore, unsuitable for the position.⁵⁸

Pikoli believed that the real reason for his suspension was to protect the Police Commissioner, Jackie Selebi. During the Ginwala inquiry, it transpired that the Minister of Justice and Constitutional Development had written a letter to Pikoli only four days before his suspension. In the letter, the Minister had instructed the NDPP not to arrest Selebi until she had seen all the evidence against the latter and was satisfied with it. Pikoli's lawyers, however, said he could not obey an unlawful and unconstitutional instruction: only the NDPP could decide on prosecutions, Pikoli maintained.⁵⁹

At the time of the writing of this article in August 2008, the Ginwala Commission had not yet presented its findings to the president. However, 11 months after the suspension of the NDPP, the dispute had still not been solved, and the political questions had not stopped. The reasons given by the president at the time of Adv. Pikoli's suspension were suspect; and the evidence given before the Ginwala Commission seems to be an afterthought to justify the president's actions.

55 Maughan & Webb (2008).

56 Basson, A. 2008. "Simelane's little secret exposed". *Mail & Guardian Online*, 1 July 2008; available at <http://www.mg.co.za/article/2008-07-01-simelanes-little-secret-exposed>; last accessed 10 July 2008.

57 Omarjee, H. 2008. "South Africa: Pikoli axed to "frustrate prosecution of Selebi". *Business Day*, 8 May 2008.

58 Anonymous. 2008a. "Scorpions 'didn't have clearance'". Available at http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2349491,00.html; last accessed 17 July 2008.

59 Anonymous. 2008b. "Inquiry told of desperate scramble to prevent Selebi arrest". *Legal Brief Today*, 2064, 9 May; available at <http://www.legalbrief.co.za/article.php?story=2008050908143157>; last accessed 17 July 2008.

The independence of the prosecutorial authority of South Africa and Namibia

The judgment of the Constitutional Court, stating that the presidential appointment of the NDPP did not undermine the independence of the judiciary and that the NDPP did not have to be independent since prosecution was an executive function, is the underlying reason for the confusion in the *Pikoli* case. It was clear the Minister of Justice and even the Director-General of the Justice Department believed they should control the National Prosecuting Authority.

The vague linking of prosecution with the judicial functions of government rather than the executive in the *Ex Parte: Attorney-General* case⁶⁰ laid the foundation for further development of the constitutional position of the prosecutorial authority in a liberal democracy.

Even more dramatic was the obiter dictum of Justice Nicholson to an application by ANC President Jacob Zuma in the High Court of Kwazulu-Natal.⁶¹ Zuma stood accused of corruption in a case that was about to start. In an application before the said court, Zuma asked the court to declare the decisions by the NDPP to prosecute him and the indictment against him invalid, and to set the indictment aside.

Zuma's application was based on technical errors by the prosecution, particularly their failure to comply with a provision in the Constitution⁶² to give the suspect an opportunity to make submissions before a decision is taken to prosecute. Zuma nevertheless submitted that there was a conspiracy in government to prevent him from becoming the next president of South Africa and, consequently, irregular political pressure on three successive National Directors to prosecute him.⁶³

The NDPP requested the High Court to strike out the allegations of political interference in the case. Referring to the questionable role of the Minister of Justice and Constitutional Development throughout the *Zuma* case and in the suspension of *Pikoli*, the court found that there was indeed political interference. In this regard, the court made the following comment:⁶⁴

There is a distressing pattern in the behaviour which I have set out above[, that is] indicative of political interference, pressure or influence.

60 *Ex Parte: Attorney-General*, supra, 1998 NR 282 (SC) (1).

61 *Jacob Gedleyihlekisa Zuma v National Director of Public Prosecutions*; unreported case of the High Court of South Africa, Natal Provincial Division, Case No. 8652\08, delivered on 18 September 2008; coram Justice Nicholson.

62 Section 179(5)(d), South African Constitution; see also the almost identical wording in section 22(2)(c) of the National Prosecuting Authority Act, 1998 (No. 32 of 1998).

63 (*ibid.*:74ff).

64 (*ibid.*:103).

Thus, the court is clearly extremely suspicious of the role played by the Minister of Justice and Constitutional Development in the whole process. Nonetheless, while quoting the Constitutional Court's reference to *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,⁶⁵ the court does not go into different approaches as regards the Constitutional Court's statement, but finds the presidential appointment of the NDPP unacceptable. Neither does the court comment on the Constitutional Court's assertion that prosecution is an executive function of government.

However, the criticism of the role played by the executive in the *Pikoli* and *Zuma* cases is a clear and unequivocal indictment of the relationship between the president and the NDPP, created by the Constitution and approved by the Constitutional Court of South Africa.

In a dramatic turn of events, the ANC leadership forced President Mbeki to resign as a result of the judgment.⁶⁶

Conclusion

Two aspects seem clear from the discussion of the provisions of the South African NDPP:

- While the South African Constitution repealed the notorious section 3(5) of the Criminal Procedure Act, the influence of politicians – both the president and the minister of justice and constitutional development – have not been removed. The Constitution stated that the prosecutorial function had to be executed without prejudice, fear or favour; so Deputy Minister Johnny de Lange was correct that the emphasis was on cooperation between the NDPP and the Ministry of Justice and Constitutional Development with a degree of autonomy given to the NDPP.⁶⁷ Prosecution, according to the Constitutional Court, remains an executive function.

65 1995(8) BCLR 1070 (Nms).

66 The President offered his resignation on 21 September 2008, and a new State President was elected on 25 September 2008. The finding of the court that former President Mbeki influenced the National Prosecuting Authority in its decision was a crucial reason for the ANC leadership to 'redeploy' him – a soft expression for pressurising him to resign. The former president denies the allegation and has appealed against the specific finding of Judge Nicholson. However, even if a subsequent appeal by former President Mbeki succeeds, it will not undo the legal and political damage done to South Africa's image as a justice state where the separation between the executive and the judiciary is respected.

67 Maughan & Webb (2008).

The independence of the prosecutorial authority of South Africa and Namibia

- The Namibian Constitution provides for a fully independent functionary. The responsibility that the Attorney-General exercises expects nothing more of the Prosecutor-General than to inform the Attorney-General of sensitive cases and assign the financial and administrative duties of the office to the political administration of the Attorney-General.

The strong emphasis in Namibia on the independence of the judiciary since the *Ex Parte: Attorney-General* case will make it highly impossible for the President or the executive to interfere in prosecutorial decisions. This is not to say that government has attempted to influence the Prosecutor-General's decisions, or that no such attempts will be made in future. It also does not guarantee politically free, objective legal decisions by the Office of the Prosecutor-General in future: even the best system is dependent on people – and people are fallible.

However, the Namibian Constitution and the Supreme Court jurisprudence have given the Prosecutor-General the power and authority to operate independently from executive interference. In this regard the independence of the judiciary to make the final decision in all matters of law is guaranteed.

SECTION V

The independence of the Lower Courts of Namibia

The Magistrates Act of Namibia and the independence of magistrates

Kaijata NG Kangueehi

Aim

This paper examines at length the concept of judicial independence with particular reference to the magistracy and the Magistrates Act, 2003 (No. 3 of 2003). It will attempt to examine the legislation and case law in this regard. As a point of departure this paper assumes that the magistracy is indeed independent and should be treated as such.

In the same vein, the paper attempts to highlight some of the threats to the independence of magistrates and proposes solutions to such threats. I am of the view that asserting the independence of magistrates requires reducing the control and powers of the Minister of Justice in the Magistrates Act and granting more powers to the Magistrates' Commission.

The legislation

The Namibian Constitution guarantees the independence of the judiciary. Article 78(1) thereof provides for judicial power to be vested in the courts, i.e. the Supreme Court, the High Court, and the magistrates' courts. Article 78(2) provides further that –

[T]he Courts shall be independent and subject only to this Constitution and the law.

Article 78(3) states that –

[n]o 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.

The Magistrates' Courts Act, 1944 (No. 32 of 1944) establishes the courts for magistrates. On the other hand, the Magistrates Act, 2003 (No. 3 of 2003) regulates, inter alia, the functioning of magistrates. Part of the latter Act's preamble says that it is to –

... provide for the establishment of a magistracy outside the Public Service.

The independence of the judiciary in general

Judicial independence first came to be determined by the High Court in the case of *S v Heita*¹ where the then Justice O'Linn expressly held that the independence of the judiciary contemplated by the Constitution had the following meaning:

The prohibition in art 78(3) not to interfere with Judges and judicial officers extends to each and every person, and is not restricted to members of the Legislature or Executive.
[Emphasis added]

In the head notes to the judgment, O'Linn correctly opines that –

Article 78(2) of the Constitution of Namibia Act 1 of 1990, which provides that the “Courts shall be independent and subject only to this Constitution and the law”, makes it abundantly clear that the independent Court is subject only to the Constitution and the law. This simply means that it is also not subject to the dictates of political parties, even if that party is the majority party. Similarly, the Court is not subject to any other pressure group. [Emphasis added]

This judgment is of pivotal importance in that it serves as a major point of reference when it comes to the interpretation of the independence of the judiciary.

Independence of the magistracy considered

In a recent High Court judgment,² the issue was whether the Magistrates' Commission was an independent body capable of managing and structuring its members and affairs relating to magistrates, such as relocating them, i.e. as magistrates themselves see fit. The High Court was, however, of the view of that the magistracy and the Commission were two distinct bodies, and when determining the independence of the former, it should not be confused with the latter. This opinion serves to present the dichotomy between the institutional independence of the Commission on the one hand, and the individual independence of magistrates as judicial officers on the other.

In *Jacob Alexander v The Minister of Justice and Others*,³ Justice Parker, without

1 *S v Heita* 1992 NR 403 (HC), at 408 F.

2 *Jacob Alexander v The Minister of Justice and Others*; unreported case of the High Court of Namibia, Case No. A210/2007 (Special Case), at 22; also available on the website of the Superior Courts of Namibia at [http://www.superiorcourts.org.na/high/docs/judgments/civil/jacob%20alexander%20versus%20the%20minister%20of%20justice%20and%204%20others.pdf#search=Jacob Alexander](http://www.superiorcourts.org.na/high/docs/judgments/civil/jacob%20alexander%20versus%20the%20minister%20of%20justice%20and%204%20others.pdf#search=Jacob%20Alexander); last accessed 2 November 2008.

3 (ibid.).

The Magistrates Act of Namibia and the independence of magistrates

considering the issue of independence of the magistracy at any length, correctly made the following remarks:

... it must be remembered that the concept of independence of the judiciary stands on two inseparable pillars, namely, individual independence and institutional independence.

On the same page the judge defined the two concepts thus:⁴

Individual independence means the complete liberty of individual judges and magistrates to hear and decide the cases that come before them. ...

Institutional independence of the judiciary, on the other hand, reflects a deeper commitment to the separation of powers between and among the legislative, executive and judicial organs of State.

The assertion regarding the individual independence of magistrates undoubtedly refers to the fact that, as individual judicial officers, they are independent in deciding the cases before them.

On 28 January 2003, the Supreme Court, per Chief Justice Strydom (with Acting Judges O'Linn and Chomba concurring), handed down a judgment in the matter of *Walter Mostert v The Minister of Justice*.⁵ In the High Court judgment of *Mostert v Minister of Justice*⁶ which is considered at length here, the first plaintiff challenged his transfer by the Permanent Secretary in the Ministry of Justice from Gobabis to Oshakati, seeking the following relief:

That the decision of the Permanent Secretary for Justice to transfer the applicant to Oshakati be reviewed and set aside.

To declare that the judiciary, including magistrates, are independent in terms of Article 78 of the Namibian Constitution and that the Permanent Secretary has no jurisdiction to appoint, transfer and/or terminate the services of a magistrate, in particular that Section 23(2) of the Public Service Act does not apply to Magistrates.

In the High Court (per Acting Judge Levy), Mostert had only been partly successful, so he appealed to the Supreme Court. On appeal, the Supreme Court, as far as is relevant, ordered as follows:

It is declared that the transfer of magistrates does not per se constitute a threat to their independence.⁷

4 (ibid.:23).

5 2003 NR 11 (SC).

6 2002 NR 76 (HC), at 78.

7 *Mostert v The Minister of Justice* 2003 NR 11 (SC), at 40.

The Magistrates Act of Namibia and the independence of magistrates

In the Supreme Court judgment, Chief Justice Strydom held that –⁸

[s]ection 23(2) [of the Public Service Act, 1995) empowers the Permanent Secretary to transfer “staff members” and it was in terms of this section that the Permanent Secretary of Justice exercised her powers to transfer the appellant, this notwithstanding the clear provisions of the Constitution that magistrates are part of the Judiciary of Namibia whose independence was guaranteed by the Constitution. This was clearly set out in Articles 12 (1)(a), 78(1) and (2) and 83 of the Constitution.

The learned Chief Justice continued as follows:⁹

For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of government. I therefore agree with the order of the Court a quo that sec. 23(2) did not apply to magistrates. [Emphasis added]

In respect of section 23(2), the Chief Justice had the following to say:¹⁰

In regard to the independence of the Courts, and bearing in mind that we have shared for a long time the same legislative enactment concerning the magistrates’ courts (Act 32 of 1944) with South Africa, the general observations by Chaskalson CJ, in the Van Rooyen case, supra, as to what is necessary for protection of the independence of the various Courts at different levels is, in my opinion, also applicable to Namibia. It was pointed out by the learned Judge that the South African Constitution dealt differently with the appointment of Judges, on the one hand, and other judicial officers, on the other hand. This applies also to Namibia. In terms of Article 82 of our Constitution Judges of the High and Supreme Courts are appointed by the President on the recommendation of the Judicial Service Commission whereas Lower Courts, which shall be presided by magistrates ‘(shall be) appointed in accordance with procedures prescribed by Act of parliament’. Article 83(2).

For the present purposes, magistrates are appointed in terms of section 13 of the Magistrates Act. Section 13(3) provides for magistrates to be appointed by the Minister of Justice on the recommendation of the Magistrates’ Commission.

I am of the view that the appointment of judges by the President clearly takes judges out of the realm of the public service. I am mindful of the possible assertion that, if the President appoints judges and s/he is the head of the executive, this

8 (ibid.:33).

9 (ibid.:35).

10 (ibid.:31).

The Magistrates Act of Namibia and the independence of magistrates

could be seen as a bigger threat to the independence of judges. There is, however, ample authority for the view that there are internal mechanisms aimed at guarding jealously the independence of judges.

It is, however, difficult to reconcile the legislative attempt to create a magistracy outside the public service and yet magistrates are to be appointed by the Minister of Justice. The powers of the Commission in this regard are merely to recommend an appointment to the Minister. The Minister may (from the wording of section 13(3)) disapprove of an employment contract recommended by the Commission. I opine that this provision constitutes an inroad into judicial independence and the section should be amended to provide for the Commission to make the actual appointments.

In the Supreme Court decision, Chief Justice Strydom went on to cite the following from the *Van Rooyen*¹¹ judgment:¹²

The constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that “the courts are independent”. Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. Nor does it mean the lower courts have, or are entitled to have[,] their independence protected in the same way as the higher courts. [Emphasis added]

In paragraphs 24 and 25 of the *Van Rooyen* case, Chief Justice Chaskalson (as he then was) pointed out the following:¹³

[24] *But magistrates’ courts are courts of first instance and their judgments are subject to appeal and review. Thus[,] higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions. These are objective controls that are relevant to the institutional independence of the lower courts.*

[25] *Another relevant factor is that district and regional magistrates’ courts do not have jurisdiction to deal with administrative reviews or constitutional matters*

11 *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810.

12 *Mostert v The Minister of Justice* 2003 NR 11 (SC), at 32.

13 Quoted in (ibid.:32).

The Magistrates Act of Namibia and the independence of magistrates

where the legislation or conduct of the government is disputed. These are the most sensitive areas of tension between the legislature, the executive and the judiciary. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with such matters, are not necessarily essential to protect the independence of courts that do not perform such functions.

In paragraph 28 the learned Judge expressed himself as follows:¹⁴

The jurisdiction of the magistrates' courts is less extensive than that of the higher courts. Unlike higher courts they have no inherent power[;] their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction. The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission; their salaries, allowances and benefits may not be reduced; and the circumstances in which they may be removed from office are prescribed. In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters. That said, magistrates are entitled to the protection necessary for judicial independence, even if not in the same form as higher courts. [Emphasis added]

Having thus quoted from the *Van Rooyen* judgment, Chief Justice Strydom concluded as follows:¹⁵

From the extracts out of the Van Rooyen case it seems clear that all courts are entitled, in terms of the particular Constitution, to the protection of their institutional independence but, depending on the nature of their jurisdiction and the hierarchical differences between the higher courts and the lower courts, this protection need not be in the same form. Coming to the situation in Namibia it seems to me that we have the same hierarchical differences between our higher and lower courts[,] which is [sic] dealt with in much the same [way] by our Constitution, as is the case in South Africa. It follows therefore that I am of the opinion that also in Namibia the protection of the institutional independence of the lower courts need not be in the same form as that necessary for the High and Supreme Courts and I say so for the reasons set out in the van Rooyen case [Emphasis added]

The Magistrates Act attempts to deal with the doubts and differences enunciated in both the *Van Rooyen* and *Walter Mostert* cases. The Act creates a Commission tasked independently with the issues of magistrates, and it clearly holds that the magistracy falls outside the public service. That, in my view, addresses the concerns in both cases, as the Act clearly constitutes a legislative attempt to comply with the order of the Supreme Court in the *Walter Mostert* case.

14 (ibid.)

15 (ibid.:33).

The Magistrates Act of Namibia and the independence of magistrates

In the Canadian case, *The Queen in Right of Canada v Beauregard*,¹⁶ Justice Dickson, speaking of judicial independence, said the following:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of the individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another Judge [–] should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

Subsequent to the enactment of the Magistrates Act, Walter Mostert returned to the High Court, arguing that the Act did not create an independent magistracy because the Magistrates' Commission was not independent but under the control of the Minister of Justice.¹⁷ In his judgment, Judge-President Damaseb remarked that –¹⁸

Decisions of the Supreme Court of Namibia are binding on this Court and all those below it by virtue of Article 81 of the Namibian Constitution. Sitting as the High Court we are bound by and must therefore apply the ratio in the Supreme Court judgment; and it is this: all courts are guaranteed institutional independence, but Lower Courts (magistrates' courts included) do not have to enjoy the same kind of rigorous protection given to the higher courts. What is also clear from the passages in the Van Rooyen judgment, cited with approval by Strydom CJ, is that in South Africa the institutional independence of the magistracy does not require an independent body to regulate its affairs. [Emphasis added]

To my mind, the *Van Rooyen* case can be distinguished from the Namibian scenario, where we have an independent Commission aimed at exactly that, i.e. the independence of the magistracy.

In his elucidation, with reference to the two standards required in respect of both the lower courts and the Superior Courts, the Judge-President went on to say the following:¹⁹

[A]lthough institutional judicial independence is guaranteed to all courts, the scheme adopted for effecting it may differ depending on which court we are looking at and that only in respect of the High and Supreme Courts is a more rigorous standard required.

16 (1986) 30 DLR (4th) 481 at 491 (SCC).

17 *Walter Mostert & Another v Magistrates' Commission & Another* [2005] NR 491 HC.

18 (ibid.:500).

19 (ibid.:502).

The Magistrates Act of Namibia and the independence of magistrates

Judge-President Damaseb then concludes that –

[t]he requirement of institutional independence of the Judiciary is not subject to any limitation and, therefore, there can be no “justification”, in the constitutional sense, for interference or abridgement of the independence of the Judiciary. (See: Van Rooyen para 35 at 273 H.)

The Judge-President, quoting with approval paragraph 66 of the *Van Rooyen* case, which stated that an independent commission was not a requirement to ensure an independent magistracy, held as follows:²⁰

The Court held [in the First Certification Judgment] that as far as magistrates are concerned, the guarantee of independence accorded to all courts by s 165 of the Constitution and the provisions of s 174(7) dealing specifically with magistrates, was sufficient guarantee of independence.

Judge-President Damaseb (with Acting Judge Angula concurring) concludes as follows as regards the issue of the independence of the magistracy:²¹

The Supreme Court judgment does not, and could not[,] require the creation of a Magistrate’s Commission or a similar body; even less an independent one for that matter. The creation of such a Commission is thus a matter of political choice as long as it does not negate the independence of the magistracy. Applying, as I should, the properly contextualized objective test of institutional independence of the Judiciary, I come to the conclusion that the independence of the Namibian magistracy is sufficiently guaranteed by the following:

- i) Article 78(2) and (3) of the Constitution;*
- ii) Article 83 of the Constitution, since interpreted in the Supreme Court judgment to mean that the magistracy must be placed outside the public service;*
- iii) Constitutional scrutiny by the Superior Courts of any legislation and administrative action bearing on such matters as the appointment, remuneration, transfer and discipline of magistrates.*

In a paper delivered at a Magistrates’ Symposium, Chief Justice Peter Shivute stated the following:²²

The independence of the judiciary is guaranteed in two respects. The first is that the judicial power is specially vested in the courts and the last is that the members of the two arms of the state or any other person for that matter are, in no uncertain terms, prohibited from interfering with judicial officers in the exercise of their independence in the exercise of their judicial functions. Furthermore[,] all organs of the state, including the Judiciary, are in pre-emptory terms required to protect the independence, dignity and effectiveness of the judiciary.

20 (ibid.:509)

21 (ibid: 509).

22 Shivute, P. 2004. “Judicial independence and the responsibilities of a judicial officer”. Unpublished paper delivered at the Magistrates’ Symposium, Heja Game Lodge, Windhoek, 12 June 2004, p 4.

Factors undermining the independence of magistrates/the magistracy

Finance

In his address to the Magistrates' Symposium, the Chief Justice asserts that, in order to ensure its independence, the judiciary needs to –²³

... exercise control over its financial and administrative operations so as to exclude the possibility of the organ of the state that holds the purse [strings] from exerting financial and administrative pressure on the judiciary ...

The Chief Justice could not have been more correct on this score. It is undoubtedly true that the magistracy in Namibia relies on the Ministry of Justice for its financing. The latter Ministry, in turn, relies on the Ministry of Finance. The Ministry of Justice literally controls the number of positions available to the Commission within which to appoint magistrates. We need to strive for a magistracy with its own budget, for only then can the magistracy adequately address its needs as regards the appointment, placement and remuneration of magistrates.

Appointment of magistrates

The United Nations African Governance Report of 2005 dealt with hurdles that compromise that independence and assert themselves as follows:²⁴

The judiciary in many African countries does not have operational independence because the executive determines the appointment, promotion and remuneration of judicial officers. The prospects of career mobility for judges therefore depend largely on how well they can court and patronize the executive. In most cases the budget and funds of the judiciary are controlled by the Ministry of Justice (an executive arm of government), which creates bureaucratic procedures in financial matters and the possibility of discriminatory funding to be used against the “erring” courts.

I have already alluded to the provisions of section 13(3) of the Magistrates Act, to the effect that magistrates are appointed by the Minister on the recommendation of the Commission.

23 (ibid.:6).

24 United Nations Economic Commission for Africa. 2005. *African Governance Report 2005*. UNECA: Addis Ababa, p 204; available at www.uneca.org/agr2005/chap7.pdf; last accessed 26 September 2008.

The Magistrates Act of Namibia and the independence of magistrates

It is clear that in the second *Walter Mostert* case, the plaintiffs challenged the wrong provision in attacking section 4(f) rather than section 13 in dealing with the appointment of magistrates.

Judge-President Damaseb opines that the Minister does not have absolute power in the appointment of magistrates. With all due respect, the learned Judge-President has failed to address the fact that the Minister can refuse an appointment despite a recommendation by the Commission. How, then, is that power not absolute? It would have been different – and even preferable – if the provision were couched in such terms as to oblige the Minister to make an appointment once the Commission had duly made its recommendation. In the alternative, the provision should be amended to the effect that the Commission is the appointing authority. That way, the Minister will have no say in who should preside in our lower courts. Nonetheless, I am comforted by the Judge-President’s own assertion:²⁵

I need to mention at the outset that the requirement of institutional independence of the Judiciary is not subject to any limitation and, therefore, there can be no “justification”, in the constitutional sense, for interference or abridgement of the independence of the Judiciary.

This opinion indicates that, in the event of conflict, our courts will assert the independence of magistrates. The question is, however, why we should wait for a threat to the independence of magistrates before we rake in the said protection.

Remuneration of magistrates

Section 18(2) provides that the Minister of Justice, in consultation with the Commission and with the concurrence of the Minister of Finance, may increase the remuneration of a magistrate. It is hard to fathom that two ministers from an arm of government from which magistrates are independent can and do determine increases in magistrates’ remuneration. The solution, in my view, lies in having a separate budget for the magistracy.

Retirement of magistrates

Magistrates may generally retire when they attain the age of 65. If, however, a magistrate had served as such prior to the commencement of the Act, s/he could retire upon attaining the age of 60 or 55. In that case, s/he would apply to the Commission for retirement, and the Commission would then make its recommendation to the Minister of Justice. In terms of section 20(3)(d) of the

²⁵ *Walter Mostert & Another v Magistrates’ Commission & Another* [2005] NAHC at 20.

Act, the Minister is not permitted to grant such approval unless s/he is satisfied that –

- sufficient reasons exist for the retirement, and
- the retirement will not be detrimental to the magistracy.

Once more, if the magistracy is meant to be outside the realm of the public service, why should the Minister be the one to decide the magistracy's interests? If the Commission is the one that regulates the functions of the magistracy, is it not, then, the proper organ to decide the matter? I believe that the section constitutes another inroad into the institutional independence of the magistracy.

Appointment of members of the Commission

In the latter *Walter Mostert* case, the first and second plaintiffs took issue with sections 4(f) and 5 of the Act, by virtue of which the Minister of Justice is empowered to appoint at least four persons to the Commission, and in terms of which the Commission makes recommendations to the Minister in the appointment and retirement of magistrates. Hence, by extension, the plaintiffs argued that the Commission was not independent. I have dealt with the latter two aspects already herein, and now turn to the first: the Minister's power to appoint at least four persons to the Commission. In this regard, Judge-President Damaseb was of the view that such appointment did not necessarily negate the independence of the Commission.²⁶

Section 5 of the Act primarily aims at ensuring all stakeholders are involved in the Commission, and that the Commission is as inclusive as possible. A cursory look at it indicates that the Minister has the power to appoint at least four of the seven members of the Commission. The fear in the *Mostert* case was that such a provision tilts the balance of power in favour of the Minister.

That fear is, in my view, justified. Firstly, section 5 should be amended to curtail the Minister's power of appointment: the Minister is already permitted to have a representative on the Commission. Secondly, magistrates themselves should be granted more representation on the Commission besides the one – appointed by the Minister – from the Judges' and Magistrates' Association. Thirdly, provision should be made for legal practitioners to be represented on the Commission. Such representation is notably lacking, and yet legal practitioners do business in the lower courts on a daily basis.

²⁶ *Walter Mostert & Another v Magistrates' Commission & Another* 2005 NAHC.

Societal influence

It has been argued that the law is a social science and, as such, needs to reflect the views of society. One of the pillars of our criminal justice system is that, in meting out a sentence, a court has to consider the interests of society as well.²⁷ Societal influence is pervasive – and this becomes very evident in regard to applications for bail. Bail is at times refused on the basis that there is a societal outcry against granting it. Being pressurised by society taints the public view about the independence of our courts.

Conclusion

I have argued that the institutional and individual independence of the magistracy are clearly entrenched in our law. There is ample authority for the view that, when faced with guarding the independence of magistrates, our courts will undoubtedly do so.

However, I believe there are threats to such independence. These threats lie within the very Magistrates Act that should remove magistrates from the realm of the public service. The provisions considered herein have given the Minister of Justice a hold over both the Commission and magistrates. In my opinion, the Act should be amended in various ways to curb such potential ministerial interference, so that the Commission and the magistracy can stand on their own two feet and be truly independent.

²⁷ In *S v Rabie* 1975 (4) SA 855 (A) at 862 G, the court held that –
punishment should fit the criminal as well the crime, be fair to society and be blended with a measure of mercy according to the circumstances.

Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice¹

Manfred O Hinz

Background

Nobody knows how many traditional courts² are currently operating in Namibia. There are 46 recognised traditional authorities³ in the country and most of them run a traditional court at the level of the “chief”, i.e. “the supreme traditional leader”⁴ of the community. There are a number of unrecognised traditional communities, which are nevertheless governed by their customary laws and also have courts and decide matters brought before them.⁵ The territories of many traditional communities are subdivided into districts under the leadership of what are normally referred to as *senior headmen*, who all preside over district courts. Within districts, there are villages under headmen who adjudicate cases in their village courts.⁶

-
- 1 The reader of this article should take note of the fact that more empirical research is needed for an adequate assessment of traditional courts: research that would follow the methodology used by d’Engelbronner-Kolff (1997) in her study of the traditional justice system of the Sambyu in Namibia’s Kavango Region. Her study compiles data on several carefully selected communities, and draws generalising conclusions (d’Engelbronner-Kolff, FM. 1997. *A web of legal cultures: Dispute resolution processes amongst the Sambyu of northern Namibia*. Maastricht: Shaker Publishing). It can only be hoped, therefore, that the following preliminary remarks may prompt an interest in having such a broader study done.
 - 2 The Act that deals with traditional courts, i.e. the Community Courts Act, 2003 (No. 10 of 2003), refers to *traditional courts* as “community courts”. Although in force, the Act has not yet been implemented. What the Namibian government has thus far failed to do is to approve the nominations of traditional justices in terms of section 8 of the Act. I prefer the term *traditional court* to any other, as it describes the courts of *traditional authorities* – as the latter are defined in the Traditional Authorities Act, 2000 (No. 25 of 2000).
 - 3 Recognised in terms of sections 4–6 of the Traditional Authorities Act.
 - 4 This is the language of section 1 of the Traditional Authorities Act, at “chief”. The use of the title *chief* is not appreciated by many traditional leaders, however. They prefer traditional titles in line with section 11 of the Act. For lack of a better term, I will follow the language of the Act.
 - 5 Rukoro (2008), for example, reports on cases dealt with by traditional courts in Ovitoto under Chief Kapuuo; both he and his community do not enjoy recognition under the Traditional Authorities Act. Rukoro, RM. 2008. “Overgrazing and grazing rights: A case study of Ovitoto”. In Hinz, MO & OC Ruppel (eds). *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society, p 101ff.
 - 6 Before the enactment of the Traditional Authorities Act, *senior headman* and *headman* were

However, differences between the communities exist as regards the degree of formalisation of traditional structures. Communities in the far north of the country⁷ in particular, where the colonial administrations had basically followed the British policy of indirect rule, traditional structures remained largely intact as they emerged from precolonial times, and even accepted further formalisations in their administrations.⁸ Others, however, such as the Nama-speaking communities, were very exposed to the direct rule of colonialism and, thus, were not left with much space to practice their inherited forms of governance.⁹ The same applies to the so-called “communities at large”,¹⁰ i.e. the Damara and *Otjiherero*-speaking communities, who were forced out of their ancestral lands into small pockets of land surrounded by commercial farms in order to make space for colonial settlers. Apart from this, a few communities, such as the San, only provided relatively informal structures for the settlement of disputes.¹¹

If one takes the example of the *Ondonga*, one of the *Oshiwambo*-speaking communities in the far north of the country, the *Ondonga* territory is divided into ten districts,¹² each under the leadership of a senior headman.¹³ A district comprises

generally used as titles for traditional leaders below the level of chief. The Act does not know these titles any more, but refers to leaders under the authority of the supreme leader as “senior traditional councillors” and “traditional councillors” (section 2). Nevertheless, it is still common practice to refer to certain traditional leaders as *senior headmen* or *headmen*, particularly in cases where these leaders hold authority over defined areas in the territory of the traditional community.

- 7 That is, in what was formerly referred to as *Owamboland*, *Kavango* and *Caprivi*.
- 8 As one can see in the establishment of almost uniform buildings erected by the South African administration in the far north of the country, and which, still today, accommodate the offices of the traditional administration.
- 9 This was gleaned by the author of this article while conducting research in 1991–1995 for his publication entitled Hinz, MO. 2003a. *Customary law in Namibia. Development and perspective*. Windhoek: Centre for Applied Social Sciences. The publication is now in its eighth edition. The difficulty experienced by Nama-speaking communities in respect of reconstructing their traditional administration of justice can still be seen today. Cf. here Mapaire, C. 2007. *Residence with tradition: The functionality and administration of the Topnaar traditional court. Internship Report*. Windhoek: University of Namibia, Faculty of Law.
- 10 A term used by the Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders. Republic of Namibia. 1991. *Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders*. Windhoek: Government of the Republic of Namibia, pp 66ff, 76f.
- 11 Cf. Marshall, L. 1976. *The !Kung of Nyae Nyae*. Cambridge, MA/London: Harvard University Press, p 287ff.
- 12 Cf. Kamati, ET. 2008. *Internship report on the official daily activities at the Ondonga Traditional Authority*. Windhoek: University of Namibia, Faculty of Law, p 1.
- 13 Or *omwene gwoshikandjo*, which, in Oshiwambo, literally means “the one who holds the authority in the district”.

hundreds of villages under the authority of headmen.¹⁴ The traditional structure in the other seven *Oshiwambo*-speaking communities¹⁵ is similar to that in *Ondonga*. The same applies to most of the communities in the Kavango¹⁶ and Caprivi Regions.¹⁷ Although one has to note that the size of the communities differs, thousands of courts deal with all sorts of day-to-day problems and conflicts in these areas of the country. Although the rest of the country is not as comprehensively covered in terms of institutions of traditional governance, they do exist.

If it is already difficult to assess the number of traditional courts, it is even more difficult to establish the number of cases decided by them. When I participated in the court hearings by a Sambyu senior headwoman who holds court in the eastern part of Rundu, I was told that six to eight cases are dealt with at each court session, and sessions take place every Saturday.¹⁸ A recent investigation into *Ondonga* court practices noted that the highest level of court sits for a week once a month, during which time it handles up to nine cases a day.¹⁹ The statistical projections based on the latter information support the assumption that the *Ondonga* court alone, in its 12 annual sessions over five days, with an average of five cases a day, processes a court record of 300 cases a year. If one adds to this the number of cases that are finally decided by the courts of the districts (where such districts exist) and those of village authorities, and one multiplies that number by seven (i.e. the other *Oshiwambo*-speaking authorities) or by 17 (the already cited communities in the far north), an unbelievably high number of cases can be seen to be adjudicated by traditional courts every year. Even if only some of these cases wound up in magistrates' courts, the latter would collapse!

14 *Headman* is *omwene gwomukunda* in *Oshiwambo*, which literally means “the one who holds the authority in the village or ward”. Cf. also the list of recognised *Ondonga* traditional leaders in *Government Gazette* 65 of 1998. The list contains more than 800 names of headmen.

15 *Ombadja*, *Ombalantu*, *Ongandjera*, *Oukwanyama*, *Uukolonkadhi*, *Uukwaluudhi*, and *Uukwambi*.

16 This appears to be the case in the Gciriku, Kwangali, Mbunza and Sambyu communities. The Mbukushu community knows only a two-layered structure: the level of the chief, and the level of the village.

17 *Mafwe*, *Mashi*, *Masubiya*, and *Mayeyi*.

18 In 1993, as part of research for Hinz (2003a).

19 Zenda, SE. 2008. *Customary law assignment*. Windhoek: University of Namibia, Faculty of Law, p 2; Kamati (2008:3f, 14f).

Traditional courts in Namibia – part of the judiciary?

It is surprising, therefore, that the Community Courts Act²⁰ – the result of some ten years of work,²¹ and representing a comprehensive framework for the uniform operation of traditional courts in Namibia – has still not been implemented although it is in force. One can only speculate as to why the Ministry of Justice has so far not processed the applications for appointments of traditional justices in the various traditional communities.²² It is rumoured that the Ministry has experienced difficulty with the provisions for appeal against the decisions of traditional courts. According to the Community Courts Act, appeals lie with the magistrates' courts.²³ The alternative under consideration is to follow Botswana's model, where a special customary law court of appeal hears appeal cases.²⁴

Apart from changes prompted by officials in the Ministry of Justice, politicians, practising lawyers, and academics in the field of law have raised other questions which, in one way or another, may have influenced the delayed implementation of the Act. Are traditional courts actually courts at all? Are they in fact courts of law? Are they subject to the same constitutional requirements as state courts are, i.e. are they subject to the rules on the independence of the judiciary? And if so, will they be able to comply with these rules? These are some of the questions that need answers.

Looking at the legal anthropological and jurisprudential debate as documented over the years since anthropologists and lawyers started studying traditional justice systems, one will learn that questions about the functioning of traditional courts have occupied scholars and politicians for many years. This was particularly true of the time when African states, after achieving independence, had to make a decision about the place of the administration of justice under customary law in their post-independence legal orders.²⁵ However, what was debated then only provides limited answers to the concerns of today. The early

20 Act No. 10 of 2003.

21 Cf. Hinz, MO. 2008. "Traditional governance and African customary law: Comparative observations from a Namibian perspective. In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 70ff.

22 As required by section 8 of the Community Courts Act.

23 See section 26 of the Act.

24 Cf. here Hinz (2003a:145ff).

25 Cf. Allott, AN, AL Epstein & M Gluckman. 1969. "Introduction". In Gluckman, M (ed.). *Ideas and procedures in African customary law*. London: Oxford University Press, p 1ff; Okupa, E. 1998. *International bibliography of African customary law. Ius non scriptum*. Hamburg: Lit Verlag, p 115ff. The United Nations Institute for Namibia applies the earlier discussion to Namibia, using the work of Sichelongo, MDF. 1981. *Toward a new legal system for independent Namibia*. Lusaka: United Nations Institute for Namibia, pp 34ff, 61ff.

post-independence discussion perceived the traditional administration of justice mainly as something that, if not entirely eliminated, would somehow be integrated into the mainstream system of justice. This meant that, although customary law would remain applicable, the courts applying this law would either be state courts in the specific sense, or state-integrated local courts, modelled after magistrates' courts.

This early post-independence option to integrate the inherited traditional administration of justice into the mainstream state-run justice system has lost ground with the recognition of traditional governance as part of the overall national governance, and the need to accept that adjudication is part of this traditional governance.²⁶

Against this background, this paper first looks at the practice of traditional courts as part of traditional offices, and at the customary law rules that relate to such courts. Secondly, some aspects of the Community Courts Act that relate to the problem of this paper are highlighted. Thirdly, I will revert to constitutional questions arising from the latter discussion, while a more general statement forms the conclusion.

Traditional courts in the interface between customary and statutory law

The traditional courts under customary law

According to the Traditional Authorities Act,²⁷ the overarching function of traditional authority is to promote peace and welfare.²⁸ What section 3 of the Act stipulates in detail shows that the functions of a traditional authority can be fully compared with the functions of the state government. Traditional authorities adjudicate cases brought before them; they have executive functions and “make customary law”, as section 3(3)(c) of the Act says. In other words, the doctrine of the separation of powers, as developed in the theory of modern constitutionalism and implemented in modern constitutions,²⁹ does not apply to systems of traditional governance. *Traditional* offices are those which attend to all sorts of issues of relevance to the community, irrespective of their nature in terms of the doctrine of the separation of powers.

26 See Hinz (2008).

27 Act No. 25 of 2000.

28 Section 3(1), Traditional Authorities Act.

29 Cf. Article 1, Namibian Constitution.

Traditional courts in Namibia – part of the judiciary?

The first point of entry for a community member who seeks assistance from a traditional authority is at village level. In some instances, the headman will not attend to the matter in substance, but forward it to the next (i.e. district level, where it exists) or even the highest level. In other cases, the headman's view will only be of an advisory nature to the higher level. Serious matters, such as cases of murder, go directly to the level of the chief. At the level of the chief, administrative professionalisation occurs in the sense that different people administer different matters. Whether a traditional authority possesses such professionalisation will depend on the degree of administrative formalisation in place, which again will depend on the financial means available to the authority. The quoted internship report on the *Ondonga* traditional office³⁰ indicates that this office has nine staff members in total: the secretary to the traditional authority, as provided for also in the Traditional Authorities Act;³¹ a spokesperson; five clerks; a police officer; and a cleaner. In this staff establishment, the traditional leaders as such – Senior Councillors, who form the King's Council, and councillors, etc. – are not included.

Traditional authorities administer communal land, they allocate it, and are involved in the registration of communal land rights, as is now required by the Communal Land Reform Act, 2002 (No. 5 of 2002). They issue customary marriage certificates³² as well as certificates for customary marriage divorces,³³ and are involved in the issuing of death certificates.³⁴ Furthermore, they form part of the administration process for applying for a firearm licence. Liquor licences are granted for *cuca* shops in remote areas by traditional authorities, as are permits to transport livestock. The *Ondonga* Traditional Authority sells permits to collect building sand for brick-making; traditional authorities in the Caprivi and Kavango Regions are involved in the regulation of tourist businesses. Where conservancies and community forests exist, traditional authorities are involved in their administration.³⁵

30 Kamati (2008:2f).

31 See section 10(3).

32 This has long been standard practice in the Caprivi Region, and is now also observed in the Kavango Region.

33 Recent personal communication from an informant originating from the Caprivi Region.

34 This and the following are supported in Kamati (2008) and Anyolo, P. 2007. *Internship report on the daily official activities at the Ombadja Traditional Authority*. Windhoek: University of Namibia, Faculty of Law.

35 Cf. Hinz, MO. 2003b. *Without chiefs, there would be no game. Customary law and nature conservation*. Windhoek: Out of Africa, p 33ff; and the contribution by Muhongo, M. 2008. "Forest conservation and the role of traditional leaders: A case study of the Bukalo Community Forest". In Hinz, MO & OC Ruppel (eds). *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society, p 197ff.

Traditional lawmaking, in the sense of official enactments of customary law, happens only at specially designed occasions. This is documented at least in the cases of kings in the *Oshiwambo*-speaking areas, who are said to have announced their new laws when ascending to the throne. One famous example of this was the new laws of King Mandume ya Ndemufayo.³⁶ When his reign over the *Oukwanyama* kingdom began, he enacted far-reaching laws by means of which he intervened in certain practices that he did not want to see continue, such as cattle raiding from neighbouring communities.³⁷ One famous example of recent lawmaking was recorded when *Oshiwambo*-speaking traditional authorities changed parts of their customary law, which is based on the matrilineal kinship structure that prevails in those and in Kavango communities, in order to protect widows and their children with respect to the occupation of fields after their spouse's/father's death. The new law now provides for the widow's right to remain on the land and to continue with its cultivation.³⁸ The proposed new constitution of the Sambyu community also has provisions on lawmaking, as well as for a legislative council at the level of the chief.³⁹

As stated in the introduction, traditional authorities perform judiciary functions at all levels, where different levels exist. Some traditional authorities have included relevant procedural rules in their *self-stated* customary laws.⁴⁰ The Laws of *Ondonga* deal with procedural matters in their first section. Section 1

36 Mandume ruled *Oukwanyama* from 1911 to 1917.

37 Cf. Loeb, EM. 1962. *In feudal Africa*. Bloomington. Mouton & Co., p 33ff.

38 Cf. Hinz, MO & P Kauluma. 1994. "The laws of Ondonga – Introductory remarks". In Elelo lyOpashwana lyOshilongo shOndonga. Traditional Authority of Ondonga. *OoVeta (OoMpango) dhoShilongo shOndonga: The Laws of Ondonga*. Oniipa: Evangelical Lutheran Church in Namibia, p 27ff; Hinz, MO. 1997. "Law reform from within: Improving the legal status of women in northern Namibia". *Journal of Legal Pluralism and Unofficial Law*, 39:69; and section 9 of the Laws of *Ondonga*. Similar protection of widows is now part of the Communal Land Reform Act; cf. section 26(2).

39 Articles 7–9, proposed constitution of the Sambyu community, April 2008. The proposal can be found in the files of the Human Rights and Documentation Centre, Faculty of Law, University of Namibia.

40 There is agreement to call exercises of communities writing up pieces of their customary laws *self-stating of customary law*. *Self-stating* is not the same as codifying; and is also not what the School of Oriental and African Studies of the University of London envisaged with its project of restating customary law. Rather, *self-stating* refers to community efforts in which aspects of importance in customary law are put down on paper. Under the auspices of the Human Rights and Documentation Centre, a first compilation of the self-stated laws of the communities in northern Namibia will appear in 2009. Cf. Hinz, MO & JW Kwenani. 2006. "The ascertainment of customary law". In Hinz, MO (ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag, p 203ff.

Traditional courts in Namibia – part of the judiciary?

informs potentially aggrieved persons that they have the right to launch a legal case; if they do so, it must be done at the lowest level. Should a complainant or respondent not be satisfied with the decision at the level of the headman, s/he may request a letter from the headman; the letter is the procedural requirement for continuing with the case at the level of the senior headman.⁴¹ Should one of the parties not be satisfied with the senior headman's decision, the same procedure will be available to take the case up to the court of the King and the King's Council – or *Ongonga*, as the laws put it in *Oshiwambo*.⁴²

It is practice in *Ondonga* that cases to be heard at the King's level have to be registered in the first three weeks of the month, i.e. before the court session in the fourth week. While in some communities the highest court is chaired by the chief, many communities have special officers who preside over the courts. *Oshiwambo*-speaking communities know the position of chairperson: in the *Ondonga* King's court, the chairperson is a very experienced senior traditional leader. In the communities of the Caprivi Region, it is the *Ngambela* who chairs the highest court. After the chief, the *Ngambela* is the highest traditional officer, and presides over the senior councillor meetings. This author was informed that the chief of the communities in the Caprivi Region did not attend court hearings, although he was consulted by the *Ngambela* before the court's final decision.⁴³ Nonetheless, in his report on the Ombadja traditional office, Anyolo⁴⁴ notes that the chief sat in on the hearings held under the chairman of the court, but only intervened in matters of law, i.e. when, to his knowledge, understanding customary law was not being properly observed. Although there is no evidence about the consultations between the *Ngambela* and the chief, it can be assumed that the purpose of the consultation, again, is to ensure compliance with customary law.⁴⁵

Some of the communities that have completed the self-statement of their customary law have explicitly provided for rules to secure the rule of law in the proceedings of their courts. The Laws of *Ukwangali* specifically do not want to see a murderer being fully exposed to both the general law and the customary law.

41 Sections 2.1 and 2.2.

42 Section 2.3. The King is *Omukwaniilwa* Immanuel Kauluma Elifas. *Omukwaniilwa* is the traditional title of the King of *Ondonga*. The Traditional Authorities Act contains some regulations of the Chief's or Traditional Council in section 9.

43 Personal communication by *Mafwe* traditional leaders during field research for Hinz (2003a).

44 Anyolo (2007:8).

45 Similar to the process of automatic review in respect of certain magistrates' cases by judges of the High Court.

Traditional courts in Namibia – part of the judiciary?

According to the latter, a defined number of cattle have to be paid by the family of the murderer to the victim's family. The Laws of the Kwangali require that the traditional court consider a balance between the sentence of the state court and the sentence of the traditional court, allowing the traditional court to reduce the customary law compensation in accordance with any years the convicted person has already spent in prison.⁴⁶ The self-stated laws of the *Mayeyi* in the Caprivi Region have a special section on procedures.⁴⁷ It has ten subsections, respectively entitled "How to submit a complaint"; "Who may be accused of a crime"; "Investigation"; "The decision to prosecute"; "Issuing of warnings"; "How a case is conducted"; "Who may appear before the court"; "Rights of the accused"; "Rights of victims and witnesses"; and "How a case is appealed". The previously mentioned proposed constitution of the Sambyu community has a chapter on the administration of justice that contains a provision according to which no traditional office-bearer is permitted to interfere with justices in the exercise of their judicial functions. The Law of the Mbukushu provides for village headmen who adjudicate cases below the level of the chief to call on neighbouring village leaders to join them in deciding cases that concern members of the village headman's family.⁴⁸

Traditional courts and statutory law

Apart from the Community Courts Act, the Traditional Authorities Act is relevant when looking at the statutory framework in which traditional courts are to operate. The first version of the Traditional Authorities Act came into force some eight years before the Community Courts Act did.⁴⁹ The lawmakers, in their attempt to set out the legal framework for traditional authorities in a broad sense, obviously found it appropriate to include provisions on the judiciary function of traditional authorities, such as the section that deals with the jurisdiction of traditional courts – to which I will revert below. There are, however, two sections in the Traditional Authorities Act that are of more principal importance, as they have a bearing on the position of traditional courts and the potential judicial officers in these courts. The first is section 15, according to which holding the office of chief and holding a political office are incompatible. *Political office* is defined to be the office of President, a Member of the National Assembly or the National Council, or the leader of a registered political party. Although the chief of a traditional community does not necessarily preside over the highest

46 Section 1.

47 Section 3.

48 Personal communication, Mr B Mushongo, Mukwe, 16 September 2008.

49 The Traditional Authorities Act in force repealed its earlier version of 1995; see section 20(1) of the 2000 Act.

Traditional courts in Namibia – part of the judiciary?

court in his/her area, and is not even necessarily member of the court, as can be seen above, for all those cases where the chief does in fact attend court, the incompatibility rule of the Traditional Authorities Act has meaning: it at least ensures that the highest officer in the traditional set-up is not bound to loyalties of a political office and, therefore, will not find him-/herself in a formal conflict of interests.

The second section of importance in the Traditional Authorities Act is section 16. This section determines the relationship between the organs of the state and traditional authorities. Section 16 requires that traditional authorities –

... give support to the policies of Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.

The scope of this support clause does not distinguish between the various functions a traditional authority performs. The introductory part of section 16 stipulates that a traditional authority, in the exercise of its powers and the performance of its duties and functions under customary law as specified in the Act, is obliged to do what the support clause demands. *Judiciary* functions are those specified in the Act in section 3(1)(b), which refers to the administration and execution of customary law as one of the tasks of the traditional authority. I will not repeat here what I have stated elsewhere about the history and debatable content of the support clause.⁵⁰ Suffice it to say here that the reasons to question the constitutionality of section 16 receive additional grounds when looking at the judicial functions of traditional authorities. As the section stands, it is open to be used as gateway for influencing traditional authorities when adjudicating cases in which government has an interest!

I now turn to the Community Courts Act. The tasks of the Community Courts Act are manifold and difficult. Despite the socio-political differences of the various traditional communities, a uniform approach had to be developed to replace the fragmented legal scene inherited from the time before independence.⁵¹ Areas for legislative interventions had to be determined and attended to in a way that would follow the principles of law reform according to which changes had to be reasoned, limited to the necessary, stated in clear language, and investigated in view of their acceptance by the addressees of the new law.⁵² The constitutional basis for law reform in this direction is Article 66(2) of the Constitution, which

50 See Hinz (2008:82ff).

51 See Schedule to the Community Courts Act.

52 Cf. Noll, P. 1973. *Gesetzgebungslehre* (“Theory of lawmaking”). Reinbeck bei Hamburg: Rowohlt.

Traditional courts in Namibia – part of the judiciary?

gives the lawmaker the authority to repeal and modify customary law and any part thereof, subject to the terms of the Constitution. In other words, repeals and modifications of customary law have to accept that customary law is confirmed as such by the Constitution – even as regards part of the enforceable right to culture.⁵³

What I will do in the following is, firstly, submit some general observations on the Community Courts Act. Secondly, I will consider some, in my view, problematic provisions of the Act that are relevant to the status and functioning of traditional courts.

The following general observations are guided by an interest to depict the legal environment in which the Community Courts Act perceives traditional courts to be.

The Community Courts Act is the result of a Ministry of Justice project that started soon after independence.⁵⁴ After an assessment of the inherited pre-independence law was done, consultations were held all over Namibia, and the various drafts of the envisaged bill were discussed with all possible stakeholders. The result, which took more than ten years to emerge, came into effect in 2003 and is a kind of compromise between common law principles on the one hand, and on the other, the increasingly appreciated need to accept approaches under customary law that differ from common law. One important feature with respect to compromising common law can be found in the section on jurisdiction,⁵⁵ which avoids the common law distinction between civil and criminal law, and confirms that community courts have jurisdiction –

... to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by the customary law.

This was done to recognise that customary law, in its main focus on compensation for wrongs committed, does not draw the same distinction between civil and criminal law that exists under the general or common law. The reference to *compensation* by customary law also notes that customary law compensation

53 Article 19, Namibian Constitution. The limitations to law reform flowing from this provision in the Constitution needed special consideration, as did the possible consequences for repeals and amendments to customary law arising from the fact that law reform inroads into customary law are inroads into law that owes its existence to tradition and traditional lawmakers.

54 Cf. what I summarised in Hinz (2008:70ff).

55 Section 12, Community Courts Act.

Traditional courts in Namibia – part of the judiciary?

is standardised and does not expect proof of loss as is the case for common law compensation, i.e. in accordance with section 300 of the Criminal Procedure Act.⁵⁶

Another area where the Community Courts Act confirms customary law is in the law of procedure applying to hearings before a traditional court. Section 19(1) of the Act states the following:

Subject to this Act, the practices and procedure in accordance with the proceedings of a community court shall be conducted, including procedures and rules relating to evidence, the manner of execution of any order or decision and the appropriation of fines shall be in accordance with the applicable customary law, but shall be in accordance with the principles of fairness and natural justice.

The implications of this are far-reaching as regards incorporating procedural customary law in general terms into the law applicable to the courts operating under the Community Courts Act. Traditional courts employ inquisitorial principles and not adversarial ones, as state courts do. Traditional courts allow hearsay evidence, which state courts do not accept. Traditional courts accept submissions that a state court may rule out as being unrelated to the case. Traditional courts have their own presumptions on which to base conclusions, but state courts may have difficulties with such presumptions.⁵⁷

However, looking at Article 66 of the Constitution, the definition of *customary law* in the definition sections of the Community Courts and Traditional Courts Acts (sections 1 of the respective Acts), and taking into account what the quoted section 19 of the Community Courts Act emphasises with its reference to the “principles of fairness and natural justice”, there is no doubt that the confirmation of procedural customary law is meant to be subject to the overarching law of the state. However, the question remains to what extent the provisions on the independence of the judiciary (see Article 78(2) of the Constitution), including consequences flowing from the doctrine of the separation of powers, apply to traditional courts.

The Community Courts Act does in fact contain some provisions that deserve mention here. The general intention of this Act is to provide some structural uniformity to the traditional administration of justice. Apart from offering traditional courts a uniform, nationally applicable system of enforcing the orders

56 Act No. 51 of 1977. Cf. Hinz (2003a:175ff).

57 See here d’Engelbronner-Kolff (1997:149ff, 226ff).

Traditional courts in Namibia – part of the judiciary?

of community courts,⁵⁸ the Act also intends to provide for (although whether it in fact does so is debatable, as will be seen later herein) standardised schemes for the establishment of traditional courts⁵⁹ as well as the appointment and removal of traditional justices⁶⁰ and the composition of traditional courts.⁶¹ The Act also sets the framework for the possibility of appealing the decisions of traditional courts.⁶² Again, whether the Act achieves this is debatable, since it does not really take note of the possible tensions between traditional courts and magistrates' courts with respect to the choice of fora existing for potential complainants, and the consequences of playing with the option to proceed either to a traditional or a magistrate's court – an issue to which I will return below.

Apart from these debatable provisions, the Community Courts Act contains two procedural provisions that deserve mention here. Section 18 of the Act declares every community court a court of record. For years, many traditional courts have employed the practice of keeping court books in which they note basic information on cases decided before them. Although these court books are valuable sources of information about the way cases are dealt with,⁶³ they do not always give enough information when it comes to what a court of appeal may wish to see. This is where section 28 comes in: traditional courts are now obliged to record the adjudicated cases in a manner expected by a court of record. Section 16 of the Act allows parties in a traditional court case to “be presented by any person of his or her choice”. Although this is interpreted to implement Article 12(1)(e) of the Constitution, according to which all persons in trial “shall be entitled to be defended by a legal practitioner of their choice”, many traditional leaders question this provision. In their view, legal practitioners should not be allowed in traditional courts as they do not understand the procedures of traditional courts and, by intervening on the basis of common and statutory law, will only disturb the traditional way of solving conflicts.⁶⁴

58 See section 23, Community Courts Act.

59 See sections 2, 3 and 4, Community Courts Act.

60 See section 8, Community Courts Act.

61 See section 7, Community Courts Act.

62 See sections 26 and 27, Community Courts Act.

63 It was one of the tasks of the Constitutional and Customary Law Project (CoCuP) which I directed in the Centre for Applied Social Sciences at UNAM's Faculty of Law from 1994 to 2000 to collect and evaluate the case books of traditional courts; see Hinz, MO. 2006. “Legal pluralism in jurisprudential perspective”. In Hinz, MO (ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag, pp 1ff, 8.

64 In many meetings with traditional leaders conducted since the enactment of the Community Courts Act, the issue of legal representation was debated at length.

Traditional courts in Namibia – part of the judiciary?

A special word is needed on the financial situation of traditional courts.⁶⁵ The administration of justice costs money; it is common knowledge that under-financing institutions that are expected to deliver justice in an unbiased manner is tantamount to inviting inroads into the independence of the judiciary. The financial situation of traditional leaders has been a point of contention since the enactment of the first version of the Traditional Authorities Act in 1995. However, even in the 2000 Act, only a limited number of traditional authorities receive a personal allowance in terms of section 17. Apart from this, the financial support of traditional offices is left to the administrative discretion of the minister of justice. Other than this, traditional communities are expected to generate their own income, be it through collecting traditional levies, or projects conducted in their areas of jurisdiction. For income of this nature, the Traditional Authorities Act offers the possibility of establishing a Community Trust which would be responsible for the administration of funds paid into it.⁶⁶ In addition, the Community Courts Act provides for allowances to traditional justices and the remuneration of traditional court clerks and messengers,⁶⁷ but goes beyond the Traditional Authorities Act in that it explicitly obliges the Minister of Justice to give financial assistance to traditional courts.⁶⁸ The terms in which this is expressed are nevertheless weak:

... the Minister shall at any time grant to a community court such financial assistance as may be necessary for defraying expenses in connection with the administration of such community court.

The “shall” in the Act is, therefore, not really a *shall*, as it is left to the Minister to decide what grant is given, when, and to which court. In view of financial sustainability, transparency and the need to provide an independent service to justice, the respective part of the Community Courts Act needs revision. Instead of leaving all decisions to the executive, the Council of Traditional Leaders⁶⁹ could be called on for their input.

65 A recent conference on the independence of the judiciary (Entebbe, 24–28 June 2008, organised by the Konrad Adenauer Foundation) stressed the need to consider to what extent the independence of the judiciary was at stake if the authority to decide on its finances lay in the hands of the executive.

66 See section 18, Traditional Authorities Act, as well as sections 4ff of the Regulations thereunder, GN 94 of 2001.

67 See section 10, Community Courts Act, but also section 12 of the Regulations under the Traditional Authorities Act, GN 94 of 2001.

68 See section 5, Community Courts Act. It is not known whether or not the Ministry of Justice has determined any formula according to which traditional courts would receive financial assistance.

69 A body created under the Constitution, as provided for in Article 102(5); cf. also the Council of Traditional Leaders Act, 1997 (No. 13 of 1997). Although the Council does not enjoy the status of a parliamentary body, it is seen by many traditional leaders to be their (third) ‘house’, next to the National Assembly and the National Council.

Traditional courts in Namibia – part of the judiciary?

Like the Traditional Authorities Act, the Community Courts Act provides for a “Revenue Account” into which “all moneys accruing to such courts” are to be paid.⁷⁰ Interestingly, the section of the Community Courts Act that deals with the said revenue account does not take any note of the provisions on the Community Trust Fund in the Traditional Authorities Act.⁷¹

In more recent versions of self-stated customary law, in the consequences for committed offences it can be seen that fines indicate a certain number of cattle having to be paid to the aggrieved, and one head of cattle to the traditional authority. The still deliberated standardised version of the laws of the five Kavango communities⁷² even adds another head to be paid to the chief. Developments of this nature are obviously responses to financial needs of the traditional authorities, and the expectation not to run local affairs at the mercy of governmental subsidies.

The special areas taken up from the Community Courts Act, besides those mentioned above, are particularly important to questions about fairness in the traditional administration of justice, its independence from governmental influence, and its adequate positioning in the overall justice system. The yardstick for my judgments is the degree of acceptance of the customary law which governs traditional courts, or in other words, the degree of interference with customary law.⁷³ The areas selected concern the following:

- The application for recognition of traditional courts (sections 2ff)
- The composition of traditional courts (section 7)
- The appointment and removal of justices (section 8)
- The limitations of liability for compensation (section 24)
- The provision on transferring cases between traditional courts and magistrates’ courts (section 21)

⁷⁰ See section 6, Community Courts Act.

⁷¹ The drafters of the Community Courts Act obviously did not fully consider what the Traditional Courts Act – enacted much earlier – entails. Another point of discrepancy can be found in comparing the applicability of customary law. Section 14(b) of the Traditional Authorities Act states that customary law only applies to the members of that traditional community and to any person who by his or her conduct submits himself or herself to customary law of that community, whereas sections 12 and 13 of the Community Courts Act appear to allow for an interpretation according to which customary law would apply as long as the cause of action arose within the area of jurisdiction of that community, i.e. irrespective of whether the party to the matter is a member of the respective community or has submitted him-/herself to customary law.

⁷² As referred to above.

⁷³ Or in more jurisprudential language, the degree of accepted legal plurality; cf. Hinz (2006:29ff).

Traditional courts in Namibia – part of the judiciary?

- The rule that obliges traditional courts to furnish records to state courts (section 18(3)), and
- The appeals against decisions by traditional courts (sections 36ff).

Although the Act is aware that traditional courts possess a layered structure in many communities,⁷⁴ the provision on recognition focuses on the highest level of the respective traditional justice system and leaves the status of those in lower levels quite open.⁷⁵ The more appropriate way would have been to recognise the traditional justice system as established according to customary law. Such a recognition could keep the administration of justice at the lower levels as it is, including its relatively less formal procedural set-up, which, for example, allows participation of the village in assessing cases before it. Recognition by the word of the law would nevertheless be of importance, as it would acknowledge the peacemaking quality of those courts and their contribution to law and order.

While the composition of the court is to some extent left to customary law – a community court shall be presided over by one or more justices⁷⁶ – there is a change to customary law in so far as the judges who will sit on the traditional bench have to come from the list of judges appointed by the Minister of Justice. Under customary law, it is up to the traditional authority to appoint members to the court.⁷⁷ Comparing the Community Courts Act with the Traditional Authorities Act, one has to note that the latter has mechanisms to control appointments only for the highest office in the community, i.e. the chief, and not for leaders below the position of chief.⁷⁸ It is not clear why the Community Courts Act, which in fact deals with one branch of traditional governance – the judiciary, suggests an approach different from the general rule in the Traditional Authorities Act.

According to section 8 of the Community Courts Act, it is the mandate of the Minister of Justice to appoint and remove traditional judges. Requirements for the appointee are that s/he –

- must be conversant with the customary law applicable to the area of jurisdiction
- must be fit and proper to be entrusted with the responsibility of the office of justice
- does not hold an office in Parliament, or a regional or local authority council, and
- is not a leader of a political party.

⁷⁴ Section 2(1)(b), Community Courts Act; section 11(1)(a), Regulations of Community Courts under the Community Courts Act, in Government Notice 237 of 2003.

⁷⁵ See sections 2 and 3, Community Courts Act.

⁷⁶ Section 7(1).

⁷⁷ Cf. Zenda (2008:3).

⁷⁸ See section 10, Traditional Authorities Act.

Traditional courts in Namibia – part of the judiciary?

As to the removal of a traditional judge, the Act stipulates that the Minister can remove a traditional judge from office if the latter becomes subject to any disqualification which would not allow his/her appointment. Before the Minister takes action, however, the relevant traditional authority has to be consulted.

As to the last point, one can in fact refer to the Traditional Authorities Act, which has incompatibility rules for supreme traditional leaders, similar to what is found in the Community Courts Act. Otherwise, what has been said above on the composition of community courts applies to the rest of the reasons for appointment or removal of judges, respectively. In addition, no criteria are given that would allow the Minister to assess whether a judge is conversant with his/her customary law, or is fit and proper for his/her office. Should one really think that appointments and, more so, removals have to be regulated in line with what the Community Courts Act stipulates, it would be advisable to determine an authority away from the administration to handle such matters. A committee of the Council of Traditional Leaders would have more insight into matters of customary law than the Minister of Justice would, and would simultaneously keep the system of traditional justice away from the influence of the administration.⁷⁹

Section 24(1) deals with cases where a court other than a traditional court grants a compensation order. In such a case, a complainant will not have the option to claim additional compensation in a traditional court. Such a rule of conflict is important, but it only covers part of the potential conflicts with respect to concurrent jurisdiction between state courts and traditional courts. For example, what is the position when, in a murder case, a traditional court decides to grant compensation to the aggrieved family under customary law, and the murderer is additionally called to stand trial in state court? What is the position when the murderer is sentenced in a state court and the aggrieved family claims customary law compensation in a traditional court? The problems in answering these questions are twofold: the first being that compensation under customary law is not just civil, but has a punitive element. This leads us to consider whether or not the prohibition on being tried twice (Article 12(2) of the Constitution) is violated in cases of this nature.⁸⁰ Statutory assistance is needed to clarify the potential

79 Noting what happened in the case of magistrates (cf. the case of *Mostert v The Minister of Justice 2003 NR 11*, which prompted the Namibian government to introduce the Magistrates' Commission – see section 5, Magistrates Act, 2003 (No. 3 of 2003)), one could expect a similar constitutional veto with respect to the quoted provisions in the Community Courts Act.

80 Hinz (2003a:175ff); Horn, N. 2006. "Criminal or civil procedure? The possibility of a plea of *autrefois* in the Namibian Community Courts Act". In Hinz, MO (ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag, p 183ff.

Traditional courts in Namibia – part of the judiciary?

conflict. Such assistance should be based on the equal treatment of the courts, meaning that state courts would have to accept that, in applying traditional justice, traditional courts conclude even murder cases.⁸¹ The equal positioning of court orders would contribute towards avoiding cases where complainants lodge a charge against a wrongdoer with the police, but very often withdraw their cases after receiving compensation from a traditional court. This practice, by which state law is used as a means to enforce customary law, would lose importance with the proposed change of the law. It would also release prosecutors from the difficult task of deciding whether or not to pursue prosecution in such cases of withdrawal, because they are very often faced with unwillingness on the part of the people who originally laid the charge, who then no longer wish to cooperate with the prosecution.

Section 21 of the Community Courts Act provides for the possibility of transfer of a case from the traditional court to the magistrate's court. It also offers the possibility of re-transfer of the case by the magistrate's court back to the traditional court. The Act, however, does not regulate the possibility of transfer from a magistrate's court to a traditional court. Why not? It is, indeed, quite easy to think of cases that would be better adjudicated under customary law than under common law.

Section 18(3) of the Community Courts Act determines that copies of court records are to be furnished to the magistrate's court and the permanent secretary of the Ministry of Justice. Why to them? Why not to the High Court? Why at all? The Act is silent and does not indicate what the magistrate and the permanent secretary are to do with the records coming from all the community courts – again, a rule which is likely to indicate the uncertainty lawmakers and law-reformers have when it comes to the positioning of traditional authorities into the overall system of law!

Appeals from traditional courts to magistrates' courts will not serve the purpose of achieving justice based on customary law. For magistrates, appeals of this nature will be cases amongst the others they have to deal with. Very often, magistrates will also not have the necessary expertise in customary law. The Botswana model as referred to above would be far more appropriate to adopt in Namibia. Composed of particularly knowledgeable traditional leaders, who may even have formal training in a school of law, a helpful hand would be assigned to the application of customary law which also takes note of the diversity of customary law on the one hand, and the need to provide certain standardisation on the other.

81 Cf. Hinz, MO. [Forthcoming]. "Introduction". In Hinz, MO (ed.). *Traditional and informal justice systems*.

Traditional courts: Courts of law?

Are the constitutional requirements for the judiciary, such as those in Articles 78(3) or 12(1)(a), binding in the same way on traditional courts as they are on the judicial organs of the state?

On the one hand, the confirmation of customary law can be acknowledged as it reads in Article 66(1), namely that the customary law in force at independence is to remain valid to the extent that it does not conflict with the Constitution or any other statutory law. This also confirms the existence and operation of traditional courts, since traditional courts are an integral part of customary law. However, and in view of the second half of Article 66(1), which subjects customary law to the Constitution and any other statutory law, one may ask whether the requirements set out in Article 12(1)(a) of the Constitution – which guarantee all persons fair and public hearings by an independent, impartial and competent court or tribunal – and the constitutionally accepted principle of the separation of powers would not require that the same also apply to traditional governance and the various distinguishable functions applied by it. If the two questions were answered in the affirmative, failing to comply with the separation of power would render traditional governance unconstitutional. Such a result would certainly violate the intention of the Constitution to provide space for inherited traditional structures to operate governmental functions.

What are *traditional courts*? Are such courts “courts” or “tribunals” in the sense of Article 12, that is, are they courts of law? The Constitution recognises, apart from the supreme and high court, lower courts.⁸² Are traditional courts lower courts? The answer to this question will differ, depending on the jurisprudential position one wishes to take. From a Kelsenian perspective, there will be no alternative other than to consider traditional courts as lower courts in a strict sense. Having the need for a hierarchical construct in which all state authority has its place and is bound to its respective higher authority, out of jurisprudential necessity, traditional courts ought to range close to magistrates’ courts: either at the same level of these courts or below them. In the latter case, the level of magistrates’ courts would be the place to appeal to from a traditional court. From a customary law perspective, however, traditional courts are difficult to accommodate in a hierarchy where they would be at the bottom. It is their foundation in ancestral legitimacy that makes members of traditional communities refer to the court at the chiefs’ level as the *traditional high court*. This high court is the highest court of the community, setting the tone for all its courts. The statutory provision

82 See Article 78(1)(c).

Traditional courts in Namibia – part of the judiciary?

for appealing against the decisions of these high courts to magistrates' courts appears, therefore, not to appreciate the status traditional high courts have in accordance with customary law. The fact that there are only a few cases of appeal from traditional courts to state courts is proof of this. A supreme traditional leader, when consulted about the Community Courts Act, stated that appeals against court decisions at the chiefs' level were unheard of and would not be acceptable – a view which is a further reflection of what has been said about the status of traditional high courts under customary law. Although such a view will find it difficult to win in a unitary state, it should promote the understanding of traditional courts in line with what has been accepted for traditional authorities as a whole, namely that they are *sui generis*.⁸³ As traditional authorities are *sui generis*, traditional courts as part of traditional authorities have this quality as well.

Is what Article 12(1)(a) guarantees also guaranteed under customary law? When the procedural requirements as recorded in the research referred to above are considered, a considerable number of rules in the self-stated customary law noted above can be seen to have an obvious basis in the rule of law. There are rules that govern all procedures at the various levels. The previously quoted case of the Laws of *Mayeyi* is a good example of the awareness on the side of traditional stakeholders that procedural rules are not only a requirement under customary law as it is interpreted today, but are also to be put on paper to give them additional weight. To what extent this can be generalised is open to research. However, what the High Court of Namibia held in the case of *Kahuure v Mbanderu Traditional Authority* is an indication of how possible procedural deficits in the application of customary law will can be remedied. What Justice Parker suggests is to draw on the principles of fairness and reasonableness in terms of Article 18 of the Constitution.⁸⁴

The issue of the separation of powers and traditional governance leads to three possible arguments. The first would be to consider what two relevant South African court decisions have to offer with respect to the issue at stake, and which hold that the doctrine of the separation of powers does not apply to traditional

83 Cf. Hinz, MO. 2002. "Traditional authorities: Sub-central governmental agents?". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: University of South Africa, p 81ff.

84 *Erastus Tjiundika Kahuure and Others v Mbanderu Traditional Authority and Others, High Court Judgment of 13 April 2007, Case No.:(P) A 114/2006* – unreported. The powerful decision of Justice Parker needs to be analysed in further detail, also in view of the decision of the Supreme Court in the same matter, which could not be accessed yet at the time of writing this paper.

Traditional courts in Namibia – part of the judiciary?

courts.⁸⁵ The second way would be to go back to the origins of the doctrine – instead of applying the doctrine of power in a very literal manner, to ask for the rationale behind it, and to enquire whether traditional governance may not perhaps have alternatives which serve the same purpose as the doctrine of separation. A third way of dealing with the question of the separation of powers in traditional governance would be to place what are known as *traditional courts* into the wider societal context in which these courts operate, and by doing so, to put particular emphasis on the main function of customary law, namely to restore communal harmony in a sense that allows the aggrieved person and his/her family to continue to live side by side with the wrongdoer and his/her family.⁸⁶

I will briefly deal with the first two ways before elaborating on the third, since the third way will be the one that gives justice to traditional courts as courts sui generis.

The judge of the first-quoted South African case is of the very clear opinion that the fact that traditional governance does not separate power as modern constitutions does not lead to verdicts of unconstitutionality. Justice Madlanga holds that –⁸⁷

[t]here seems, in my view, to be no reason whatsoever for the imposition of the Western conceptions of the notions of judicial impartiality and independence in the African customary law setting. Any such imposition is very much akin to the abhorrent subjection of matters African to “public policy”. As our recent legal history discloses, such was the public policy of those then in power and it did not necessarily accord with the public policy of the Africans and, for that matter, the public policy of the rest of the South African people who were not in power. The believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial function. The imposition of anything contrary to this outlook would strike at the very heart of the African legal system, especially the judicial facet thereof.

In concluding this statement, Justice Madlanga refers to section 31 (the right to culture), section 33(3) (just administrative action) and section 181 (establishment of state institutions supporting constitutional democracy) of the Constitution of the Republic of South Africa.

This position certainly supports concepts inherent in customary law and, by

85 *Bangindawo and Others v Head of the Nyanda Regional Authority and Another* 1998 (3) BCLR 314 (Tk), but also *Mhlekwana and Feni v Head of the Western Tembuland Regional Authority and Another* 2000 (9) BCLR 979 (Tk).

86 Cf. Hinz (2003a:9ff).

87 At 327.

Traditional courts in Namibia – part of the judiciary?

doing so, assists in maintaining a vanguard against inroads from the modern legal system. In this respect, it would deserve more detailed analysis, particularly in view of the second South African decision, which deviated from the first in certain aspects. It is not within the scope of this paper to undertake such an analysis, but I will instead revert to the position held by Judge Madlanga below, and view it from a different perspective.

The second way of dealing with the question of the separation of powers in traditional governance enquires about what the proponents of the doctrine of the separation of powers – the philosophers Montesquieu and Locke, during the Enlightenment – had in mind when they propagated the separation of powers, and asks whether traditional governance would offer alternatives that would serve the same intention as envisaged in this doctrine. Montesquieu and Locke's interest was to support the rule of law by preventing undue influence of one branch of government on the other. Each branch of power was expected to run its affairs by applying the law relevant to it. Decisions, be they in the field of administration, the field of lawmaking, or the field of adjudicating, were to be based on the generally applicable law and not on personal preferences or in pursuance of personal interests.

In view of this, when I revisit what was said earlier on the structuring of traditional courts, on the composition of courts at the chief's level (recall what has been recorded about the institution of *chairperson* of the court), it can indeed be affirmed that there are mechanisms in place in the traditional administration of justice that employ concerns as they inform the doctrine of the separation of powers. The said mechanisms are additionally supported by the way decisions are reached in the traditional set-up. The consultations that precede decisions are usually not restricted to the same kind of stakeholders as those defined by law to appear before state courts. A dispute is something that concerns everybody in the village, and not only the parties involved. At the chief's level in particular, the submissions of opinions are structured in such a manner that all arguments, starting from the more junior persons and proceeding to the senior ones, are heard, taken up, summarised and integrated into the final word, with which everyone is expected to be in agreement. Nevertheless, all this is not really a satisfactory answer to the problem of the separation of powers in traditional circumstances!

The third way to look at the doctrine of the separation of powers in the context of traditional courts takes as its starting point the arguments submitted by Judge Madlanga, but goes further by contextualising traditional courts in the broader socio-legal environment in which they operate.

D’Engelbronner-Kolff analyses in her “web of legal cultures” the working of normative orders from the widest possible perspective with respect to one of the traditional communities in the Kavango Region.⁸⁸ When people talk about traditional courts, it is very often overlooked that, apart from the relatively formalised traditional courts – as one has in mind when talking of traditional courts – there are even less formalised bodies beneath and around traditional courts, which play important roles in the management of problems and solution of disputes. There is the family in its various appearances; there are church bodies of various sorts; there are individual community stakeholders such as traditional healers; and there are government offices! They are all important as institutions to assist in the maintenance of peace in the community. Procedural formalities are not their first concern, however. Instead, they are results-driven – and the result they are after is this: solve the problem in a way that is accepted by all. Procedural formalities, i.e. the formalities protecting the rights of the parties to a dispute in terms of the rule of law (including the guarantee to fairness through mechanisms as entailed in the doctrine of the separation of powers), are also subject to this orientation, i.e. achieving a generally accepted solution of the problem. As the less formal ways of achieving results fail and the dispute moves on to gradually more formalised, higher fora, the said procedural formalities gain increasing importance. Procedural formalities appear to be stricter the higher the case moves in the adjudicating hierarchy. Higher instances of this nature may be the first levels below the traditional administration of justice, followed by the various levels of the traditional administration of justice, and then by the state courts. To the latter, all procedural requirements, including those that follow from the doctrine of the separation of powers, apply in full. In other words, what is propagated here is a view that, on the one hand, allows the traditional administration of justice to operate in its inherited ambit, and on the other, accepts that what has become standard in the operation of the state and its institutions need not be forced onto structures which work on societal matters from a different perspective.

88 D’Engelbronner-Kolff (1997:106ff).

Conclusion

This article has demonstrated that the Community Courts Act, which deals with the traditional administration of justice, could be improved in various ways. Indeed, some of these improvements would, by avoiding questionable statutory interventions, actually strengthen the constitutional confirmation of customary law. Other improvements, like getting the Council of Traditional Leaders involved in the appointment of traditional justices and giving the Council a say in the financial operation of the courts, would contribute to the independence of traditional courts. The following concluding remarks will focus on the more general need to provide traditional courts their appropriate place in the system of the judiciary as a whole, and, by doing so, to respond to the plea of traditional authorities to be respected as authorities of justice in their own right.

I wish to lead to the conclusion by referring to the case of *S v Haulondjamba*, a case that was originally adjudicated by a traditional court and re-adjudicated by a magistrate's court.⁸⁹ The opinion delivered by the reviewing judge of the High Court amply indicates the unfortunately limited knowledge professional lawyers have with respect to the traditional administration of justice. While the traditional court sentenced the person convicted for attempted rape to pay compensation to the complainant in terms of a certain number of cattle, the magistrate amended the traditional verdict by sentencing the accused to pay a certain amount of money to the state or face imprisonment, but confirmed the traditional court by ordering compensation amounting to two head of cattle to the complainant. The case came to the High Court on automatic review. While the judge at the High Court confirmed the sentence of payment to the state or, alternatively, imprisonment, the court set aside the order of payment of compensation for the following reasons:⁹⁰

Insofar as the sentence imposed by the tribal court has been made part of the magistrate's sentence, this is an irregularity. Any person can submit to the jurisdiction of a tribal chief and agree to be bound by the judgment of the tribal court. The law will not interfere with such procedure, provided such procedure complies with the principles of natural justice. Unless there are special conditions present and all interested parties agree to have the decision of the tribal court made an order of the magistrate's court or High Court (this is, where the position is analogous to the position where parties agree to have an arbitration award made an order of court) a court of law cannot make the tribal court's sentence an order of court. This does not mean the court of law concerned sets aside the tribal court's judgment and sentence. As far as the parties are concerned, the tribal court's decision in this case will stand but it does not form part of the sentence of the magistrate.

89 1993 NR 103.

90 (ibid.:103f).

Traditional courts in Namibia – part of the judiciary?

This quotation prompts two observations at least. The first is that the learned judge obviously missed that Article 66 of the Namibian Constitution reconfirmed customary law to be the law of the land, which, by virtue of this confirmation, also required attention by the courts of the state. To place the order of the traditional court next to an arbitration order is therefore really unacceptable. The second observation is more of a general nature. Whereas the magistrate's decision tried to accommodate the customary law concept of compensation, which is in line with the customary-law-based concept of justice and according to which the payment of compensation to the aggrieved party is essential to achieving societal peace, the judge of the High Court did not even attempt to pay attention to this. It is as if the administration of justice proper starts with the state-administered courts, the courts of law. What the High Court did in the *Haulondjamba* case reflects the very attitude against which Judge Madlanga argued in the case where the doctrine of the separation of powers was invoked. Only when the seriousness of traditional justice and its administration are respected will justice be done to customary law and its operations. Only when traditional justice and its operation are respected as having their own rationale will it be possible to argue for changes to improve justice and its administration at all levels, in line with the wider debate about the rights of the parties involved in a dispute. Without an openness towards alternative approaches, communication with those who stand for such alternatives will fail. Without such openness, law reform will not be able to learn about the need to employ creative legal mechanisms that will give the traditional administration of justice the legally accepted and protected space not only to operate, but also to develop.

I submit my full agreement to what a prosecutor, who works in a magistrate's court close to the efficient centres of traditional justice, recently expressed in a meeting with students of the Faculty of Law,⁹¹ namely that he found it inappropriate that an appeal from a traditional high court would be heard by a magistrate's court.⁹² Why? "The traditional high court and the magistrate's court are on a par," the prosecutor said.⁹³ "How can the latter revisit a case coming from a court which operates at the same level?"

91 Customary law field work in the Kavango Region, 17 September 2008.

92 After the repeal of legislation in place before the Community Courts Act, and because the Act is not yet implemented, it is uncertain whether appeal from a traditional court is possible at all.

93 This argument gains even more power when one considers that magistrates' courts are statutory creations. There are good reasons to argue that traditional courts have, like the High and Supreme Court, original jurisdiction. Interestingly, the now repealed Civil and Criminal Jurisdictions. – Chiefs, Headmen, Chiefs' Deputies and Headmen's Deputies, Territories of South West Africa Proclamation R348 of 1967 referred to the civil jurisdiction of traditional courts of the northern part of the country as "original and exclusive jurisdiction" (see section 4(1)(a)).

SECTION VI

**The independence of the
Superior Courts**

Politics and judicial decision-making in Namibia: Separate or connected realms?

*Peter VonDoepp*¹

Introduction

To what extent can we detect the influence of political factors in decision-making at Namibia's High and Supreme Courts? The question goes to the heart of a key issue for the democratic dispensation in the country. As most observers readily acknowledge, independent and assertive judicial institutions are critical for democratic consolidation. Yet, to what extent are Namibia's judicial institutions independent, such that they are willing to assert their authority vis-à-vis other branches of government?²

To investigate this question at the heart of the study, I undertook a statistical analysis of nearly 250 decisions made by judges of the High and Supreme Courts since the country's independence in 1990. The analysis examines whether and how certain political factors have affected the patterns of decision-making that have been witnessed. Have judges, for instance, deferred to government when faced with rendering decisions in important political cases? Have all judges been equal in terms of their tendencies to side with or against the government? And have judges altered or adjusted their decision-making in light of pressures and threats from the elected branches and other political actors?

The study indicates that, as a whole, the judiciary has performed quite admirably in terms of independence from the other branches. The extent of deference to the executive has been minimal. This is true regardless of the period during which decisions have been taken, and regardless of the type of case being decided. This said, the analysis tentatively suggests that one category of judges – foreign judges appointed in the mid-1990s – has displayed a modest tendency to side with government. This tendency has been somewhat more apparent since 2000, when such judges became the target of attack from political circles after their

1 The author expresses his gratitude to the Institute for Public Policy Research, which provided generous support during the period when data was collected and analysed for the study. I am also grateful to the Legal Assistance Centre, whose library was used to collect much of the data for the study.

2 The paper builds on and modifies slightly the findings from an earlier working paper published with the Institute for Public Policy Research (IPPR) in Windhoek, Namibia. The earlier draft can be found on the IPPR website at <http://www.ippr.org.na/publications.php>.

decisions in certain cases. This is not to suggest that such judges have been wholly obsequious to the government; to the contrary, such is not the case and in several instances they have rendered important anti-government decisions. Nonetheless, the findings should give pause to those concerned with the independence of the judiciary in the country.

Looking at Namibia's judiciary via statistical analysis

It requires neither extensive reading nor deep reflection to understand the important role of judiciaries in new democracies. Whether focused on the need for the rule of law, the importance of human rights, or the development of a good climate for business activities, independent and assertive judiciaries are central considerations. Yet to what extent has the judiciary in Namibia demonstrated independence in its decision-making?

Studies of the courts in a variety of settings have made effective use of statistical techniques to try to answer this type of question. Via such methods, analysts have been able to discern the extent to which political and other types of factors shape the decisions that are rendered by judiciaries. For example, in previous work conducted on High Court behaviour in Malawi and Zambia, this author was able to demonstrate that judges of the Zambian High Court tended to side with the government in cases in which the president was involved. This suggested that these judges were concerned about how the executive branch would react to their decisions and, accordingly, tailored their decision-making in favour of the executive – a clear problem in terms of judicial independence.³ Others, working on the Argentine courts, have used similar techniques to show that Supreme Court judges are more deferential to the executive to the extent that they believe that the executive will remain in power in the foreseeable future.⁴ This raises questions about the extent of independence operating in the country's judiciary.

Similar techniques can help us to detect whether and how political factors affect decision-making on the Namibian bench. To be sure, this does not imply that the analysis conducted here represents the definitive statement on whether or not the Namibian judiciary is independent. Still, via such analysis we can obtain an important picture, and preliminary statement on, judicial independence in

3 VonDoepp, Peter. 2006a. "Politics and judicial decision-making in Namibia: Separate or connected realms?". *IPPR Briefing Paper* No. 39. Available at <http://www.ippr.org.na/publications.php>; last accessed 31 October 2008.

4 Helmke, Gretchen. 2002. "The logic of strategic defection: Court-Executive relations in Argentina under dictatorship and democracy". *American Political Science Review*, 96(2):305-320.

Namibia. The sections that immediately follow describe the process through which this research was conducted and highlight the key findings. This is followed by a concluding section that discusses some of the implications of these findings.

Data

The data for this study consist of 247 individual decisions taken by judges of the Namibian High and Supreme Courts between 1990 and 2005.⁵ The bases for these decisions were 147 cases that came before the courts during this period. Excluded from the data set were sentence and verdict decisions in simple criminal cases, although cases involving criminal procedure are included.

The sources for the data were twofold. First, along with research assistants, the author reviewed the Namibian Law Reports for the years 1990 to 2005, and included in the data set case decisions with the following characteristics:⁶

- Decisions in cases where the government and its officials, the ruling party, or affiliated entities presented arguments: By *affiliated entities* we refer to SWAPO-affiliated organs, such as the National Union of Namibian Workers, or SWAPO-run companies.
- Decisions in cases in which the government or ruling party had an apparent interest: In cases of this type, neither the government nor ruling party presented arguments, but it was clear from the nature of the case that the outcome was of great interest to the government. One example is cases involving disputes in opposition parties in which the government, although not a party to the case, stood to benefit, and
- Decisions that could clearly be designated as either *pro-government* or *anti-government*.

While the Law Reports provided the majority of the decisions for the data set, on review it also became apparent that they represented an incomplete source of

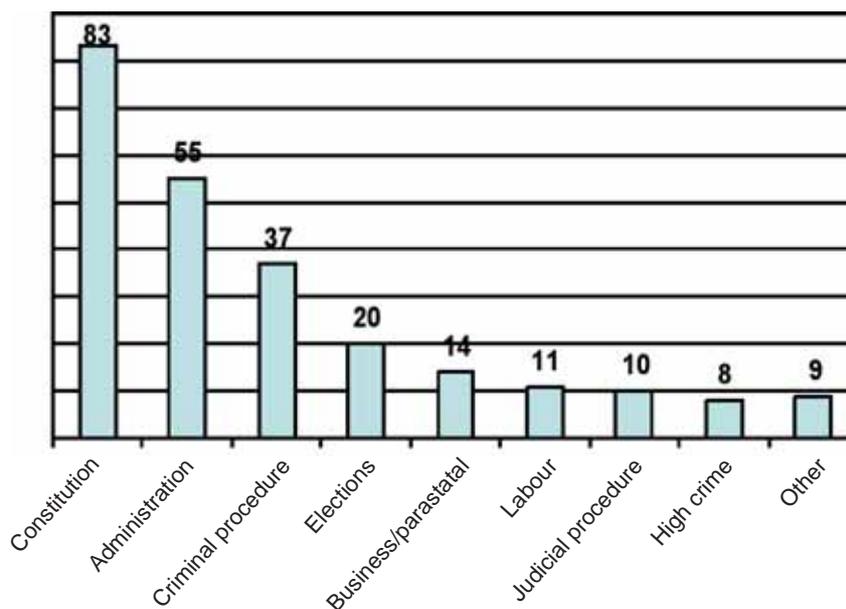
5 In this respect, the analysis offered here uses a slightly different database than that utilised in VonDoepp, Peter. 2008. "Context-sensitive inquiry in comparative judicial research: Lessons from the Namibian judiciary." *Comparative Political Studies*, 41(11):1515–1540. In the latter analysis, a total of 244 decisions were analysed as opposed to the 247 examined here. In the 2008 study, three cases involving municipal authorities were removed from the analysis. Notably, the results and key findings do not change when the same analysis conducted here uses the data set consisting of only 244 cases.

6 Legal Assistance Centre. [Various]. *Namibian Law Reports* (1990–2005). Lansdowne: Juta Law Publishers.

data. As Atkins (1992)⁷ reminds us, to the extent that we rely only on officially published records of court decisions, we miss out on a large amount of data critical for analysis. Thus, we also reviewed 15 years' of issues of the leading newspaper in the country, *The Namibian*, to obtain information on court decisions that were not included in the law reports. All told, these represent approximately 10–15% of the decisions included in the data set.

The data include judicial decisions on a wide range of issues. In order to shed some light on this, the chart below displays the distribution of decisions based on the case type with which they were associated. As can be seen, the decisions involved a wide range of cases, spanning constitutional issues, election disputes, criminal procedure, the actions of administrative agencies, etc.

Chart 1: Decisions by case type



⁷ Atkins, Burton M. 1992. "Data collection in comparative judicial research: A note on the effects of case publication on theory building and hypothesis testing." *Western Political Quarterly*, 43(3):783–792.

Variables

Of greater importance than the type of case associated with the decision, however, is how these cases were decided by judges. The table below displays the distribution of the decisions in terms of whether they were decided in favour of or against the government. As is evident, the majority of cases were decided against the government, offering some limited evidence of judicial independence in the country.

Table 1: Decisions by individual judges

Court level	Pro-government		Anti-government		Total	
Supreme Court	34	57%	26	43%	60	100%
High Court	78	42%	109	58%	187	100%
Total	112	45%	135	55%	247	100%

The table provides the empirical foundation for the key question underpinning this paper. Specifically, what are the factors that determine whether or not a case was decided in favour of or against the government? And more directly, can we discern the influence of political factors on judicial decision-making?

To be sure, in raising this question, I am necessarily challenging the image that judicial decision-making is a practice that is insulated from the political environment. Of course, this is the ideal vision of the judiciary that many legal and judicial professionals hope would approximate reality. The key issue that this analysis seeks to examine is whether this image obtains in reality, or, alternatively, whether we can detect political influences.

Drawing on knowledge of the Namibian situation, as well as the larger body of literature on judicial decision-making in other settings, the analysis focuses on three broad types of factors that might affect decision-making in the Namibian High and Supreme Courts. The first of these is the *context* in which the decision was taken. This focuses specifically on when and where the decision was taken. Research from other contexts has very clearly indicated that judges can be more prone to decide against the government during certain periods and under certain circumstances.⁸ Seeking to see if such insights applied to the Namibian

8 Ginsburg, Tom. 2003. *Judicial review in new democracies: Constitutional courts in Asian cases*. New York: Cambridge University Press; Iaryczower, Matias, Pablo Spiller & Mariano Tommasi. 2002. "Judicial independence in unstable environments, Argentina 1935–1995". *American Journal of Political Science*, 46(4):699–716.

courts, each decision in the data set was coded according to the following considerations:

- Firstly, was the decision taken at the *High Court* or the *Supreme Court*? The theoretical expectation is that, because the Supreme Court is the final court of appeal, anti-government decisions taken there are more likely to incur the wrath of government. Thus, to the extent that judges are fearful of government, we would expect decisions taken at the Supreme Court to be more likely to be decided in favour of government. In the analysis that follows, this variable is labelled “Supreme Court”.
- Secondly, was the decision taken *before* or *after 2000*? The reason the year 2000 is designated as significant is that it was when the judiciary had to decide a number of contentious cases,⁹ and came under attack as a result of the anti-government decisions that they rendered in those cases.¹⁰ The then Minister of Home Affairs, Jerry Ekandjo, several members of the ruling party, and segments of the public all articulated critical and sometimes threatening statements against the courts. To the extent that judges feared these political actors, we would expect more pro-government behaviour in the period after 2000. In the analysis that follows, this variable is labelled “Post-2000”.

The second type of factor considered is the nature of the *case* itself. Again, previous research has indicated that some types of cases are more (or less) likely to be decided in the government’s favour.¹¹ For instance, some of my earlier research on the *Zambian* courts clearly indicated that the *Zambian High Court* had been less likely to decide against the government in cases in which the president was involved.¹² To the extent that judges are fearful of political

9 Such as the *Sikunda* case and *Osire Stars* case. In the former case, Judge John Manyarara issued an interim edict restraining the Ministry of Home Affairs from detaining or deporting Jose Domingo Sikunda. This interdict is described in *Government of the Republic of Namibia v Sikunda* (SA5/01; SA5/01) [2002] NASC 1 (21 February 2002). In the latter case, Judge Anel Silungwe issued an order restraining the government from deporting or detaining members of the *Osire Stars* musical group. This is described in *The Namibian*, August 2000. The specific case in question is *Alphonso Ngoma v Minister of Home Affairs*, High Court Case No. A206/2000.

10 See Bukurura, Sufian. 2002. *Essays on constitutionalism and democracy on Namibia*. Windhoek: Out of Africa Publishers.

11 Herron, Erik S & Kirk A Randazzo. 2003. “The relationship between independence and judicial review in post-communist courts”. *Journal of Politics*, 65(2):422–438; Iaryczower et al. (2002).

12 VonDoepp, Peter. 2006b. “Politics and judicial assertiveness in emerging democracies: High Court behavior in Malawi and Zambia”. *Political Research Quarterly*, 59(3):389–399.

circles, we might similarly expect that the Namibian courts would defer to the government in certain types of cases. Accordingly, each decision was coded depending on whether it was taken in one of three types of cases:

- Firstly, was the decision taken in a *political* case? Presumably, to the extent that judges' independence is compromised, we would expect that they would defer to government in such cases. Accordingly, each decision was coded on the basis of whether it was taken in a political case. *Political* cases were designated as those in which the government should have had special interest, i.e. cases that were on the government radar at the time they were being heard. Unfortunately, the only way to make this determination was to allow the author some subjectivity in assessing, in each specific case, the extent to which government had an interest. Hence the author's own perception of each case is the basis of this variable in the analysis that follows. In the future, the author hopes to have similar evaluations of the cases made by local experts so as to enhance the validity of this variable. In the analysis that follows, this variable is labelled as "political".
- Secondly, was the decision taken in a case involving *elections*? Each decision was coded on the basis of whether or not the case in question involved either the outcome or the conducting of elections. Given their importance for determining the distribution of political power in government, it was expected that such cases would be of special concern to the government. In the analysis that follows, this variable is labelled "elections".
- Finally, was the decision taken in a case that involved a *human rights* issue? In contrast to our expectations for decisions in the above cases, the expectation in designating decisions on this basis was not that they would be likely to be decided in favour of government. On the contrary, given the strong historical record of human rights litigation in Namibia, and the presence of strong organisations who undertake advocacy on such issues, we expected that there would be a tendency to decide against the government in these kinds of cases. This variable is labelled as "human rights" in the analysis which follows.

The third and final type of factor considered is the *nature of the judge* who took the decision. Many studies, particularly those from the United States, have shown that who decides the case – as in what kind of judge – has implications for the

kind of decisions that are rendered from the courts.¹³ Do such ‘judge-specific’ factors also operate on the Namibian bench, such that some types of judges are more (or less) likely to render decisions against the government? In order to examine this, each decision was coded on the following considerations:

- Firstly, was the judge in question white? As any close observer of the Namibian political scene would acknowledge, government officials and ruling party members have on several occasions complained about the ‘lily-white’ bench. Presumably, the reason for this is frustration with the decisions that emerge from the white judges. Yet this naturally begs the question of whether or not white judges have shown a greater tendency to side against the government. By coding each decision based on this consideration, we can statistically examine whether this has been the case. This variable is identified as “race” in the analysis that follows.
- Secondly, was the judge in question appointed after the first term of the Founding President, Sam Nujoma? The reason for designating decisions on this basis is that, during Sam Nujoma’s first term of office, the judiciary demonstrated, via several highly visible decisions, that it was willing to take an independent line vis-à-vis government. Thus, one would expect that judges appointed after this period would be much more closely vetted by those in the executive branch. Studies of the judiciary operate on the expectations that, all other things being equal, government seeks to place loyalists on the bench.¹⁴ If this were the case in Namibia, we would expect judges appointed after 1994 to side with the government more than judges appointed prior to that date. In the analysis that follows, this variable is labelled “post-1994 appointee”.
- Thirdly, was the judge in question a foreigner? Foreign judges have also been the target of government attack. As above, this begs the question of whether they have demonstrated different tendencies in decision-making compared with other judges on the bench. In the analysis below, this variable is labelled “foreigner”.

13 Segal, Jeffrey & Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press; Tate, C Neal. 1981. “Personal attribute models of the voting behavior of US Supreme Court Justices: Liberalism in civil liberties and economics decisions, 1946–1978”. *American Political Science Review*, 75(2):355–367.

14 Ramseyer, Mark J & Eric B Rasmusen. 2001. “Why are Japanese judges so conservative in politically charged cases?”. *American Political Science Review*, 95(1):331–344; Songer, Donald R & Susan Haire. 1992. “Integrating alternative approaches to the study of judicial voting: Obscenity cases in the US Courts of Appeals”. *American Journal of Political Science*, 36(4):963–982.

- Fourthly, important as the general category of foreigner may be, it is also important to recognise differences among judges who fall into this category. One central distinction can be made between those appointed before December 1994, during Sam Nujoma's first term, and those appointed after that date. Those appointed before December 1994 were appointed largely, if not exclusively, on the basis of expediency (i.e. the very high needs of the bench in Namibia) and many of them came or were seconded from South Africa. Those appointed after that date were appointed on the basis of the high needs for personnel on the bench, but also towards the end of creating a more representative bench. Beyond this, many of those appointed came from less favourable environments than Namibia, providing an extra incentive to remain in the country. Thus, we might expect these judges to be prone to side with government. In the analysis below, these judges are labelled "post-1994 foreigner". As will be seen below, the analysis also prompts the consideration of judges appointed after 1993 as a distinct group. The reasons are described below. In the analysis these judges are labelled "post-1993 foreigner".
- Finally, was the judge in question an *acting judge*? Studies of the judiciary in other parts of the world have suggested that judges who lack security of tenure should be those most lacking in independence.¹⁵ Accepting that such a situation was true of Namibian acting judges, each decision was coded on the basis of whether the judge in question was acting or not, with the expectation that such judges would be more prone to side with the government.

Notably, in the analysis below, I consider the role of these factors both as they have operated on their own (controlling for other factors), but also in terms of what happens in the event of interactions between variables. For example, I consider if it matters that the case was decided not only by a foreign judge appointed after 1994, but also by such a judge *after 2000*. As we will see, such interactions are important for understanding the patterns of decision-making in the Namibian judiciary.

15 Dodson, J Michael & Donald Jackson. 2001. "Judicial independence and instability in Latin America". In Russell, Peter H & David M O'Brien (eds). *Judicial independence in the age of democracy: Critical perspectives from around the world*. Charlottesville, VA: University Press of Virginia; Ramseyer & Rasmusen (2001).

Techniques and cautions

The analysis below is devoted to examining whether and how the factors described above have influenced whether or not a judge's decision went for or against the government. The analysis is based on logistic regression techniques, which are used when the variable being predicted is dichotomous. Since the key outcome variable is whether a decision was "for" or "against" the government, such techniques are well suited to the analysis. As with all multiple regression techniques, those employed here allow us to detect the influence of one variable while controlling for the influence of other variables.

The analysis employs five different statistical models, which are specified differently to handle the problems of covariance among several of the important predictor or independent variables in the analysis. These problems are described in more detail below. Furthermore, for each model, we ran not only basic logistic regression analyses, but also analyses that are designed to detect the marginal effects of the variables of interest. This allows us to observe not only *whether* there is a relationship between the predictor variables and the outcome variable of the case decisions, but also *the extent to which* that variable has an effect.

Finally, in all of the models below, I employ clustering techniques to correct for the fact that the many of the decisions were taken on panels of judges, as opposed to individually. In statistical terms, this problem stems from the fact that our observations in such situations are not independent of other observations. In effect, we need some means of correcting for the fact that decisions on panels may be different from decisions taken by judges independently. The clustering technique allows us to do this.

Before describing the findings, it is important to acknowledge some potential limitations of the study and the techniques employed. As any good social scientist recognises, statistical analysis is but one technique to try to understand social phenomena, and there are potential problems with such techniques. For example, to the extent that the data set is incomplete, then the findings are problematic. Problems can also exist by virtue of certain variables being 'left out' of the analysis. Finally, problems can arise due to the techniques employed. Indeed, the analysis below employs only modestly modified models from those utilised in the original study published by the IPPR. Yet the findings that emerge are different, leading me to be more cautious about my conclusions regarding foreign judges.

Given this, the overall findings should be treated with caution, and should be subjected to review and re-analysis by knowledgeable individuals. To this end, I have listed all of the cases included in this data set in an appendix.¹⁶

Table 2 below lists the results of the regression analyses for the five models. For each variable, the table provides the estimated raw coefficients with robust standard errors. In practical terms, since the models are designed to predict decisions against the government, a positive score indicates that the variable in question *increased* the likelihood of an anti-government decision. Those listed in **bold** are statistically significant. For those variables that are statistically significant, I have also listed the marginal effect statistics (along with standard errors). These are listed directly beneath the raw coefficients. These marginal effect statistics indicate the changed likelihood of an anti-government decision with a one-unit increase in the variable (with other dichotomous variables held at zero and continuous variables held at their means). Again, only those variables listed in **bold** are statistically significant, and marginal effects are only listed for those that obtain significance.

¹⁶ Furthermore, the data can be accessed by contacting the author.

Table 2: Determinants of judicial decisions for or against Government

Variable	Model 1	Model 2	Model 3	Model 4	Model 5
Context					
Supreme Court	-.625 (.511)	-.681 (.513)	-.688 (.498)	-.659 (.522)	-.677 (.511)
Post 2000	-.123 (.489)	-.374 (.524)	-.190 (.504)	.061 (.577)	.329 (.586)
Nature of the case					
Political	-.471 (.511)	-.426 (.521)	-.481 (.516)	-.363 (.534)	-.416 (.521)
Elections	-.478 (.791)	-.645 (.783)	-.517 (.797)	-.703 (.778)	-.593 (.812)
Human rights	2.00 (.520) .37 (.088)	2.00 (.549) .34 (.084)	2.02 (.533) .34 (.085)	2.02 (.555) .36 (.087)	2.03 (.539) .37 (.088)
Nature of the judge					
Race	-.084 (.344)	-.400 (.350)	-.319 (.357)	-.345 (.344)	-.252 (.352)
Acting	-.131 (.312)	-.096 (.321)	-.088 (.318)	.013 (.325)	.083 (.326)
Post-1994 appointee	.289 (.440)	.829 (.505)	.431 (.448)	.477 (.494)	.110 (.452)
Foreigner	-.028 (.322)	–	–	–	–
Post-1994 foreigner	–	-1.23 (.478) -.29 (.102)	–	-.397 (.603)	–
Post-1993 foreigner	–	–	-.603 (.399)	–	.142 (.500)
Interactions					
Post-1994 foreigner* Post-2000	–	–	–	-1.30 (.815)	–
Post-1993 foreigner* Post-2000	–	–	–	–	-1.39 (.729) -.30 (.120)
N	247	247	247	247	247
Constant	.048 (.429)	.261 (.375)	.256 (.397)	.151 (.380)	.095 (.404)
Pseudo r-square	.154	.173	.160	.179	.169

* Asterisks denote the use of an interaction term for two variables. Specifically, the two interaction terms listed above indicate that the case was decided by a specific type of judge (foreigners appointed after 1993 or 1994) after the year 2000.

Findings

Overall, the findings indicate that judicial independence has held up fairly well in Namibia. With respect to the first factor of interest, namely the context in which the decision was taken, there is simply no evidence that politics has intruded

upon the decision-making of judges. Judges at the Supreme Court have been no less likely to side against the government than judges at the High Court. This is evident in Table 2 above: in none of the models was the variable indicating a Supreme Court decision statistically significant. Furthermore, it should be added that in other analyses¹⁷ there was no evidence that significant political cases heard at the Supreme Court were any more likely to be decided in favour of the government.

Similarly, it does not appear that the court *as a whole* has been more compliant since the public attacks on the judiciary in 2000. In general, decisions taken after this period have been no more likely to be decided in favour of the government. This said, as I will indicate below, the analysis did reveal that one particular group of judges had been more likely to support the government since that time.

The second factor of interest was the nature of the case. Have decisions in political or election cases, for instance, been more likely to go in favour of government? The answer based on the analysis is “No”. In none of the models does the variable indicating that the decision was taken in a political case come up as significant. In much the same way, the variable indicating that the decision was taken in an election case fails to obtain statistical significance. This suggests that judges on the whole have not felt the need to defer to government when faced with rendering decisions in political cases.

Again, one very important finding does emerge from our attention to the nature of the case in which the decision was taken. Specifically, the findings unequivocally indicate that decisions in human rights cases are in fact *more likely* to be decided against the government. Indeed, the marginal effect statistic indicates that, all other things being equal, the likelihood of anti-government decision increases by 34% to 37% if the case involved human rights. This certainly indicates that the courts are doing a good job in cultivating and upholding a rights culture in the country.

How can this finding be interpreted? Several factors appear important. In the first place, as mentioned above, since the period of the liberation struggle, the Namibian courts have been quite accustomed to hearing cases concerning human rights and to upholding those rights. Thus, human rights jurisprudence has a relatively deep history in the country that today’s judges seem to draw upon. Furthermore, Namibia has also been served by very effective and powerful human rights advocacy organisations, such as the Legal Assistance Centre, which have

17 Not shown here; VonDoepp (2008).

provided legal counsel for those seeking legal redress when their rights have been violated. Finally, these cases often involve administrative incompetence by government agents, not the express designs of those holding power. Thus, they are very difficult cases for the government to defend. Indeed, in several of the cases it may even be that the government did not enter a defence.

Finally, does it matter what type of judge made the decision in the case? It is here that some of the most important and interesting findings emerge. In the first place, the findings indicate quite clearly that white judges have been no more likely to side against government than other judges. In none of the models does the variable “race” come up as statistically significant. Similarly, judges appointed after Sam Nujoma’s first term have been no more likely to decide in favour of the government. The same can be said of acting judges: despite their lack of secure tenure, they have not demonstrated any tendency to be more supportive of government than their permanent colleagues on the bench. Finally, foreign judges on the whole have shown no tendency to either support or rule against government. Model 1 very clearly shows that decisions made by such judges are no more likely to be decided in the government’s favour than local judges’ decisions.

Yet interesting findings emerge when we consider foreign judges appointed after 1994. As Model 2 very clearly indicates, judges in this group have displayed a tendency to side with government. The marginal effect statistic indicates that, all other things being equal, foreign judges appointed after 1994 are 29% more likely to decide in favour of government.

While these findings certainly give pause, they also need to be treated with some caution. The reasons for this are twofold. On the one hand, only five judges are included in this category. Thus, it is entirely possible that one or two of these judges have skewed the results for group as a whole. Notably, preliminary indications suggest that this is not the case. For example, when the decisions of the ‘most pro-government’ judge, who sided with government in 65% of his decisions in the data, are excluded from the analysis, the results do not change: the variable for foreign judges appointed after 1994 remains significant.

On the other hand, we need to acknowledge the somewhat arbitrary cut-off for judges included in this category, namely foreign judges appointed after December 1994. With this conceptualisation, we exclude from this category High Court decisions that have been undertaken by one specific judge appointed in October of 1994. Indeed, if we change the category to include decisions by

judges appointed after 1993, hence including this judge's High Court decisions, the results change. As Model 3 indicates, when such decisions are included, creating a variable labelled "Post-1993 foreigner", the results are insignificant. Thus, foreign judges appointed after 1993 are no more likely than their local counterparts to decide cases in government's favour.

In order to obtain more insight into this issue, I interacted the variables "Post-1993 foreigner" and "Post-1994 foreigner" with the variable "Post-2000" in Models 4 and 5. This allows us to see whether decisions by these particular judges taken after 2000 were more likely to be decided in government's favour. As any observer of the Namibian scene will recall, foreign judges were singled out for attack in 2000. Specifically, they were threatened by former Home Affairs Minister Jerry Ekandjo with having their work permits revoked. Thus, we might expect that this particular group would be especially prone to support the government after 2000.

The results from Models 4 and 5 are somewhat equivocal. On the one hand, they indicate that we cannot statistically conclude that judges appointed after 1994 were more likely to side in favour of government after 2000 than they were before. This said, other analysis, using different statistical models, suggests that they indeed were.¹⁸ Even more suggestively, the analysis indicates that decisions by judges appointed after 1993 have since 2000 been more likely to be in government's favour. The marginal effect statistic indicates that the likelihood of a pro-government decision increased by .30 in the event that the decision was taken after 2000 and was rendered by a foreign judge appointed after 1993.

Concluding thoughts

It again deserves emphasis that these findings should be treated as preliminary. The study and the insights presented here should be critically evaluated and critiqued by knowledgeable individuals. Such will be an important additional step in generating better knowledge about the impact of political factors on judicial decision-making in the country.

Nonetheless, the analysis points to two issues that deserve highlighting when we consider the relationship between politics and judicial behaviour in the country. On the one hand, for those who are concerned with the independence of the judiciary, there is much to celebrate here. The findings clearly indicate that decisions in political cases have not been any more likely than others to be in

18 See VonDoepp (2008).

government's favour.¹⁹ The same can be said of election cases. It is also evident that government tends to lose cases involving human rights. This certainly suggests that the Namibian political environment remains supportive of human rights – a very positive sign for the deepening of democracy in the country.²⁰ Finally, the evidence presented here suggests that, in general, the government has not politicised the bench via its appointments. As indicated, decisions from more recent appointees have been no more likely to be decided in government's favour than those appointed before them.

At the same time, there are some areas of concern. Most notably, there appears to be one category of judges – foreign judges appointed in the mid-1990s – who have tended to side with the government. Does this mean that they always side with government? Absolutely not. There is clear evidence that such judges will decide against government. Some of the more important anti-government decisions in recent times, notably those in the *Sikunda* and *Mwilima* cases,²¹ have come from foreign judges. Despite this, the analysis tentatively suggests that such judges have displayed a tendency to side with government. Whether this represents a real and durable threat to judicial independence in Namibia remains an issue to be debated.

19 Further analysis by VonDoepp (2008) confirms this.

20 Diamond, Larry. 1999. *Developing democracy: Toward consolidation*. Baltimore, MD: Johns Hopkins University Press.

21 *Mwilima and Others v Government of the Republic of Namibia and Others* 2001 NR 307 (HC); the *Sikunda* reference here is to the interim interdict issued by High Court Acting Justice John Manyarara, inter alia, restraining the Ministry of Home Affairs from detaining or harassing Mr Sikunda. This is described in the case *Government of the Republic of Namibia v Sikunda* (SA5/01; SA5/01) [2002] NASC 1 (21 February 2002).

Appendix: Case list

CASE	YEAR	NOTE
<i>S v Mbali</i>	1990	Court grants evidence may be admitted in diamond trafficking case.
<i>Cabinet of the Transitional Government of South West Africa v Dagnin</i> 1990 NR 14 (HC) 90 NR 14 (HC)	1990	Air accident involving plane and people employed by the Transitional Government of National Unity's Department of Transport. Government takes pilot's son to court to recover losses paid to other deceased in accident.
<i>S v Acheson</i>	1990	Government seeks more time in the Lubowski murder case.
<i>S v Acheson</i>	1990	Bail for Acheson, the accused in the Lubowski murder case.
<i>Minister of Defence v Mwandighi</i>	1990	Namibia's Minister of Defence can be held accountable for actions by the Minister of Defence of South Africa.
<i>Mineworkers' Union of Namibia v Rössing</i>	1991	Rössing Uranium seeks to cut salaries and meets court action.
<i>Minister of Defence v Mwandighi</i>	1991	The Supreme Court addresses an earlier High Court decision.
<i>S v Kleynhans</i>	1991	Treason case involving white extremists (verdict).
<i>S v Kleynhans</i>	1991	Treason case involving white extremists (sentence).
<i>Oryx Mining v Secretary for Finance</i>	1991	Corporate tax dispute dating back to the apartheid era; question of whether the Supreme Court in Namibia had jurisdiction.
Avis 5 – racially motivated murder	1991	Sentencing decision in murder case. Taken from press report, <i>The Namibian</i> , 9 November 1991.
<i>Djama v Government of the Republic of Namibia</i>	1992	Courts demand the release of a Somali held by the Ministry of Home Affairs.
<i>Limbo v President of Namibia</i>	1992	Original case brought against the Administrator-General of South West Africa/Namibia before independence; sought seeks permission to bring the case against the Namibian President.
<i>Cultura 2000 v GRN</i>	1992	Constitutionality of State Repudiation Act, 1991 (No. 32 of 1991) questioned.
<i>Garoeb and Others v President of the Republic of Namibia and Others</i>	1992	Question of holding regional and local elections at the same time; asks court to declare void the President's setting of dates for the election; call for extension of registration period.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
The Democratic Turnhalle Alliance (DTA) asks for SWAPO Member of Parliament Maxuilili to be muzzled	1992	Effort by the DTA to prevent inflammatory speech ahead of local polls. Taken from press report, <i>The Namibian</i> , 27 November 1992.
<i>S v Hotel Onduri</i>	1993	Discrimination case relating to Ben Ulenga.
<i>Alberts v Government of the Republic of Namibia and Another</i>	1993	Court set limits on the government's ability to redefine citizenship.
<i>African Granite v Mineworkers' Union of Namibia</i>	1993	Eviction order upheld in case where strikers were occupying houses.
<i>S v Van Rooyen</i>	1993	Criminal procedure in fraud case.
<i>Skeleton Coast Safaris v Namibia Tender Board</i>	1993	Question of tender granted by the Namibia Tender Board.
<i>Government of the Republic of Namibia v Cultura 2000</i>	1993	Supreme Court decision on constitutionality of State Repudiation Act, 1991 (No. 32 of 1991).
<i>S v Haita</i>	1993	Criminal procedure in dagga possession case; right to call witnesses.
<i>S v Hansen</i>	1994	Appeal against procedure; issue is access to psychiatrist, courts grants access to psychiatrist.
<i>Kauesa v Minister of Home Affairs and Others</i>	1994	Kauesa makes comments about the white command structure of the Namibian Police and the Inspector-General on TV; question of whether his speech was protected.
<i>Du Plessis v Government of the Republic of Namibia</i>	1994	Du Plessis sues the Government of the Republic of Namibia for not meeting the contractual obligations incurred by the previous administration; the Administration of Whites had granted loan to Du Plessis in January 1990, but the GRN refused to honour it.
<i>S v Nassar</i>	1994	Case cited in press regarding rules of discovery of evidence; the state had to hand over material to defence in a gem case.
<i>S v Strowitzki</i>	1994	Appeal against O'Linn decision refusing appellants application to stay proceedings against him; question of whether the courts have jurisdiction to hear this appeal.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Vlaisu v President of Namibia and Others (including Ministry of Health)</i>	1994	Did government act beyond the scope of its authority when it fired a doctor and caused him economic distress?
<i>S v Heidenrich</i>	1994	Right of accused to a speedy trial.
Koevoet case	1994	Former members of <i>Koevoet</i> (the South African Defence Force's notorious counter-insurgency unit) from returning to Namibia; case not covered in law reports. Court declares that they be allowed entry into Namibia. Taken from press report, <i>The Namibian</i> , 19 August, 1994.
<i>Namib Machine Tools v Minister of Works, Transport and Communications</i>	1994	Plaintiff claims money from Minister of Works, Transport and Communications for goods sold; fraudster acquired goods using false government purchase vouchers.
<i>Eimbeck v Inspector-General of Police and Another</i>	1995	Siggi Eimbeck demands that he gets paid while his case is pending.
<i>Mwandingi v Minister of Defence</i>	1995	Government is sued for the actions of the South African Defence Force; High Court and Supreme Court cases.
<i>Kausa v Minister of Home Affairs and Others</i>	1995	The Supreme Court hears an appeal of an earlier decision made in the High Court; the Supreme Court declares a section of the Police Code from 1964 that infringes on free speech as invalid. Supreme Court does not declare anti-discrimination law invalid, only the law that forbids the police from commenting unfavourably in public on the administration of the force.
<i>Nel v Kalahari Holdings</i>	1995	Contract/payment dispute; Kalahari Holdings belongs to SWAPO.
DTA election case	1995	Do courts have power to open ballot boxes after the 1994 elections?
<i>Eimbeck v Inspector-General</i>	1995	Eimbeck's application to have termination reversed; Eimbeck loses.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
Baster land case	1995	Baster leadership's effort to have properties transferred to its name. Government succeeded in taking properties from them. High Court ruling; Supreme Court ruling is listed below. Taken from press report, <i>The Namibian</i> , 29 May 1995.
<i>Prosecutor-General v Attorney-General</i>	1995	Does the Attorney-General have authority over the Prosecutor-General?
DTA Election Case	1995	Can the court order the opening of ballot boxes? Supreme Court case. Taken from press report, <i>The Namibian</i> , 14 March 1995.
Sex Shop Case	1995	Police confiscation of items from sex shop declared illegal. Taken from press report, <i>The Namibian</i> , 25 September 1995.
<i>Navachab v Mineworkers' Union of Namibia</i>	1995	Court confirms order preventing unlawful conduct by striking workers; required them to strike in designated places; highly contentious statements from Labour Minister in public in support of the strikers and in opposition to the Navachab company. See <i>The Namibian</i> , 1 October 1995.
Hartliefs v Union	1995	Court forbids workers from keeping non-strikers from entering the premises; Labour Minister condemns ruling, as do unions. See <i>The Namibian</i> , 12 October 1995.
Sex Shop case 2	1995	Court orders the Ministry of Home Affairs to stop interfering with the Sex Shop's business and demands return of items confiscated. Taken from press report, <i>The Namibian</i> , 1 October 1995.
<i>19 foreigners v Ministry of Home Affairs</i>	1995	Court grants temporary application to foreigners being held by the Ministry of Home Affairs. Taken from press report, <i>The Namibian</i> , 1 November 1995.
<i>21 foreigners v Ministry of Home Affairs</i>	1995	Court tells the government to free 21 foreigners. Taken from press report, <i>The Namibian</i> , 13 November 1995.
Government ordered to allow lawyer access to immigrants	1995	Taken from press report, <i>The Namibian</i> , 19 December 1995.
<i>President of the Republic of Namibia and Others v Vlaisu</i>	1995	Could government appeal the previous High Court decision listed above.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Du Toit v Office of the Prime Minister</i>	1995	Reinstatement of employee; issue was failure to renew employee's contract.
<i>Gauseb v Minister of Home Affairs</i>	1995	Judicial procedure in the case of a man shot by the South African police in Walvis Bay in 1993.
<i>Ohlthaver & List v Minister of Regional and Local Government and Housing</i>	1996	Appeal against a High Court judgment that sided with the ministry; question of rezoning of Post Street.
<i>Rehoboth Bastergemeente v Government of the Republic of Namibia</i>	1996	Supreme Court version of the Baster land case listed above.
<i>Kruger v Office of the Prime Minister</i>	1996	Question of whether money was owed to employee; specifically, whether a supplementary allowance was the same as remuneration under the Labour Act, 1992 (No. 6 of 1992).
<i>S v Angola</i>	1996	Evidence and rules of discovery in fraud and theft case; applicants appeal against lower court ruling refusing to allow discovery.
<i>Namibia Ports Authority v Leningrada</i>	1996	Port Authority seeks to sell confiscated vessel in order to recover port dues.
<i>State v Smith and Others</i>	1996	Constitutionality of anti-discrimination law; this is the case where a Nazi advertisement appeared in the <i>Windhoek Observer</i> . Parliament is given six months to fix the Act.
<i>Hameva and Another v Ministry of Home Affairs</i>	1996	Question of costs in a Legal Assistance Centre case; original decision by Teek and Mtambanengwe.
<i>Julius v Commanding Officer, Windhoek Prison and Others</i>	1996	Civil imprisonment declared unconstitutional.
<i>Hindjou v Government of the Republic of Namibia</i>	1996	Constitutionality of the Income Tax Act, 1981 (No. 24 of 1981); appeal against decision of the High Court full bench.
<i>S v Vries</i>	1996	Constitutionality of mandatory sentences for stock theft; parts of Stock Theft Act, 1990 (No. 12 of 1990) found to be unconstitutional.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Gurirab v Die Republikein</i>	1997	Judge orders Ministry of Trade to hand over documents in libel case against <i>Die Republikein</i> .
Legal Assistance Centre/ <i>Ovahimba</i>	1997	Judge declares that the President cannot ban meetings based on an apartheid era law. Taken from press report, <i>The Namibian</i> , 7 August 1997.
<i>Disposable Medical Products v Tender Board of Namibia</i>	1997	Application to review tender decision.
<i>Koortzen v Prosecutor-General</i>	1997	Rules of discovery for the defence; ruling forced state to provide witness statements to defence.
<i>Swart v Moha</i>	1997	Ruling that a South African citizen in residence for 15 years be granted citizenship without first becoming a permanent resident.
<i>S v Kapika</i>	1997	Admissibility of confessions; accused must be informed of rights.
<i>Kerry McNamara v Minister of Works, Transport and Communications and Others</i>	1997	Locus standi of architectural firm seeking interdict and relief; issue concerns the award of a tender to another firm.
<i>Gurirab v Die Republikein</i>	1998	Permanent Secretary wins lawsuit against the newspaper.
<i>Re Miguel Simao Antonio and the Minister of Home Affairs</i>	1998	Court orders government to stop Neto's removal from the country.
Confession ruled out	1998	Two alleged confessions ruled as inadmissible because the accused were not advised of their right to representation. Taken from press report, <i>The Namibian</i> , 10 November 1998.
<i>Fantasy Enterprises v Minister of Home Affairs</i> <i>Nasilowski v Minister of Justice</i>	1998	Sex shop challenges constitutionality of two laws and wins.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Namibia Wholesale Workers' Union v Democratic Media Holdings</i>	1998	Applicants were retrenched by respondents; labour case involving severance allowances.
<i>Aonin Fishing v Minister of Fisheries</i>	1998	Application for delivery of certain documents in review proceedings.
<i>S v Uahanga and Others</i>	1998	Accused was correctly acquitted by magistrate because prosecution failed to bring speedy trial.
<i>Njathi v Permanent Secretary of the Ministry of Home Affairs</i>	1998	Immigration officer appeals for reinstatement after he was dismissed for unauthorised leave.
<i>Correia v Commanding Officer, Windhoek Prison</i>	1998	Was the detention of a prohibited immigrant lawful?
<i>Namunjepo and Others v Commanding Officer, Windhoek Prison and Another</i>	1998	Leg irons issue; High Court decision.
Hannah decision on gay rights	1998	As described in <i>The Namibian</i> on 6 April 1998.
O'Linn reversal of Hannah decision	1998	Claims wrong party was listed in the dispute. Taken from press report, <i>The Namibian</i> , 6 July 1998.
<i>S v Likuwa</i>	1999	Court declares minimum sentence unconstitutional; challenges Arms and Ammunition Act, 1996 (No. 7 of 1996), thus undermining authority of the legislature.
<i>S v Smith</i>	1999	Reverses conviction of Smith by Hannah on contempt charges; Smith was convicted of contempt by Hannah for refusing to disclose documents regarding the Lubowski murder.
<i>Muller v President of the Republic of Namibia</i>	1999	German national seeks to adopt wife's name; discrimination case.
<i>Frank and Another v Chairperson of Immigration Selection Board</i>	1999	Immigration Board ordered to give Frank permanent residence status.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Namunjepo v Commanding Officer, Windhoek Prison</i>	1999	Leg irons issue; Supreme Court decision.
<i>Hannah v Government of Namibia</i>	2000	Hannah attempts to sue government over labour dispute.
<i>Seaflower Whitefish Corporation Ltd v Namibian Ports Authority</i>	2000	Former sued the latter for overcharging of port fees.
<i>Public Service Union of Namibia and Another v Prime Minister of Namibia and Others</i>	2000	Question of appointment of Permanent Secretary; appellant applied to have decision to appoint a certain candidate for the post set aside.
<i>Nanditume v Minister of Defence</i>	2000	HIV case in the Namibia Defence Force; lots of press coverage.
<i>Sibeya v Minister of Home Affairs</i> <i>Mutumba v Minister of Home Affairs</i> <i>Mazila v Minister of Home Affairs</i>	2000	Does the state of emergency (SOE) apply only to the Caprivi Region? Those arrested under the SOE in other Regions could not be held.
<i>Amakali v Minister of Prisons</i>	2000	Prisons tried to keep plaintiff incarcerated beyond the time of his sentence.
<i>Engelbrecht v Minister of Prisons</i>	2000	Prisoner sues for his treatment while awaiting trial.
<i>Van As v Prosecutor-General</i>	2000	Does a release for failure to bring a speedy trial constitute a permanent stay of prosecution?
<i>Namibia Insurance Company v Government of the Republic of Namibia</i>	2000	Insurance company case.
The DTA contests the Gobabis poll	2000	Taken from press report, <i>The Namibian</i> , 20 October 2000.
Levy order regarding Rundu detainees	2000	Order that three detainees be given access to lawyers. Taken from press report, <i>The Namibian</i> , 26 October 2000.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Alphonso Ngoma v Minister of Home Affairs</i>	2000	Minister of Home Affairs restrained from deporting or detaining Osire Stars.
Sikunda	2000	Report in <i>The Namibian</i> , 25 October 2000; Court (Manyarara) demands that Sikunda be released.
Ekanjjo contempt	2000	Teek refuses to compel government to comply with ruling by Manyarara. Taken from press report, <i>The Namibian</i> , 30 November 2000.
<i>Sikunda v Government of the Republic of Namibia (1)</i>	2001	Ekanjjo found to be in contempt by Mainga and Hoff.
Settlers on Omitara Farm	2001	Kicks settlers off government land abutting commercial farms; National Union of Namibian Workers calls for eviction order to be ignored. Taken from press report, <i>The Namibian</i> , 25 January 2001.
<i>Chairperson of Immigration Selection Board v Frank and Another</i>	2001	
<i>S v Delie</i>	2001	Case of failing to pay maintenance; question of whether the appeal should proceed to the High Court or the Supreme Court.
<i>Sikunda v Government of the Republic of Namibia (3)</i>	2001	Sikunda release order.
<i>S v Ganeb</i>	2001	Covered in press; court eases appeal process by declaring provision of security to settle disputes as unconstitutional.
<i>Mwilima and Others v Government of the Republic of Namibia</i>	2001	Treason accused to get legal representation.
<i>Mostert v Minister of Justice</i>	2001	Power of Minister to transfer magistrates is upheld.
<i>Gurirab v Government of the Republic of Namibia</i>	2001	Lawsuit against the government for holding Gurirab without granting bail.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Kuaima Riruako and 46 others v Minister of Regional and Local Government and Housing, and The President of Namibia</i>	2001	Chiefs sue government for refusing to recognise them.
<i>Government of the Republic of Namibia v Sikunda</i>	2002	State appeals High Court decision.
<i>Government of the Republic of Namibia v Mwilima</i>	2002	Legal representation case at Supreme Court.
<i>Namibia Grape Growers v Minister of Mines and Energy</i>	2002	Question of property rights and right of government to engage in prospecting under the Mining Act, 1992 (No. 33 of 1992).
<i>Hendricks and Others v Attorney-General of Namibia</i>	2002	Constitutionality of the Immoral Practices Act, 1980 (No. 21 of 1980).
Project Prado/ Government of the Republic of Namibia case	2002	Court orders the government to return vehicles seized under "Project Prado". Taken from press report, <i>The Namibian</i> , 18 June 2002.
Illicit trade money	2002	Court rules that government can confiscate money used in illicit trade. Taken from press report, <i>The Namibian</i> , 21 November 2002.
Omitara settlers	2002	Ruling refuses to compel government to build fence 'protecting' commercial farms from settlers. Taken from press report, <i>The Namibian</i> , 14 June 2002.
Private clinics case	2002	As reported in <i>The Namibian</i> , 13 September 2002; Ministry had ordered that nurses at private clinics stop dispensing medicine; court overruled the Ministry.
<i>Burger and Another v Ministry of Finance and Another</i>	2003	The Minister of Finance tried to cancel the contract with medical service providers; court overruled the action.
<i>Onesmus v Minister of Labour</i>	2003	Employee of Social Security Commission seeks relief against actions of Ministry of Labour; court turns her down.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
Demonstrators' access to Parliament	2003	Court rules in favour of Ministry of Home Affairs as demonstrators try to deliver submissions to Parliament. Taken from press report, <i>The Namibian</i> , 12 February 2003.
<i>Mostert v Minister of Justice</i>	2003	Supreme Court case.
<i>Dresselhaus Transport v Government of the Republic of Namibia</i>	2003	Failure of police to protect overturned beer truck.
<i>Minister of Works, Transport and Communications v Namupembe</i>	2003	Labour case; accusation of unfair labour practices.
<i>Ekanjo-Imalwa v Law Society of Namibia</i>	2003	Constitutionality of Legal Practitioners Amendment Act, 2002 (No. 10 of 2002).
<i>Namib Etosha Group v Tender Board of Namibia</i>	2003	Tender dispute; procedure for reviewing decisions questioned.
<i>S v Zemberuka</i>	2003	Question of constitutionality of Acting Prosecutor-General.
<i>Ndumba v Ministry of Home Affairs</i>	2003	Man shot by Namibian Police is awarded damages.
Congress of Democrats on Electoral Constituencies/ Delimitation Commission	2003	Taken from press report, <i>The Namibian</i> , 2 December 2003.
DTA effort to block Grootfontein poll	2004	Taken from press report, <i>The Namibian</i> , 12 February 2004.
Appeal effort by DTA on National Unity Democracy Movement (NUDO)	2004	Could NUDO break away from DTA? Taken from press report, <i>The Namibian</i> , 11 February 2004.
Hoff decision on jurisdiction in Caprivi 13 trial	2004	Taken from press report, <i>The Namibian</i> , 24 February 2004.
Hoff refuses leave to appeal in Caprivi 13 trial	2004	Taken from press report, <i>The Namibian</i> , 5 March 2004.

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
Leave to appeal Hoff decision on jurisdiction	2004	Taken from press report, <i>The Namibian</i> , 18 March 2004.
Caprivi 13 release bid at High Court	2004	Taken from press report, <i>The Namibian</i> , 7 May 2004.
SWAPO struggle in Ongwediva	2004	Could SWAPO replace elected councillors?
Caprivi 13 trial at Supreme Court	2004	Taken from press report, <i>The Namibian</i> , 23 July 2004.
<i>Minister of Home Affairs v Luiza Lomba</i>	2004	Person claims unlawful arrest and detention and seeks damages; was suspected of being an illegal immigrant; magistrate's court awarded damages to her; Minister of Home Affairs appeals.
<i>Van der Berg v Minister of Home Affairs and Ekandjo</i>	2004	Damages claim due to damage done to pick-up truck while in police custody.
<i>Republican Party of Namibia and Another v Electoral Commission of Namibia and Others (1)</i>	2004	ECN ordered to hand over poll documents.
<i>Alweendo v Minister of Home Affairs</i>	2004	Officer shot by police awarded damages.
<i>Republican Party of Namibia and Another v Electoral Commission of Namibia and Others (2)</i>	2005	Recount ordered.
Police Act case	2005	Damaseb declares that sections of the Police Act, 1990 (No. 20 of 1990), giving people only a year to sue the Police is unconstitutional. Taken from press report, <i>The Namibian</i> , 27 May 2005.
Avid inquiry	2005	Heathcote turns down bid to stall Avid inquiry. Taken from press report, <i>The Namibian</i> , 19 July 2005.
<i>Sharunguro v Minister of Home Affairs</i>	2005	Suit for damages incurred while in custody fails.
<i>Munuma and Others v S</i>	2005	Are the accused legally before the court?

Politics and judicial decision-making in Namibia

CASE	YEAR	NOTE
<i>Karuaihe v Minister of Education</i>	2005	Case of mother kicked out of school; judge declares application an abuse of the court process as another application is already pending.
<i>Shiyambi v Minister of Home Affairs</i>	2005	Unlawful arrest; plaintiff seeks damages.
<i>Block and Another v Minister of Home Affairs</i>	2005	Unlawful arrest; plaintiff seeks damages.
<i>Mukenani v Electoral Commission of Namibia</i>	2005	Employment case.
<i>Beyer v Minister of Finance</i>	2005	Public servants found guilty have charges overturned.
<i>S v Munuma and Others</i>	2005	Manyarara claims court has jurisdiction over Caprivi accused.

The role of the executive in safeguarding the independence of the judiciary in Namibia¹

Oliver C Ruppel

*Judicial independence is a prerequisite to 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.*²

Introduction

Rather than thinking of the relationship between the executive and the judiciary as unhealthy, with the former threatening the independence of the latter, the executive should be considered a facilitator of the independence of the judiciary. It is imperative in a mature democracy – and similarly in an adolescent one like Namibia’s – that Judges are independent both of parliament and government. It is against this background that this paper endeavours to determine the role of the executive in safeguarding the independence of the judiciary. In particular, it aims to examine the Constitution of the Republic of Namibia with a view to establishing how the executive can employ the appropriate constitutional provisions to protect judicial independence, juxtaposing the two organs of state on the power-sharing stage with mutual and interdependent coexistence.

The need to seat the organs of state next to each other with some sort of specialisation is due to the potential usurpation of power. With this in mind, the analysis of the topic at hand will start with a consideration of the Namibian constitutional arrangement and monitor how that arrangement puts the Namibian executive in a position where it safeguards the independence of the judiciary.

- 1 Paper originally presented at the Conference on the Independence of the Judiciary in Sub-Saharan Africa: Towards an Independent and Effective Judiciary in Africa. The Conference was organised by the Konrad Adenauer Foundation’s Rule of Law Programme for Sub-Saharan Africa, and was held at the Imperial Beach Hotel, Entebbe, Uganda, from 24 to 28 June 2008.
- 2 Value 1 of the 2002 Bangalore Principles of Judicial Conduct. These Principles, developed by the Judicial Group on Strengthening Judicial Integrity, are increasingly seen as a document which all judiciaries and legal systems can unreservedly accept. The United Nations Social and Economic Council, in Resolution 2006/23 of 27 July 2006, invited member states, consistent with their domestic 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.

Since this theoretical analysis needs a practical exhumation of the realities on the ground, tangible practicalities of the safeguards the executive offers will also be scrutinised.

The Namibian Constitution, democracy and the rule of law

The Republic of Namibia, as the country is known today, was declared a German Protectorate in 1884 and a Crown Colony in 1890; thereafter it became known as *Deutsch-Südwestafrika*, *South West Africa* and *South West Africa/Namibia*. The territory remained a German colony until 1915, when it was occupied by South African forces. From 1920 onwards, the territory became a protectorate, i.e. a mandated territory under the protection of South Africa in terms of the Treaty of Versailles. Significant local and international resistance to South Africa's continued domination of the country emerged in the late 1950s and early 1960s.³

In the wake of the substantial repression of an incipient nationalist movement within South West Africa, the South West African People's Organisation (SWAPO), under the leadership of Sam Nujoma, was formed in exile in 1960. The organisation committed itself to ongoing efforts to work through international bodies, such as the UN, to pressure the South African government, and took up an armed struggle against the latter. Political and social unrest within Namibia increased markedly over the 1970s, and was often met with repression at the hands of the colonial administration. In 1978, the UN Security Council passed Resolution 435 and authorised the creation of a transition assistance group to monitor the country's transition to independence. In April 1989, the UN began to supervise this transition process, part of which entailed supervising elections for a constituent assembly to be charged with drafting a constitution for the country. After more than a century of domination by other countries, Namibia finally achieved its independence in 1990 after a long struggle on both diplomatic and military fronts.⁴

The 1990 Constitution of the Republic of Namibia is the fundamental and supreme law of the land. The Constitution is hailed by some as being among the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters which contain 148 articles that relate to the chapter title. Together, they organise the state and outline the rights and freedoms of people in Namibia.

3 Amoo, SK & Skeffers, I. 2008. "The rule of law in Namibia". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 17.

4 (ibid.).

The role of the executive in safeguarding the independence of the judiciary in Namibia

The Constitution excels in guaranteeing human rights by comprehensive coverage and provisions set out in clear language. Human rights are justifiable as their protection can be secured through the courts. The Bill of Rights embodied in Chapter 3 of the Constitution outlines the 16 fundamental rights and freedoms which voice the carpet values and spirit of the independent Namibian nation. Most post-independence jurisprudence revolves around the application and interpretation of Chapter 3. Article 10, for example, provides as follows:

- (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.*

Article 12 of the Constitution contains the provisions for a fair trial. The principle of the rule of law runs throughout the constitutional regime.⁵ The Constitution explicitly states that Namibia is established as –⁶

... a democratic and unitary state founded on the principles of democracy, the rule of law and justice for all.

The fact that power is stated to vest in the people who exercise their sovereignty through the democratic institutions of the state in turn reinforces the concept of legitimacy.⁷

Central to the notion of *democracy* is access to information and public participation. Government has the duty to make available information to ensure that citizens know what it is doing on their behalf, something without which truth would languish and people's participation in government would remain fragmented. Only when government business is conducted in a transparent manner in which scrutiny by an informed public is allowed can the independence of courts be guaranteed. After all, the people of Namibia are the ones to confer power to the executive through democratic elections. If they are made aware of irregularities on the part of the government they voted into power, they are able to alter the situation through the ballot box.

The rule of law, apart from concepts such as *separation of powers* and *limited government*, is another factor that contributes to democracy. Constitutional

5 Hinz, MO. 2003. "The rule of law and the new African constitutionalism". In Hinz, MO (ed.). *Without chiefs there would be no game: Customary law and nature conservation*. Windhoek: Out of Africa Publishers, p 273.

6 Article 1(1), Namibian Constitution.

7 Article 1(2), Namibian Constitution.

theories were written about the rule of law centuries before the concept of *constitutionalism* gained momentum. What is noteworthy is that constitutionalism is related to both democracy and the rule of law. Indeed, the doctrine of the rule of law and constitutionalism both deal with the limits on the exercise of the powers of government. They rest on three premises:⁸

- The absence of arbitrary power: No person is above the law and no person is punishable except for a distinct breach of the law established in the ordinary manner before the ordinary courts
- Equality before the law: Every person is subject to the ordinary law and the jurisdiction of the ordinary courts, and
- Judicial decisions confirming the common law.

Separation of powers

The principles of Montesquieu's theory of the separation of powers require that the three organs of a state exercise their constitutional functions independently from each other, meaning that one branch should not interfere with the functions of another organ of state.⁹ In order to guarantee and protect the fundamental rights of the individual and to prevent dictatorship and tyranny, established mechanisms need to be put in place to place constitutional and legal restraints on the powers of government or the various organs of state.¹⁰ 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.¹¹

In Namibia, the separation of legislative and executive powers from those of the independent judiciary is guaranteed. Various mechanisms are put in place to ensure that each branch of government remains independent of the other through a system of checks and balances.¹² According to Article 1(3) of the Constitution, there are three main organs of state: the executive, the legislature,

8 Dicey, AV. 1965. *An introduction to the study of the law of the constitution* (10th Edition). London: The Macmillan Press Ltd, p 15ff.

9 Bradley, AW & KD Ewing. 1997. *Constitutional and administrative law* (12th Edition). London: Longman, pp 89–90.

10 Amoo, SK. 2004. "The concept of *constitutionalism*". Unpublished notes prepared for first-year students taking the "Introduction to Law" course. University of Namibia, Windhoek, p 170.

11 (ibid.).

12 Diescho, J. 1994. *The Namibian Constitution in perspective*. Windhoek: Gamsberg Macmillan, 70ff.

and the judiciary. With respect to the judiciary, both the powers granted to the institution and the protections that it enjoys are quite substantial. Included in the Constitution is an extensive and fully justiciable Bill of Rights, which specifically requires that administrative agencies act fairly and reasonably towards citizens. This gives citizens the right to take executive agencies to court, and the judiciary the authority to adjudicate such matters. Beyond this, the rights of standing (concerning who may bring matters before the court) are relatively broad, thus increasing the prospects that courts will be called upon to adjudicate the actions of the executive and legislative branches.

The executive

Chapters 5 and 6 of the Constitution indicate that the executive comprises the President and Cabinet.¹³ Their working relationship is consultative, and their paramount function is policy-making. Cabinet members are required to attend sessions of the National Assembly to answer questions pertaining to the legitimacy, wisdom, effectiveness and direction of government policies. According to Article 35(1), the Cabinet consists, inter alia, of the President, the Prime Minister, and other members to be nominated for the purposes of administering and executing the functions of the government. Besides policy-making, the executive is responsible for negotiating and signing international agreements, which, according to Article 144 of the Constitution, form part of the law of Namibia.

The Constitution explicitly incorporates international law and makes it part of the law of the land. Ab initio, public international law is part of the law of Namibia.¹⁴ No transformation or subsequent legislative act is needed.¹⁵ However, international law has to conform with the provisions of the Constitution in order to apply domestically. In case a treaty provision or other rule of international law is inconsistent with the Constitution, the latter will prevail. A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met.¹⁶

13 Article 27(2) of the Namibian Constitution; see also Naldi, G. 1995. *Constitutional rights in Namibia: A comparative analysis with international human rights*. Kenwyn: Juta & Co. Ltd, pp 15–17.

14 See Tshosa, O. 2001. *National law and international human rights law: Cases of Botswana, Namibia and Zimbabwe*. Burlington: Ashgate Publishing Company, p 79ff.

15 Erasmus, G. 1991. "The Namibian Constitution and the application of international law in Namibia". In Van Wyk, D, M Wiechers & R Hill (eds). *Constitutional and international law issues*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, p 94.

16 (ibid.:102ff).

The role of the executive in safeguarding the independence of the judiciary in Namibia

The conclusion of or accession to international agreements is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Constitution. The executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required that the National Assembly agrees to the ratification of or accession to international agreements. The Constitution does not require a promulgation of international agreements in order for them to become part of the law of the land.¹⁷

The primary function of the executive is to provide political leadership.¹⁸ Thus, the leadership is entrusted with the power to manage the nation's collective affairs.¹⁹ Because the Constitution creates the system of executive presidency, the President, as the head²⁰ of the executive, chairs Cabinet meetings.²¹ These responsibilities place him or her in a position with considerable influence over policies and bills to be tabled before Parliament.²² As stated in Article 32(4)(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.

Before Namibia's independence, judges were appointed by the President of the Republic of South Africa on the recommendation of the minister of justice in that country, a position that applied to the mandated territory, Namibia, as well. In this respect, the executive historically exercised a great measure of control over the judiciary. In this premise of history, it is evident that, still today, the President is vested with a great deal of power and responsibility, which, if employed in accordance with the rule of law, can contribute greatly to the attainment of the independence of the judiciary in Namibia. Moreover, Article 32(1) subjects the exercise of presidential executive functions to the overriding terms of the Constitution, the laws of Namibia, and the rule of law, and obliges the President to uphold, protect and defend the Constitution as the Supreme Law.²³

17 (ibid.).

18 Mbahuurua, VH. 2002. "The executive power in the Namibian Constitution: Percept and practice". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia Press, p 42.

19 (ibid.).

20 Article 32(3), Namibian Constitution.

21 Article 40 sets out the duties and functions of the Cabinet.

22 See Article 32, Namibian Constitution.

23 See also Article 5, which generally obliges all branches of government as well as private individuals to respect and uphold the Bill of Rights. This effectively demonstrates that the Bill of Rights has both vertical and horizontal application.

The legislature

The legislature as outlined in Chapter 7 and 8 of the Constitution is made up of the National Assembly and the National Council. In Namibia, *Parliament* refers to the National Assembly acting in terms of the Constitution and subject to review by the National Council. The legislative power of Namibia is vested in the National Assembly, subject to the assent of the President or the National Council, where applicable. As the principal legislative authority in the country, the National Assembly has the power to make and repeal laws. According to Articles 74 and 75 of the Constitution, the National Council has the power to consider and review legislation passed by the National Assembly. Without playing a judicial or quasi-judicial role, with a view to Article 32(9) it can be submitted that the executive branch is accountable to the legislative branch.²⁴

The judiciary

Chapter 9 of the Constitution deals with the administration of justice. In Article 78, the Constitution refers to the judicial powers that are comprised of the Supreme Court, the High Court, and the Lower Courts of Namibia. Article 78(2) explicitly states that the courts are to be independent and subject only to the Constitution and the law. The administration of justice is required to be independent from the other organs of state. The sacrosanct nature of this value was expressed by the Supreme Court.²⁵ The Supreme Court is the highest national forum of appeal. It has inherent jurisdiction over all legal matters in Namibia and, according to Article 79 of the Constitution, it adjudicates appeals emanating from the High Court, including appeals that involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed therein. The Supreme Court also hears matters referred to it by the Attorney-General or authorised by an Act of Parliament.²⁶

As Namibia has a system of stare decisis, meaning that all decisions emanating from the Supreme Court are binding on all other courts unless they are reversed by an Act of Parliament or the Supreme Court itself.²⁷ Unlike the Supreme Court,

24 Mbahuurua (2002:50).

25 See *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

26 To date, only two cases have been referred to the Supreme Court by the Attorney-General, namely *Ex Parte: Attorney-General. In re: Corporal Punishment by Organs of State* 1991 (3) SA 76, and *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

27 Article 81, Namibian Constitution.

the High Court exercises original jurisdiction. As set forth by Article 80, the High Court can act both as a court of appeal and a court of first instance over civil and criminal prosecutions and in cases concerning the interpretation, implementation and preservation of the Constitution.²⁸ There are several lower courts in Namibia. They are the magistrates' courts, the labour courts, and the customary courts.

The independence of the judiciary

It is a constitutional obligation upon the executive and legislature to safeguard the independence of the judiciary, which is unconditionally proclaimed in Article 78(2) of the Namibian Constitution. *Judicial independence* can be defined as –²⁹

... the degree to which Judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the Judges personally or on the power of the court.

The judiciary is considered as the watchdog of the fundamental rights and freedoms of individuals. For instance, as Article 25 of the Constitution provides, every individual who is of the opinion that his or her fundamental rights have been violated or threatened is entitled to approach a competent court to protect such right or freedom.³⁰ In addition, the judiciary has the duty to check that the other branches of government do not abuse their powers. However, in order to effectively fulfil these functions, it is essential that the legislature and executive do not interfere with the work of the courts. Article 25 further gives a court of competent jurisdiction the power to declare an Act of Parliament inconsistent with the provisions of the Bill of Rights. What must be noted is that, as an option to declaring the Act of Parliament invalid, the court also has the discretion to refer it to the National Assembly for the defect in the impugned law to be corrected.³¹

28 The High Court is presided over by the Judge-President. A full sitting of the High Court consists of the Judge-President and six other judges. The jurisdiction of the High Court with regard to appeals is required to be determined by Acts of Parliament. Some decisions of the High Court, which bind the Lower Courts, are recorded both in Namibian and South African law reports.

29 Becker, TL. 1970. *Comparative judicial studies*. Chicago: Rand McNally and Co., p 15. Regarding the tests which the courts have used to determine the independence of the judiciary, see *Van Rooyen and Others v The State and Others* (General Council of the Bar of South Africa Intervening 2002 (5) SA 246 para. 22–28).

30 See in this regard *Kauesa v Minister of Home Affairs and Another* 1995 NR 175, and *S v Sipula* 1994 NR 41.

31 See also *Ex Parte: Attorney-General. In re: Corporal Punishment by Organs of State* 1991

The role of the executive in safeguarding the independence of the judiciary in Namibia

Furthermore, Article 25 read with Article 18 also subjects executive powers to judicial review. In terms of these two Articles, the courts may declare invalid any executive action which abolishes or abridges the fundamental rights and freedom of individuals, and the courts may review any administrative functions. Thus, it can be stated that legislative sovereignty is limited by the supremacy of the Constitution.

The culture of judicial independence is obliged to be sustained by procedures for appointment to the bench (Article 82), which must be fair, transparent and reasonable. The judicial input is substantial and manifest and, by guaranteeing security of tenure for judges and protecting them against dismissal or suspension (Article 84), their salaries must be adequate to protect their dignity and vulnerability. This input is accompanied by –

- making available to judges adequate secretarial facilities to enable them to discharge their functions efficiently and effectively
- enhancing opportunities for judges to acquire training and sensitivity towards groups unfairly marginalised or otherwise disadvantaged by previously unarticulated assumptions
- encouraging access for judges to technological equipment and to research assistants which facilitate just and expeditious decisions, and
- full and generous opportunities for judicial training and education in the vast network of increasingly complex sociological and scientific disciplines that impact on the identification and protection of the core values articulated by an increasingly transnational constitutional culture, and mediated by universally shared values and aspirations.

In a democratic society governed by fundamental principles such as the rule of law and respect for human rights, the judiciary might be subject to criticism. However, Judge-President Petrus Damaseb put it as follows in his speech delivered at the 2008 commemoration of the International Day of Democracy in Windhoek:³²

[A]ttacks against the judiciary undermine the independence of the judiciary and erode public confidence in the administration of justice. Criticisms against the judiciary should be informed and properly investigated before publication and should not impute improper motives against a judge.

The institutions of justice must themselves project and nurture the good reputation of the judiciary in respect of their independence and integrity, by –

(3) SA 76 (NmSC), *Kauesa v Minister of Home Affairs and Another* 1995 NR 175, and *The Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

32 Damaseb, P. 2008. “Judicial perspective: Democracy in Namibia – Before and after Independence”. *New Era*, 19 September 2008.

- providing adequate domestic mechanisms to correct erroneous or unjust decisions
- making access to the courts friendly and comfortable, and
- demystifying anything in the language of the law that makes it unintelligible.

Judges are clearly entitled to demand and to expect fidelity to these truths from the society that sustains them, but that society is also entitled to demand from judges fidelity to the many and subtle qualities in the judicial temper that legitimise the exercise of judicial power. Conspicuous among these qualities are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper is wisdom – enriched as it must be by a substantial measure of humility, an instinctive moral ability to distinguish right from wrong, and sometimes the more agonising ability to weigh two rights or two wrongs against each other.

The Judicial Service Commission

The Judicial Service Commission (JSC) plays an important role in ensuring the independence of the judiciary. The JSC, regulated in Article 85 of the Constitution, consists of the Chief Justice, a judge appointed by the President, 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. The JSC is entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with the Constitution or any other law.

The JSC makes recommendations to the President when it comes to the appointment (Article 82) or removal (Article 84) of judges. In the case of removal, the JSC investigates whether or not a judge should be removed from office on the given grounds, and if it decides in favour of the removal, it informs the President of its recommendation. During such investigations the judge in question is suspended from office. It is submitted that, except where the President is empowered to extend a judge's retiring age, the modes of appointment and removal effectively insulate the judiciary from the executive. For this purpose, the Judicial Service Commission Act, 1995 (No. 18 of 1995) regulates, inter alia, the representation, tenure of office, and functions of the JSC and its members.³³ Section 5 of the Act points out the need for a balanced structuring of judicial offices.

³³ Mbahuurua (2002:56).

Constitutional measures for the executive to safeguard judicial independence

By way of Article 78(3) of the Constitution, members of the executive are prohibited from interfering with the functions of the judiciary. The obligation to safeguard this independence arises from the second part of Article 78(3): the safeguard does not end at independence, but includes dignity and effectiveness, which also have to be protected subject only to the Constitution or any other law. Interestingly, instead of ending at prohibiting interference, the Constitution obliges the same people who threaten the independence of the judiciary to grant the desired independence. In this light, the prohibited interference should be understood as negative interference, otherwise the constitutional mandate to protect and safeguard the judiciary's independence would be futile; indeed, it would be superfluous to prohibit the executive from taking positive constitutional and protective action.

Furthermore, safeguarding such independence is not left to the whims of political will: the obligation is legally imposed. However, the independence of the judiciary cannot be protected if it is so insulated that access to it becomes difficult and the efficient administration of justice is hampered. On the contrary, the constitutional mandate encourages an environment of mutual coexistence and interdependence. It aims at the judicialisation of politics rather than the politicisation of the judiciary. Now the question arises: how is this constitutional mandate respected, and how does the judiciary confront the danger of interference? No politician can afford to be seen to defy the orders of a judiciary perceived by the people to be scrupulously independent and honest in the defence of the constitutional values bonding a nation. Therein lies the real source of the strength of the judiciary and its legitimacy in seeking to execute its potentially awesome powers. Therein also lies the secret of its capacity to defend and protect the Constitution of a nation. A judiciary which is independent and which is perceived to be independent within the community protects both itself and the freedoms enshrined in the Constitution from invasion and corrosion. A judiciary that is not impairs both.

The negative duty placed on the executive is the duty to refrain from interfering with the functions of the judiciary. This duty was interpreted in the case of *S v Heita and Another*,³⁴ where, after an imposition of a sentence in one treason trial, judges were accused of being racist and disloyal, which accusation was coupled with demands for their posts as judges to be revoked with immediate effect. *In casu*, the court held that the members of the legislature and the executive were

34 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

expressly prohibited from interfering with judges or judicial officers, and that —³⁵

... such interference is not allowed at any stage, be it before, during or after a verdict in a particular trial.

This duty of non-interference was also reiterated in the case of *Ex parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,³⁶ where the Attorney-General brought a matter ex parte in terms of Article 79(3) of the Constitution, requiring the court among other things to decide the extent of the Attorney-General's final authority over the office of the Prosecutor-General. The court took cognisance of the fact that the office of the Attorney-General was an executive one, while the office of the Prosecutor-General was at the very least quasi-judicial. From this premise the court found that it would be militating against the independence of the office of the Prosecutor-General to put the final responsibility of its affairs in the hands of a political appointee. Therefore, in line with the duty of non-interference, the court found that the Prosecutor-General only needed to report to the Attorney-General on issues of public interest. Only to this extent was the Attorney-General similarly authorised to involve him-/herself with the office of the Prosecutor-General. Thus, the Attorney-General was prohibited from interfering with the process of prosecution, for this would be in conflict with the constitutional guarantee of the judiciary's independence.³⁷

In the case of *Sikunda v Government of the Republic of Namibia (2)*, the court was confronted with a situation in which the Minister of Home Affairs failed to comply with a court order that directed him to release a certain detainee. It was contended by the court that the principle of the independence of the judiciary was entwined in its own right to the effectiveness of the court; therefore, —³⁸

... the court must not only be independent but also effective: non-compliance with Court orders, even by State officials, diminished that effectiveness and could lead to collapse of the legal system.

From the foregoing it is clear that the duty as regards non-interference cannot be overstated. It forms the basis of the effectiveness of the judiciary, which is dependent upon the people's respect for such office. In *Sikunda v Government*

35 (ibid.).

36 *Ex parte: Attorney-General of Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

37 See also the contribution in this publication by Lovisa Indongo.

38 *Sikunda v Government of the Republic of Namibia and Another (2)* 2001 NR 86 (HC).

The role of the executive in safeguarding the independence of the judiciary in Namibia

of the Republic of Namibia and Another (1),³⁹ the Judge-President recused himself from the case in light of attacks that had been made on his office in the newspapers and other public fora. He found that, against this background, any ruling he would make would lack credibility and legitimacy and that –⁴⁰

... these attacks affected his independence, dignity and integrity as a Judge.

The general rule is that the executive should not interfere with the functions of the judiciary. An exception to this rule, however, exists in order to facilitate the achievement of the mandate of the judiciary. The exception is that the executive is only permitted to descend into the arena of the judiciary in order to protect the latter from attacks by the public, the legislature, or any other body. The second leg of Article 78(3) provides that –

... all organs of State shall accord such assistance as the Courts may require to protect their independence and effectiveness, subject only to the terms of this Constitution or any other law.

As noted by Judge O’Linn, this places a positive duty on all organs of state to protect the courts.⁴¹ It follows that failure to interfere where the court is under attack would be an evasion of their constitutional duty. This was stated in *S v Heita and Another*, where the court stated the following:

It is ... an evasion and abrogation of their legal duties if the aforesaid organs say we cannot interfere because the Judiciary is independent but then indicate that the public is free to interfere Such an attitude means in effect that these organs and their members also cannot interfere with such purported rights of the citizen. It is obvious that such an attitude is an open invitation to the disgruntled

The executive is legally obliged to protect the judiciary to ensure the effectiveness of the court.⁴² The judges depend on the protection of their independence, dignity and effectiveness, which is a pillar without which the Constitution would not survive.⁴³ Unlike Parliament or the executive, courts do not have the power of the purse of the army or the police to execute their will. The courts would be impotent to protect the Constitution if the agencies of the state refused to

39 *Sikunda v Government of the Republic of Namibia and Another* (1) 2001 NR 67 (HC).

40 Although this case involved the attacks made by the Society of Advocates and the leading newspapers, it is contended that the effect of the attacks was to render the decision doubtful in the eyes of the public as it would not be free of potential bias.

41 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

42 (ibid.).

43 (ibid.).

command resources to enforce the orders of the courts. Otherwise, courts could be reduced to paper tigers: with a ferocious capacity to roar and snarl, but no teeth to bite with, and no sinews to execute what may then become a piece of sterile scholarship.⁴⁴

Efficiency of the executive in discharging its constitutional mandate

In *S v Heita and Another*,⁴⁵ the court identified several offices as falling under the legal duty to protect the independence of the judiciary. These included the President, the Attorney-General, the Prosecutor-General, the Ombudsman, the Police Force, and the Defence Force. In *S v Heita and Another*, the Minister of Justice issued a statement that reiterated the state's commitment to uphold the independence of the judiciary. It was stated that, while an honest and temperate expression of shock would not constitute contempt of court, –⁴⁶

[I]t is inadmissible and patently unconstitutional to bring or attempt to bring political pressure to bear on a judicial officer by[,] for example, calling for his dismissal simply because he or she handed down a verdict which a person or group do not agree with. Once this is allowed a fundamental pillar of our constitutional democracy, namely the independence of the Judiciary[,] is totally threatened and with it, the rule of law and our constitutional democracy.

In Namibia, the executive cannot initiate the removal of judges from office. The executive makes sure, through respect of the Constitution, that judges feel secure in their positions and will only pay allegiance to the Constitution and the law according to their oaths. There is only one incident of a judge who resigned on dubious grounds, and returned to private practice in January 1997. The reasons for his resignation were not disclosed, but there was no objection from the executive; the Chief Justice at the time only stated that there had been concerns on the bench itself.⁴⁷

In the case where a judge was accused of rape and was arrested by the police and charged, the JSC requested the accused to show cause why he should not be dismissed from the bench as stipulated in the Constitution.⁴⁸ When it came to

44 *Sikunda v Government of the Republic of Namibia and Another* (2) 2001 NR 86 (HC).

45 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

46 (ibid.).

47 Bukurura, SH. 2002. "The Namibian Constitution and the constitution of the judiciary". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia Press, p 299ff.

48 Case unreported. Following the judge's arrest, he was suspended from his position as the Supreme Court Judge of Appeal at the time, before he retired from that position in October 2005. The trial ended on 28 July 2006, acquitting the accused at the close of the state's case

the issue of trial, it was clear that using the same judges who were his colleagues would infringe upon the independence of the judiciary and would discredit the result of the proceedings, thus putting the integrity of the justice system into question in the eyes of the public. This led the executive to step in, and upon the JSC's recommendation, they appointed a judge from South Africa to try the accused. The case shows that, like everyone else, judges are not above the law. However, their position as judges in a democratic state requires that they be – and be seen to be – independent and not subject to direct or indirect pressure from the executive. Thus, any investigation of criminal charges against them needs to be conducted with sensitivity to their status, their role in society, and their relationship with the executive. Procedures should be followed to avoid as far as possible any suggestion that a particular judge was being victimised by the executive for his/her views or decisions. Such procedures ordinarily involve the holding of an independent enquiry into whether or not the judge should be impeached. If the allegations are then found to have substance, and the judge is subsequently impeached, a criminal prosecution may follow.

The executive should be exemplary in its respect of court judgments. This principle was reflected by a judgment⁴⁹ delivered on 28 January 2003. The judgment held that the Permanent Secretary of Justice had no jurisdiction to appoint, transfer or terminate the services of a magistrate, and, more specifically, that section 23(2) of the Public Service Act, 1995 (No. 13 of 1995), which authorised such transfers, did not apply to magistrates. The court put it this way:

For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of Government. I therefore agree with the order of the Court a quo that sec. 23(2) did not apply to magistrates.⁵⁰

The message the court sent here was that magistrates' courts were courts like any other, and should, therefore, not be under executive control. The executive took heed and established the Magistrates Commission, which is now in charge of all

on all charges. In his judgment, which was severely critical of the police's handling of the investigation of the case, South African Judge Ronnie Bosielo ruled that the evidence was so poor, contradictory and tainted by shortcomings in the police investigation that it was not necessary for the former Supreme Court Judge of Appeal and High Court Judge-President to even present the case in his defence to the court before a verdict was to be delivered. Now, more than two years later, the case is set to be revived. See *The Namibian*, 22 July 2008. The State was granted permission to appeal by the Supreme Court.

49 *Mostert v Minister of Justice* (SA3/02; SA3/02) [2003] NASC 4.

50 (ibid.).

appointments and transfers of magistrates. In this example, the executive played an important role in executing its mandate to protect and assure independence to magistrates' and other courts.

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases before them. No outsider – be it government, a pressure group, an individual or even another judge – is permitted to interfere or even attempt to interfere with the way in which a judge conducts a case and reaches a decision. In the *Heita* case,⁵¹ the High Court decided that it would not bow to political pressure – even from the ruling SWAPO Party. After all it is incumbent on all to ensure that the appointment of judges is not partisan, since this would jeopardise the independence of the judiciary.⁵²

In *Mostert v Magistrates Commission*,⁵³ the court said that there was a need to guard against the intrusion of the independence of the judiciary. It is the primary duty of the Namibian government to promote unity in a culturally diverse environment. In ensuring unity in diversity, the executive will be ensuring the institutional independence of the judiciary. The executive has a role to play in making sure that the bench is well constituted and represented, since it is relatively deeply involved in the appointment of judges in terms of the Constitution.

In sum, it must be submitted that government has never really developed a major interest in controlling the courts. As a result, the judiciary in Namibia ultimately enjoys high levels of autonomy. This has remained true despite power having been concentrated in the hands of the ruling party since Independence, and despite the courts having shown no inclination to defer to government in the rulings that come before them. Judges are supported by elements of civil society that rally to the defence of the courts in the wake of public comments about the bench. Legal advocacy and academia, and human rights groups such as the National Society for Human Rights (NSHR) are outspoken and active in condemning government actions that potentially threaten judicial autonomy. The press are also willing to carry releases from these associations, which have in the past brought public and sometimes even international attention to aggressive government actions. One such local organisation is the Namibian Human Rights Forum, informally established in February 2008 by various key actors in an endeavour to promote

51 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

52 See also Viveca, N. 1997. "Empty-bench Syndrome: Congressional Republicans are determined to put Clinton's judicial nominees on hold". *Time*, 26 May, p 37.

53 *Mostert and Another v Magistrates Commission and Another* (PI1857/04) [2005] NAHC 25.

respect for human rights, the rule of law, democracy, and the independence of the judiciary in Namibia. The Forum so far includes politicians, law professors, non-governmental organisations (NGOs), legal practitioners, and members of the Law Society, the Anti-corruption Commission, and the Office of the Ombudsman. The Forum intends to monitor the human rights situation in Namibia and the Southern African Development Community (SADC) region. Its objective is to promote human rights and protect the national democratic space by highlighting potential threats and abuses.⁵⁴

Budget funding, the executive, and judicial operational independence

If judges leave the bench for financial reasons, then the independence of the judiciary is at a crossroads. In Namibia, judges' salaries are constantly reviewed and raised if necessary. The Minister of Justice, in consultation with the Ministry of Finance, sets and publishes judges' salaries in the *Government Gazette*. Thus, an executive legislative power determines what judges should earn. Judges' salaries are charged to the Consolidated Revenue Fund so that Parliament cannot seek to exert influence on judges via the annual discussion of the state budget. This measure adds to ensuring the independence of the judiciary.⁵⁵ As yet, there is no example in Namibia of a judge leaving office on the grounds of being unable to sustain his/her family. In sum, an independent judiciary depends on security of tenure and irreducible salaries.

It is said that the judiciary in many African countries does not have operational independence because the executive determines the appointment, promotion and remuneration of judicial officers. The prospects of career mobility for judges, therefore, depend largely on how well they can court and patronise the executive. In most cases, the budget and funds of the judiciary are controlled by a ministry of justice (an executive arm of government), which creates bureaucratic procedures in financial matters and the possibility of discriminatory funding to be used against 'erring' courts. However, judicial independence needs constant vigilance when it comes to the salary, pension and other benefits of a judge's office. In Namibia, for example, the Judges' Remuneration Act, 1990 (No. 18 of 1990) provides, inter alia, for the remuneration of judges and the granting of additional benefits to them.

54 See Ruppel, OC. 2008. "The Human Rights and Documentation Centre at UNAM". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan, pp 131–140.

55 Madhuku, L. 2002. "Constitutional protection of the independence of the judiciary: A survey of the position in southern Africa". *Journal of African Law*, 46(2):232–245.

The role of the executive in safeguarding the independence of the judiciary in Namibia

Section 2(2) of this Act states the following in particular:

Any salary and allowance payable ... shall be paid from the State Revenue Fund out of moneys appropriated by the National Assembly for that purpose.

Section 3(1) of the Act makes provision for amendments to the First Schedule, which contains the annual salaries associated with designated offices. Here it says the following:

The President, acting on recommendation of the Judicial Service Commission, may by proclamation in the Gazette amend the second column of the First Schedule so as to increase the rates specified therein.

Again, the influence of the executive is noticeable in the above statutory context: the executive is clearly able to exercise a degree of control over the judiciary by holding its purse strings. A restricted budget can create inefficiency and, consequently, a lack of public confidence – eventually leading to a situation where the executive can manipulate a weak and unpopular judiciary.

The executive has a significant hand on further important aspects of judicial independence, being the independence in administration, covering not only the operation of the courts, but also the appointment and supervision of supporting staff and of the various supporting services such as the library and law reports.⁵⁶

In 2006, an objective study statistically evaluated judicial independence in Namibia, using nearly 250 cases that were analysed on whether and how certain political factors had affected the patterns of decision.⁵⁷ The study investigated statistically to what extent Namibia's judicial institutions were independent, such that they were willing to assert their authority vis-à-vis other branches of government. The analysis further examined whether and how certain political factors had affected the patterns of decision-making that had been witnessed. The following questions were raised:⁵⁸

56 Oputa, CJ. 1981. *The law and the twin pillars of justice*. Owerri: Government Press, p 115.

57 VonDoepp, P., *Politics and judicial decision-making in Namibia: Separate or connected realms?* in this publication.

58 (ibid.).

The role of the executive in safeguarding the independence of the judiciary in Namibia

- *Have Judges, for instance, deferred to government when faced with rendering decisions in important political cases?*
- *Have all Judges been equal in terms of their tendencies to side with or against the government?*
- *Have Judges altered or adjusted their decision-making in light of pressures and threats from the elected branches and other political actors?*

The result of the study indicated that, as a whole, the Namibian judiciary had performed quite admirably in terms of independence from the other branches.⁵⁹ The extent of deference to the executive was found to be minimal, although some foreign, i.e. non-Namibian, judges had displayed a tendency side with government. This tendency was especially apparent after 2000, when such judges became the target of attack from political circles following their decisions in certain cases. In this respect, their deferential tendencies toward the elected branches of government were not entirely surprising.⁶⁰

Recommendations

The executive can only safeguard judicial independence if it conducts its business in accordance with the law, and in an open and transparent manner. In this context it must be submitted that civil society also plays a role, namely by –

- advocating for key constitutional and legal reforms that impact directly on the independence of the judiciary
- monitoring and evaluating court procedures and processes, including judicial selection procedures
- monitoring and auditing judicial performance
- supporting judicial training and education
- ensuring compliance with domestic and international standards
- curbing judicial corruption, and
- monitoring actions of the executive that may interfere with the independence of the judiciary.

It has been submitted that, in various African countries and to some extent in Namibia, judicial officers are poorly trained and, thus, unable to perform their functions efficiently and effectively. This problem is especially pronounced in the Lower Courts. Magistrates barely receive judicial training, but are recruited directly from university. The culture of judicial education needs improvement in Namibia. When judicial training is poorly funded and judicial officers are poorly trained, the recipients of such training are vulnerable to demotivation, corruption and low commitment.⁶¹ This is undoubtedly one reason why some courts have poor facilities, cases are delayed, and access to justice is denied to the citizen.⁶²

59 (ibid.).

60 (ibid.).

61 See also the contribution in this publication by Isabella Skeffers.

62 This concern has recently repeatedly been expressed to the author of this paper, especially by magistrates.

Conclusion

The subservience of the judiciary to the executive is still a noticeable problem in many countries. This should be tackled wherever it exists in order to ensure that the judiciary is independent. The Namibian courts have stressed in several judgments that the separation of the bodies of government and, in particular, the independence of the judiciary are of utmost importance. Indeed, there are several provisions in the Namibian Constitution aiming to uphold the separation of powers and the notion of checks and balances.

It is clear that the executive has a strong hand in determining and protecting or taking away the independence of the judiciary. In carrying its mandate in protecting the independence of the judiciary, the executive recognises that the Constitution is the supreme law. In this respect, the role of the executive, as Justice Anel Silungwe put it, is as follows:⁶³

... to safeguard the proper functioning of the Judiciary. It shall do all that it can that the Judiciary can carry out its proper functions and must not allow its agents or servants to interfere with the functions of the Judiciary. The Executive should execute orders of courts and provide for an environment conducive to the Judiciary. The Executive should give public support to the Judiciary, the Attorney-General as the defender of the Constitution and the Ministry of Justice.

The Namibian Constitution recognises the weaknesses of the judiciary as the custodian of the Constitution and put in place measures for its protection. According to Judge O'Linn, –⁶⁴

[t]he Judiciary has no defence force or police force. They are not politicians. They cannot descend into the arena to defend themselves. They can but they should not, generally, descend by making use of a remedy of ordinary citizen to institute actions for damages for defamation or injuria. Precisely because they cannot protect themselves, unscrupulous persons may exploit this weakness by scandalising the Court or their Judges or a particular Judge, even spreading untruths without fear of contradiction.

Because of the vital role of the executive in the attainment of the ideals and aspirations of the Namibian people, it is imperative that it takes an active role in ensuring that the independence of the judiciary is not undermined by individuals,

63 Acting Judge of the High Court and Supreme Court of Namibia; substantive Judge until retirement of the same courts; former Minister of Justice and Attorney-General in Zambia; former Judge of the Court of Appeal in the Seychelles. Statement from an interview dated 27 May 2008.

64 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

The role of the executive in safeguarding the independence of the judiciary in Namibia

society, or state organs. The effectiveness of the judiciary is dependent on the executive keeping their end of the bargain to protect society from anarchy.

If the executive respects and upholds the doctrine of the separation of powers as provided for in the Constitution, it not only promotes the independence of the judiciary, but also serves as restraint on its excessive powers. In addition it ensures accountability in government – a condition without which no democratic country can flourish.⁶⁵ Accountability is a tool for achieving transparency in government, and this in turn might help to protect the independence of the judiciary.

The constitution of a nation serves as an important mechanism to uphold and further the independence of the judiciary. However, a constitution is an ideal, i.e. words on paper. It is the people of a country, and in particular those voted into power through democratic elections, that determine whether or not a constitution becomes a living document. Only if the constitutional rules and principles are upheld will it be possible to safeguard judicial independence. This, then, is what is truly meant by a constitution being an ideal: until its provisions are put into practice, it will remain a document on the shelf, gathering dust, and unable to grant people access to an independent judiciary.

In the Konrad Adenauer Foundation's 2006 Democracy Report on the Rule of Law in Zimbabwe, it is stated that the executive control over the judiciary and increased militarisation can only mean that citizens' rights have been curtailed.⁶⁶ Democracy is without a doubt a prerequisite for collective and individual judicial independence. In Namibia, these positive circumstances – to a very large extent – seem to prevail.

65 Tonchi, VL & S Nsingo. 2002. "Democratic accountability and responsiveness in Namibia's Public Service". In Hinz, MO, Amoo, SK & van Wyk, D (eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia Press, p 97.

66 <http://www.kas.de/wf/de/33.9396/>; last accessed 18.06.2008.

Appointing acting judges to the Namibian bench: A useful system or a threat to the independence of the judiciary?

Norman Tjombe

Introduction

As a young country, deprived of educational and employment opportunities for a long period by the colonial administrations that governed it prior to independence in 1990, Namibia is in dire need of judicial officers, particularly at its High and Supreme Courts. The Namibian Constitution requires a quorum in the Supreme Court to consist of three judges. However, not once in the Supreme Court's existence since 1990 has there been a quorum of three permanent judges. Every year, the President has appointed acting judges to the Supreme Court to complement the permanent judges. Since 2006, the only two permanent judges are the Chief Justice, Mr Justice Peter Shivute, and Judge of Appeal, Mr Justice Gerhard Maritz. As regards the High Court, there were only four permanent judges on the bench in 1990, and five acting judges were appointed for different lengths of tenure.¹ There is no requirement how many judges should be appointed in the High Court. The Supreme Court should have at least three.

Recruiting judges from the ranks of experienced private legal practitioners remains problematic in Namibia, as such lawyers have to forego the considerable rewards of private practice for lesser rewards as a judicial appointee.² This obviously has a severe impact on the administration of justice in Namibia, with the most obvious being a huge backlog of cases – especially in the High Court. The development of jurisprudence is important for any country, but especially true for Namibia. As a young democracy with a brutal history of institutionalised lack of rule of law, despite its progressive Constitution, the country is stifled by not having an adequate pool of judges with diverse legal backgrounds and philosophies.

1 Legal Assistance Centre. [Various]. *Namibian Law Reports* (1990–2005). Lansdowne: Juta Law Publishers.

2 Hatchard, J, M Ndulo & P Slinn. 2004. *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective*. Cambridge Studies in International and Comparative Law. Cambridge: University of Cambridge.

Appointing acting judges to the Namibian bench

The Constitution allows for the appointment of acting judges to serve on both the High Court and Supreme Court benches, and several acting judges have indeed been appointed since independence in order to alleviate the acute shortage of judicial officers. However, this can have a number of problems as well as benefits for the judiciary. For example, in some instances, judges of the High Court were appointed to the Supreme Court on an acting basis. This practice can be problematic, as the Lesotho High Court case of *The Law Society of Lesotho v Mr Justice Michael Ramodibedi and Others*³ demonstrated. The Law Society of Lesotho brought an application to the High Court of Lesotho, in which it raised its concern about High Court judges who were being elevated to the Court of Appeal to hear High Court appeals. The concern was that this could impact the independence of the judiciary, in that the dual roles of the High Court judges would create the perception that the Court of Appeals might be loath to overturn judgments delivered by their High Court colleagues. Whilst this practice of such appointments seems to be the standard practice in Lesotho, in Namibia it does not appear to happen often.

Legal practitioners with large private practices and, therefore, a large volume of clients, may find it difficult to be appointed to the bench on an acting basis, particularly as Namibia's population is rather small. It was recently revealed in a local tabloid⁴ that an acting judge had sat on a case in which his private law firm was representing one of the litigants. At the time of writing, the matter was sub judice;⁵ suffice it to say here that, on closer examination of the record of this case, the newspaper report was grossly inaccurate and the matter had been blown out of proportion. The same newspaper reported that another acting judge had adjudicated on a case in which one of his family members was a witness for one of the litigants.⁶ Judges, whether permanent or acting, can recuse themselves from sitting on cases in which they may have an interest, but it may then happen that the judge with a large volume of clients in his/her private practice will literally recuse him or herself from just about every other case, thus rendering the short tenure at the bench underutilised or the appointment meaningless. However, the High Court roll indicates that all the judges appointed on an acting basis have been very busy during their short tenure, which demonstrates the need for

3 *The Law Society of Lesotho v Mr Justice Michael Ramodibedi and Others*; unreported judgment of the High Court of Lesotho, delivered 15 August 2003. The judgment can be found at www.venice.coe.int/SAJC/contributions/LES; last accessed 4 October 2008.

4 Moyo, T. 2008. "Judges' conduct queried: Conflict of interest casts shadow over judicial system". *The Namibian Sun*, 2 October.

5 The Registrar of the High Court issued a press release on 10 October 2008 stating that the Judge-President would comment on the matter after the conclusion of the case.

6 Moyo (2008).

Appointing acting judges to the Namibian bench

judicial officers. It also evidences how the system of appointing acting judges has assisted in reducing the backlog of cases and providing access to justice for litigants who would otherwise have to wait for many years before their matters are called in court. However, the problems associated with conflict of interest may still arise.

The system of acting judges does fulfil a number of useful functions, however, such as assessing the suitability of individuals for possible permanent appointment, and providing potential appointees to gain experience. It also helps ease the backlog of cases.⁷ In a press release dated 10 October 2008, the Registrar of the High Court, Mr Edwin Kastoor, gave the following response to negative media coverage of an acting judge's handling of a litigation matter:

Acting judges from private practice play an important role in our judicial system. Most come to assist the Court at great personal sacrifice. It is important therefore not to demonise the practice of appointing acting judges from private practice to assist the High Court in the performance of its functions.

Several judges who have served on the bench of the High Court as acting judges at various times since Namibia's independence in 1990 have become permanent judges, and have written judgments of exceptional quality. Indeed, many of Namibia's landmark constitutional judgments have been delivered by acting judges, which testifies that the development of jurisprudence in Namibia has benefited from the diversity of judicial officers enabled by the system of appointing acting judges.

The value of acting judges may be also seen through the reappointment of some acting judges for further terms, even though they may have handed down judgments which may be seen as 'anti-government'. For example, the acting judge who presided over a 2005 judicial inquiry into the affairs of a company under liquidation – which attracted unprecedented public interest and attention, not least because of the involvement of some senior ruling party politicians – was reappointed for another term in 2007.⁸

7 Hatchard et al. (2004).

8 On the judicial inquiry, see generally Dentlinger, L. 2005. "What is the Avid Company inquiry all about?". *The Namibian*, 12 August; Amupadhi, T. 2005. "Don't blame Avid". *Insight Magazine*, August 2005, p 18. The former President sued at least one newspaper for defamation after being linked to the liquidation scandal. Several people, including a former deputy minister, were ultimately criminally charged. At the time of publication, the criminal trial was under way.

Appointing acting judges to the Namibian bench

In February 2001, acting Justice Elton Hoff, sitting with Justice Mainga, convicted the then Minister of Home Affairs, Jerry Ekandjo, of contempt of court after the Minister refused to obey an earlier court order to release Mr Sikunda, a detainee. This case was very controversial, with senior ruling party officials and the Minister openly calling for the defiance of the court order and deportation of the suspect. They also called for the resignation of acting Justice Manyarara, who had issued the order for Mr Sikunda's release. The former Judge-President, Justice Pio Teek, recused himself from hearing the matter,⁹ and instead laid criminal charges of contempt of court against two local newspapers and the Society of Advocates after they criticised him for not enforcing the earlier court order.¹⁰ A complaint was also communicated to the African Commission on Human and Peoples' Rights by the International Centre for the Legal Protection of Human Rights, a human rights organisation based in the United Kingdom. In response, the Chairperson of the African Commission wrote to the Namibian authorities expressing concern on the threat of the imminent deportation of the detainee. During a promotional visit to Namibia in July 2001, one of the Commissioners of the African Commission, Andrew Chigovera, also raised the matter of this complaint with officials from the Ministries of Justice and Foreign Affairs.

However, the complaint to the African Commission was ultimately ruled to be inadmissible for lack of exhausting local remedies. In fact, at the time that the complaint was communicated to the African Commission, the same matter was pending in the High Court of Namibia, with Mr Sikunda being victorious in both the High Court and the Supreme Court.¹¹

Before they convicted the Minister of contempt of court, Justice Mainga, with whom acting Justice Hoff agreed, said the following:¹²

...[t]o refuse a litigant who has successfully secured his liberty in a Court of law is a practice inconsistent with our commitment to the rule of law – and it should be rejected and it is rejected and should be condemned in the most strongest [sic] terminology.

The *Sikunda* case was no ordinary matter, and it had high stakes for the judiciary.

9 The recusal judgment of Justice Teek is reported as *Sikunda v Government of the Republic of Namibia (1)* 2002 NR 67.

10 The Prosecutor-General refused to prosecute any of the parties for lack of a prima facie case.

11 See *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002). A copy of the African Commission's decision is available at http://www.chr.up.ac.za/centre_publications/ahr/r/AHRLR-2002-text.pdf; last accessed 4 October 2008.

12 *Sikunda v Government of the Republic of Namibia (2)* 2001 NR 86 at 93H.

Appointing acting judges to the Namibian bench

However, despite these controversies, Justice Hoff was shortly thereafter appointed as a permanent judge in February 2001, thus indicating the value of acting judges in Namibia.

The government appealed Mr Sikunda's case to the Supreme Court, where two of the three judges – Justices O'Linn and Chomba – were serving in an acting capacity at the time. The judgment of the Supreme Court, which was written by Acting Justice of Appeal O'Linn, was much more critical of the government's defiance of the court order than the judges of the High Court had been in their conviction of the Minister of contempt of court.¹³ All three judges (Justices O'Linn and Chomba, and former Chief Justice Strydom) were subsequently appointed to the Supreme Court as Acting Judges of Appeal.¹⁴ Again, this indicates the value of acting judges in Namibia.

In 2000, the same Minister threatened to withdraw the work permits of all foreign judges after an acting judge, who is of foreign nationality, prevented the police by way of an interdict from arresting a group of refugee musicians who had performed at an opposition party's public rally.¹⁵ The Minister ultimately publicly apologised for his conduct after a meeting with the Chief Justice and the Judge-President.

Acting Justice John Manyarara, who was appointed on an acting basis in 2000, was continually reappointed at the expiry of his one-year tenures, despite calls from certain politicians that his tenure should have been terminated because of his order against the Minister of Home Affairs to release Mr Sikunda. Acting Justice Manyarara was also the judge who had issued the order interdicting the police in 2000 to prevent them from arresting the refugee musicians; this led to the threats that his and other foreign judges' work permits would be withdrawn and had them facing deportation from Namibia.

The courts have been very forceful in protecting their independence. Shortly after Namibia's independence, judges of the High Court came under public attack – partly because they were mostly white, and partly because it appeared that they

13 Menges, W. 2002. "Supreme Court slams Govt over Sikunda case". *The Namibian*, 22 February. The Supreme Court judgment is available at <http://www.saflii.org/na/cases/NASC/2002/1.html>; last accessed 4 October 2008 and *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).

14 Justice Strydom retired as the Chief Justice in 2004, but has been called to the bench on several occasions as an Acting Judge of Appeal in the Supreme Court.

15 The Minister of Home Affairs asserted that it amounted to criminal conduct for refugees to participate in the political affairs of their host country, even though it was common knowledge that the same musical group had performed at the ruling party's rallies and at government functions on numerous occasions.

Appointing acting judges to the Namibian bench

had previously imposed lenient sentences against white treason convicts. Justice O'Linn, at that time a judge of the High Court, wrote as follows in a judgment:¹⁶

Can a Judge effectively perform his onerous task if people are allowed to continue undeterred to scandalise the Judges – to misrepresent, to agitate, to incite, to demand, to dictate and even to threaten from public platform, from the bush and from the streets, through the media and through the structures of their parties, trade unions and churches? The answer is clearly in the negative.

The independence of acting judges is a particular issue as they have a short tenure. This issue is compounded by the fact that there have been more acting appointments than permanent appointments to the Namibian judiciary, and because of the threats of removal made against acting judges of foreign nationality. Security of tenure is key to judicial independence. The reason is obvious: if judges are appointed for a fixed term, there is a danger that they will be seen as attempting to curry favour with the appointing authority in order to obtain reappointment for another term.

In an age when judicial decisions can be the subject of intense public controversy, particularly where sentencing of criminal offenders or the review of actions and decisions of the executive branch are concerned, how is the appearance of independence to be maintained when an acting judge makes difficult and potentially controversial decisions during his/her short tenure? Although this is a concern, all acting appointments to Namibia's bench have been uncontroversial so far. In fact, in his article on Namibia's judiciary in the current publication, Peter VonDoepp¹⁷ states that –

... as a whole, the [Namibian] judiciary has performed quite admirably in terms of independence from the other branches. The extent of deference to the executive has been minimal.

The constitutional process of appointing

The integrity of the appointing process is safeguarded by the Judicial Service Commission, a constitutional body which makes all the recommendations to the President for the appointment of judges. The Commission was created by Article 85 of the Constitution, and is composed of the Chief Justice as its chairperson, a judge appointed by the President, the Attorney-General, and two members of the legal profession nominated by the professional organisations representing

16 *S v Heita and Another* 1992 NR 403 (HC) at 414D–E.

17 See Peter VonDoepp in this publication

Appointing acting judges to the Namibian bench

the interests of the legal profession in Namibia. The Commission's composition is designed to ensure that the body is, and remains, independent, free from any party-political influence, so as to –¹⁸

... preclude a process of political selection and appointment where the incumbents may feel themselves obliged to do the bidding of political taskmasters rather than executing their powers, duties and functions independently, impartially and only subject to the Constitution and the laws applicable thereunder.

In the past, it appeared to be the practice to appoint acting judges, whether to the High Court or to the Supreme Court, simply by the Judge-President or Chief Justice making a request to the President, and not on recommendation by the Judicial Service Commission.¹⁹ This was highlighted in a High Court case which sought to challenge the appointment of an 'acting' Prosecutor-General. Justice Maritz, with Justices Sylvester Mainga and Elton Hoff concurring, stated in his judgment that the Constitution expressly required all appointments of judges to the Supreme Court and the High Court, including acting judges, to be made by the President on the recommendation of the Judicial Service Commission.

It is not known how many of the appointments have been made without the intervention of the Judicial Service Commission, since its deliberations are not open to public scrutiny. However if, in the period 1990 to October 2003,²⁰ the President indeed appointed some acting judges without due recommendation by the Judicial Service Commission, the consequences are serious. Several hundred cases have been heard by acting judges in cases involving millions of dollars, and several hundreds of people have been sentenced in criminal cases – some of whom were given lengthy periods of imprisonment, others stiff fines. Such cases would possibly have to be reheard at enormous costs to the litigants and to government – not to mention the many potential claims for damages against the state arising out of decisions passed by acting judges so unconstitutionally appointed. This error could be worth millions, if not billions, of dollars. However, it seems as if the High Court is of the opinion that such appointments can be ratified by retroactive action.²¹

18 *S v Zemburuka (2)* 2003 NR 200 (HC) at 204J.

19 This was possibly on the reading of Articles 82(2) and 82(3) of the Constitution in isolation of Article 82(1).

20 All the President's appointments of acting judges to the High Court and Supreme Court have, since October 2003, been done strictly on the recommendation of the Judicial Service Commission.

21 See *S v Zemburuka (2)* 2003 NR 200 (HC), at 201f. See also footnote 476 below.

Appointing acting judges to the Namibian bench

After all, Article 12(1) of the Constitution requires that the determination of all civil rights and obligations as well as criminal charges are to be made by “a competent court”: *competent* not only in terms of the jurisdiction of a particular court to hear a particular type of a case, but also a competent presiding officer or officers, and if such presiding officer was appointed in violation of the Constitution, s/he can never be a competent judge.

This has happened elsewhere in the world. John Duffy claimed²² that several of the judges on the United States of America’s Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences had been appointed unconstitutionally, since the government official who had made the appointments did not have the capacity – or competence – to do so. Duffy concludes that the decisions taken by such improperly appointed judges are, therefore, invalid. At the time of writing, a case is pending in the United States Supreme Court, challenging the validity of a decision taken by an improperly appointed judge.²³

However, it was argued that the problem could be solved by legislation retroactively validating the decisions made by the unconstitutionally appointed judges.²⁴ On 12 August 2008, United States President George Bush signed a bill which allowed for the retroactive appointment of such unconstitutionally appointed judges, with the aim of validating their decisions. However, some academics there were sceptical about the constitutionality of the retroactivity provision.²⁵

In Namibia, something similar occurred, albeit in a slightly different context. The Ombudsman is also appointed by the President upon the recommendation of the Judicial Service Commission. On 16 September 1996, former President Sam Nujoma announced the appointment of Ephraim Kasuto as Namibia’s Ombudsman. However, the purported appointment was withdrawn shortly thereafter, following the revelation by *The Namibian* that the Judicial Service

22 Duffy, J. 2008. *Are administrative patent judges unconstitutional?* Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128311.htm; last accessed 4 October 2008.

23 *Translogic Technology, Inc., Petitioner v Jonathan W Dudas, Director, Patent and Trademark Office*. Procedurally, however, the case is only a request at this point for the United States Supreme Court to consider the issues. The Supreme Court may even decline to review the case. The status of the case can be found at <http://www.supremecourtus.gov/docket/07-1303.htm>; last accessed 4 October 2008.

24 Grady, MH & HS Engelson. 2008. “Unconstitutional judges? Not just a question for academics”. *IP Law Advisory*, July.

25 Liptak, A. 2008. “Fix to patent judge appointment procedure”. *New York Times*, 13 August.

Appointing acting judges to the Namibian bench

Commission had not even known about the appointment, let alone recommended it.²⁶ The appointment was invalid on the grounds of the lack of an appropriate recommendation by the Judicial Service Commission,²⁷ and it appears that the same argument would apply to the appointments of judges appointed without the recommendation by the Commission.

It is ironic that the primary reason for the appointment of acting judges – that of easing the backlog of pending matters – could be negated by the very appointment of acting judges because of this oversight in the appointment procedure, or the wrong interpretation of the relevant constitutional provisions.

After the passing of the *S v Zemburuka (2)* judgment by the full bench of the High Court, the Judicial Service Commission promptly made recommendations to the President for the appointment of acting judges, some of whom were already serving on the bench at that time. The recommendations for their appointments were made retrospectively, therefore. This potentially serious constitutional crisis, which could have tumbled the administration of justice into possibly irreparable harm, passed without any public debate – even in the legal profession – and was only reported in a local daily, as follows:²⁸

The Judicial Service Commission moved swiftly last week to plug a constitutional gap in the appointment of Acting Judges that emerged from a judgement of a full bench of the High Court last Tuesday.

The Commission (JSC), which has to recommend the appointment of High Court and Supreme Court Judges to the President, had an urgent meeting last Wednesday to make recommendations on the appointment of Acting Judges who are currently serving in Namibia's judiciary.

By Friday, the President had acted on the JSC's suggestions and had appointed four Acting Judges in the High Court and five Acting Judges of Appeal to the Supreme Court, it was confirmed from the Office of the Chief Justice at the Supreme Court yesterday.

The steps were taken after the High Court ruled on Tuesday that the Constitution requires that all appointments of Judges to the High Court and Supreme Court have to be made by the President on the JSC's recommendation.

Since October 2003, all the President's appointments of acting judges to the High Court and Supreme Court have been done strictly on the recommendation

26 Fild, L. 1996. "Decision of Kasuto can be challenged". *The Namibian*, 16 September.

27 Maletsky, C. 1996. "Who's advising the President? Illegal appointment of Ombudsman questioned". *The Namibian*, 25 September.

28 Menges, W. 2003. "Acting Judges' appointments corrected after court ruling". *The Namibian*, 7 October. See also *S v Zemburuka (2)* 2003 NR 200 (HC).

Appointing acting judges to the Namibian bench

of the Judicial Service Commission, which confirms the reasoning of the full bench of the High Court in *S v Zemburuka (2)*.²⁹ It is important to note, however, that the court did not say that the previous appointments were unconstitutional; in fact, the court did not express itself on the issue. However, the fact that the court accepted that an omission of the President to announce the extension of the acting Prosecutor-General's appointment could be ratified later, may indicate that, were the court to rule on the constitutionality of the appointment of acting judges, it may have concluded that the flaw in the appointment of acting judges was ratified by the correct procedures in October 2003.³⁰

The functioning of the acting judge in the framework of constitutional independence

According to the Namibian Constitution, the appointment of acting judges is aimed at filling casual vacancies, and in the Supreme Court, as –³¹

... 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 special knowledge of or expertise in such matters.

In addition to filling casual vacancies, the appointments of acting judges to the High Court are –³²

... to enable the Court to deal expeditiously with its work.

As stated earlier, Namibia suffers from an acute shortage of judicial officers, and as a result, the High Court and Supreme Court continuously make use of acting judges. In the Supreme Court, only six permanent appointments have been made from 1990 to 2008. Justice Berker was appointed Chief Justice at Namibia's independence, and on his retirement, Justice Mahomed was appointed. When Justice Mahomed retired from the bench, he was succeeded by Justice Strydom, who in turn was succeeded by Justice Shivute in 2004. Justices Teek and Maritz, as Judges of Appeal, were the only other permanent appointees to the Supreme Court. All the appointments were made at different times and, as a result, the highest court of the land has never had a full quorum of permanent judges: all

29 *S v Zemburuka (2)* 2003 NR 200 (HC).

30 *S v Zemburuka (2)* at 201f. See footnote 24 on retroactive legislation in the USA to solve a similar problem.

31 Article 82(2), Namibian Constitution.

32 Article 82(3), Namibian Constitution.

Appointing acting judges to the Namibian bench

the other appointments have been for acting positions. In other words, acting judges play an important role in dispensing justice in Namibia. Justice Teek resigned in 2005, thus robbing the Supreme Court of an opportunity to have a full quorum of permanent judges. Justice Maritz was appointed on 1 January 2006 as a permanent judge to the Supreme Court bench.

Security of tenure for judicial officers is indispensable for the independence of the judiciary. Under the Constitution, judges can only be removed under the most stringent circumstances, such as gross misconduct or mental incapacity, and then only by the President on recommendation of the Judicial Service Commission. In terms of Article 82(4) of the Constitution, all permanent judges would otherwise hold office until the prescribed retirement age of 65 years, which may be extended by the President to 70 years.³³ It is not immediately clear whether the President can only extend the retirement age with the recommendation of the Judicial Service Commission. It would appear this is the case, since these would be judges already appointed on recommendation of the Judicial Service Commission, and the President would then simply extend their tenure to a higher retirement age. It will not be a fresh appointment, so no recommendation from the Judicial Service Commission should be necessary in such instances.

Since acting judges do not have the security of a long tenure, their independence will, of course, be an issue. Some judges are appointed for very short periods such as a month, or for particular cases. For example, South African Judges of Appeal Piet Streicher, Kenneth Mthiyane and Fritz Brand, who are all members of the bench of the Supreme Court of Appeal in South Africa, were appointed in August 2008 as Acting Judges of Appeal in Namibia's Supreme Court to hear an appeal in the criminal trial of a former Namibian Supreme Court judge.

Whilst the independence of the Judicial Service Commission – and, therefore, the integrity of the recommendations it makes – in respect of the appointment of acting judges received a welcome boost in *S v Zemburuka*, the perceived independence of the judiciary will always remain a concern because of the high number of appointments in judges acting capacities. Studies of the judiciary in other parts of the world have suggested that judges who lack security of tenure are likely to be the ones most lacking in independence.³⁴

33 It is interesting to note that there is no compulsory retirement age for members of the executive or legislative branches of government.

34 See Peter VonDoepp in this publication.

Tenure of office and casual vacancies

As some of the judges are continuously appointed as acting judges on a one-year-tenure basis, which is then renewed time and again at the expiry of the previous tenure, questions arise as to how that may impact on the independence of the judiciary.³⁵ There is no empirical evidence to suggest that acting judges may have passed their decisions in such a way as to please the government due their lack of an extended secure tenure. However, VonDoepp³⁶ has indicated that foreign judges appointed on Namibia's bench have displayed a tendency to side with the government – especially after 2000, when such judges became the target of attack from political circles after their decisions in certain contentious cases.

The question then also arises whether acting appointments to the Supreme Court are strictly in accordance with the provisions of the Constitution. The Constitution requires that such appointments are made solely to fill casual vacancies, to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, or where the Chief Justice is of the opinion that it is desirable that an acting judge should be appointed by reason of his/her special knowledge or expertise in the matter at hand. In light of the Supreme Court's chronic shortage of judges since independence, there can be no doubt that vacancies in the Supreme Court have not been of a "casual" nature, as contemplated by the Constitution.

Most of the cases that reach the Supreme Court invariably involve complicated constitutional matters or issues of fundamental rights and freedoms, which, considering Namibia's young and developing jurisprudence, would require careful adjudication and by able and highly experienced judicial officers. The Supreme Court is also the highest court of the land, and the court of last appeal. Since there is no further platform to adjudicate in the event that a litigant is not satisfied with the outcome of a case in the Supreme Court, it is of utmost importance that any decision by this court should stand the test of time.

However, in the normal course of the many cases served before the Supreme Court, mostly appeals from the High Court or Labour Court, many would be straightforward and uncomplicated matters. Nonetheless, in all cases brought before the Supreme Court, regardless of their complexity or lack thereof, the bench has always consisted of permanent judges sitting together with acting judges; and in some cases, only acting judges constituted the quorum of the Supreme Court.

35 See LAC ([Various]).

36 See Peter VonDoepp in this publication.

Appointing acting judges to the Namibian bench

If the Supreme Court has a 'chronic' vacancy (not a "casual" one, as contemplated by the Constitution), and if some of the matters are not of a constitutional or human rights nature requiring special knowledge or expertise, then it follows that some of the appointments of judges on an acting basis to the Supreme Court have not been strictly within the parameters of the Constitution. Acting judges to the Supreme Court are appointed for a particular term of the court or for a particular year. The Supreme Court has no control over the nature of cases placed before it, as this is largely dependent on appeals from the High Court. As a result, the acting judges appointed for a particular term will sit on such cases, not because these cases are necessarily complicated, but simply because they were set down in that particular term. This ought to be rectified, lest a point is taken in a litigation matter that such judges are unconstitutionally appointed and, therefore, that the validity of their decisions may be questionable.

Of course, the answer to the vacancy issue lies in more serious commitment needing to be displayed as regards the independence of the judiciary, by making permanent elevation to the bench attractive to private legal practitioners. Until fairly recently, judges did not even have computers to work with; and it is common knowledge that the remuneration of even senior judges is far less than what senior legal practitioners command in private practice.

Conclusion

In general, the Namibian judiciary has performed remarkably, and the system of appointing acting judges has greatly assisted the development of the country's young jurisprudence and eased the burden of the High Court's caseload. Indeed, as VonDoepp concluded –³⁷

... for those who are concerned with the independence of the judiciary, there is much to celebrate here.

However, in the long term, it is not a healthy situation that so few lawyers are able and willing to serve on the bench on a permanent basis; thus, the courts rely on the appointment of acting judges from time to time. Without the security of long tenure, there may be a perception that such judges are more likely not to have independence in the execution of their functions on the bench.

37 (ibid.).

Appendix 1

Article 82 Appointment of Judges

- (1) All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission and upon appointment Judges shall make an oath or affirmation of office in the terms set out in Schedule 1 hereof.
- (2) At the request of the Chief Justice the President may appoint Acting Judges of the Supreme Court 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 special knowledge of or expertise in such matters.
- (3) At the request of the Judge-President, the President may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, or to enable the Court to deal expeditiously with its work.
- (4) 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). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

Article 85 The Judicial Service Commission

- (1) There shall be a Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, 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.
- (2) The Judicial Service Commission shall perform such functions as are prescribed for it by this Constitution or any other law.
- (3) The Judicial Service Commission shall be entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with this Constitution or any other law.
- (4) Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.

The right to an independent and impartial tribunal: A comparative study of the Namibian judiciary and international judges

Francois-Xavier Bangamwabo

Introduction

The principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments.¹ Indisputably, this requirement constitutes a general principle of law and it gives rise to one of the most fundamental of human rights.² Thus, in the *Farundzija* case,³ the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held as follows:

The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial.

The notion of *judicial independence* derives from the doctrine of the separation of powers, as advocated by Montesquieu, the French jurist and philosopher. In *L'Esprit des Lois* (1748), Montesquieu cautioned that –⁴

[t]here is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

The learned scholar further opined that if the judiciary were not independent of the legislature and the executive, the law could not be employed as a means of ensuring liberty and advancing human rights. In those circumstances, the law

1 See e.g. Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR); Article 6(1) of the European Convention on Human Rights (ECHR); Article 8(1) of the American Convention of Human Rights (ACHR); and Article 78(2) and (3) of the Namibian Constitution.

2 Cassese, A. 2003. *International Criminal Law*. Oxford: Oxford University Press, pp 393–394.

3 Case No. IT-95-71/1-A99, para. 43.

4 Montesquieu, C de S. 1748. *De L'Esprit des Lois*, Book XI, Chapter 6. Whitefish: Kessinger Publishing.

The right to an independent and impartial tribunal

could not empower the affected citizen to challenge the lawfulness or otherwise of any piece of legislation or any executive order that impede his/her rights.⁵

The conditions for judicial independence and impartiality have been a subject of debate by both scholars and lawmakers. Briefly, these include but are not limited to the election and appointment of judges; security of tenure of their office; their immunities and privileges; their salaries and financial security; their discipline and removal (or disqualification); and the institutional independence. It is important to note that the conditions of judicial independence and impartiality apply *mutatis mutandis* to national and international judges alike.

In this paper, the author examines the concepts of *judicial independence* and *impartiality of the judiciary* as applicable to and interpreted by the Namibian judiciary as well as by international (and regional) courts or tribunals. To this end, Namibian case law and statute law as well as the statutes and judicial decisions of international courts on the topic are explored. Some of the international judicial fora explored are the recently created International Criminal Court, the ad hoc United Nations (UN) International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, the European Court of Human Rights, and the Southern African Development Community Tribunal. This paper is thus structured into three main parts: (i) the nature and content of the right to an independent and impartial tribunal; (ii) the independence and impartiality of the Namibian judiciary; and (iii) the independence of international or regional courts.

The nature and content of the right to an independent and impartial tribunal

The survey of international and regional human rights instruments shows that they all provide for the guarantee to a competent, independent, and impartial tribunal established by law.⁶ The common elements to all these texts appear to be *tribunal*, *independent*, *impartial*, and *established by law*. Additionally, the International Covenant on Civil and Political Rights (ICCPR) and the American Court on Human Rights require that the tribunal be “competent”: a requirement which, under the European Court on Human Rights (ECHR), can be construed as being equivalent to the term *established by law*.

5 (ibid.).

6 See e.g. Article 10 of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(1) of the American Convention on Human Rights Law; and Article 7(a), (b) and (d) of the African Charter on Human and Peoples’ Rights.

The right to an independent and impartial tribunal

The words “independent and impartial tribunal” were used in the first draft of the Universal Declaration on Human Rights (UDHR).⁷ During the drafting process of the UDHR, the United Kingdom proposed a text which dropped the word “independent”, but it was later reinserted by Mr R Cassin, who was in charge of incorporating amendments, without any discussion. Equally, the early version of the ICCPR as suggested by the United States of America in 1947, only referred to a “competent and impartial tribunal”, but the Working Group incorporated and maintained the term “independent” in the final text.⁸ With regard to the words “established by law”, their origin can be traced back to Mr F Sages, the Chilean delegate, who suggested that the tribunal also had to be “regular”, namely “pre-established by law”.⁹

That the requirement of “an independent and impartial tribunal established by law” is one of the key parameters of the right to a fair trial, and thus vital to the protection of constitutional and human rights, is not questionable. This is because the guarantee ensures that the individual human and constitutional rights of a party to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial. On the other hand, the guarantee of “a competent, independent and impartial tribunal” is considered as the foundation of the rule of law. Indeed, without an independent and impartial judiciary, one may wonder whether the law itself can have any real meaning.

Originally, this requirement was conceived to address the inherent deficiencies posed by special jurisdictions, in particular tribunals set up *ex post*, for trying cases with political implications.¹⁰ In the ensuing discussion, the three elements of the guarantee are examined. First, the concepts of *independence* and *impartiality* are dealt with, and then the requirement that a “court be established by law” is discussed.

7 For more on this, see Trechsel, Stefan. 2005. *Human rights in criminal proceedings*, Vol. XII/3. Oxford: Oxford University Press, p 45; Weissbrodt, D. 2001. *The right to a fair trial: Article 8, 10, and 11 of the Universal Declaration of Human Rights*. The Hague: Kluwer Law International, pp 13–15, 17, 33, 45–46, 51–52, 54.

8 Weissbrodt (2001:45–46).

9 (ibid.:54).

10 Trechsel (2005:47); see also the findings of the UN Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev. 1 at 14 (1994), para. 4, where the Committee found as follows:

The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial, and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.

Judicial independence as distinguished from judicial impartiality

Some jurists opine that the concepts of *judicial independence* and *impartiality* overlap and can hardly be distinguished in a clear way.¹¹ Others stress that they are different notions and should, therefore, be distinguished.¹²

In ordinary language, *independence* essentially means “freedom from influence”. This ordinary meaning is somehow underscored by the legal definition of *judicial independence*, namely “the lack of subordination to any other organ of the state, in particular to the executive”. Specifically, *judicial independence* implies that judges are the authors of their own decisions, and that they should be free from any ‘inappropriate’ influence.¹³ Having said that, it is worth noting that a judge need not be free of influence from *all* individuals. For instance, a judge may be influenced by submissions (either oral or written) made by parties to the dispute and their respective witnesses, or by any third party who may have an interest in the case being adjudicated. Such influence or persuasion may not be referred to as ‘inappropriate’ influence.

The nature of ‘inappropriate’ influence and the identity of actors who may influence the presiding judge might differ, depending on the normative theory of adjudication from which the definition of *judicial independence* emerges. A theory of adjudication specifies the content of the obligation to decide a case. In turn, the obligations determine what constitutes inappropriate influence from various individuals.¹⁴

Two theories of adjudication exist, namely the so-called *Hart’s Theory of Mechanical Adjudication*, and *R Dworkin’s Theory of Adjudication*. According to the *Theory of Mechanical Adjudication*, the judge identifies the legal rule that governs the case by tracing its pedigree, and then applies the legal rule to the case at hand in a straightforward manner.¹⁵ Thus, under this theory, the parties may only guide the judge in highlighting the relevant statutes, case law, and other regulations, but no other influence by anyone else is legitimate.

11 See e.g. Trechsel (2005:45).

12 See e.g. Van Dijk, P & GJH van Hoof. 1998. *The right of an accused to a fair trial under international law*. The Hague: Kluwer Law International, p 451.

13 See Burbank, SB (ed.). 2002. *Judicial independence at the crossroads: An interdisciplinary approach*, New York: Sage Publishers, pp 46–49.

14 (ibid.:48).

15 (ibid.:49); Hart, HLA. 1961. *The concept of law*. Oxford: Oxford University Press, p 29.

The right to an independent and impartial tribunal

What happens if there are no legal rules governing the case to be decided? Under such circumstances, the judge is obliged to exercise discretion. In exercising this discretion, s/he may not act arbitrarily, and more importantly, s/he is required to render an even-handed judgment that promotes the end of the statute in question or makes good law. The judge cannot simply act capriciously.¹⁶ Thus, whether the law is clear or not, the resolution of the dispute does not depend on the identity of the presiding judge, but rather on the applicable law, the submissions by both parties, and the ends of justice.

In contrast, *Dworkin's Theory of Adjudication* holds that, before rendering a decision, a judge is required to interpret the political history of the jurisdiction in which s/he sits to make the law of that jurisdiction "the best it can be".¹⁷ In other words, this theory imposes an obligation on the judge to interpret the law in a way that makes it "the best it can be". Consequently, the outcome of the case has to both fit the past political history of the jurisdiction, and cast that political history in a favourable light.¹⁸ Undoubtedly, this theory brings in issues pertaining to the philosophical definitions of law, its contents, and its role in a given society. These are not, however, part of our discussion herein.

On the other hand, *judicial impartiality* relates to a specific case at hand. Essentially, it is this part of the guarantee which plays a vital role in the protection of individual rights. *Impartiality* means that a judge is not biased in favour of the other party. According to Stefen Trechsel, "a judge must be free to float hither and thither between the positions of the parties and finally reach a decision at the place which, in correct application of the law and rules of jurisprudence, marks the just solution".¹⁹ Thus, for an individual party to a civil or criminal proceeding, what matters most is the impartiality of the judge, and not necessarily his/her independence. For example, if a judge is not independent, there is definitely a suspicion that s/he will not be impartial; but in some specific cases, dependence may be irrelevant.²⁰ If, however, a judge is partial, s/he is not fit to sit; and it becomes immaterial whether s/he is independent or not.²¹

16 See Burbank (2002:49).

17 See Dworkin, R. 1978. *Taking rights seriously*. Oxford: Oxford University Press, pp 31–39.

18 (ibid.).

19 See Trechsel (2005:50).

20 See the foregoing paragraphs, which noted that a presiding judge may be influenced by either submissions from parties to the dispute, or a set of political and moral values prevailing in a given jurisdiction.

21 Trechsel (2005:50).

The right to an independent and impartial tribunal

The distinction between *judicial independence* and *judicial impartiality* has been addressed by both domestic and international jurisprudence. In the *Valente* case, the Canadian Supreme Court held as follows:²²

Although recognizing the ‘close relationship’ between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “independent”, however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees. [Emphasis added]

Also in Canada, in the *Lippe* case, the then Chief Justice Lamer stated that –²³

... judicial independence is critical to the public’s perception of impartiality; judicial independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

In this context, *impartiality* is viewed as wider than *independence*, in that a tribunal can be independent and yet be biased against one of the parties to the dispute. However, it is difficult to understand how, in a criminal case, a tribunal can lack independence and yet be impartial. Surely, in all criminal proceedings, where the state is involved, the lack of independence of a trying magistrate or judge would result in bias, i.e. *a lack of impartiality*.

In *Prosecutor v Kanyabashi (Appeal)*, the International Criminal Tribunal for Rwanda (ICTR) also stressed the distinction between these two concepts where it found as follows:²⁴

Judicial independence connotes freedom from external pressures and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play.

In contrast with the above jurisprudence, it appears that the ECHR does not attach much importance to the distinction between *judicial independence* and *impartiality*. Thus, in *Findlay v United Kingdom*, the ECHR held as follows:²⁵

The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case.

22 *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985), at 201–202.

23 *Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.

24 *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

25 *Findlay v United Kingdom*, Reports 1997 – I, 263, (1997) 24 EHRR 211, para. 73; also *Incal v Turkey*, Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65; *Sener v Turkey*, No. 26680/95, (2003) 37 EHRR 34, para. 56.

The requirement that a court be established by law

We now examine another essential component of the guarantee, to wit, a “competent tribunal established by law”.

In determining whether the guarantee to an independent and impartial court has been violated or otherwise, the first issue to be examined is this: Was the tribunal established by law? If the answer to this question is in the negative, this would be the end of the enquiry, and there is no purpose in considering other elements such as the right to a counsel of one’s choosing, the right to cross-examine witnesses from the other side, or the right to be informed of the nature of the charges or allegations, to name but a few.²⁶

The requirement that a court be established by law lies at the foundation of judicial independence. This was stressed by the European Commission of Human Rights in *Zand v Austria*, where it held as follows:²⁷

The judicial organization in a democratic society must not depend on the discretion of the Executive, but should be regulated by law emanating from Parliament.

The Commission further stated that the term “a tribunal established by law” in Article 6(1) of the European Convention on Human Rights envisages the whole organisational set-up of the courts, including not only matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction.²⁸

In this context, Article 78(2) of the Namibian Constitution reads as follows:²⁹

The courts shall be independent and subject only to this Constitution and the law.

It goes without saying that the laws establishing courts or tribunals must themselves reflect the wishes of the people. Thus, the law-making processes are not only obliged to be transparent, but the lawmakers also need to be democratically elected – if courts or tribunals established by them are to have any legitimacy.

26 See e.g. the ECHR decision in *Rotaru v Romania*, (2000) 21/4-7 HRLJ 231, para. 62; *Pfeifer and Plankl v Austria*, (1992) 14 EHRR 692, p 25.

27 European Commission of Human Rights, Application 7360/76.

28 (*ibid.*).

29 A similar provision is found in most modern Constitutions.

The right to an independent and impartial tribunal

With regard to international tribunals or courts, while most of them are ordinarily established by a treaty or agreement, others have been created by the United Nations (UN) Security Council using its powers under Chapter VII of the UN Charter.³⁰ Most probably, the UN General Assembly, which is considered as the Parliament of the world body, was better placed to create the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) through treaties.

Nevertheless, there is a need to recognise inherent deficiencies involved in treaty-based tribunals. These include the following:³¹

- The time required for the elaboration, negotiation and conclusion of a treaty
- The additional time required to attain the necessary ratifications for its entry into force, and
- More importantly, the absence of any guarantee that states whose participation would be essential to the effective operation of the tribunal would become party to the treaty creating the tribunal.

Certainly, without prompt ratification of the underlying treaty by the states concerned, a tribunal established under this treaty would be *brutum fulmen*.

In contrast, a tribunal created by the Security Council under Chapter VII of the UN Charter would guarantee a quick and expeditious result. Moreover, it would be a very effective instrument, since all Security Council resolutions are binding on all states.³² Notably, not only did the General Assembly endorse the Security Council decisions to establish the ICTY and the ICTR,³³ it also plays a vital role in the functioning of these sister tribunals, e.g. in electing judges, approving the budget, and reviewing the tribunals' annual reports.³⁴

In the light of the foregoing, it can safely be argued that the two UN ad hoc international criminal tribunals are "tribunals established by law", as required by the guarantee. However, with the establishment of the International Criminal

30 See e.g. the creation of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda by, respectively, SC Resolutions 808 (1993) and 955 (1994).

31 See Morris, V. 1998. *The International Criminal Tribunal for Rwanda*, Vol. I & II. New York: Transnational Publishers Inc., pp 99–100.

32 See Article 25, UN Charter.

33 GA Res. 206, UN GA OR 49th Session, Supp. No. 49, Vol. I, at 227, UN Doc. A/49/49 (1995).

34 See Article 12 of the Rwanda Tribunal (election of judges), Article 30 (expenses of the tribunal), and Article 32 (annual report).

The right to an independent and impartial tribunal

Court, it is unlikely that the UN Security Council will, in future, establish other ad hoc international tribunal(s) using its powers under Chapter VII of the UN Charter.³⁵

Judicial independence and impartiality in the Namibian context

Article 78(1) of the Namibian Constitution vests judicial power in the courts of Namibia, which consist of a Supreme Court, a High Court, and Lower Courts. In addition, paragraphs 2 and 3 of the same Article provide as follows:

- (2) *The Courts shall be independent and subject only to this Constitution and the law.*
- (3) *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 ...*

The reading of the above constitutional provisions clearly demonstrates that judicial independence and impartiality are protected by the highest law of the land. Additionally, judges and other judicial officers are only answerable to the Constitution and any other valid laws.

The question of judicial independence in Namibia was raised in the case of *S v Heita & Another*.³⁶ In this case it was recounted that members of a political party had made public threats against a judge for imposing what they believed to be lenient sentences in a treason trial. Indeed, a sentence imposed on 19 September 1991 in the case of *S v Kleynhans and Others*³⁷ in the Namibian High Court had led to then presiding Judge O'Linn and other judicial officers³⁸ being scandalised, insulted and threatened from public platforms through the media and through the structures of political parties, trade unions and churches.

Consequently, the issue of recusal from the ongoing treason trial by the trial judge was raised by the court ex mero motu. In its deliberations, the court held that the existence of a separation of powers among the three separate branches of government was certainly one of the main pillars of the Constitution and the

35 For excellent arguments on this, see Schabas, WA. 2006. *The UN International Criminal Tribunals*. Cambridge: Cambridge University Press, pp 32–34.

36 1992 NR 403 (HC).

37 This case involved another three accused persons in the same treason trial.

38 The Attorney-General and the Prosecutor-General.

The right to an independent and impartial tribunal

state. The independence of the judiciary and the preconditions for ensuring it are in fact clearly set out in Article 78 of the Constitution.

In regard to Article 78(2) and (3) of the Constitution, Justice O'Linn made the following points:³⁹

- That interference with judges and/or judicial officers in the exercise of their judicial functions was not allowed at any stage, be it before, during or after a verdict in a particular trial
- That the prohibition in Article 78(3) not to interfere with judges and/or judicial officers extended to each and every person, and was not restricted to members of the legislature or executive, and
- That –

... the aforesaid prohibitions and legal duties are imposed obviously to make it possible for judges and other judicial officers to perform effectively and responsibly their very onerous functions.

In the same case, the Justice O'Linn emphasised that it was not only the independence of the judges or judicial officers that had to be protected, but their dignity and effectiveness as well. Thus, judges are dependent on the proper functioning of sub-Article 78(3) of the Constitution for the protection of their independence, dignity and effectiveness, and for the maintenance of the independence of the judiciary as a pillar of the Constitution – without which the Constitution itself cannot survive. Thus, the Constitution makes it abundantly clear that independent courts are subject only to the Constitution and to any other laws properly enacted. Put differently, this means that Namibian courts are not subject to the dictates of any political party, even where that party is the ruling party.

In the end, the court held that the Presiding Judge should not recuse himself, mainly for the following reasons:

- Both the state and the defence counsel had indicated that the presiding judge should not recuse himself as they believed he would decide the case on its merits and in consideration of the arguments presented by parties, and
- There were indications that the Prosecutor-General might take the necessary action against individuals who had breached the law by insulting, threatening, intimidating, menacing, and verbally abusing the judiciary.

39 See at page 793B of the case.

As a corollary to the concept of *judicial independence* is *institutional independence*, i.e. the independence of the judiciary as an institution as opposed to individual judges. To assess the institutional independence of the Namibian judiciary, one needs to look at the standard criteria and conditions for judicial independence. These include the appointment and removal of judges, their remuneration and salaries, their security of tenure, and their discipline and disqualification (recusal). We now turn to these conditions as applied and adhered to in the Namibian context.

Appointment and security of tenure of Namibian judges and other judicial officers

Appointment of judges⁴⁰

According to Article 82(1) of the Namibian Constitution, all appointments of judges to the High and Supreme Courts are to be made by the President on the recommendation of the Judicial Service Commission. The Judicial Service Commission is established in terms of Article 85(1) of the Constitution. It consists of the Chief Justice, a judge appointed by the President, 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. Once appointed, judges are required to make an oath or affirmation of office in the terms set out in Schedule 1 of the Constitution.⁴¹

Article 82(2) provides for the President to appoint acting judges of the Supreme Court at the request of the Chief Justice. Acting judges may be required to fill casual vacancies in the court from time to time, or as ad hoc appointments to sit in cases involving constitutional issues or an interpretation of the Bill of Rights if, in the opinion of the Chief Justice, it is desirable that such persons be appointed to hear such cases by reason of their special knowledge or expertise in such matters. Furthermore, Article 82(3) is similar, but it relates to the ad hoc appointments of High Court judges. Thus, in terms of the latter constitutional provision, at the request of the Judge-President, the President may appoint acting Judges of the High Court from time to time to fill casual vacancies in the court, or to enable the Court to deal expeditiously with its work.

40 In this part, our discussion only focuses on judges. With regard to other judicial officers such as the Prosecutor-General and the Attorney-General, their appointment and judicial independence are discussed elsewhere in this volume.

41 Article 82(1).

Security of tenure of Namibian judges

Article 82(4) of the Constitution states the following:

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). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

In regard to the removal of judges, Article 84(1) of the Constitution provides that a judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission. Judges may only be removed from office on the grounds of mental incapacity or gross misconduct, and then only in accordance with the provisions of Article 84(3).⁴² The latter states that the Judicial Service Commission is obliged to investigate whether or not a judge should be removed from office on such grounds, and if it decides that the judge should be removed, it informs the President of its recommendation.

Apart from the above constitutional provisions, a judge's security of tenure is also addressed in Acts of Parliament establishing the High Court and the Supreme Court. Thus, section 8(1) of the High Court Act, 1990 (No. 16 of 1990) provides as follows:

Any Judge of the High Court holding office in a permanent capacity –

- (a) *shall retire from office on attaining the age of 70 years;*
- (b) *may retire from office if he has attained the age of 65 years and has completed at least eight years pensionable service as defined by any law relating to the pensions of Judges;*
- (c) *may at any time with the approval of the President retire from office if he or she becomes afflicted with a permanent infirmity of mind or body disabling him or her from the proper discharge of his or her duties of office or any other reason exists which the President deems sufficient.*

Section 8(1) of the Supreme Court Act, 1990⁴³ is similar in all respects but one, namely that it applies to any judge of the Supreme Court holding office in a permanent capacity.

42 Article 84(2).

43 Act No. 15 of 1990.

Remuneration of judges

In terms of section 10(1) of the Supreme Court Act, the Chief Justice and other judges of the Supreme Court are entitled to receive or enjoy such remuneration, benefits, allowances or privileges as may be prescribed by law.⁴⁴ Subsection (2) states that the remuneration of any judge referred to in subsection (1) will not be reduced at any time while s/he is in office, but is subject to review from time to time. In light of the above, the judges' financial security is guaranteed in that their salaries can only be increased – and this is done in accordance of properly enacted laws.

The judicial independence and impartiality of international judges

In order to assess the compliance with and adherence to the concept of judicial independence by international judges, a number of international judicial fora are explored. These are the recently created International Criminal Court, the ICTY and ICTR created by the UN, the Special Court for Sierra Leone, the Southern African Development Community (SADC) Tribunal, and the ECHR. Other international courts or tribunals may be mentioned en passant, because their jurisprudence on the topic is either insignificant or non-existent. Thus, the present author's research on the International Court of Justice (the World Court) case law on the topic did not bear any fruit. The same applies to the African Court on Human and Peoples' Rights: although its Protocol entered into force in 2004 and its judges were sworn in in 2006, it is not yet operational.

The judicial independence of the Yugoslavia Tribunal and the Rwanda Tribunal

Nearly 50 years after the creation of international military tribunals by the victors of World War II, the international community, through the UN Security Council,⁴⁵ established the International Criminal Tribunal for the former Yugoslavia (ICTY) to deal with the atrocities committed in the Balkans whilst the world was sleeping.⁴⁶ The ICTY was mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of

44 This is also found in section 5 of the High Court Act.

45 See SC Res. 808 (1993), 22 February 1993, UN SC OR, 48th Session, at 28, UN Doc. S/INF/49 (1994).

46 For a detailed background on the creation of the ICTY, see Schabas (2006:13–24); also Morris (1998:79–98).

The right to an independent and impartial tribunal

the former Yugoslavia after 1991.⁴⁷ The legality of the ICTY is fully discussed in the Report prepared by the UN Secretary-General at the behest of the Security Council.⁴⁸

At the time of ICTY's creation, a civil war was raging between the Hutu and Tutsi in Rwanda, which culminated in acts of genocide in April 1994. In the aftermath of the genocide, the UN and the international community – which had dismally failed to prevent or stop the massacres – thought that a creation of an ad hoc criminal tribunal for Rwanda would restore peace and stability to the region, and contribute to national reconciliation in Rwanda.⁴⁹ On 8 November 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR), with the mandate to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.⁵⁰

Although the Rwanda Tribunal parallels the ICTY, it is worth noting that there are important differences with regard to jurisdiction *ratione materiae*. For example, whereas the armed conflict in the former Yugoslavia was both internal and international, in Rwanda the armed conflict was purely between two internal arch-rival ethnic groups.⁵¹ Finally, both judicial institutions were created by the UN Security Council under Chapter VII, have in common the Appeal Chamber and initially even shared the same Prosecution office.⁵²

As soon as the two ad hoc tribunals began their work, their judicial independence was challenged and questioned by defendants appearing before them. Thus, in

47 See SC Res. 808 (1993), para. 1.

48 See *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, presented 3 May 1993, S/25704, para. 18–30.

49 See e.g. Prof. A Cassesse, who argues that when the Great Powers and the UN are unwilling or unable to put an end to atrocities and serious political crises, they tend to fall back on the establishment of a tribunal. Cassesse, A. 2004. “*International justice, diplomacy, and politics*”. In Badinter, R (ed.). *Judges in contemporary democracy: An international conversation*. New York: New York University, pp 186–188.

50 See UN SC Res. 955 (1994).

51 See Schabas, WA. 1995. “Prosecuting international crimes: Searching solutions to impossible problems”. *Criminal Law Forum*, 7:550; *Prosecutor v Tadic*, Case No. IT-94-1-AR 72 (ICTY, Appeal Chamber, 2 October 1995).

52 On 2 August 2003, the UN Security Council adopted Res. 1503 (2003), splitting the Prosecution's Office of the two Tribunals. Thus, the Security Council appointed a new Prosecutor for the ICTR, Justice Hassan Bubacar Jallow, from the Gambia. Carla Del Ponte, who was combining prosecutorial duties for both Tribunals, was henceforth to deal with ICTY prosecutions only.

The right to an independent and impartial tribunal

the cases of *Prosecutor v Tadic* (ICTY)⁵³ and *Prosecutor v Kanyabashi* (ICTR)⁵⁴, both defendants contended that the two Tribunals lacked judicial independence in that they were creations of a political body, i.e. the UN Security Council. Moreover, the defendants argued that the independence of these Tribunals was derogated by their respective obligations to annually report to the Security Council in compliance with Article 35 of their respective Statutes.⁵⁵ Finally, the impartiality of the Rwanda Tribunal had not been demonstrated because of the ‘selective prosecution’ of only one side to the conflict (the Hutus).⁵⁶

In regard to the first of these challenges, both Tribunals held that all criminal courts worldwide were the creation of legislatures which were eminently political bodies. In regard to the second challenge, i.e. mandatory annual reporting to the Security Council, both Tribunals ruled that this requirement –⁵⁷

... is purely administrative and not a judicial act and therefore does not in any way impinge upon the impartiality and independence of their judicial decisions.

As to the third argument, to wit, the impartiality of the Rwanda Tribunal had not been demonstrated because of the ‘selective prosecution’ of one side, i.e. the Hutus, the Trial Chamber of the ICTR reiterated that, pursuant to Article 1 of the Rwanda Tribunal Statute, all persons suspected of having committed crimes falling within the jurisdiction of the Tribunal were liable for prosecution.⁵⁸

In regard to the issue of ‘selective justice’, it is the present author’s submission that the impartiality of the Rwanda Tribunal will remain doubtful for as long as it applies ‘selective prosecution’ of one party to the Rwandan conflict. It is common cause that, to date, the Rwanda Tribunal has not yet indicted any suspect from the Rwandese Patriotic Front (RPF), a former Tutsi rebel movement, currently the ruling party in Rwanda. Yet there is tangible and overwhelming evidence that some elements – and, indeed, some senior leaders in the RPF – have committed

53 Case No. IT-94-1-AR 72 (Appeals Chamber, 2 October 1995).

54 Case No. ICTR 96-15-T (18 June 1994).

55 The Tribunals now have to report twice a year in terms of their “Completion Strategies”; see SC Res. 1534 (2004).

56 *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

57 (ibid.:11).

58 (ibid.); Article 1 of the ICTR Statute provides for the jurisdictional scope of the Rwanda Tribunal. With respect to personal jurisdiction, the ICTR’s competence is limited to all persons who committed crimes on the territory of Rwanda, and to Rwandan citizens who committed crimes in the neighbouring states between 1 January and 31 December 1994.

The right to an independent and impartial tribunal

serious violations of International Humanitarian Law.⁵⁹ It remains a moot issue whether the Rwanda Tribunal will ever indict or prosecute alleged RPF perpetrators, considering that its lifespan ends in 2008.⁶⁰

In regard to the victor's justice, as practised by the ICTR, one of its former justices makes the following startling revelation:

I have to admit that defense counsels representing defendants at ICTR have so far furnished with the Tribunal enough evidentiary proofs that RPF soldiers and some of its key leaders have committed numerous crimes against humanity. That there is no indictment on RPF side to date, undoubtedly Hutu consider the Rwanda Tribunal as another form of victor's justice.⁶¹

Article 13(1) in the Statute of the ICTY stipulates that all judges are required to be persons of high integrity and impartiality. This provision is buttressed by Sub-rule 15(A) and (B), which provides for the disqualification of judge(s) for

59 See e.g. various reports on the massive and widespread killings committed by the RPF in 1994. These include, but are not limited to the following: (i) *Amnesty International – Rwanda: Reports of killings and abductions by the Rwandese Patriotic Army, April–August 1994*; (ii) the so-called *Gersony Report*, in which the author stated that “within only two months, RPF soldiers have killed and massacred more than 300 000 people, all of whom were of Hutu ethnic group”. This Report is now with the ICTR; (iii) *Rwanda: The preventable genocide*, authored by the International Panel of Eminent Personalities (IPEP); available at <http://www.visiontv.ca/RememberRwanda/Report.pdf>; last accessed 5 August 2008; (iv) the *UN Interim Report of the Independent Commission of Experts for Rwanda*, established in accordance with Security Council Res. 935 (1994), UN Doc. S/1994/1125 (1994); the Report states, inter alia, –

(i) *that individuals from both sides to the armed conflict in Rwanda have perpetrated serious breaches of international humanitarian law*, in particular of obligations set out in Article 3 Common to the four Geneva Conventions of 12 August 1949 and in Protocol II Additional to the Geneva Conventions, [and]

(ii) *that individuals from both sides to the armed conflict have perpetrated crimes against humanity in Rwanda.*[Emphasis added]

(v) Finally, early in 2008, Judge Fernando Andreu of the Spanish National Court, applying the doctrine of universal jurisdiction, issued indictments against 40 Rwandan senior army officers for war crimes, mass murder, genocide, and crimes against humanity allegedly committed in the aftermath of the 1994 Rwanda genocide; see *Los Angeles Times*, 7 February 2008; available at <http://articles.latimes.com/2008/feb/07/world/fg-rwanda7>; last accessed 23 August 2008.

60 According to the ICTR Completion Strategy, all trials are due to be completed by the end of 2008, whereas appeals are expected to extend to 2010, see *ICTR Press Release*, Arusha, 8 June 2006, ICTR/INFO-9-2-479.EN; available at <http://www.ictr.org>; last accessed 9 September 2008.

61 Justice Yakov Ostrovsky; translated from French by the author, in Thierry Cruvellier, *Diplomatie Judiciaire*, 23 April 2002.

The right to an independent and impartial tribunal

reasons that may lead to the lack of impartiality. On more than one occasion, the ICTY had to determine cases pertaining to the judicial independence and impartiality of its judges. For instance, in *Prosecutor v Delalic, Mucic, Delic and Landzo*, the Yugoslav Tribunal had to decide whether one of its judges – who had been appointed Vice-President of her country of origin – was still independent, considering that her new appointment involved political activities in the executive branch of government. After a survey of the case law from the ECHR and domestic jurisprudence, the Bureau of the Tribunal concluded that the impartiality of the judge in question was not affected by the new appointment, mainly because she had not yet taken up her new duties.⁶²

The Special Court for Sierra Leone and the concept of judicial independence

Another jurisdiction worth mentioning is the Special Court of Sierra Leone (SCSL). Unlike the two existing ad hoc UN tribunals, the SCSL was created by an agreement between the UN and the Government of Sierra Leone.⁶³ However, the SCSL applies international law, and both its Statute and Rules of Evidence and Procedure are the same as those of the ICTR. The jurisdictional scope of this hybrid court is to try persons who bear the greatest responsibility of the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law in Sierra Leone.⁶⁴

The guarantee for an independent and impartial tribunal is stipulated in Article 13(1) of the SCSL Statute. In addition, Rule 15(A) and (B) of the Court's Rules provides for the disqualification of SCSL judges if they lack judicial impartiality. With regard to the Court's jurisprudence, an important decision on the topic of impartiality is the case of *Prosecutor v Issa Hassan Sesay*.⁶⁵ In casu, the accused's defence counsel filed an application seeking the disqualification of one of the Court's judges, Justice Robertson, on the ground that said judge has expressed clear bias against the defendant.

62 For the full facts and submissions of the case, see *Prosecutor v Delalic et al.* Case No. IT-96-21-T, 4 September 1998; other cases include *Prosecutor v Farundzija*, ICTY Appeals Chamber, Judgment of 21 July 2000, Case No. IT-95-17/1-A 99, at para. 177; *Prosecutor v Blagovic*, Case No IT-02-60-PT, 19 March 2003; and *Prosecutor v Seselj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003.

63 See *Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Freetown, 16 January 2002. For further reading on the SCSL, its jurisdiction and creation, see Schabas (2006:34–40).

64 UN Doc. S/RES/1315 (2000), para. 3.

65 Case No. SCSL-2004-15-AR 15.

The right to an independent and impartial tribunal

The crux of the application concerned comments, opinions, and statements made by Justice Robertson about the Revolutionary United Front (RUF) and the Armed Forces Revolutionary United Front (AFRC) in his book entitled *Crimes against humanity – The struggle for global justice*.⁶⁶ After reading written submissions from both the Prosecution – in fact the Prosecution conceded that there had been an appearance of bias on the part of Judge Robertson – and the Defence, the Appeals Chamber of the Court was convinced that Justice Robertson was not fit to sit in matters involving members of the RUF.⁶⁷ However, the Appeal Chamber dismissed another application which sought to bar Justice Robertson from participating in all of the Court's decisions, both administrative and judicial, even in the course of the Plenary Council of the Judges.⁶⁸ Considering that the bulk of the cases being tried by the SCSL involve members of the RUF and/or their accomplices, one wonders why Justice Robertson was not simply and permanently disqualified from sitting as a judge of the SCSL.⁶⁹

The International Criminal Court and the European Court of Human Rights

Drawing from the experience of the two ad hoc international criminal tribunals, and desirous to strengthen the human rights elements as per Article 14(1) of the ICCPR, the Rome Statute of the International Criminal Court (ICC)⁷⁰ provides detailed and perhaps the best provisions for the protection of the guarantee to a competent, independent, and impartial tribunal established by law.⁷¹ Specifically, Article 36(3)(a) of the Rome Statute provides for the nomination and election of judges who are persons of high moral character, integrity and impartiality. Article 40 is exclusively devoted to the judicial independence of the ICC judges. This Article prohibits any activity that may affect the judicial functions of the judges and, particularly, the confidence in their independence. Disqualification of ICC judges for any lack of impartiality is dealt with in detail in Article 41(2)(a)–(c). The independence and impartiality of the Prosecutor is stipulated in Article 42(1), (3) and (5). Finally, Article 67(1) provides for the right of the

66 See Robertson, G. 2002. *Crimes against humanity: The struggle for global justice*. New York: The New Press.

67 See *Prosecutor v Issa Hassan Sesay* Case No. SCSL-2004-15-AR 15, para. 18.

68 Decision in *Prosecutor v Issa Hassan Sesay et al.* Case No. SCSL-04-15-PT.

69 At the time of writing this paper, the author learnt that Justice Robertson was no longer with the SCSL.

70 For an excellent account on the creation of the ICC, its jurisdiction, structure and functioning, see Schabas, WA. 2004. *An introduction to the International Criminal Court* (Second edition). Cambridge: Cambridge University Press.

71 See Articles 36(3); 40(1)–(3); 41(2)(a)–(c); 42(1), (3) and (5); and 67(1).

The right to an independent and impartial tribunal

accused to an impartial hearing. Understandably, we are yet to benefit from the ICC jurisprudence, considering its recent creation.

The interpretation of the guarantee to an independent and impartial judiciary by the European Court of Human Rights (ECHR) is the most elaborate of the regional human rights systems to date. Its jurisprudence is widely cited and applied by both domestic and international courts. The guarantee to a competent, independent, and impartial court under the European Human Rights System is clearly stipulated in Article 6(1) of the European Convention on Human Rights.⁷² Generally, in interpreting the above provision, the ECHR uses the old maxim:⁷³

Justice must not only be done, but also it must be seen being done.

The criteria for judicial independence were drawn up by the ECHR in many cases, one of which is the decision in *Le Compte, Van Leuven and De Meyere v Belgium*.⁷⁴ In this case, the court reiterated that for a tribunal to be considered independent in terms of Article 6(1), regard must be had to, inter alia, the manner of appointment of its members and their terms of office, the existence of safeguards against outside pressures, and the question of whether it presents an appearance of independence.

With regard to judicial impartiality, the Court has used the ‘objective and subjective approach’. Thus, in *Incal v Turkey*, the Court held as follows:⁷⁵

As to the condition of impartiality, [t]here are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

Put differently, these are objective and subjective tests. The issue to be considered in an objective test is whether the judge is objectively biased. In other words, —⁷⁶

[c]an the judge be said to be biased in the eyes of a reasonable person or an ordinary citizen?

72 Article 6(1) of the ECHR reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law ...

73 See e.g. *Delcourt v Belgium*, 17 January 1970, para. 31.

74 *Le Compte, Van Leuven and De Meyere v Belgium*, Series A No. 43 (1982) 4 ECHR, para. 55.

75 Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65.

76 E.g. *Belilos v Switzerland*, Series A No. 132, (1998) 10 EHRR 466, para. 67.

The right to an independent and impartial tribunal

Thus, it is not sufficient that the applicant be apprehensive with regard to the impartiality of a tribunal. He also needs to give reasons for his fears, and the Court will decide whether they are sufficient to justify his fears.

As to the subjective test, this comes into play when determining the lack of impartiality because of a judge's personal bias. In general, the Court has been reluctant to address the lack of impartiality of individual judges. This is so because all judges are presumed impartial until strong evidence is adduced to the contrary.⁷⁷

The Court has also dealt with situations of a lack of impartiality pursuant to a judge's prior involvement in the same case. These mainly include prior involvement as a prosecutor (or *Ministere public* in Civil law systems), a member of the police, an investigator, a member of a body responsible for preparing the indictment, or as a judge on the merits. Virtually both the European Commission and the ECHR have repeatedly stated that any prior involvement in the pre-trial proceedings would amount to a lack of impartiality.⁷⁸ The leading case on this is *De Cubber v Belgium*,⁷⁹ where a trial judge had first acted as an investigating judge in the same case. The Court concluded that the prior involvement was not compatible with the objective requirement of impartiality.⁸⁰

The judicial independence of the SADC Tribunal

The SADC Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State and Government, which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal, during its Summit in Gaborone, Botswana, on 18 August 2005, appointed the members of the SADC Tribunal. The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia. The seat of the Tribunal has been designated by the SADC Council of Ministers to be Windhoek, Namibia. Article 22 of the Protocol on the Tribunal provides that the working languages of the Tribunal will be English, French and Portuguese.⁸¹

77 See e.g. *Piersack v Belgium*, Series A No.53, (1983) 5 EHRR 169, para. 25; *Le Compte, Van Leuven and De Meyere v Belgium*, supra, note 69, para. 58.

78 See e.g. *Ben Yaacoub v Belgium*, Application 9976/82, Series A, No. 127 – A, (1991) 13 EHRR 418, para. 108.

79 Series A No. 53 (1983) 5 EHRR 169.

80 (*ibid.*:para. 29ff).

81 See <http://www.sadc.int/tribunal>; last accessed 20 July 2008.

Appointment of SADC Tribunal Judges

Article 16(3) of the SADC Treaty and Article 4 of the SADC Protocol provide for the appointment of judges. Ten judges are appointed for a five-year period, which can be renewed by the common accord of the governments of the member states. For obvious practical reasons, the number of judges cannot be equal to that of the member states. However, Article 3(5) of the Protocol provides that, if it eventually becomes apparent that there is need for an increase from the ten judges initially chosen, then the Council of Ministers may increase the number at the Tribunal's proposal.

Once the ten judges have been appointed, the SADC Council of Ministers has to designate five as regular members who also have to sit regularly. The remaining five constitute a pool from which the President of the Tribunal may invite a member to sit on the Tribunal whenever a regular member of the Tribunal is temporarily absent or otherwise unable to carry out his/her functions.⁸² At all times, the Tribunal is required to be constituted of three members, which forms the ordinary sitting. In cases where the Tribunal decides to constitute a full bench, then the members should be five.⁸³

The Tribunal may not include more than one national from the same state.⁸⁴ In the unlikely event that it happens that two such judges are in fact chosen, it might be worth adopting the position taken by the International Court of Justice (ICJ) according to which, if two candidates having the same nationality are elected at the same time, only the elder is considered to have been validly elected. At most, a judge may only serve for two consecutive terms, after which s/he ceases to qualify to hold office.⁸⁵

Article 6 of the Protocol provides that –

... of the members initially appointed, the terms of the two (2) of the regular and two of the additional members shall expire at the end of three years. The Members whose term is to expire at the end of three years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.

It is submitted that the above provision is included in order to ensure a certain measure of continuity. Two fifths of the Court, that is, four judges, are elected

82 Article 3(2), SADC Protocol.

83 Article 3(3), SADC Protocol.

84 Article 3(6), SADC Protocol.

85 Article 6, SADC Protocol.

The right to an independent and impartial tribunal

every three years; the other three fifths are left until their five years lapse. The same method was also adopted by the ICJ, whose judges run for a maximum term of nine years, but a third of them are elected every three years.⁸⁶

Member states have great latitude in choosing whom to nominate for the Tribunal. All state parties to the SADC Treaty have the right to propose a candidate. The only limitation is that they should qualify for appointment –⁸⁷

... to the highest offices in their respective States or [be] jurists of recognized competence.

It should be stressed that, once elected, a member of the Tribunal is a delegate neither of the government of his/her own country, nor of that of any other state. Unlike most other organs of international organisations, the Tribunal is not composed of representatives of governments. Tribunal members reach their decisions with complete independence and impartiality. However, in some way or other they do in fact represent their legal systems, that is, the judges' professional experience and background obviously has a way of showing in their decisions. This is in no way a weakness. In fact, this has the valuable consequence that the Tribunal operates as a comparative law jurisdiction, merging experiences and understandings of lawyers skilled in the wide range of different legal (civil and common law) systems and, indeed, families of law. As noted by Hunnings, –⁸⁸

... such a respect and understanding for alien legal systems as part of day-to-day decision making is both unique and revolutionary and goes in some way in ensuring the great strength of the court.

The procedure of appointment is that each member state nominates one candidate who meets the specifications laid down in Article 3 of the Protocol. This list of candidates is then forwarded to the Council of Ministers, who selects possible members and recommends such chosen members to the Summit. From the said recommendations, the Summit makes the final appointment.⁸⁹ However, due regard has to be taken to ensure fair gender representation in the appointment and nomination process.⁹⁰

86 See Muller, AS. 1997. *The International Court of Justice: Its future role after fifty years*. The Hague: Martinus Nijhoff Publishers, p 67.

87 See Article 3(1), SADC Protocol.

88 Hunnings, NM. 1996. *The European courts*. London: Cartermill Publishing, p 52.

89 Article 4(4), SADC Protocol.

90 Article 4(2), SADC Protocol.

Independence and impartiality of the SADC Tribunal

Certainly, a proper and concrete assessment of the judicial independence and impartiality of the SADC Tribunal is not easy without reference to its jurisprudence. This is, however, not possible, given the fact that the Tribunal is still in its infancy.

Several provisions have been included in the Protocol to guarantee the independence and impartiality of the judges. Before taking up their duties, members of the Tribunal are required to make a solemn declaration in open session that they will exercise their powers independently, impartially and conscientiously.⁹¹ The implication and essence of this solemn declaration by all members is that the Tribunal should only act on the basis of the law, independently of any outside influence or interventions whatsoever, in the exercise of its judicial function entrusted to it alone by the SADC Treaty and the Protocol.

In order to guarantee judicial independence, no member of the Tribunal can be dismissed unless in accordance with the rules.⁹² Members of the Tribunal may not simultaneously hold any political or administrative office in the service of a state, community, or any other organisation.⁹³ This provision seeks to protect the judges from member states or other institutions' influences. In addition, it fosters public confidence in the Tribunal as a separate and independent judicial entity.

While the European Court of Justice forbids its judges from *engaging in any occupation, whether gainful or not*, for practical reasons the judges of the SADC Tribunal are employed on a part-time basis and can, therefore, hold other judicial offices.⁹⁴ With regard to the well-known principle of *nemo iudex in sua causa*, Article 9(2) of the Protocol stipulates that –⁹⁵

... no Member of the Tribunal shall participate in the decision of any case (dispute) in which he was previously involved.

Another feature relevant to the independence of the Tribunal is the fixed term of office of its judges, namely five years, which term is renewable. It has been argued that the possibility of renewal of their appointment could encourage judges to try

91 Article 5, SADC Protocol. This provision is buttressed by Rule 3 of the Rules of Procedure of the Tribunal.

92 See Article 8(3), SADC Protocol.

93 See Article 9, SADC Protocol.

94 Hunnings (1996:52).

95 This may happen in many ways, e.g. where the judge has acted previously in the dispute at hand as an agent, an attorney or advocate, a legal adviser, or a judge at domestic level.

to please their governments in order to get another renewal nomination.⁹⁶ While this might pose a problem with the European Court of Justice, where each member state nominates one candidate, this does not apply to the SADC Tribunal. The process of selection is such that not all member states can have a candidate sitting on the bench. The result is that the Summit is forced to consider the qualifications of the candidates recommended by the Council of Ministers in order to make their choice. In the end, the judge on the bench will not feel compelled to please his/her government to ensure another term in office. Furthermore, when engaged in the business of the Tribunal, the judges enjoy privileges and immunities to ensure that their decisions are not tainted with the fear of being held accountable at the end of their tenure.⁹⁷ Nonetheless, as mentioned earlier, it is too soon to assess the judicial independence and impartiality of the SADC Tribunal in practice, as the case law of this jurisdiction is almost non-existent.

Conclusion

This paper has explored the concept of judicial independence and impartiality. The author examines the nature and content of the right to a competent, independent and impartial tribunal and its application and interpretation at both national and international levels. In this regard, the judicial independence of the Namibian judiciary and international judges was discussed with a focus on both case law and statute law. True, the conditions for judicial independence of national judges are applicable *mutatis mutandis* to international judges. These include the manner in which judges are appointed and removed; their financial and office security; their immunities and privileges; and their discipline and disqualification.

That the requirement of an independent and impartial tribunal established by law is one of the key components of the right to a fair trial and, therefore, vital to the protection of individual rights, is not questionable. This is because the guarantee ensures that individual rights of parties to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial. On the other hand, the guarantee of an independent and impartial tribunal is considered as the foundation of the rule of law. Indeed, without an independent and impartial judiciary, one may wonder whether the law itself can have a real meaning.

Notwithstanding the above, it is to be borne in mind that there is no such thing as 'pure judicial independence and impartiality'. Naturally, in the exercise of their judicial functions, judges, as human beings, will be influenced by the prevailing

96 Hunnings (1996:53).

97 See Article 10, SADC Protocol.

The right to an independent and impartial tribunal

political, social and economic conditions in their respective jurisdictions.⁹⁸ In addition, judicial decisions, more often than not, are influenced by a judge's personal history. Everyone has a personal history that affects their judgment pervasively. Thus, though personal history can be a cause of judicial fallibility, it is perhaps absurd to hold that a judge should decide as if s/he had no personal history.⁹⁹ Certainly, in a criminal case, a judge with a human rights defending background will be inclined to protect and uphold the defendant's rights, whereas a judge with crime prevention or prosecutorial background will be harder with accused persons in criminal matters.

98 For an excellent discussion on the relationship between judges and politics, see Guarnieri, C. 2002. *The power of judges: A comparative study of courts and democracy*. Oxford: Oxford University Press, pp 4–13.

99 Burton, SJ. 1989. "A discussion on the independence and impartiality of international judges". *American Society of International Proceedings*, 83:512–516; see also Shetreet, S. 1985. "Judicial independence: New conceptual dimensions and contemporary challenges". In Shetreet, S (ed.). *Judicial independence: The contemporary debate*. The Hague: Martinus NP, p 627.

SECTION VII
Beyond the Namibian judiciary

The independence of the Ombudsman in Namibia

Katharina G Ruppel-Schlichting

*The independence of the Ombudsman provides his Office with a strong basis for the exercise of his powers, and ensures that he may insist on complete liberty to investigate and examine incidents of abuse without interference.*¹

Introduction

The institution of the Ombudsman has its roots in Sweden and dates to the 19th century, when the Swedish Parliamentary Ombudsman was instituted to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch.² Ombudsmen's application of the technique of making government accountable has since been developed to a sophisticated level.³ Today, this institution has been adopted in many countries all over the world, including many in southern Africa.⁴ Within the Southern African Development Community (SADC), all member states have institutions that keep an eye on the proper exercise of power and the protection of human rights, even though not all these countries use the same terminology for concepts relating to these functions.⁵

- 1 The late MP Tjitendero, former Speaker of the National Assembly in Namibia, in his opening address to the Southern African Conference for the Institution of the Ombudsman held in November 1995 in Swakopmund, Namibia. See Kasuto, E & A Wehmhörner (eds). 1996. *The Ombudsman in southern Africa: Report of a Subregional Conference*. Windhoek: Friedrich-Ebert-Stiftung, p 11.
- 2 With regard to the Ombudsman in Namibia and the protection and promotion of human rights, see Walters, J. 2008. "The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman". In Bösl, A & N Horn (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia.
- 3 As to the background of the Ombudsman institution in general, see Mumba, FN. 1996. "Development and essential features of the Ombudsman institution". In Kasuto, E & A Wehmhörner (eds). *The Ombudsman in southern Africa: Report of a Subregional Conference*. Windhoek: Friedrich-Ebert-Stiftung, 17ff.
- 4 Cf. Kasuto & Wehmhörner (1996).
- 5 Ombudsmen are established in Angola, Botswana, Lesotho, Malawi, Mauritius Namibia, the Seychelles, Swaziland, Zambia, and Zimbabwe. In Mozambique, the institution of an Ombudsman was established by constitutional amendment in 2005, and is in the process of being realised. In Tanzania, similar functions to those typically held by an Ombudsman are performed by the Permanent Commission of Enquiry. In South Africa, the title *Ombudsman* was changed to *Protector-General*. Madagascar has established an institution of a *Défenseur*

The independence of the Ombudsman in Namibia

In Namibia, the Office of the Ombudsman was entrenched when the Constitution of the Republic of Namibia came into operation on 21 March 1990. Since then, two Acting Ombudsmen, one Deputy Ombudsman, two Ombudsmen and one Ombudswoman have been at the helm of the Office.⁶ The institution of the Ombudsman stands for the protection of and respect for the rights of the individual, the promotion of the rule of law, and the promotion and advancement of democracy and good governance.⁷ Included in the Namibian Bill of Rights in Chapter 3 of the Constitution is a provision dealing with the enforcement of fundamental human rights and freedoms, namely Article 25(2), which reads as follows:

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.

However, the most relevant legal provisions with regard to the Ombudsman are to be found in Chapter 10 of the Namibian Constitution as well as in the Ombudsman Act, 1990 (No. 7 of 1990). Even though the formal state system is considered to be functioning well in Namibia,⁸ there is a need for informal mechanisms for conflict resolution. The Office of the Ombudsman functions as a watchdog for the people, who will hold government accountable for its actions. The broad mandates of the Ombudsman give the citizen an expert and impartial agent in a wide variety of matters, without personal cost or bureaucratic hurdles to the complainant, without time delay, without the tension of adversary litigation, and without the requirement of professional legal representation.

Broadly speaking, the Ombudsman in Namibia investigates complaints about the violation of fundamental rights and freedoms, and about the administration of

du Peuple (“Public Protector”), while the Democratic Republic of Congo constitutionally provides for five institutions to support democracy, including *L’Observatoire National des Droits de l’Homme* (“the National Observatory for Human Rights”) as well as *La Commission de l’éthique et de la lutte contre la corruption* (“the Commission for Ethics and Anti-corruption”).

6 The Office is currently headed by Ombudsman John Walters.

7 Kasuto (1996:118).

8 Ruppel, OC. 2008a. *Third-generation human rights and the protection of the environment in Namibia*. In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Ruppel, OC. 2008b. *The role of the Executive in safeguarding the independence of the judiciary in Namibia* in this publication.

all organs of government. Violations are corrected by attempting a compromise between the parties concerned, bringing the matter to the attention of the authorities, referring the matter to the courts, or seeking judicial review.

In order to provide an insight into the fields of activity of the institution of the Ombudsman in Namibia, its mandates will be introduced briefly before discussing in more detail the concept of *independence*.

The main mandates of the Ombudsman

The Office of the Ombudsman is intended to function as an independent body to ensure that citizens have an avenue open to them, free of red tape, and free of political interference.⁹ Despite proactive functions such as to contribute towards educational and developmental issues,¹⁰ the Ombudsman has reactive functions as laid down in the Constitution and the Ombudsman Act. Several types of actions can give rise to complaints under the competence of the Ombudsman, including the failure to carry out legislative intent, unreasonable delay, administrative errors, abuse of discretion, lack of courtesy, oppression, oversight, negligence, inadequate investigation, unfair policy, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, violation of law or regulations, abuse of authority, discrimination, and all other acts of injustice. Complaints may be submitted to the Office of the Ombudsman by any person, free of charge and without specific form requirements.

The Office of the Ombudsman cannot investigate complaints regarding court decisions, however. Neither can the Office assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities that may be

9 Tjitendero, M. 1996. "Opening address to the Subregional Conference on the Ombudsman in Southern Africa". In Kasuto, E & A Wehmhörner (eds). *The Ombudsman in southern Africa: Report of a Subregional Conference*. Friedrich-Ebert-Stiftung, p 10.

10 The Office of the Ombudsman provides for outreach programmes and specific human rights education, in order to enhance public education. These programmes are carried out in collaboration with NGOs, community leaders, local authorities, etc. The Office of the Ombudsman has also conducted several awareness campaigns, and continues to do so. Such campaigns take the form of public lectures, community meetings, or the distribution of newsletters and brochures, to name but a few. Furthermore, during April 2006, in collaboration with NGOs, civil society organisations and the Council of Churches in Namibia, the Ombudsman established the Ombudsman Human Rights Advisory Committee. The latter Committee consists of 20 members of the aforementioned institutions, who together create a forum for dialogue on all areas of human rights. For more detail on specific awareness campaigns undertaken by the Office of the Ombudsman, see Walters (2008:122, 129).

The independence of the Ombudsman in Namibia

complained about include government institutions,¹¹ parastatals,¹² local authorities and – in the case of the violation of human rights or freedoms – private institutions and persons.¹³ In 2006, complaints were brought against the City of Windhoek, the Government Institutions Pension Fund, several ministries, the Namibian Police, the Namibian Wildlife Resorts, the Public Service Commission, Prison Service, and others.¹⁴ Within the group of complaints against government institutions, a statistical analysis of cases taken up during the period 2004–2006 shows that around 65% of them referred to the Ministry of Justice, the Namibian Police, and prison-related matters.¹⁵

The Ombudsman has relatively broad mandates and corresponding powers.¹⁶ According to Article 91 of the Constitution, the mandates of the Ombudsman in Namibia mainly relate to four broad categories: human rights, administrative practices, corruption,¹⁷ and the environment. At this stage, an imbalance as to complaints by specific mandates can clearly be pointed out.¹⁸ On the one

11 Including ministries, the National Assembly, the National Planning Commission, and the Attorney-General.

12 Including NamPower, Telecom, NamWater, NamPost, and the Namibian Broadcasting Corporation.

13 Gawanas, B. 2002. "Office of the Ombudsman 1990–2000". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work – 10 years of Namibian nationhood*. Pretoria: VerLoren van Themaat Centre, University of South Africa, p 104.

14 Office of the Ombudsman. 2007. *2006 Annual Report*. Windhoek: Office of the Ombudsman, p 27ff.

15 (ibid.:35).

16 For more details on the mandates of the Ombudsman, see Windhoek: Macmillan Namibia. Ruppel, OC & KG Ruppel-Schlichting. [Forthcoming]. "Between formal and informal justice? The mandate of the Ombudsman in Namibia". In Hinz, MO (ed.). [Forthcoming]. "Traditional and informal justice systems".

17 According to an article in *The Namibian* newspaper on 16 September 2008, however, Cabinet intends to amend the Constitution to remove the word "corruption" from the list of functions of the Ombudsman in Article 91. Government had allegedly been working secretly to change a number of provisions in the Constitution – including criteria for citizenship, reducing the terms of regional councils, and removing the job of fighting corruption from the Office of the Ombudsman, according to a Cabinet letter dated 11 November 2007. For more details, see <http://www.namibian.com.na/2008/September/national/08297C131F.html>; last accessed 21 September 2008. In this regard, the Ombudsman would be stripped of some of his/her constitutional powers to deal with corruption and/or its manifestations. The intention behind this proposed amendment might be to avoid a duplication of functions between the Office of the Ombudsman and the Anti-Corruption Commission of Namibia. The latter was established by the Anti-Corruption Act, 2003 (No. 8 of 2003), and inaugurated early in 2006. Thus, processing of all corruption-related complaints would ideally be centralised with the Anti-corruption Commission.

18 Cf. Office of the Ombudsman (2007:37).

hand, the imbalance can be traced back to the nature of topics/complaints, with some occurring more frequently than others; on the other hand, the lack of public awareness on the Office being able to look into complaints relating to other topics, such as the environment, can be seen as another reason for the imbalance. Although the categories of maladministration and violation of human rights play the most vital role in the work of the Office of the Ombudsman,¹⁹ the other categories deserve equal attention. The environmental mandate²⁰ of the Ombudsman's Office can be regarded as a progressive and innovative step towards environmental protection, as environmental concerns have significantly gained importance within the legal environment for the past few decades.²¹ By including the environmental mandate in the functions of the Ombudsman the Constitution provides for unique provisions that go beyond the traditional powers and functions of an Ombudsman institution. The data on complaints by mandate for 2006 reflect that environmental issues could play a more vital role within the Ombudsman's activities.²² This is why strategies are currently being developed in order to put more emphasis on the environmental mandate.²³

In 2006, a total of 2,060 complaints were brought to the Office of the Ombudsman.²⁴ A statistical analysis of complaints according to the Ombudsman's mandates²⁵ shows that, in 2006, 1,286 of these complaints related to the mandate of maladministration, 177 to human rights violations, 39 to corruption, and only 2 referred to environmental matters. The remaining 556 complaints covered miscellaneous issues. The respective statistics for 2005 present a similar picture. The positive effect of the Office's laudable efforts with regard to the more popular mandates such as maladministration and human rights violations can hopefully be extended in future to those that have so far merely attained little attention in terms of complaints. This was also recently highlighted by the UN Committee on the Elimination of Racial Discrimination (CERD). In its concluding observations on Namibia's periodical reports issued in connection with its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination,²⁶ the CERD commended Namibia for

19 Walters (2008:121ff).

20 For a more detailed discussion of the environmental mandate of the Ombudsman in Namibia, see Ruppel & Ruppel-Schlichting [Forthcoming].

21 For further reference, see Ruppel (2008:101ff).

22 Office of the Ombudsman (2007:37).

23 Special workshops are conducted and information leaflets are compiled in order to sensitise the staff of the Office of the Ombudsman with regard to the relevance of environmental concerns.

24 Cf. Office of the Ombudsman (2007:4).

25 (ibid.:37).

26 See concluding observations of the Committee on the Elimination of Racial Discrimination,

the planning to increase the financial and human resources of the Office of the Ombudsman. However, concern was expressed as to the small number of complaints that had been received with regard to racial discrimination, due to victims' lack of information about their rights and of access to legal remedies. CERD therefore encouraged Namibia to sensitise the public about their rights and the availability of legal remedies for victims of racial discrimination.²⁷

Independence of the Ombudsman: Legal foundations

Despite the basic characteristics²⁸ of being impartial, fair, and acting confidentially in terms of the investigation process, the Ombudsman in Namibia is designed to be independent. This can be inferred from Article 89(2) of the Constitution, which provides as follows:

The Ombudsman shall be independent and subject only to this Constitution and the law.

One further provision within the constitutional framework which relates directly to the institution's independence is Article 89(3), which reads as follows:

No member of the Cabinet or the Legislature or any other person shall interfere with the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman.

However, the Constitution does not specify what the term "independence" means here. It goes without saying that the attribute of being independent is multifaceted. Therefore, the following paragraphs will discuss the components considered to be the most material to the institution of the Ombudsman in Namibia.

dated 19 August 2008. These observations, as well as a list of issues and Namibia's written responses to them, are available at <http://www2.ohchr.org/english/bodies/cerd/cerds73.htm>; last accessed 20 September 2008.

27 The Office is currently active in giving substance to the recommendations of the Committee by, inter alia, conducting racial discrimination hearings throughout the country. Furthermore, considering that many pre-independence enactments are still in force, the Office of the Ombudsman – in cooperation with the Konrad Adenauer Foundation – intends to launch a project under the human rights mandate with regard to racism, entitled "Creating an apartheid-free Namibia".

28 As to the characteristics of a classical Ombudsman in general, see Gottehrer, DM & M Hostina. 1998. *Essential characteristics of a classical Ombudsman*. Available at www.usombudsman.org/documents/PDF/References/Essential.PDF; last accessed 6 June 2008.

Components contributing to the institution's independence

Independence is probably the most fundamental and indispensable value for the successful functioning of the Ombudsman. Generally speaking, *independence* describes a state of not being controlled by other people or things. The underlying rationale for independence in this context is that an Ombudsman has to be capable of conducting fair and impartial investigations, credible to both complainants and the authorities that may be reviewed by the Office of the Ombudsman.²⁹

There are several factors, which, taken as a whole, serve to secure the independence of the institution. These factors are related to –

- the positioning of the institution within the legal framework
- the method of appointing and removing an incumbent from office
- accountability
- funding and personnel issues
- enforcement mechanisms, and
- the investigation process.

The following paragraphs will focus in more detail on each of these factors from a theoretical perspective, and will subsequently determine whether, in practice, the Office of the Ombudsman is in a position to act independently on the basis of the existing legal framework.

Positioning within the legal framework

The institution of the Ombudsman can only be established in law or by way of a jurisdiction's constitution. With regard to the institution's independence, its anchorage in a jurisdiction's constitution is of greater effect as it underlines the permanence of the institution: the constitutional amendment process is specifically designed so as to prevent frequent amendment.

In Namibia, the establishment of the Office of the Ombudsman rests on two pillars. The first of these, the legal authority, is found in the Constitution. Nonetheless, the Constitution also authorises the legislative body to enact statutory law to amplify the Ombudsman's powers and responsibilities. This law has duly taken the form of the Ombudsman Act. By integrating the institution of the Ombudsman into the Constitution, which is the supreme law of the land,³⁰ the permanence of the

29 United Nations Development Programme. 2006. *Guide for Ombudsman institutions: How to conduct investigations*. Bratislava: UNDP, p 12.

30 Article 1(6), Namibian Constitution.

institution is underlined – since any constitutional amendment is subject to strict conditions. This creates stability for to the office, and lends credibility to it in terms of the public’s perceptions. Thus, the Ombudsman is free to investigate cases without fear that the office will easily be closed down or restricted.

Method of appointment and removal from office

Another aspect which is relevant to the independence of an Ombudsman is the method of his/her appointment and removal from office. In order to guarantee independence, the Ombudsman is to be appointed or confirmed, preferably by a majority of a legislative body or entity. Political appointments should be prevented in order that the Ombudsman can act independently. Therefore, the appointing institution should not be one subject to the Ombudsman’s review.

In Namibia, the Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission.³¹ The latter consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession.³² The appointing process consists of the Judicial Service Commission’s recommendation and the subsequent formal act of proclamation by the President. This process secures, firstly, that the appointed incumbent is widely respected by diverse political groups as fair and impartial, and secondly, that the appointment is not the responsibility of one particular institution. The composition of the recommending institution, consisting of various professional branches, strengthens the independence of the Ombudsman at the early stage of appointment.

Furthermore, the two-stage appointment process intends to make sure that the Ombudsman is independent of any agency under the office’s jurisdiction. Were the Ombudsperson not independent of the agency being reviewed, s/he could be subject to pressures that would reduce the credibility of the institution. In all the instances of appointment of an Ombudsman that have taken place to date,³³ the constitutional two-stage appointment process has been observed. With regard to the appointment of an acting or deputy Ombudsman, respective provisions are contained in the Ombudsman Act.³⁴

The Ombudsman’s independence is additionally supported by the conditions of the removal process. Before the expiry of the Ombudsman’s term of office, the

31 Article 90(1), Namibian Constitution.

32 Article 85(1), Namibian Constitution.

33 So far, three Ombudsmen have taken office: the late Fanuel J Kozonguizi in 1992, Bience Gawanas in 1996, and John R Walters in 2004.

34 Section 2.

The independence of the Ombudsman in Namibia

President, acting on the recommendation of the Judicial Service Commission, is empowered to remove the Ombudsman from office.³⁵ The Ombudsman can only be removed for specified causes, e.g. incapacity, or gross misconduct.³⁶ This guarantees that the Ombudsman will not be removed for political reasons or just because the results of investigations have offended those in political power in the legislative body. The provision that the Ombudsman is not permitted to perform remunerative work outside his or her official duties without the permission of the President³⁷ is another supportive provision safeguarding the Ombudsman's independence.

Other relevant safeguards comprise the selection criteria as well as matters related to the Ombudsman's term of office. The stricter the selection criteria for the Ombudsman are, the less control is required – since strict selection criteria guarantee that the candidate is highly qualified for the position. Were the Ombudsman subject to the control of another institution, the degree of independence enjoyed by the office would accordingly decrease. In Namibia, the strict selection criteria³⁸ in terms of personal qualifications warrant that the Ombudsman is not subject to further control:

The Ombudsman shall either be a Judge of Namibia, or a person possessing the legal qualifications which should entitle him or her to practise in all the Courts of Namibia.

The Ombudsman also enjoys a fixed, long term of office – which is another way of securing independence from acute political developments. Article 90(2) of the Constitution provides that the Ombudsman hold office until the age of 65. However, the retiring age may be extended by the President to the age of 70. No further provision is contained as to the term of office, which implies that, regardless of the age at the time of appointment, the Ombudsman theoretically holds office until the age of 65 or 70, respectively. The Ombudsman Act, however, states that the appointment of the Ombudsman is required to be in accordance with such terms and conditions as the President may determine. Many legal systems providing for the establishment of the institution of Ombudsman have a time restriction on the term of office, combined with the possibility of an extension. Especially in the light of the independence of the institution, a long, fixed term of office subject to a time limit with the option of reappointment or extension seems to be relatively more acceptable than an indefinite term of office. However, experience has shown that the possibility of one person holding the office for decades remains theoretical.

35 Article 94(1), Namibian Constitution.

36 Article 94(2) and (3), Namibian Constitution.

37 Section 2(4), Ombudsman Act.

38 Article 89(4), Namibian Constitution.

Funding, remuneration and personnel issues

It is essential for the independence of the Ombudsman that the office is equipped with a budget that is sufficient to carry out the functions as set out by the law. If this is not the case, the Ombudsman would be incapable of carrying out the necessary investigations – resulting in a lack of independence. In this regard, the Southern African Conference on the Institution of the Ombudsman³⁹ resolved that the institution should receive adequate funding in keeping with good governance and easy accessibility, and that the matter of funding should not militate against the institution's independence.

In this context, it is imperative that, even though the Ombudsman might account directly to the legislative body, the available funds can be spent by the Ombudsman at his/her discretion without the approval of any higher authority.

The budget of the Office of the Ombudsman is proposed by the Ombudsman and tabled in Parliament through the Ministry of Justice. Together with external financial support,⁴⁰ the Office of the Ombudsman at this stage has adequate means to perform the functions required by law.⁴¹

The Office of the Ombudsman currently has a staff establishment of about 25. Ten investigators are assigned to the Windhoek Office.⁴² The Office's subdivisions currently work with one investigator in Keetmanshoop, and two in Oshakati; additional staff will be recruited in due course. The size of the Office is such that the Ombudsman can be cognisant of the Office's affairs at all times, and that it can during the ordinary course of business meet performance standards with regard to such factors as speed, accuracy of results, and quality communication.

As to the salary of an Ombudsman, since an Ombudsman makes certain recommendations to government officials, amongst other persons, during his/her investigations, the remuneration associated with the office should be commensurate with the responsibility and the required qualifications. Many legal systems have, therefore, adjusted the Ombudsman's salary to equal that

39 The Conference was held in November 1995 in Swakopmund, Namibia. For further details see Kasuto & Wehmhörner (1996).

40 Such as financial support granted by the Embassies of Finland and France, as well as by institutions such as the Konrad Adenauer Foundation; see Office of the Ombudsman (2007:3).

41 Interview by OC Ruppel with J Walters, Ombudsman of Namibia, on 12 August 2008.

42 A significant number of vacancies will hopefully be filled in due course. The recent appointment of a new Director of the Office of the Ombudsman, Eilene Rukow, is a step in this direction.

The independence of the Ombudsman in Namibia

of judges or Ministers. This top salary bracket not only reflects the level on which the Ombudsman eventually conducts investigations, it also guards against corruption and justifies the rule that, generally, an Ombudsman is not allowed to generate income other than the remuneration which is granted in his/her function as an Ombudsman. All the aforementioned factors have high relevance in terms of working independently. In order to avoid the Ombudsman being indirectly punished for politically difficult reports or inconvenient recommendations, it should not be permissible to reduce the Ombudsman's salary during his/her term of office, unless the salaries of all government officials are subject to such reduction.

Currently, the same conditions of service of a High Court judge apply to an Ombudsman. Thus, the Ombudsman's salary may generally not be reduced during a term of office. Respective provisions are contained in the contract between the President of the Republic of Namibia and the Ombudsman.⁴³

In the light of the nature of investigations conducted by the Office of the Ombudsman, which are frequently confidential, it is imperative that the Ombudsman has full confidence in his/her staff members. True independence can only prevail if the office is not politicised, and if the Ombudsman has the sole discretion to appoint and remove staff from his/her office and to distribute specific responsibilities among the staff. The de facto situation in Namibia, however, reflects a different reality. Generally, the Ombudsman is assisted by officers in the public service who are appointed by government at the recommendation of the Public Service Commission.⁴⁴ However, provision is made that the Ombudsman may also obtain the services of any other person.⁴⁵

Where the Ombudsman is not in a position to perform his/her duties for any reason, or if the office is vacant, section 2 of the Ombudsman Act provides for a deputy or acting Ombudsman to be appointed to exercise the Ombudsman's powers in order not to paralyse the work flow. No such deputy currently serves, although one had been appointed in the past.⁴⁶ Nonetheless, the establishment of new Ombudsman subdivisions, e.g. in Swakopmund, are expected to create new needs in regard to the appointment of new staff. The work flow is currently safeguarded by the remaining staff members, especially by the Office's Director and the investigators, who step in whenever the Ombudsman is temporarily not in a position to perform his/her duties.

43 Interview with Ombudsman J Walters by OC Ruppel, 12 August 2008.

44 Section 7(1), Ombudsman Act.

45 Section 7(2), Ombudsman Act.

46 Ephraim K Kasuto was appointed as Deputy Ombudsman in 1993.

The independence of the Ombudsman in Namibia

Following the principle of immunity from liability and criminal prosecution that is granted to heads of state, it is considered appropriate to grant immunity to an Ombudsman for acts performed under the law for the following reasons:

- It is highly likely that people subject to investigations could sue the Ombudsman for acts carried out under his/her mandate.
- Immunity from criminal prosecution guards against all forms of political control, and
- Immunity from liability and criminal prosecution allows the Ombudsman to concentrate on his/her tasks rather than on defence strategies for warding off lawsuits.

In its resolutions and recommendations, the Southern African Conference for the Institution of the Ombudsman provides that –⁴⁷

[t]he Ombudsman and members of his/her staff should not be personally liable for anything that they do in the due course of their duties, provided that liability be attached to the Institution for the Ombudsman and his/her staff for wilfully committing or omitting anything in bad faith.

In this regard, Namibia's Ombudsman Act provides for a limitation of liability in respect of anything done in good faith under any provision of the Act.⁴⁸ This applies to the Ombudsman⁴⁹ as well as to his/deputy and other Office staff.

The investigation process

The independence of an Ombudsman can be measured by the extent of his/her discretion in an investigation process. Various single steps within the investigation process contain elements that are indispensable to the institution's independence.

Tribute is paid to this independence in section 4 of the Act, which provides that –

[W]hen the Ombudsman performs his or her duties and functions in terms of the Act –
(a) *the Ombudsman may in his or her discretion determine the nature and extent of any inquiry or investigation ...*

47 The Conference was held in November 1995 in Swakopmund, Namibia. For the resolutions and recommendations, see Kasuto & Wehmhörner (1996:6).

48 Section 11, Ombudsman Act.

49 The Ombudsman holds a diplomatic passport ex officio.

The independence of the Ombudsman in Namibia

Usually, the investigation process is started by a complaint brought before the Ombudsman by an individual. In this context and with regard to the Ombudsman's independence, consideration needs to be given to whether the Ombudsman, apart from conducting an investigation on the basis of a complaint, may also conduct own-motion investigations. Such competence would indeed contribute to the independence of the Ombudsman in that s/he would not be bound by incoming complaints. One can well imagine that the Ombudsman comes across situations which, in his/her eyes, would justify an investigation, but which were not brought before him/her by way of a complaint from outside the Office. This may be so either because the persons aggrieved may be intimidated and, therefore, unwilling to hand in a complaint, because the observed or known misconduct is not public, or for other reasons. Own-motion investigations can also be appropriate in cases where the persons affected are unable to make a complaint themselves, e.g. if affected persons would endanger themselves by submitting a complaint.⁵⁰

Although neither the Constitution nor the Ombudsman Act contains an explicit provision allowing the Ombudsman to conduct an investigation without having received a complaint, the Ombudsman may decide to undertake an own-motion investigation if such investigation is about issues and authorities that would be within the institution's competence if they had been brought by a complainant. The wording of the Constitution attaches investigation procedures to complaints brought before the Ombudsman. The Act, however, which defines and describes the functions of the Ombudsman⁵¹ as required by Article 91 of the Constitution, is broader in the sense that inquiries or investigations are to be undertaken upon "any request or complaint". Even if this wording does not contain an explicit mandate to investigate violations on the Ombudsman's own motion, it would be completely against the object and rationale of the institution if the Ombudsman were unable to take action in cases where s/he obtains knowledge about violations of rights under his/her mandate. Moreover, there is no restriction on the question as to who is allowed to bring a complaint before the Ombudsman. Therefore, there is no reason why a complaint or request from out of the Office itself should not be permissible. Accordingly, the Southern African Conference on the Institution of the Ombudsman resolved as follows:⁵²

*IN RESPECT OF OWN MOTION (MERO MOTU), that:
The Ombudsman should also initiate investigations in his/her own motion.
Under mero motu investigations, an Ombudsman should take up matters reported in the media or other sources.*

50 UNDP (2006:25).

51 Section 3(1), Ombudsman Act.

52 Kasuto & Wehmhörner (1996).

The independence of the Ombudsman in Namibia

The de facto situation in Namibia underlines that own-motion investigations are acceptable and are indeed being conducted.⁵³

After having received and channelled the complaint, and after having independently decided on the question of jurisdiction and whether to investigate, investigations are undertaken through fact-finding by collecting all the necessary information with the goal to resolve complaints where possible, and to achieve a remedy for the complainant and/or a restoration of rights that have been violated. Where the Ombudsman believes that an instance investigated by him/her can be rectified or remedied in a lawful manner, s/he gives notification of his/her findings and recommends how to rectify or remedy the matter.⁵⁴

The Ombudsman is not endowed with the coercive powers typical of formal justice systems. Rather, the institution follows the approach of alternative dispute resolution: an informal process in which conflicting parties revert to the assistance of a third party who helps them resolve their dispute in a less formal and often more consensual way than would be the case in court. The methods for dealing with grievances underline the Ombudsman's independence in terms of the broad variety of options available for conflict resolution. On the one hand, the Ombudsman can bring proceedings before competent courts if s/he deems it necessary;⁵⁵ on the other, the Ombudsman can opt for various alternative methods to resolve the disputes in question. Compared with the rights-based traditional adversarial attitude towards dispute resolution, the alternative interest-based approach to dispute resolution has expanded significantly within the past few years, not only in the field of human rights and administrative justice, but also in the private sector.⁵⁶ Indeed, several arguments favour alternative dispute resolution above court proceedings. Normally, such alternatives are faster and less expensive. They also generally allow greater and more flexible control over the dispute. Moreover, the process is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state; and finally, in most processes, the disputants outline the process they will use and define the

53 Especially in cases of human rights violations, own-motion investigations have repeatedly been conducted; interview with Ombudsman J Walters by OC Ruppel, 12 August 2008. See also Walters, J. 2006. *Special Report on conditions prevailing at police cells throughout Namibia*. Windhoek: Office of the Ombudsman.

54 Section 5(1)(b), Ombudsman Act.

55 Article 91(e) of the Constitution provides for specific instances in which the Ombudsman can bring proceedings before the courts, e.g. in order to obtain an interdict to secure the termination of the offending action or conduct (Article 91(e)(dd)), or to seek an interdict against the enforcement of legislation by challenging its validity (Article 91(e)(ee)).

56 Ruppel, OC. 2007. *Interdisziplinäre Schlüsselqualifikation Mediation*. Hamburg: p 1.

substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached. By avoiding court proceedings, the relationship between the disputing parties is often less afflicted, which is a key advantage in situations where the parties need to continue interacting after settlement has been reached, such as in labour management cases.

While the most common forms of alternative dispute resolution are mediation and arbitration, there are many other techniques and procedures applied by Ombudsman institutions. However, dispute resolution techniques applied by the Office of the Ombudsman are not comparable to those applied by courts or tribunals within the framework of formal justice. Typically, the Ombudsman explores options and attempts to achieve equitable solutions for all parties. The Ombudsman works through alternative dispute resolution methods such as negotiation, mediation, consultation, influence, shuttle diplomacy, and informal investigation. These methods, techniques and procedures of investigation applied by the Ombudsman appear to be more informal than formal.

One further aspect in favour of the independence of the Ombudsman within the investigation process is the fact that, although the Ombudsman obviously has to adhere to the provisions of the Constitution and the Ombudsman Act, strict rules of procedure such as those that apply to court proceedings do not have to be applied by the Ombudsman. Instead, the Ombudsman uses his/her discretion to generate a speedy and informal resolution by applying techniques such as negotiation and compromise.⁵⁷

The powers of investigation described in Article 92 of the Constitution and section 4 of the Act are additional essential tools to secure the Ombudsman's independence, as they warrant self-determined investigation procedures.⁵⁸ The Ombudsman may, at his/her discretion, determine the nature and extent of any inquiry or investigation and has –

... the right to enter at any time ... any building or premises ..., except any building or premises or any part thereof used as a private home, and to make such enquiries therein or thereon, and put such questions to any person employed thereon ... in connection with the matter in question

57 Article 91(e)(aa) of the Constitution.

58 As to the adequacy of powers given to the institution, see Gawanas (2002:105).

The Ombudsman furthermore has the right to access all sorts of documents relevant to the investigation, as well as the right to seize anything that s/he deems necessary in connection with the investigations.⁵⁹ The investigation powers of the Ombudsman also imply the right to require any person to appear before him/her in relation to a specific inquiry or investigation. Individuals may be compelled to appear and give testimony, or to produce information determined to be relevant to the investigation. In this regard, the Ombudsman even has the right to issue subpoenas.⁶⁰ These far-reaching powers of investigation and their anchorage in the aforementioned legal instruments emphasise the basic approach that the Ombudsman is empowered to conduct investigations without being dependent on any other body. However, litigation might become necessary to enforce the powers granted to the Ombudsman by the Constitution and the Ombudsman Act.

Enforcement mechanisms

The investigation generally ends once the Ombudsman is satisfied that it has yielded all the relevant facts. His/her findings and reports are final. Generally speaking, the Ombudsman is not permitted to make binding orders. As a consequence, the Ombudsman's findings are not subject to judicial review, except where the Ombudsman's jurisdiction has been questioned. However, a claimant can still take the case to the courts after having submitted a respective complaint to the Ombudsman for one objective of establishing the office is to offer an alternative to litigation but not to force an aggrieved to choose between the option to submit a complaint to the Ombudsman and the possibility of taking the alleged offender to court.

As the Ombudsman's role is to recommend an administrative response to grievances instead of issuing binding orders, it could be argued that, without such issuing power, the Ombudsman cannot effectively protect the rights under his/her mandate; moreover, the lack of such power might be interpreted as a weakness or even a lack of independence in the institution, since the Ombudsman – without the assistance of the judiciary – cannot actually compel a person or institution under investigation to rectify or remedy the subject of the complaint. On the other hand, the Ombudsman has extensive powers to enquire and investigate. If the Ombudsman had the power to make binding orders, the institution would assume the function of a court of last instance, which would – apart from the fact that greater financial resources would be needed – not meet the basic rationale

59 Section 4(1)(b), Ombudsman Act.

60 Article 92(a), Namibian Constitution.

of the institution of the Ombudsman.⁶¹ Where an investigation results in a determination that the complainant was justified in bringing the complaint, the Ombudsman's main instrument is to make recommendations in order to solve problems or prevent them from reoccurring.⁶² By using this method, offenders are persuaded rather than forced to act, which in many cases may lead to a more effective and efficient solution. Also, if an Ombudsman were granted the power to issue binding orders, they would be subject to judicial review – again preventing the Ombudsman from fully concentrating on the complaints brought before him/her.

Accountability

In terms of functional and political autonomy, it is essential that the Ombudsman is independent of the institutions or organisations s/he reviews.⁶³ If this were not the case, there would be an increased risk of serving in the interests of the organisation being reviewed, and complaints would not be dealt with in an

61 See UNDP/United Nations Development Programme. 2004. *Report on the Fourth UNDP International Round Table for Ombudsmen institutions in the ECIS Region*, p 3. Available at europeandcis.undp.org/files/uploads/kaplina/RoundtableReport_ombudsman.doc; last accessed 19 June 2008. It is argued that the lack of power of making binding orders, considered by some as a weakness, is in fact the institution's strength:

Where any institution has the power to order others to do its bidding, another institution must have to power to review the decisions of the first institutions. In this case, if Ombudsmen were to have the power to issue binding orders, the courts would be the place where the Ombudsman's orders would be reviewed. Having the power to order that recommendations be implemented would change dramatically the dynamic of an Ombudsman institution ... What was created to be a less formal and faster way of solving problems would likely become more formal and slower. The cost to the Ombudsman, the people and the state would be greater and the benefits would be fewer.

Similar arguments in favour of not granting an Ombudsman the power to issue binding orders were spelled out by the European Ombudsman NP Diamandouros. Diamandouros, NP. 2006. *The institution of the ombudsman as an extra-judicial mechanism for resolving disputes in the context of the evolving European legal order*. Available at <http://ombudsman.europa.eu/speeches/en/2006-04-14.htm>; last accessed 15 June 2008.

62 For these reasons, in its concluding resolutions and recommendations, the Subregional Conference on the Ombudsman in Southern Africa held that (Kasuto & Wehmhörner 1996:5) –

[t]he Ombudsman should not have enforcement mechanisms and/or powers.

63 An example of the independence of the Ombudsman in Namibia is associated with a government directive that exists with regard to its offices, ministries and agencies not being permitted to advertise in specific newspapers. The Ombudsman, however, does not follow this directive, amply demonstrating his independence. To reach the public, the Ombudsman considers it necessary to approach the public in all newspapers. Interview with Ombudsman J Walters by OC Ruppel, 12 August 2008.

The independence of the Ombudsman in Namibia

impartial manner based on examination and analysis of the facts and the law. Provision for the independence of the Ombudsman from the organisations s/he reviews is made in Article 89(2) of the Constitution. Legislative control is only permissible by way of the Ombudsman's appointment, reappointment or removal from office, with strict preconditions attached to the latter – as regulated by Article 94.

According to the Constitution and the Act, The Office of the Ombudsman is obliged to draft various reports on his/her investigations.⁶⁴ These reports can be divided into two main categories: those that are drafted for single complaints, and those that contain all the activities of the Office within a specific period.⁶⁵

When investigations are completed, the Ombudsman drafts a report containing his/her findings on the complaint, as well as recommendations to solve the problems or to prevent them from happening again. Apart from the final recommendations, this report summarises the complaint, the facts found in the investigation, the law governing the situation, an analysis of the facts in light of the law, as well as a finding on what the complaint alleged.⁶⁶

An annual report containing all the Ombudsman's activities during the period 1 January to 31 December is to be drafted and submitted to the Speaker of the National Assembly, and subsequently to the National Assembly.⁶⁷ These annual reports include information as to the scope of activities, complaints, investigations, management services and administration, as well as details on outreach and public education programmes. The reports impressively reflect that the Office of the Ombudsman takes the task of protecting and promoting the values under his/her mandate through independent and impartial investigations very seriously, as they do not mince words. Inter alia, the reports contain specific case summaries referring to complaints against several government and other institutions, and statistical breakdowns draw a clear picture on the work performed by the Office in several respects.

64 Provisions for reports to be furnished by the Office of the Ombudsman are contained in Article 91(g) of the Constitution as well as in section 6 of the Ombudsman Act.

65 Such as Office of the Ombudsman. 2008. "Ombudsman Report to the Parliamentary Committee on Constitutional and Legal Affairs in regard to human rights violations in Namibia". Unpublished.

66 UNDP (2006:21).

67 Article 91(g), Namibian Constitution; section 6(2), Ombudsman Act.

Concluding remarks

Through investigations and the resolution of complaints, the institution of the Ombudsman in Namibia promotes and protects human rights, and fair and effective public administration; it combats corrupt practices, and protects the environment and natural resources. In order to effectively fulfil these functions, the Ombudsman has to be impartial, fair, and independent. Independence is considered to be one of the most fundamental and indispensable values for the institution to function successfully. The necessary foundations for such independence have been built by a bundle of legal provisions within the constitutional and statutory regime. Thus, the Namibian Constitution as well as the Ombudsman Act can be regarded as suitable tools for safeguarding the Ombudsman's independence.

The positioning of the institution within the constitutional and statutory framework, the method of the Ombudsman's appointment and removal from the office, accountability provisions, funding and personnel issues, enforcement mechanisms, and the investigation process: all these elements have to be designed in a manner that promote the institution's independence.

It has been shown that the existing legal provisions provide a solid legal basis for the Ombudsman to perform his/her mission, independent from any other institution or authority. The Ombudsman is able to take decisions in an autonomous manner without fear of reprisal by the subjects under review. In summary, therefore, it can be stated that, at least theoretically, independence is firmly embedded in the existing legal regime.

The second stage, however, is to put these underlying legal provisions into practice. In this regard, the annual reports issued by the Office of the Ombudsman serve as vital evidence that the institution can indeed act independently. The reports not only show that complaints are directed against a broad range of institutions, including the highest in government, local authorities, parastatals and others; they also clearly speak out on specific complaints as well as on difficulties in the execution of the Office's duties, which are caused principally by bad governance in the offending institutions.

In all, it can be concluded that, in being independent, the institution of the Ombudsman in Namibia significantly contributes towards the protection of the rights of the individual, the promotion of the rule of law, and advancement of democracy and good governance.

The independence of the legal profession in Namibia

Clive L Kavendjii and Nico Horn

Introduction

The legal profession has always and will predictably continue to play a pivotal role in Namibia's social development. Indeed, the observance of the rule of law in a democratic country like Namibia will be mere rhetoric if its judges and legal practitioners are not assured of independence of mind and action. The independence of the legal profession is not accorded to lawyers for their own benefit or to shield them from being held accountable in the performance of their duties: the purpose of independence is to protect the people by affording them a platform from which to pursue, ultimately exercise, and protect their constitutional rights.

The *independence* of the legal fraternity means that they are accorded protection similar to that of the judiciary, in order to enable them to render their services to clients without fear, favour, or undue interference by the state. This paper sets out to explore whether the legal fraternity in Namibia is independent. Because the independence of the legal profession is intertwined with the concept of *judicial* independence, the paper will also examine the extent to which the legal profession can enhance this very important branch of government. The paper concludes by looking at the challenges facing the legal profession, and makes recommendations to address these challenges.

Is there a basis for the independence of the legal profession?

We will review the current legislative framework relating to the theme of this paper.

The Namibian Constitution

Whilst the independence of the judiciary in Namibia is guaranteed by the Constitution,¹ the position of the legal fraternity is not that clear. However, it is submitted that, implicit in the protection of an independent judiciary, is also the protection of an independent legal profession. It is inconceivable that the

1 Article 78(2) of the Constitution states that –
[t]he Courts shall be independent and subject only to this Constitution and the law.

The independence of the legal profession in Namibia

Constitution would not recognise an independent legal profession, since it is a sine qua non for an independent judiciary.

It is further submitted that the protection given to courts in terms of Article 78(3)² is by implication also extended to the legal profession. This is based on the fact that, in order for the rule of law to have meaning, the legal profession should enjoy the same protection accorded to the judiciary.

Legislation

The Legal Practitioners Act, 1995 (No. 15 of 1995) regulates all matters relating to the legal profession and legal practitioners in Namibia. Inter alia, the Act deals with –

- admission and enrolment
- privileges, restrictions and offences in connection with practice
- discipline and removal from practice
- restoration to the roll, and the legal practitioner's fidelity fund.

The Act does not deal with the duties of legal practitioners or the extent to which they are independent from external pressures in the execution of their mandate.

The Legal Practitioners Act and the race issue

The Legal Practitioners Act has, however, restricted the independence of the legal profession. Before independence, the profession was responsible for the practical training of aspirant legal practitioners.

Namibia had a divided profession, comprising attorneys and advocates. Advocates were seen as specialists in their various fields. Therefore, the public could not go directly to advocates, but had to be referred by an attorney. Advocates could appear in both the Lower Courts (magistrates' courts) and the High Court, or Supreme Court of South West Africa, as it was then known.

Since the profession was divided into attorneys and advocates, there were also two different methods of entering the profession. For two years, candidate attorneys with the required degree in law were attached as articled clerks to a

2 See Article 78(3):

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.

The independence of the legal profession in Namibia

principal who had to be a practising attorney. At the successful completion of their articles, the candidates sat for an admissions examination, set and moderated by the Law Society. A candidate could not apply for admittance by the Supreme Court of South West Africa without passing this examination. While a four-year B Proc degree for a South African university was the academic requirement for an attorney, an aspirant advocate needed a five-year LLB degree from a South African university.

During the colonial era, black lawyers (more often, aspiring black lawyers) complained that the system worked against them. A case in point was a complaint that Ephraim Katatu Kasutu submitted to the Black Lawyers Association (BLA) in South Africa, stating that he had repeatedly failed the Board examination without due cause. The BLA took the matter up with the Law Society, and Mr Kasutu was admitted.³

The fear of black lawyers was not without foundation. The apartheid policies of the South African government, the financial disadvantages of the black communities as a result of those policies, and the total absence of training facilities for aspiring black lawyers kept the profession almost exclusively white. The case of Mr Kasutu is a clear indication that the black community was highly suspicious of the legal fraternity and its ability to level the playing fields after independence.

When the SWAPO Party of Namibia won the elections and became the first government of an independent Namibia, it was committed to transforming the legal system. SWAPO initially wanted to replace the Roman-Dutch common law, inherited from the South African colonial rule, with an indigenous legal system. However, when the realities of such a radical change became clear, the Constituent Assembly opted to maintain the Roman-Dutch common law and the statutory laws enacted during the colonial period. The whole legal system valid on the day before independence became the legal system of an independent Namibia.⁴

The government were faced with another dilemma as well. The law graduates who had received their legal education in foreign jurisdictions in exile did not qualify to enter the legal profession in Namibia – whether as lawyers or attorneys. Ten years later, an online government publication remembered the first clash between government and the legal profession:⁵

3 BLA/Black Lawyers Association. 2008. *The history of BLA*, http://www.bla.org.za/asp/content_sub.asp?id=4&sid=3; last accessed 2 October 2008.

4 Article 140, Namibian Constitution.

5 GRN/Government of the Republic of Namibia. 2000. *A decade of peace*. Windhoek: Ministry of Justice & Office of the Attorney-General. Available at <http://www.op.gov.na/>

The independence of the legal profession in Namibia

Since the return of Namibian citizens in 1990 who had left Namibia during the colonial period, the ministry and the legal profession had been inundated with inquiries about the possible recognition of the foreign legal qualifications of returnees. In order to address this issue, it was decided that the admission of legal practitioners to the bar and the attorney profession should be dealt with at the same time. These efforts culminated in the passing by the [sic] parliament of [the] Attorneys Amendment Act, 1991 (Act 17 of 1991) and the Admission of Advocates Amendment Act, 1991 (Act 19 of 1991). These amendments were carried out amid fierce resistance from certain circles of the old establishment that viewed the integration of Namibians who had obtained their legal qualifications in countries other than South Africa as a “threat to the rule of law[”]. Given this resistance from the private sector, those who were integrated into the profession experienced considerable discrimination in the initial period.

The amendments were not too drastic. The profession was open for aspiring law students who had completed a LLB degree in a Commonwealth or other common law jurisdiction, but not for graduates from civil law jurisdictions.⁶ Consequently, “the threat to the rule of law” was soon forgotten.

The real changes to the profession came with the Legal Practitioners Act. The Act merged the two professions and took away the Law Society’s control over the practical training of lawyers and over Board examinations. These changes took away some accepted powers and functions of the profession. Both advocates and lawyers took exception and fiercely resisted the new Act. Petitions were even sent to the Human Rights Commission in Geneva, as well as to the International Bar Association in London.⁷

The Law Society of Namibia and the Society of Advocates issued a joint response to government. The document was harsh and insensitive. It accused the government of being as negative towards an independent profession as the previous government had been.⁸ They also warned that the rule of law was being undermined in limiting the independence of the profession, —⁹

Decade_peace/moj.htm; last accessed 2 October 2008.

6 It is ironic that the government opted to emphasise the name or title of the degree rather than the actual level of degree. The United Kingdom’s LLB is a case in point. While it is only a three-year degree, it received the same recognition as the then five-year LLB degree from a South African university, although the LLB was already a second degree. South African students could even skip the LLM and do a LLD or PhD immediately after an LLB. Yet, the three-year law degree from South Africa, the B Iuris was not seen as an adequate qualification to enter the profession. The inconsistency is still in place.

7 GRN (2000).

8 “Joint response by the Law Society and the Society of Advocates to government” (Maritz & Theunissen 1995; cited by Shikongo, E. 2003. “Annual Report of the President of the Law Society of Namibia”. Windhoek: Law Society of Namibia. Reprinted in Steinmann, R & Cohrsen, C (eds). 2006. *The Law Society of Namibia: 85th Anniversary Commemorative Book*. Windhoek. Law Society of Namibia, p 160ff.

9 (ibid.:161).

The independence of the legal profession in Namibia

... which in turn could result in constitutional reforms and the eventual instalment of a benign dictator.

The joint statement explained the tension between government and the profession by stating that, —¹⁰

... as is the case in any third world countries [sic], the legal profession is viewed as partisan and anti-government and its opinion untrustworthy.

For government, the fusion of the profession was the only way to guarantee black legal practitioners equal opportunities. The Society of Advocates was white and elitist. By the merging of the profession, new black practitioners no longer had to wait for briefs from white law firms. An admitted legal practitioner can now appear in both the Lower Courts and the High Court.

The Attorney-General, the usually moderate Adv. Vekuui Rukoro, reacted in Parliament with an equally hard response:¹¹

Coming, as it does[,] from a group of people who kept muted silence throughout the occupation of our country by the former colonial regime, particularly as regards the atrocities committed by that government on our people, the statements are too laughable for words. I will not bother to say anything more about them.

The comment of the Attorney-General is clear: how can one take this harsh response of an organisation that is almost exclusively white seriously in the light of their support of the previous colonial regime?¹² To add insult to injury, the Attorney-General thanked the Namibian Law Association (NLA), an association representing the interest of blacks in the profession, for their contribution and positive attitude.¹³

There is merit in the Attorney-General's reply to the joint response, especially if one takes note of its insensitive wording. Even the phrase "third world countries"

10 (ibid.).

11 "Address to the National Assembly" (Rukoro 1995; cited in ibid.:161).

12 Steinmann and Cöhrssen (2006:13f) state that the Society of Advocates took a strong position against injustices committed under so-called anti-terrorism legislation during the liberation struggle. However, the advocates who actively supported the struggle for independence were seen as mavericks and were isolated in the white community. See also Durbach, A. 1999. *Uppington*. Cape Town: David Philip Publishers, 19ff; Du Preez, M. 2003. *Pale native. Memories of a renegade reporter*. Cape Town: Zebra Press, p 121ff.

13 Rukoro (1995; cited in Steinmann & Cöhrssen 2006:161).

The independence of the legal profession in Namibia

was regarded as derogatory in the developing world.¹⁴ But to blame the tension between government and the profession on a third-world mentality is not only insensitive: it also sounds like the typical racist opposition to majority rule in southern Africa. This is not to say that the societies were racist, but it does reflect their ignorance of the sensitivities of the black community.

However, it is unfortunate that the racial divisions of the past made a fruitful discussion on the independence of the legal profession impossible. Instead of discussing meaningful ways to address the inequalities of the past without limiting the independence of the profession, the different roles of the parties during the liberation struggle became the invisible pretext of the debate.

The Society of Advocates resisted the funeral of their organisation. While it no longer had government approval or a legal foundation, it remained active as a voluntary organisation. A transitional clause in the Legal Practitioners Act allows practitioners to practice without a Fidelity Fund certificate. Consequently, legal practitioners can still practice de facto as advocates, and rely on attorneys to refer clients to them whenever their expert knowledge is needed.¹⁵

The Society of Advocates also kept their pupillage programme and an admittance examination in place. It remains a question if the provisions of section 67(2–4) of the Legal Practitioners Act allows only members of the Society of Advocates to practice without a Fidelity Fund certificate. Nothing in the Act indicates that legal practitioners need to be affiliated with the Society of Advocates in order to practice without such a certificate. However, the Law Society seems to support the view that a legal practitioner who operates without a Fidelity Fund certificate should belong to the Society of Advocates to ensure self-regulation.

The Legal Practitioners Act gave the mandate to provide the practical training for legal practitioners to the University of Namibia, while the curriculum of such training is determined by a new statutory body, the Board for Legal Education, who also moderate the Legal Practitioners Qualifying Examination. The candidate attorneys are still obliged to do a period of attachment under a legal practitioner, but the legal practitioner's contribution to the admittance process is limited to approval of the candidate attorney's diary.

14 Scholars from the South prefer to speak of the '2/3 world', referring to the fact that the majority of the world's population lives in the South.

15 The Fidelity Fund certificate safeguards clients against possible abuse of their funds in a lawyer's trust account. Since advocates only see clients referred to them by lawyers, they do not handle trust money.

Racial issues after 1995

Race remained a contentious issue after 1995. In March 1998, Attorney-General Rukoro was accused by the President of the NLA, Dirk Conradie, of contributing to the status quo by briefing only white lawyers to handle commercial cases.¹⁶

Attorney-General Rukoro sympathised with the predicament of black lawyers, but stated in defence of his office that black lawyers had admitted to not being competent enough to handle complex cases. He opined that the government could not take the financial risk of briefing inexperienced lawyers.¹⁷

In 2002, there were only two elected black councillors on the Law Society Council. In addition, the Society did not have a black President despite the fact that Elias Shikongo served two consecutive terms as its Vice-President.

In July 2002, the Law Society, after long deliberations with the NLA, accepted a proposal that the Legal Practitioners Act and the rules of the Law Society be amended in order to allow for equal representation on the Council.¹⁸

Although the Law Society became more representative, and Elias Shikongo served two consecutive terms as its President in 2003 and 2004, the proposed amendments to the Act only came into force with the promulgation on 1 November 2005 of the Legal Practitioners Second Amendment Act, 2002 (No. 22 of 2002), during Eliza Angula's presidency. Government was possibly suspicious of the motives of the Law Society in the light of the fact that black membership of the Society would soon overtake white membership. By passing the Amendment after white members have lost their majority, the amendment will protect the white minority rather than opening the offices of power to the new black practitioners.

Although the amendment did not solve all the problems of black legal practitioners, and did not remove all the animosity against the Law Society, it made the Society more representative, and consequently gave it more space to operate as an independent institution.

16 *Namibia News Online*, 8 March 1998; Centre for African Studies, University of Pennsylvania. Available at <http://www.africa.upenn.edu/Newsletters/nano3.html>; last accessed 29 September 2008.

17 (ibid.).

18 Steinmann & Cöhrssen (2006:148).

A joint challenge

In 2002, the Legal Practitioners Act was amended by the Legal Practitioners Amendment Act. This made it possible for public prosecutors, legal aid practitioners and magistrates with more than five years' experience, and the required academic qualification, to enter the profession at the recommendation of the Minister of Justice (magistrates) or the Attorney-General (prosecutors). The Minister or Attorney-General issue a certificate that would exempt them from attending the prescribed practical training programme at the University of Namibia or writing the legal practitioners' qualifying examination.¹⁹

The amendment was challenged in court by both the Law Society and the NLA, mainly on the basis that the Act had the limited objective to allow a specific candidate to qualify for appointment as Prosecutor-General.²⁰

The High Court ruled against the Law Society and the NLA, finding that there was no reason to believe that the Act would affect the independence of the Office of the Prosecutor-General, since prosecutors would still work under the direction and guidance of the Prosecutor-General. Consequently, the possibility is slim that local prosecutors would be reluctant to oppose the Attorney-General since it may influence him/her not to issue the prosecutor with an exemption certificate.

The Law Society and the NLA did not raise the further decline of their own authority in the process of admitting applicants to the profession. A great number of former prosecutors, legal aid lawyers and magistrates can now enter the profession without writing the qualifying exams, and without the profession having any say in their admittance.

Given the oppressive context of the colonial era, one cannot fault the actions of government to set structures in motion to open up the profession to previously

19 *Ekandjo-Imalwa v The Law Society of Namibia and Another; The Law Society of Namibia and Another v The Attorney-General of the Republic of Namibia and Others* 2003 NR 123 (HC).

20 See the summary by Justice Du Plessis:
The Law Society and the Law Association launched this application under case No (P) A55/2003 wherein they seek to have the Attorney-General's decision to issue the certificate reviewed and set aside. They also contend that s 5(1)(c A)(ii) is inconsistent with art 88(2) of the Namibian Constitution and seek a declaratory order to that effect. The Law Society and the Law Association further seek an order declaring s 18(1)(b) of the Act (which D was inserted into the Act by the Amendment Act) to be inconsistent with art 88(2) of the Constitution (I shall refer to this application as "the review application").

disadvantaged groups. The fusion of the profession was a necessary step, as was the decision to take the practical examination of aspirant legal practitioners from the then almost exclusively white Law Society and give it to two statutory bodies, the Law Faculty of the University of Namibia and the Board for Legal Education.

However, the Namibian legal scene has changed dramatically over the last six years. With the amendment of the Act, the leadership of the Law Society is no longer in white hands, and the black lawyers are no longer a small minority amongst the membership. We shall return to this issue when we discuss legal education.

International law

The concept of the *independence* of the legal profession is recognised in a variety of international instruments. The preamble of the UN Basic Principles on the Role of Lawyers bears testimony to this.²¹ It is also worth noting that Principle 22 places an obligation on governments to specifically protect the attorney–client privilege.²² Even though these basic principles are not legally binding, they nonetheless contain a series of basic principles and rights that are based on human rights standards enshrined in other international instruments like the UN International Covenant on Civil and Political Rights, and the African (Banjul) Charter on Human and People’s Rights.²³

The recognition of the right to a lawyer and/or legal representation in these international instruments is a clear manifestation that an independent legal profession is of fundamental importance to the functioning of a democratic state founded on the rule of law.

21 See Preamble: The independence of lawyers:
Adequate protection of the human rights and fundamental freedoms to which all are entitled ... requires that all persons have effective access to legal services provided by an independent legal profession.

See also Principles 7 and 8 of the UN Basic Principles document.

22 The Principle provides as follows:
Government shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

23 Article 7 of the African Charter provides as follows:
Every individual shall have the right to have his cause heard. This comprises (c) the right to defense, including the right to be defended by counsel of his choice.

The importance of the independence of the legal profession

Namibia, as a democratic state, is founded on the principle of the rule of law. According to Dicey, this concept is based on, inter alia, the following:²⁴

- (a) *The absence of arbitrary power – [N]o man is above the law and no man is punishable except for a distinct breach of the law established in the ordinary manner before ordinary courts.*
- (b) *Equality before the law – [E]very man is subject to the ordinary law and the jurisdiction of the ordinary courts.*
- (c) *Judge-made constitutions – [T]he general principles of the British Constitution[,] particularly those governing the liberties of the individual, are the result of judicial decisions confirming the common law.*

It is submitted, therefore, that the exercise of governmental powers needs to be conditioned by law, and furthermore, that citizens (persons) should not be subjected to the arbitrary will of the ruler.

It is of cardinal importance that the legal profession is free from interference in the execution of their duties: only then will the rule of law be guaranteed. David K Malcolm AC agrees that the maintenance of an independent judiciary and legal profession is an integral part of ensuring the state adheres to the principles of the rule of law.²⁵ He argues as follows:²⁶

If the community is to have faith in our legal system, not only must they be assured that our judiciary is free from bias and unafraid to make unpopular decisions in the face of powerful interests, but we must also have lawyers and related members of the legal profession who are willing to defend the rights of people they may morally abhor, and advocate unpopular causes without fear or favour where this is consistent with the Rule of Law. By adhering to the Rule of Law, in the face of wealthy and powerful interests or popular opinion fuelled by misinformation or paranoia, both lawyers and Judges are a necessary resource in our community for protecting the rights of the minority groups and individual citizens.

24 Dicey, AV. 1885. *Introduction to the study of law of the constitution*. Available at http://www.constitution.org/cmt/avd/law_con.htm; last accessed 30 October 2008. See also citation in Carpenter, G. 1987. *Introduction to South African Constitutional Law*. Durban: Butterworths, p 85.

25 Malcolm, DK. 2005. "Independence of the legal profession and judiciary". Unpublished paper presented to the Law Society of Western Australia; available at <http://www.supremecourt.wa.gov.au/publications/pdf/TheChurchService09052005.pdf>; last accessed 29 September 2008.

26 (ibid.).

The independence of the legal profession in Namibia

In upholding the rule of law, a lawyer has a duty to fearlessly uphold the interests of a client without any regard to any unpleasant consequences to him-/herself or any other person. It is submitted that this duty can be effectively executed if there is no hindrance or interference from the government and its agencies. Similarly, if a lawyer cannot act freely for a client without fear of harassment or recrimination, then the rule of law will inevitably be tainted. In Singapore, for instance, lawyers representing clients with unpopular causes risk drastic repercussions ranging from criminal prosecutions, civil suits, economic ruination, disbarment, and loss of entitlement to run for public office.²⁷

A lawyer has a further duty to speak on behalf of a client, and say what the latter could properly say if s/he possessed the required skill and knowledge.²⁸ It is an indubitable fact that a large section of our society is illiterate and poor; thus, this duty is of paramount importance.

The role of the legal profession in promoting the independence of the judiciary

The concept of *judicial* independence denotes that judges be free from any interference in exercising their judicial powers. It is submitted that the erosion of the independence of judges will ultimately have a monumental impact on the independence of the legal profession. Therefore, it is in the interest of the independence of the legal profession in Namibia to jealously guard against such erosion, because failure to do so will lead to the entire legal system's collapse.

The former Chief Justice of Zimbabwe, A Gubbay, noted as follows:²⁹

Even though the independence of the judiciary is enshrined by our and other Constitutions, it is up to the politicians to respect and honour this independence and to foster respect for this independence through their actions. To disregard and undermine this independence would lead to the destabilisation of the entire region.

27 See for example Ravi, M, Chia Ti Lik & LF Violet Netto. 2007. *Lawyers petition Law Society of Singapore*. Available at <http://theonlinecitizen.com/2007/12/lawyers-petition-law-society-of-singapore/>; last accessed 3 November 2008.

28 Palmer, R & D Maquoid-Mason. 2000. *Basic trial advocacy skills*. Durban: Butterworths, p 11.

29 Gubbay, Justice A. 2002. Unpublished paper delivered by the former Chief Justice of Zimbabwe, at the Inaugural World Bar Conference - Edinburgh on 28 June 2002. Johannesburg: *De Rebus*, August 2002; published at <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu>; last accessed 28 October 2008.

The independence of the legal profession in Namibia

It is the duty of the legal profession (lawyers) to adequately and competently represent their clients in the courtroom. The quality of the decision to be given by the court is largely determined by facts and arguments presented by the lawyer. Tom Ojienda, Chairman of the Law Society of Kenya, opines in this regard that a judge could lose his/her impartiality when the facts and points of law are unevenly presented.³⁰ The above point is illustrated by the Judge-President of the High Court of Namibia in the following:³¹

It is very important therefore that practitioners have a very sound knowledge of both substantive and procedural law. Many a case flounders, regrettably with great cost to the paying client, because practitioners at the early stage do not apply themselves carefully to the matter at hand.

Ojienda further believes that lawyers have a lot to gain in safeguarding an independent judiciary by way of maintaining an independent legal profession. In the first place, lawyers represent the pool that provides the bulk of the people who are eventually appointed as judges; secondly, a lawyer who desires independence for his/her profession is unlikely to bend towards undermining judicial independence in his/her conduct with the judiciary.³² In the final analysis, Ojienda argues that advocating for judicial independence is not only beneficial to judges; it also creates an enabling environment for legal practice by lawyers.³³

An independent legal profession has also a duty to speak out against threats and intimidation aimed at the judiciary. In the southern African sub-region, a total onslaught against the judiciary is being witnessed. In South Africa³⁴ and

30 Ojienda, T. 2006. "The role of lawyers and the civil society in safeguarding the independence of the judiciary in Africa". Konrad Adenauer Stiftung. *Summary Report of the Stakeholders' Conference on the Independence of the Judiciary in Sub-Saharan Africa, held in Nanyuki, Kenya, October 3-7, 2006*. Available at www.kas.de/proj/home/events/104/1/year-2006/month-vera; last accessed 26 September 2008.

31 Damaseb, PT. 2005. "High Court matters – Effective case flow". Unpublished paper presented at the SADC Conference and Annual General Meeting in Windhoek, June 2005; Damaseb was the Judge-President of the High Court at the time.

32 (ibid.).

33 (ibid.).

34 This was a result of the corruption charges levelled against the President of the African National Congress. Disconcerting in this case is the fact a judge of the High Court, Justice Hlope 'allegedly' tried to influence his brothers in the Constitutional Court to rule in favour of the ANC President. Also, unwarranted statements in the case to the effect that the judiciary was counter-revolutionary have been uttered by those in the ANC itself and those in the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP).

The independence of the legal profession in Namibia

Zimbabwe³⁵, the judiciary has come under unwarranted and unjustified attack. In the case of *S v Heita*³⁶, wherein Judge Brian O'Linn was asked to recuse himself from hearing the case, he said the following:³⁷

Can a judge effectively perform his onerous task if people are allowed to continue undeterred to scandalise the judges – to misrepresent, to agitate, to incite, to demand, to dictate and even to threaten from public platforms, from the bush and from streets, through the media and through the structures of their parties, trade unions and churches?

Surely the answer is a resounding “No”, and to this end it is submitted that the legal profession has an obligation to come to the defence of the judiciary in all instances where its independence is under threat.

It is commendable that the Bar Council of the Society of Advocates of Namibia, in the case of *Ngeve Raphael Sikunda v The Republic of Namibia*,³⁸ came to the judiciary's defence – despite the fact that doing so was perceived by the judge hearing the case as an attack on the independence of the judiciary. In this matter, the judge failed to commit the Minister of Home Affairs for contempt of court after the Minister's repeated failure to adhere to the court directive to release the applicant from detention. The Bar Council was subsequently charged with contempt of court, after it issued a statement saying the attitude of the judge was in direct contravention of the rule of law.

In a media release of 29 November 2000, the Society of Advocates stated the following:³⁹

The Constitution of Namibia is premised upon the rule of law and upon the separation of powers. The ruling by the Judge-President is tantamount to condoning disobedience of a court order and to exempt Government officials from complying with the law. This negates the entire notion of the rule of law. It presupposes that everyone is equal before the law and that the laws of the country are to be obeyed by all, even by the highest authorities.

35 Zimbabwe possibly represents the worst-case scenario when it comes to the threats posed to the independence of the judiciary and the legal profession. Many members of the legal profession have been denied access to see their clients who were victims of political violence, and members of the judiciary viewed as not being sympathetic to the government were replaced by those by those loyal to it.

36 1992 NR 402 (HC).

37 (ibid.:414).

38 2001 NR 181 (HC).

39 Society of Advocates. 2000. Media release, 29 November 2000. Windhoek: Society of Advocates.

The independence of the legal profession in Namibia

In Namibia, the Law Society of Namibia,⁴⁰ being the umbrella body of an organised and independent legal profession, has been vocal in speaking out against what has been perceived as attacks on the independence of the judiciary and the legal profession, particularly in Zimbabwe. In a media release and following the arrest and detention of two lawyers outside the High Court of Zimbabwe, the Law Society reminded the Zimbabwean government of its obligations under international law, in particular the Declaration on Human Rights Defenders adopted by the UN General Assembly in 1998.⁴¹

Furthermore, the Law Society condemned the xenophobic attacks that took place in South Africa:⁴²

Our Southern African democracies have their foundations in democratic values such as a climate of legality, the rule of law and fundamental human rights, including freedom from unfair discrimination. The principle of non-discrimination is deeply embedded in the values of the new democratic societies that we sought to create by rejecting the injustice and inequality of apartheid.

In view of the above, the authors are of the opinion that, due to the judiciary being the weakest branch of government, it is incumbent on the legal fraternity to vigorously defend the independence of that branch.

In this light, the former Chief Justice of Zimbabwe, A Gubbay, praised the Law Society of Zimbabwe at a conference in Edinburgh.⁴³

[T]hroughout the regrettable saga[,] the council of the Law Society had proved to be the judiciary's staunchest and unwavering ally. In so recognising its obligation to promote and protect the rule of law, it put itself in the front line of attack by the government and its controlled media.

40 The Law Society is a statutory body established in terms of section 40 of the Legal Practitioners Act. It is tasked with maintaining and enhancing the standards of conduct and integrity of all members of the legal profession. It encourages and promotes efficiency and responsibility in the legal profession. It defines and enforces correct and uniform practice, and maintains discipline among members of the legal profession.

41 Article 11 of this Declaration provides as follows:
Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

42 *Namibia Economist*, 30 May 2008; "LSN condemns SA xenophobic attacks". Available at <http://www.google.com.na/search?hl=en&q=Law+society+of+Namibia+condemns+xenophobia&btnG=Google+Search>; last accessed 30 October 2008.

43 *De Rebus*, August 2002

The independence of the legal profession in Namibia

The fact that lawyers ought to play a prominent role in protecting the independence of the judiciary is recognised by the judiciary itself. At the SADC Lawyers Association Conference held in Windhoek in June 2005, Chief Justice Julian Nganunu of Botswana said that the existence of a strong, professional and competent legal profession in any country made a big contribution to the efficient delivery of judicial service. He went on to say that lawyers were probably the first to know when a judge was corrupt. Finally, he appealed to lawyers to help sustain judicial independence and to guard against corruption in the courts.⁴⁴

It should also be noted that the Law Society of Namibia has engaged the judiciary, and continues to do so in matters likely to impact on the independence of the legal profession.

A case in point is the issue of outstanding judgments by judges of the High Court of Namibia. A number of High Court judges failed to deliver judgments timeously; in fact, some judgments had been outstanding for more than two years. This situation was likely to derail the administration of justice and compromise the rule of law, because justice delayed is justice denied.

In the case of *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*,⁴⁵ the Court addressed the issue of delayed judgments as follows:

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. First, 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 cloak 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 delay 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 legal aphorism, namely that “justice delayed is justice denied” will become a mere platitude.

⁴⁴ *De Rebus*, August 2005. “Botswana Chief Justice pleads for judicial independence”. Available at <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu>; last accessed 30 October 2008.

⁴⁵ 2005 (3) SA 238 (SCA) at p 260H to 262 A.

The independence of the legal profession in Namibia

After numerous meetings with the Judge-President, the Law Society reported that there had been some success: a time schedule had been provided, within which the High Court judges in question were expected to deliver their outstanding judgments.⁴⁶

It is submitted that the role played by the Law Society on behalf of the legal profession in this matter contributed to the safeguarding of judicial independence and the rule of law.

Challenges and/or threats facing the legal profession in Namibia

As a profession, legal practitioners do not operate in a vacuum because we are part and parcel of society. It is every lawyer's call, therefore, to engage in activities aimed at the upliftment of the standards of our communities. Namibia has a history of imbalances created by the former South African apartheid regime Africa. It is our duty to try our outmost to help create a society that cherishes a respect for human rights and the rule of law.

Although the legal profession in Namibia is independent, it is submitted that there are a number of challenges that confront it. It is the moral and ethical duty of this profession to address and find lasting solutions to these challenges. I will now briefly discuss some of the more pertinent issues that the organised legal profession should tackle.

Pro bono work

The legacy of apartheid left the majority of Namibians illiterate, poor and in squalid conditions. In this context, the celebrated idea of equality before the law remains a pipe dream.

The legal profession therefore has a social and public responsibility to provide their services to the indigent and marginalised members of Namibian society. At present, the government, through its Directorate of Legal Aid, assist the indigent. However, albeit commendable, the Directorate's assistance is largely in criminal matters – to the detriment of other areas of law. Similarly, the Legal Assistance Centre, a non-profit NGO, has a specific mandate and cannot come to the aid of every person who needs legal help.

46 Circular of the Law Society to its members, 24 April 2008.

Thus, the authors propose that the Law Society make it obligatory for every law firm in the country to provide 30 hours of pro bono services a year.⁴⁷ This should not be seen as a panacea for all the problems faced by impoverished communities, but at least it is a way of making the law accessible to everyone.

Legal education

There is a strong feeling amongst legal practitioners that the Justice Training Centre at the University of Namibia (UNAM) does not adequately prepare candidate legal practitioners for entry into the legal profession. In fact, it is anticipated that the Centre's entire curriculum is to be revamped. If the training given is inadequate, it will without a doubt adversely affect the independence of the legal profession. As stated earlier, the motivation for UNAM's current programme is hardly relevant now, close to 20 years after independence. There is no longer a threat that a small white elite will be able to keep young black candidate legal practitioners out of the profession. In this regard, it is proposed that the Law Society consider and promote the following:

- **A culture of mentorship in the legal profession:** This should be cultivated, even if it means a return to the two-year full-time articles option, rather than a shorter period. This will undoubtedly have financial implications for settled law firms. And the Law Society will have to come up with a plan to accommodate candidates who cannot find a law firm willing to employ him/her.
- **Closer monitoring of the training of candidate legal practitioners at law firms and the Justice Training Centre:** At present, a principal's only role is to sign the diary of a candidate attached to his/her office once a week. While UNAM and the Board for Legal Education have taken over the qualifying exams and the determination of the curriculum, principals – and, consequently, the profession – have become passive role players of whom very little is expected.
- **A programme for principals who train candidate legal practitioners:** This will ensure that principals impart the necessary skills to candidates. A system could be considered to certify that the candidate has indeed received adequate training. One way forward could be to make a practical evaluation by the principal a compulsory component for all candidate legal practitioners. This should go beyond the principal's current signing of the diary and submission of an affidavit to the court.

⁴⁷ Rule 21 of the Cape Law Society requires its members to provide 20 hours of pro bono services a year.

- **Greater synergy between legal practitioners and practitioners practising as advocates under the Society of Advocates in respect of training:** Presently, a legal practitioner who has completed the Justice Training Centre programme and has passed the Legal Practitioners' Qualifying Examination, and intends to join the Society of Advocates, still needs to complete a pupillage and write an entrance examination. All of these requirements should be synergised and unnecessary duplication removed.
- **Periodic assessments of candidates throughout the period of articles:** These should be in relation not only to his/her work at the Justice Training Centre, but also to his/her practical work as a candidate legal practitioner attached to a law firm.
- **Adequate understanding of all aspects of law:** For those who enter the profession in terms of the amended Legal Practitioners Act (prosecutors, magistrates and legal aid lawyers), it is proposed that the Law Society devise a special programme to ensure that these practitioners have a sufficient grasp of other areas of law apart from other than criminal law, and
- **Close relationship with UNAM:** The Law Society should develop a close working relationship with the Faculty of Law at UNAM, since this will enable the Law Society to contribute on matters relating to the curriculum.

Transformation

The legacy of apartheid has created an imbalance that, still today, continues to impact negatively on previously disadvantaged members of the legal profession. Despite the changes brought about by the fusion of the profession and the amendment to the Legal Practitioners Act, there is still a perception amongst black practitioners that they do not get a fair deal.

Many black legal practitioners are confined to providing legal services only in the criminal field, whilst their white counterparts are engaged in providing services in lucrative areas of the law such as conveyancing.

Moreover, the recent rise in disciplinary cases against legal practitioners has highlighted the fact that all the racial issues have not been settled.⁴⁸ Some black practitioners recently raised their concern with the local *Insight Magazine* that

⁴⁸ Anonymous. 2008. "Disciplinary cases sharpen racial divide". *Insight Magazine*, October:25f.

white practitioners involved in disciplinary cases got away lightly, compared with their black counterparts.

According to the *Insight* article, there is still a large group of black legal practitioners who feel that they are marginalised and do not get the same opportunities as their white colleagues. On the other side of the spectrum, liberals who have made it as practitioners see these complaints as an ‘entitlement’ mentality.⁴⁹

The Law Society has a moral – if not a legal – duty to ensure that the playing field is levelled to the satisfaction of all its members. A more proactive role by the Society in engaging financial institutions to channel work equally to black and white lawyers will go a long way towards bridging the gap between different groups.

Conclusion

The independence of the legal fraternity is fundamental to the practice of law. Moreover, if the legal fraternity is not independent, then the whole idea of the rule of law will remain a pipe dream in Namibia. The existence of an independent judiciary depends on an independent and organised legal profession.

There are still monumental challenges facing the legal profession, and these ought to be addressed as a matter of urgency.

49 (ibid.).

Legal education and academic freedom in Namibia

Isabella Skeffers

Introduction

Academic freedom and education are concepts that are increasingly interlinked and finding wider significance. In Namibia, academic freedom is afforded the status of a fundamental freedom by the Namibian Constitution in terms of Article 21(1)(b), which states the following:

All persons shall have the right to:

(a) ...

(b) *freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;*

However, the question is what scope of application academic freedom actually enjoys in Namibia. As yet, no petition has reached any Namibian court regarding the interpretation of academic freedom in the country. If such a petition were ever to reach the Namibian houses of justice, it would be interesting to see how a bench would deal with the matter. For now, however, one can only speculate on the extent of the concept's application with reference to the structures and legislation which govern academia in the country.

Of particular interest in this paper is how academic freedom relates to legal education in Namibia, the latter being a relatively new concept in the independent state, following the inception of the Law Faculty at the University of Namibia (UNAM) in 1994.

With Namibia already having had its first UNAM law graduate called to the High Court bench, with surely more to follow, this paper ultimately questions whether the legal education system in the country allows for and nurtures a culture of independent and critical thinking and decision-making.

Legal education and academic freedom: A conceptual excursion

Any exposition of the status quo of academic freedom in legal education in Namibia should essentially begin with a consideration of the underpinnings of two principal concepts, *legal education* and *academic freedom*. An overriding consideration in this quest is the important role academic institutions play in

shaping and influencing ideas and information. Therefore, it is essential in a faculty such as law for academic freedom to be guarded at all costs.

Academic freedom is a concept which, in its most modern form, originated in Germany, with Alexander von Humboldt being credited with being the force behind its formulation during the 18th and 19th centuries.¹ In German, the concept is referred to as *Lehrfreiheit* (“freedom to teach”) and *Lernfreiheit* (“freedom to learn”), both of which are now universally recognised and accepted principles. Essentially, the concept of academic freedom from the point of view of an academic institution holds that any of its faculties should be free to teach, devoid of any influence from management, government, donors, or other third parties. These circumstances do not obtain in cases like Ethiopia, where, if scholars –²

... attempt to teach, learn or communicate ideas or facts that are inconvenient to the regime, they will likely find themselves targeted for public vilification, job loss, harassment or even worse.

Interpretation of academic freedom in Namibia

Academic freedom is an obscure concept in Namibia, as it is not certain how it is interpreted or applied by role players. A case in point occurred on 22 August 2007, when a well-known Zimbabwean academic was scheduled to deliver a critical lecture on the state of affairs in his country. At the last minute, UNAM withdrew its consent for the lecture to be held on campus, without giving reasons for its decision. The lecture was jointly organised by UNAM and a local NGO. The latter raised its concern for academic freedom and freedom of expression in the country in general, and at UNAM in particular. It seems the NGO had acted in good faith in organising the lecture with UNAM, and at no stage before the scholar’s arrival had the university expressed any problem with the speaker or the topic, which was “Landscapes of poverty: Daily life and social crisis in Zimbabwe”. In another recent incident, under the same circumstances as the UNAM lecture, the Polytechnic of Namibia withdrew permission for a press conference to be held on its campus, i.e. without previously showing any objection to either the speaker or the topic, but cancelling at the last minute without providing reasons for doing so. The press conference, dealing with the discovery of mass graves in northern Namibia, was organised by a local human rights organisation. The cancellation of the venues for these two critical events

1 See www.wilhelm-von-humboldt.com.

2 For a discussion on the state of academic freedom in Ethiopian tertiary institutions, see Alemayehu, MG. 2008 [online]. *Tyranny in the academy*. Available at http://ethiopolitics.com/news_1/20080204200.html last accessed 3 November 2008.

Legal education and academic freedom in Namibia

gives an indication of the status or importance of academic freedom and freedom of expression in independent academic institutions in Namibia.

Another example of the interpretation that academic freedom is subject to in Namibia concerns a recent debate sparked at UNAM after two staff members were held in violation of university staff policy when they chose to hold political office while simultaneously serving as UNAM employees. In this regard, clause 3.1.13 of the UNAM Staff Terms and Conditions of Employment holds as follows:

A staff member may –

- (a) be a member of a legal political party;*
- (b) attend a legal public political party meeting and take part in the discussion, but may not preside or act as a speaker at such meeting;*
- (c) not conduct his/her political activities in such a way that he/she becomes an embarrassment to the University;*
- (d) not conduct party politics on campus or use bodies, meetings, etc. to promote specific political or [politically] orientated aims;*
- (e) not compile or deliver public addresses to further or prejudice the interests of a political party.*

Furthermore, clause 3.1.17 provides that –³

... council underwrites the principle of academic freedom subject to the provisions of the Act.

The question being asked by some is whether UNAM's policy on political participation interferes with the academic freedom of its staff members. However, it is submitted that the opposite contention could not be truer: if UNAM did *not* have such strong policies against political participation by its staff members, it does not take much imagination to conceive the possible threats to the independence of the institution and, eventually, the potential tarnishing of the academic freedom of staff and students alike. For example, one can only imagine the possible interference by political parties if UNAM staff were allowed to hold political office. After all, the lecture hall is meant for imparting knowledge, not political rallying.

Fundamental freedoms: The applicable constitutional provisions

As stated earlier in the quoted Article 21(1)(b), academic freedom is a constitutionally recognised freedom in Namibia. Notably, academic freedom has

3 The *Act* referred to here is the University of Namibia Act, 1992 (No. 18 of 1992), which makes no mention of academic freedom.

Legal education and academic freedom in Namibia

been included in the Article with freedom of thought, conscience and belief, while the freedom to practice any religion and to manifest such practice is contained as a separate freedom.⁴ The Namibian Constitution is only as old as the country's young democracy, established on independence in 1990. For this reason, many a petition has been brought to the Supreme Court calling for interpretation of some or other constitutional provision. Most often, such requests involve Chapter 3, which deals with fundamental human rights and freedoms.⁵

While a plethora of interpretations of the fundamental freedoms contained in the Constitution has already been offered by the courts to date, the question of academic freedom has not yet been presented to the courts. Therefore, for the time being, an interpretation of *academic freedom*, as contained in the Constitution, has to be considered with the general interpretation the courts have attached to fundamental freedoms.

While Article 21(1) sets out the relevant fundamental freedoms, Article 21(2) provides that –

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 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.

Further, the limitation clause (Article 22) provides that any law aimed at limiting any fundamental right or freedom is required to –

- (a) *be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;*
- (b) *specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.*

4 Article 21(1)(c) contains the freedom to practice any religion. Comparatively, Article 18 in the International Covenant on Civil and Political Rights provides that –
[e]veryone 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.

5 For an overview of Namibia's Constitutional jurisprudence since independence, see Amoo, S. 2008. "The constitutional jurisprudential development in Namibia since 1985". In Horn, N & Bösl, A. *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 39.

Legal education and academic freedom in Namibia

Finally, Article 25(1) lays down concrete guidelines as to the enforcement of fundamental rights and freedoms, in terms whereof –

... 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: ...

Furthermore, Article 25(2) lays down the rights an aggrieved person has to redress an alleged unlawful infringement of or threat to a fundamental right or freedom. The rights of the aggrieved person include access to a competent court, and the Ombudsman.

The legal education system in Namibia

The undergraduate study programme

Legal education in Namibia essentially falls within the ambit of only one tertiary institution: the University of Namibia. The undergraduate course is designed to allow students to obtain two bachelor's degrees⁶ within a period of five years. The LLB and BProc⁷ degrees qualify a graduate for entry to the Legal Practitioners' Training Course, and so become registered as a legal practitioner. As from 2007, the course has been offered part-time as well, which entails a longer study period.

The LLB is based on the theoretical aspects of different areas of the law, with the main focus of the subjects being Namibian law. The problem here is that the teaching material is largely based on South African literature, given the historical and legal ties between the two countries. Furthermore, students are expected to complete one paper and one test per semester for each subject. At the end of each semester, a final examination is written, which determines whether the student has a sufficient grasp of the subject to enable him/her to advance to the next stage of studies.

It is an unfortunate state of affairs that Namibia does not possess a wealth of academics who are dedicated full-time to academia. This is especially the case in the legal field.

6 A three-year Baccalareus Juris (B Juris) degree, followed by a two-year Legum Baccalareus (LLB). The law Faculty also offers a Master's degree (Legum Magister/LLM), which is done through research only.

7 This degree was offered in South Africa prior to the introduction of the LLB; it is not offered at UNAM.

At present, law students at UNAM are taught by full-time academic staff as well as lawyers in full-time practice. There has been some debate as to whether this set-up is in line with UNAM Regulations on academic staff members engaging in full-time professions while in UNAM's employ. This practice undoubtedly also casts a shadow over how dedicated a lecturer would be if his main source of income is from outside the university walls.

Nonetheless, the quality of education received by UNAM's law students is regarded, in SADC at least, as being good; for example, graduates who further their studies in South Africa are able to function well at leading universities there. However, it is submitted that there is definitely room for some improvement and some suggestions to this end will be made later in this paper.

Practical legal training in Namibia

Practical legal training is the second step, in most cases, in one's legal education to become a fully-fledged member of the legal fraternity. In Namibia, such practical training is mostly aimed at would-be legal practitioners. Before the creation of the Justice Training Centre in Namibia and the concomitant system of legal education, candidate legal practitioners were expected to work as an articled clerk for a law firm for a period of two years, after which s/he would write an examination for admission as a legal practitioner.

Training for legal practitioners

The Justice Training Centre

The Justice Training Centre (JTC) is a UNAM Department. According to section 16 of the Legal Practitioners Act, 1995 (No. 15 of 1995), the JTC is required to provide a postgraduate course for the training of candidate legal practitioners. The course is followed by a mandatory qualifying examination under the control of the Board for Legal Education.⁸ After successful completion of the legal practitioners' course and practical training at a law firm (known as an *attachment* to such firm), a candidate legal practitioner may apply to the High Court of Namibia to be admitted to the roll of legal practitioners.

Section 5(1) of the Legal Practitioners Amendment Act, 2002 (No. 10 of 2002) contains a contentious issue for the admittance of legal practitioners, because it allows persons with a certain amount of experience (five years) in government

8 The Board for Legal Education is created by section 8 of the Legal Practitioners Act.

Legal education and academic freedom in Namibia

to be admitted as legal practitioners without having gone through the JTC.⁹ The amendment has been viewed with some suspicion as having been promulgated to allow one particular person to be admitted as a legal practitioner, i.e. that the amendment amounted to ad hominem legislation. In fact, the Law Society of Namibia and the Namibia Law Association challenged the constitutionality of the amendment in *Ekandjo-Imalwa v The Law Society of Namibia and Another* as well as in *The Law Society of Namibia and Another v The Attorney-General of the Republic of Namibia and Others*.¹⁰ In casu, Acting Judge Du Plessis was faced with several questions to decide on, most importantly whether the amendment was in conflict with Article 88(1) of the Constitution, which sets out the requirements of appointment for Prosecutor-General, including the following:

No person shall be eligible for appointment as Prosecutor-General unless such person:

- (a) *possesses legal qualifications that would entitle him or her to practise in all the Courts of Namibia; ...*

After a consideration of all the facts and arguments before it, the court decided that the amendment did in fact pass the constitutional test, and that it was not ad hominem legislation because the amendment had been introduced into Parliament before new candidates had been considered for the Prosecutor-General's post (which requires the candidate to be an admitted legal practitioner).

9 Section 5(1) of the Amendment Act provides as follows:

[A] person shall be duly qualified for the purposes of s 4(1) if – ...

(cA) *he or she holds a degree in law from the University of Namibia or a degree or equivalent qualification in law from a university or a comparable educational institution outside Namibia which has been prescribed by the Minister under subsection (4)(a) or (b) and who has been issued with a certificate –*

(i) *by the Minister, after consultation with the Board for Legal Education, stating that he or she has for a continuous period of five years, and to the satisfaction of the Minister, performed duties in the service of the State as –*

(aa) *a magistrate appointed under section 9 of the Magistrates' Courts Act, 1944 (Act 32 of 1944); or*

(bb) *Director of Legal Aid or legal aid council appointed under section 3 of the Legal Aid Act, 1990 (Act No. 29 of 1990); or*

(ii) *by the Attorney-General, after consultation with the Board for Legal Education, stating that he or she has for a continuous period of five years, and to the satisfaction of the Attorney-General, performed duties in the service of the State as a prosecutor in the office of the Prosecutor-General ...*

10 2003 NR 123.

Content of the postgraduate training course

In the legal practitioners' course, candidate legal practitioners are expected to attend lectures for 11 subjects¹¹ in total. For the most part, the lectures are of a very theoretical nature. They are basically a refresher course, particularly for those who did their undergraduate studies in Namibia. Some of the subjects offered are crucial to any legal training, namely legal drafting, civil and criminal procedure, drafting contracts, and the administration of estates. Students are taken through the salient issues in each subject for an effective period of one week, with each lecture lasting 90 minutes. As with the undergraduate programme, students are expected to write an assignment for each subject.

The lecturers at the JTC are mostly legal practitioners in full-time practice. This seems to be the only requirement for lecturing at JTC, as most of the nine current lecturers are not senior legal practitioners. It is not suggested here that this fact diminishes the quality of instruction received by the candidates, but it cannot be disputed that the experience of a practitioner who has been in the business for 20 years, for example, is more valuable in practical training than that of someone who has been practising law for only three years.

The attachment

A candidate legal practitioner is required to be attached to a legal firm for two years in order to qualify for admission to practice law professionally. The attachment has to be completed either during the course of his/her postgraduate studies or, where the candidate has already passed the qualifying examination, for a continuous period of six months.¹² The rationale is that, during this period of attachment, the student is expected to be exposed to the practical side of the profession.

The Board provides each candidate with what is known as a *Right of Appearance*, which allows his/her to appear before a magistrate's court. The certificate, if utilised effectively, would allow a candidate to gain a valuable understanding of the workings of the Lower Courts, which is where most Namibians have their first point of contact with the justice system.

11 These currently include Constitutional Law; Criminal Practice and Procedure in the Namibian Courts; Administration of Estates; Practice and Procedure relating to Commercial Transactions and the Drafting of Contracts; Practice of Labour Law and Alternative Dispute Resolution; Professional Ethics and Conduct, and Techniques in Litigation, including Salient Rules of Evidence; Motor Accident Law and Motor Vehicle Accident Claims; Law of Insolvency and Trusts; Civil Practice and Procedure; Wills; Legal Drafting; and Practical Bookkeeping and Accounts.

12 Section 5(2), Legal Practitioners Act.

Legal education and academic freedom in Namibia

The value or success of each attachment essentially depends on the legal practice in question. The candidate obtains instructions from his/her principal, i.e. the legal practitioner responsible for the candidate. However, a principal may very well only assign administrative duties and no practical legal work to a candidate. Another consideration is that not all practices concentrate on the same areas of the law. Thus, a candidate legal practitioner may receive practical training in a limited number of areas or even none at all – depending on the principal. What is worrying about this system is that the Board has little oversight over a candidate's work during an attachment. Granted, by studying the candidate's diary, the Board has to be satisfied that s/he has been sufficiently exposed during the time of attachment. However, as with most control mechanisms, this is open to abuse in a number of ways, as it is certainly very difficult to verify the accuracy of each and every candidate's diary presented to the Board.

The worst-case scenario would be where a candidate legal practitioner successfully passes the qualifying examination, and the Board is satisfied with his/her diary. The person is admitted as a professional legal practitioner, but s/he was only exposed to a repetition of what was already covered in the undergraduate programme. This means the practitioner has very little if any conception of the practical workings of the law.

One could argue that such a person would have ample opportunity to gain experience once s/he is in professional practice. It is submitted that this is a potentially irresponsible argument. The day the candidate is admitted and recognised as a legal practitioner, it becomes a matter of justice. What needs to be remembered is that procedural justice is just as imperative as substantive justice. An error in judgment regarding the administration of justice could mean the difference between a client receiving judgment or not, for example. It is not suggested here that justice training could be so all-encompassing as to provide a candidate with holistic practical experience, but it is contended that a shift in focus (possibly a shift in structure) of the postgraduate course could provide a better practical foundation to aspiring legal practitioners.

Training for other judicial officers: Prosecutors and magistrates

The training of judicial officers in Namibia is a contentious issue, especially when it comes to magistrates and prosecutors. Prosecutors need a minimum of a B Juris degree to be admitted to the legal profession. This degree, which UNAM offers, attempts to provide a solid theoretical foundation of the law for persons who choose not to follow up the degree with an LLB. Therefore, a prosecutor entering the profession at least has some basic knowledge of the law. However,

Legal education and academic freedom in Namibia

there is not really a strong emphasis on practical training: this is mainly left to practice. In practice, the Office of the Prosecutor-General annually offers new prosecution recruits an induction course, which introduces new staff to relevant legislation, case law, etc. In essence, the first day a new prosecutor enters his/her office is the day s/he has to take control of a courtroom, without any assistance. This is a less than ideal situation. This failure to effectively train prosecutors may be a contributing factor to some of the problems which are plaguing the Lower Courts system.

The training of magistrates is another area which is not ideal. Firstly, the requirements for being eligible as a magistrate are currently set out in section 14 of the Magistrates Act, 2003 (No. 3 of 2003), as follows:

Subject to section 29(2), a person who immediately before the date of commencement of this section did not hold a substantive appointment as magistrate is not qualified to be appointed as a magistrate under this Act unless –

- (a) such person –
 - (i) is a legal practitioner who has practised as such for at least two years; or*
 - (ii) has passed in Namibia any examination in law declared by the Commission [The Magistrates Commission] in general or in any particular case to be a qualification of a satisfactory standard of professional education for the appointment of a person as magistrate; or**
- (b) such person has outside Namibia in a country which is a member of the Commonwealth passed any examination in law which is of a standard not lower than the minimum qualification required by that country for the appointment of a person as magistrate; or*
- (c) such person holds a diploma or degree in law obtained in collaboration or association with the United Nations or any organ or agency thereof, and which is generally directed to the education or training of magistrates; or*
- (d) such person has outside Namibia or any other country which is a member of the Commonwealth passed any examination in law which is considered by the Commission to be a qualification of a satisfactory standard of professional education for the appointment of a person as magistrate.*

However, the Magistrates Act entered into force after independence, i.e. at a time when many of the country's magistrates had already been appointed and these requirements were not applicable. Although a discussion on the appointment and qualification requirements for magistrates is beyond the scope of this paper, the requirements stated in the Act serve as an indication of the education or training that is expected to be provided to magistrates.

Legal education and academic freedom in Namibia

As far as the practical training of magistrates goes, the JTC's mandate includes –¹³

... pre-service (induction) and in-service (capacity[-]building) training courses for magistrates, interpreters, court clerks, police, defense, immigration, prison services and other law administrative and enforcement personnel.

However, this course has been dormant since 2000.¹⁴ Therefore, apart from some ad hoc workshops and training opportunities – that were not given to all magistrates, there is no set training programme specifically designed for magistrates. Thus, the prosecution and defence may appear before magistrates who are not competent to hear the matter before them due to one of two reasons: a lack of knowledge of the substantive law, or insufficient practical experience.

A comparative example

It is conceded that each country has its own needs and that an exact duplicate of another system would not serve any purpose. In addition, although legal education systems over the world are as diverse as the number of countries and different legal systems in it, valuable examples may be drawn from some of these systems. Namibia's historical ties with South Africa allow the latter to be used as a reference point for Namibia in the discussion that follows.

Legal education in South Africa

Although it is imperative for Namibia to move away from duplicating South Africa's legal system, one cannot deny that there are valuable lessons or examples to be obtained from our neighbour's efforts. Learning from these efforts will only be successful if the conditions that make Namibia different are kept in mind at all times.

South Africa has a total of 21 law faculties at various academic institutions. For the most part, the undergraduate programmes are quite similar to those offered in Namibia as far as course content is concerned. One of the principal differences between the two countries is that students studying law in South Africa have the opportunity to specialise in elective subjects. Namibian law students do not have such choices.

13 See http://www.unam.na/centres/jtc/jtc_index.html.

14 According to the JTC records, a three-month course was only offered between 1998 to 2000.

Practical legal education in South Africa warrants a closer look as well, in order to consider its merits. The Law Society of South Africa runs legal training in that country through its Schools for Legal Practice. These are established in accordance with the South African Attorneys Act, 1979 (No. 53 of 1979). According to the Act, any person who wishes to apply for admission as an attorney is obliged to complete a period of at least two years as an articled clerk at a recognised law firm, in addition to completing a course of vocational training. If a candidate produces a certificate obtained from a School of Legal Practice, s/he is exempted from having to do a two-year articled clerkship and only has to do it for one year.

This standard requirement of two years of articled clerkship allows the candidate to be exposed to as wide a spectrum of the law as possible. Notably, the system was used in Namibia before the JTC was established. The South African system was criticised as being inaccessible to aspiring black lawyers in Namibia: historically, there were no black law firms, so it was difficult for black candidate legal practitioners to be attached to or be employed by a law firm prior to independence. Obviously, this time has passed, and a number black law firms operate in Namibia.

Thus, the question which presents itself is this: Does the justification for doing away with the two-year article system still subsist? Alternatively, does the current JTC system do justice to the requirement of practical legal training for candidate legal practitioners? It is conceded that there is no foolproof way of determining which system works better – except, of course, for directly correlating experience with time of exposure to legal practice. In other words, it is conceivable that a person who does a practical attachment for two years is more experienced than a person who does it for six months.

Recommendations

The question which flows from everything that has been said about the legal education system in Namibia, keeping in mind the issue of academic freedom is this: Does the system allow for and/or produce persons who are sufficiently educated and trained to enable them to make informed, sufficiently critical, independent decisions when practising law – whether it be on the bench as a judge or magistrate, defence counsel or prosecuting on behalf of the state? It is contended here that, although academic freedom is guaranteed on paper, certain conditions persist which possibly encroach on that freedom, and which could ultimately result in a judiciary which is not as competent as it should be. For

this reason, the following recommendations are submitted, which are largely aimed at providing a more practical foundation for legal education at UNAM and providing judicial officers with better skills through a structured training process.

Recommendation 1: Introduce more practical subjects to the undergraduate programme; alternatively, introduce more practical means of assessment to existing subjects

Undoubtedly, a fair amount of students use their B Juris degrees to either sit on the bench as magistrates or to prosecute. Since the B Juris is a sufficient condition for a graduate to prosecute and even qualify as a magistrate, UNAM should assume some responsibility for equipping students with some practical skills. For example, the undergraduate programme could contain a court orientation course. It would also be helpful to make moot courts a more permanent feature in the curriculum. Currently, the Faculty only has one local moot court, in which all students are expected to participate (in Criminal Procedure). The international moot courts¹⁵ are not compulsory, however.

Introducing additional practical means of assessment is especially important for students in that it would encourage them to think more critically about situations they may face in practice. In addition, it would foster a sense of confidence and independence in the students because they would get to know at least the basic structures and duties required of all role players in a court of law.

Recommendation 2: Restructure the JTC programme

It has become clear that the JTC programme needs to undergo serious restructuring in order to provide a better foundation for candidate legal practitioners entering the profession. What is not so clear is how best to do this.

The following are some recommended options:

15 UNAM students participate in the African Human Rights Moot Court Competition and the Phillip Jessup International Law Moot Court Competition on a purely voluntary basis. Indeed, students have to raise their own funds to participate, especially as regards the Jessup Competition, while the African Competition is sponsored by the University of Pretoria. Generally, encouragement by the UNAM Law Faculty for students to participate in these competitions is very limited. Although the reason for this is unclear, it is probably related to a question of finances.

- **Option 1 – Return to the previous two-year articulated clerk system (two-year attachment followed by a Board examination):**

As stated earlier, the original reason for discontinuing the articulated clerk system is no longer valid. There are now many more law firms in operation that could take in candidate legal practitioners. However, the JTC programme admits increasing numbers of students each year. Consequently, law firms in Windhoek are saturated with candidates, meaning that some cannot find an attachment. The two-year articulated clerk system would be more useful in this context, as candidates could do their articles anywhere in Namibia, without having to worry about attending classes in Windhoek at the JTC. In other words, the articulated clerk system would be more accessible than the current JTC system.

- **Option 2 – Effectively use current structures, i.e. the Legal Aid Clinic:**

The Legal Aid Clinic was established as a project of UNAM's Law Faculty in order to expose undergraduate law students to community work. As good as the idea was, however, it does not seem to be working in practice. Students generally do not get an opportunity to do any community work, as the Clinic is not really well known at community level, probably due to a lack of proper advertising. That being said, the Clinic might nonetheless provide a good platform for candidate legal practitioners who cannot find an attachment at a law firm. If effectively advertised, the Clinic could offer an alternative means of attachment for some of the candidates. To achieve this, the capacity of Clinic should be extended to accommodate all candidates, unless a schedule is worked out to have the candidates come in on a shift basis. This is an opportunity for Option 3.

- **Option 3 – Provide a more holistic form of attachment:**

Not all legal practitioners intend to practise law at a private firm. Some might venture into alternative avenues, including working for the state in prosecution or even on the bench. It would be quite advantageous, therefore, if the attachment could be done in phases. In other words, within a two-year period, candidates could assume attachments with different stakeholders such as a private legal practice, a magistrate's court, or a judge. This would closely resemble the system currently practised in Germany. The benefits of such a system would be twofold:

firstly, candidates would be exposed to all possible angles of the law and thereby gain a greater understanding of the workings of the justice system; and secondly, the justice system (especially the state) would benefit from having a constant flow of law graduates to assist in the administration of justice, without necessarily having to pay high salaries for such assistance.

Recommendation 3: Improve training for judicial officers (prosecutors and magistrates)

As noted earlier, the academic and practical training of magistrates and prosecutors currently leaves much to be desired. Not only does the lack of practical training compromise those who enter the magistracy, when it is offered, it comes too late. Therefore, it is imperative to provide would-be magistrates and prosecutors with continuous, systematic training on a structured basis, at an institution that is sufficiently staffed and resourced. This is ultimately an issue of national importance, as it undoubtedly affects any person's rights to a fair trial when s/he comes before an incompetent or grossly inexperienced judicial officer.

Conclusion

It is imperative for the rule of law in general and for the independence of the judiciary in particular that there is an active, ongoing and critical evaluation of the legal system and all its ancillary systems. More importantly, such evaluation needs to be done in a holistic manner. The legal education system, being such an ancillary system, forms an inseparable part of the bigger legal picture: it ultimately produces the judges, magistrates, prosecutors, the defenders of the law, and protectors of society. For this reason, it is important that a system in which academic freedom is nurtured should be encouraged in order to produce independent, free-thinking jurists who make decisions that are well-argued, reasoned and justified. Thus, high educational standards, which include both theoretical and practical training, are an indispensable part of any legal education system.

