

Für Elza: Ich weiß was es heißt, eine Hilfe zu haben.....wieder.

I thank my supervisors (Proff MO Hinz and G Winter) for their guidance.

**INTERPRETING THE INTERPRETERS:
A CRITICAL ANALYSIS OF THE INTERACTION BETWEEN FORMALISM AND
TRANSFORMATIVE ADJUDICATION IN NAMIBIAN CONSTITUTIONAL
JURISPRUDENCE
1990 - 2004**

JOHANNES NICOLAAS HORN

Submitted in accordance with the requirements

For the degree

Dr iuris

In the subject

CONSTITUTIONAL LAW AND JURISPRUDENCE

At the

UNIVERSITY OF BREMEN

PROMOTER

PROF MO HINZ

CO-PROMOTER:

PROF G WINTER

JUNE 2016

INDEX

CHAPTERS AND SUB-CHAPTERS	Page No
CHAPTER 1 GENERAL OVERVIEW	6
1.1 Introduction	6
1.2 Modus operandi	13
1.2.1 The inclusion of the Supreme Court of SWA/Namibia Judgments during the time of the Transitional Government of National Unity	14
1.2.2 Analysing the judgments with reference to the Bench	16
1.2.3 The Choice of Cases	17
1.2.4 The South African Debate	18
CHAPTER 2 LEGAL HERMENEUTICS, OPPRESSION AND APARTHEID	21
2.1 Introduction	21
2.2 Hart and Dworkin, interpreters in times of transition	25
2.3 Hinz (Allott) and the limits of law	31
2.4 Southern African Judiciary and Apartheid	33
2.5 Transformative Constitutionalism	40
2.6 Positivism a Problem?	52
2.7 Summary	58
CHAPTER 3 THE TIME BETWEEN THE TIMES: CONSTITUTIONAL INTERPRETATION IN PRE-INDEPENDENT SOUTH WEST AFRICA/NAMIBIA	60
3.1 Historical Background	60
3.2. Katofa: The first challenge for the Interim Government	62
3.3 Constitutional Developments after Katofa	67
3.4 More legal challenges after the Chikane case	71
3.5 The Supreme Court of SWA/Namibia and oppressive South African legislation	72
3.6 Conclusion	78

CHAPTER 4 THE NAMIBIAN CONSTITUTION	80
4.1 Introduction	80
4.2 The Influence of Namibian Groups in the Development of a Constitution	82
4.2.1 The Constitution and the 1982 Principles	83
4.2.2 Constitutional Developments in the SWAPO Party from 1976	87
4.2.3 Constitutional Developments in the Turnhalle grouping	92
The Windhoek Declaration	92
The Hiemstra Constitution	93
4.2.4 Conclusion	94
4.3 The Namibian Constitution as a Transformative Instrument	98
CHAPTER 5 TAKING OWNERSHIP OF THE CONSTITUTION	104
5.1 Introduction	104
5.2 S v Acheson: The First Test for Constitutionalism	104
5.3 The Effects of the Release of Acheson on the Outcome of the Case	108
5.4 The Outcome of the Case	109
5.5 Kleynhans and Others, a Different Scenario	112
5.6 Acheson, Kleynhans and a Hermeneutic of Justice	116
5.7 Value-Based Judgments: Ex Parte Attorney General: In Re Corporal Punishment by Organs of State	121
5.7.1 Reactions	129
5.7.2 Traditional Authorities	130
5.7.3 Final Comments	132
5.8 Interpreting the Independence of the Prosecutor-General in Independent Namibia	132
5.8.1 The Historical Independence of the Prosecutor-General	134
5.8.2 The Independence of the Prosecutor-General vis-à-vis the Attorney-General	136
5.8.3 A Different Approach: The Supreme Court was wrong	141
5.8.4 The Prosecutor-General as an Independent Office	143

5.8.5	South Africa: a short comparison	145
5.8.6	The Pikoli and Simelane saga	148
5.8.7	Concluding Remarks on the Case	151
5.8.8	The On-going Issue of Independence: Are the Employees of the Office Prosecutor-General Public Servants?	154
5.9	Due Process and the Constitution	159
5.10	A Clash of Theories and a Hierarchy of Rights: The Kauesa Cases	164
5.10.1	The Process of Deconstruction in Kauesa	177
5.10.1.1	Understanding Deconstruction	177
5.10.1.2	Deconstruction in Kauesa	180
5.10.2	Concluding Remarks	183
CHAPTER 6 THE END OF EUPHORIA: CRITICAL CHALLENGES		188
6.1	Introduction	188
6.2	The Police Docket: A Break with the Past	190
6.3	Freedom of Expression and Hate Speech	192
6.4	Reaction from the Government	203
6.5	Constitutional issues that did not end in Court	207
6.5.1	The Third Term	207
6.5.2	The Homosexual Issue	208
6.5.3	The Abortion Issue	211
6.6	Conflict in the House: Government and the Judiciary	213
6.7	The Powers of the Attorney General and Prosecutor-General Revisited	216
6.8	The Gender Cases	219
6.8.1	The Cautionary Rule Applicable to a Single Female Witness in Sexual Related Trials	220
6.8.2	Sexual Orientation and the Constitution: The <i>Frank Case</i>	224
6.8.2.1	The High Court	224
6.8.2.2	The Supreme Court	228
6.8.2.3	The Interpretive Key of the Judgment	231
6.8.2.4	The Limits of the Law	236

6.9	Minority Rights	238
6.10	The Independence of the Judiciary: The Magistracy	243
6.11	The Right to Legal Representation: The Relationship Between the Human Rights Covenants and the Constitution	252
CHAPTER 7 ANALYSIS		263
The Interpretive Models of the Superior Courts of Namibia		263
7.1	The Development of a Constitutional Model: Freedom and Constraint, Objectivity or Value-based Subjectivity	264
7.2	Evaluation of a Positivist Challenge to Value Judgements	275
7.3	Transformation and Socio-Economic Rights	283
7.4	Transformative Constitutionalism and Judicial Review	286
7.5	The Executive and the Judiciary	291
7.6	Judges and their influence	295
7.7	Final Conclusions	304
BIBLIOGRAPHY		315
ADDENDUM		344

CHAPTER 1

GENERAL OVERVIEW

1.1 Introduction

On 16 January 1989, the Security Council adopted Resolution 629 determining 1 April 1989 as D-day for the implementation of Resolution 435,¹ preparing the way for the independence of Namibia. The United Nations supervised the elections in November 1989, with SWAPO gaining a conclusive victory. On 21 March 1990, Namibia became independent.

Despite political expectations of a completely new legal system incorporating elements of customary law and totally disbanding Roman Dutch Law, the Namibian Constitution maintained the law of the territory before independence. The legal transition was not to be revolutionary. Independence Day was just another day in the courts of Namibia.

The laws, legal system and the officials of the court, smoothly moved over from one dispensation to the other. The Constitution did not only opt for the Roman Dutch Law and English adversarial procedural law, it also made sure that the judges, the prosecutorial authority and the major decision making body, the Judicial Service Commission, would be in the hands of the pre-independence role players for at least some time.² It was only on the bench of the lower courts that the government could initially make some moderate steps towards transformation.³ However, the Constitution was meant to change and transform the old non-representative parliamentary democracy to a Constitutional democracy.

The new High Court of Namibia was a continuation of the pre-independent Supreme Court of South West Africa/Namibia. The Bench was a mixed group and included Namibian-born Afrikaners like Justice Strydom and acting Justice Muller, and South Africans Judges Levy, Hendler and Bethuen. Shortly before independence Namibian activist advocate *cum* politician Bryan O'Linn, known for his defence of SWAPO members and guerrilla fighters of the SWAPO military wing, People's Liberation Army of Namibia (Plan) was appointed to the Bench. The first

¹Carpenter, G. 1987. *Introduction to South African International Law*, Durban: Butterworths, p. 59.

²See Steytler, N. 1991. The Judicialization of Namibian Politics, 9 *South African Journal on Human Rights*, p. 477.

³After independence, Namibia uncritically took over the South African custom that magistrates were civil servants appointed by and working under the auspices of the Minister of Justice. It was only in *Mostert v Minister of Justice* NR 2003 11 (SC) when the Supreme Court declared the practice unconstitutional.

appointee to the Supreme Court Bench was Justice Berker, the first chief justice of Namibia.

The new rulers were not comfortable with the post-independence legal system. The separation of powers and the specific historical make-up of the judiciary and prosecutorial authority, limited their powers. The major liberation movement, SWAPO Party of Namibia (SWAPO) wanted a just dispensation demanding immediate radical changes. SWAPO wanted a judiciary who respect their laws and assist them in creating a new society after a century of colonialism, but had to bear with the colonial system and office bearers for the time being. The Constitution was the instrument to rid Namibia of its unjust past.

It is this struggle between constitutional values, constitutional aspirations and practical politics, that I wish to deal with in my analysis of the constitutional jurisprudence of Namibia. Karl Klare differentiates between a formalistic approach to law and transformative constitutionalism.⁴ Woolman and Davis emphasise the importance of understanding the ideology behind a constitution if the courts want to get to the real meaning of constitutional directives⁵.

Both Klare and Woolman/Davis challenge the general accepted myth of the apartheid era that the making of law is the prerogative of the legislator and the courts only need to interpret and apply these laws at the hand of clear and simple rules. The post-apartheid constitutional democracies in South Africa and Namibia ended the rule-based interpretation of statutes by the old standard textbooks of authors such as Steyn.⁶ Apart from the typical parliamentary democratic judicial role of interpreting and applying the laws of the legislator (and often the directives of the executive embedded in Proclamations and other executive quasi-legislative declarations), the judiciary in a constitutional democracy also carries the burden to protect the constitutional dispensation against unconstitutional legislation and executive directives.

It is, however more than a mere parliamentary democracy *vis-à-vis* a constitutional democracy. How does one make sense of the sometimes unexpected

⁴Klare, K. 1998. Legal Culture and Transformative Constitutionalism, 14 SAJHR, p. 146.

⁵Woolman, S and Davis, D. 1996. The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions. 12 SAJHR, p. 361.

⁶Steyn, L. 1974. *Die Uitleg van Wette, (The Interpretation of Statutes)*, Cape Town: Juta and Co.

and surprising differences in the interpretation of the Namibian Constitution by judges? Is there an ideological or legal foundation for the different approaches? Is one legal and the other political? If so, can one say that one approach is of necessity wrong and the other right? If not, is there any foundation for legal certainty other than the final words by the Supreme Court?

This study is about these questions. The answers are not obvious. It deals with models of interpretation in the constitutional jurisprudence of the Namibian courts between 21 March 1990, when Namibia became independent, and December 2004. It is, however, not a neutral approach looking and analysing all the possibilities of constitutional interpretation. I deal with the interpretation of an independent Namibia in a contextual manner. While South African colonial rule in Namibia was an occupation with a very specific political ideology and an even more specific futuristic expectation, the courts – like their masters in South Africa, the Appellate Division of the Supreme Court – operated under the presumption that legal interpretation can be political neutral.

Consequently, the courts bound themselves to an almost impossible ideal. Despite the fact that the whole post 1948 (when the Nationalist Party came to power and implemented the policy of apartheid) law making process was defiled with an ideology of an advantaged white society and an oppressed black society, the courts wanted to apply the law without taking cognisance of the injustice embedded in it.

In legal positivism the South African courts and the Supreme Court of South West Africa/Namibia found a strong ally in their endeavour to remain neutral, fair and just in an oppressive society without moving away from their only objective: to interpret the law. South Africa and Namibia were not alone in their positivist approach. It was also the basic approach of the United States Supreme Court. In the academia Oxford scholar, HLA Hart laid the legal foundation followed by academics and the courts in many western liberal democracies.

When the American Realists and Hart's successor in Oxford, Ronald Dworkin, challenged the apolitical positivism in the United States and Europe, Witwatersrand University scholar John Dugard challenged it in South Africa. He went beyond calling it a bad model, or attempting to replace it with something better. He did not even make a choice between Dworkin's Reconstruction and the model (if one can speak of a model) of the Realists and opted for an undefined combination of the two.

More important, however, was Dugard's thesis that positivism was the reason for the impotence of the South African courts and its inability to provide justice to the oppressed people. Since South Africa administered Namibia in contravention of several United Nations Security Council resolutions like one of its provinces, his criticism applied *mutatis mutandis* to the Supreme Court of South West Africa.

Shortly after the first democratic governments were instated in Namibia (1990) and South Africa (1994) a colleague of John Dugard, Ettienne Mureinik, published an article on constitutional interpretation.⁷ His emphasis was not on interpretation *per se*, but an attempt to assign a broader task to the South African constitution and the courts. Constitutional interpretation, he asserts, is much more than declaring the law. He used the metaphor of a bridge to explain his understanding of constitutional jurisprudence. The constitution is a bridge to take a nation from oppression to liberation, from injustice to the rule of law, from inequality and division to unity, from apartheid to justice. In other words, constitutional adjudication must keep the ideals of the constitution and the constitutional state in mind. The judgments of the courts must be contextualised. It has to be the vehicle to attain the high values and expectations of the constitution.

There is no public legal debate in Namibia on issues like majoritarianism and constitutionalism, positivism, natural law and post-modernism, the rights of the victim *vis-à-vis* the right of the accused, and other constitutional issues. Whenever these debates take place, it is often populist politicians attacking the judiciary for not taking the will of the people into account, for being unpatriotic, for taking sides with oppressors, racists and enemies of the state.⁸

While the actions of populists can be annoying, one can understand both the frustrations of the people with the Constitution and the frustration of the jurists with the naivety of the politicians or their lack of insight in constitutionalism. This thesis will attempt to debate the different constitutional approaches to legal hermeneutics. I will evaluate the common grounds, but also the ideological and legal differences between judgments. In some instances, there may even be opposed hermeneutical keys used by judges upholding the same Constitution and the same values.

⁷ Mureinik, E. 1994. A Bridge to where? Introducing the Interim Bill of Rights. *10 SAJHR*, p. 31.

⁸ For an example see Nyanchama M. 1996. Editorial. New Year Internet Edition, *Misa Free Press*. Windhoek: Media Institute of Southern Africa. Available at <https://groups.google.com/forum/#!topic/soc.culture.kenya/pXwB3CkAQsl>. Last accessed on 3 April 2015.

To call it a hermeneutical study, would give too broad meaning to the word *hermeneutics*. This study is not so much a study of the text of the Namibian Constitution *per se*. It is a study of the interpretation of the Constitutional text and its effects on transforming society. Constitutional interpretation has always been controversial and contested. The early value-based judgments of the neo-constitutionalists were severely questioned and criticised by the old school who contested the idea that a constitution is a *sui generis* with different interpretive rules.

This controversy imbedded several modern day legal issues: the struggle for a correct constitutional hermeneutic, the struggle between positivism and post-modernism and the struggle between majoritarianism and constitutional counter-majoritarianism. To use Klare and Woolman/Davis, the battle between formalism and transformative constitutionalism or between a pure liberal approach and liberalism that care about the needs of people, or in the understanding of Woolman and Davis, the battle between liberalism and Creole liberalism.

The judgments themselves were often part of a debate between representatives of different schools of thought on how to understand and interpret the Constitution.⁹ It is also a reflection of the morals, the values and aspirations of the people. The judges do not agree on the method of establishing the values and norms of the people, neither are there general norms and values accepted by all the judges of the High and Supreme Court benches.

I will always come back to one question: How do we read the Namibian Constitution? Should we approach it like any other legislation (and maybe follow the strict division between the executive powers of government and the role of the judiciary)? Alternatively, should we accept the socio-political dimensions of the judiciary, and more specifically, the special role of the judiciary as the protector of a constitution in constitutional democracies?

The interpretation of the Constitution is not only a legal issue, as we have already seen. The new government, more so than a government in a stable, old democracy, wants to see the transformation of society. The Constitution cannot be limited to creating the legal framework of the post-independent Namibia. The

⁹This is especially true of the judgments of Judge O'Linn. See for example his long discourses against Mahomed in *S v Vries* 1996 (2) SACR 638 (NM) and *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Another* 2001 NR 107 (SC). But see also acting Supreme Court Judge Dumbutshena's criticism of O'Linn in *Kauesa v Minister of Home Affairs and Others*, 1996 (4) SA 965 (NMS). I shall return to these cases later.

Constituent Assembly also wanted it to have a political dimension, hence the inclusion of chapter 11 on government policy, a chapter loaded with state obligations to bring social justice to the not-haves, or the provision for affirmative action in article 23, to address the inequalities of the past.

However, the relationship between government and the courts were not always plain sailing. The opinion formers in government have often felt alienated from the Constitution, especially when it protected rights or actions that went contrary to the plans and values of the SWAPO Party. How can their Constitution be interpreted in such a way that it nullifies much of what the Party has always believed in?¹⁰

The attitude of the people, and especially the governing elite, towards the Constitution went through several stages since its inception on 21 March 1990. These attitudes are often related to other frustrations and not necessarily an *ex post facto* disagreement with the text. The conflict of ministers with the foreign judges had little to do with the fact that they were not Namibians. It was much more a frustration with restrictions that the Constitution and the legal system in general placed on the ruling party and the government.

The ghost of apartheid was never out of the picture. Namibia did not begin its nationhood on a clean slate. It inherited hundred years of inequality and severe oppression, first by Germany, and since 1916, by South Africa. The Constitution is a multi-faceted document. On the one hand, it had to satisfy South Africa that the white Namibians and their property would be safe in an independent Namibia. With the assistance of the Eminent Persons Group¹¹ and the United Nations, the Constitutional Principles of 1982¹² made it possible to ease the fears of the whites and other minorities.

On the other hand, the inequalities had to be addressed. The Preamble left no doubt that the Constitutional drafters intended it to play an important role in this redress of history. It speaks of the “rights so long denied to the people of Namibia by

¹⁰See Chapter 5, subsection 5.5 on p.111. *Kleynhans and Others, a Different Scenario*.

¹¹Constitutional Principles by the Western Contact Group or the Eminent Persons Group, consisting of the Canada, France, Germany, Great Britain and the United States. The Constitutional Principles was an attempt by the western group to ease the fears of both South Africa and the internal parties (the Democratic Turnhalle Alliance and some smaller parties who co-operated with South Africa in the Transitional Government for National Unity).

¹²United Nations, Organisation. 1982. *Principles for a Constituent Assembly and for a Constitution of an independent Namibia* New York: UN document (S/15287), accepted by the Security Council as part of Resolution 435 on 12 July 1982.

colonialism, racism and apartheid". The people are consequently "determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle" and "desire to promote amongst all of us the dignity of the individual".¹³

The compromises, aimed at peace and reconciliation on the one hand and the determination to transform society and give the previous disadvantaged equal opportunities on the other, remained causes of disagreement. These opposing interests are clearly illustrated in Art 16 of the Constitution that makes provision for both the protection of property rights and the right of the State to expropriate in the public interest. Amoo and Hering suggested that even the protection of property rights creates more conflict than reconciliation.¹⁴ Only white property rights, they pointed out, are protected by Art 16, while traditional property rights generally fall outside the ambit of legally registered rights and as a consequence outside the ambit of constitutional protection. At the same time, the white commercial farmers experienced every expropriation as an attack on the predominantly white agricultural society and an infringement of Art 16.

I will finally look at the constant conflict between competing constitutional interpretive jurisprudential models. This competition is never without political significance. I will look at the interpretive models of the Supreme and High Courts from two angles:

- To what extent does the judgment honour the Namibian Constitution?
and
- To what extent will the judgment transform the Namibian society?

In conclusion: while every judgment claims to be solely an interpretation of law, the spectacles used by the interpreter always play an important role. A literal or positivist approach has the potential to maintain the *status quo*, while a transformative interpretation, or a value judgment, leans more towards a broader interpretation to uphold the spirit of constitutional values.

In the process, Namibia's apartheid past will always feature in the background. Does a judgment radically break the historical ties of the law with the ideology of apartheid, or does it under the guise of literal interpretation, original intent

¹³Preamble of the Constitution of the Republic of Namibia, 1990.

¹⁴Amoo, S and Haring, S. 2010. Intellectual Property under the Namibian Constitution, in Bösl, A, Horn, N and Du Pisani, A. *Constitutional Democracy in Namibia. A Critical Analysis After Two Decades*. Windhoek: Macmillan Education, Namibia, p. 299.

or positivism “baptise” old outdated apartheid structures in constitutional jargon, making them acceptable?

1.2 Modus operandi

Following the mentioned article by the late Etienne Mureinik¹⁵, Karl Klare wrote his now famous article on transformative constitutionalism.¹⁶ Klare developed the basic idea further that the courts in a democratic South Africa have the obligation to interpret the constitution in a transformative manner. Articles on the meaning of transformative constitutionalism abounds. Pityana defines transformative constitutionalism as follows:

... this has to do with the duty for judges to reflect the racial, gender, disability, geographic and class demographics of our country.

The concept of transformative constitutionalism was both heartily acclaimed and vigorously opposed. The usefulness of a transformative interpretation of a liberal constitution lies in the fact that it treats a constitution with an entrenched bill of rights as a *sui generis* that needs to be interpreted in a manner that appreciates the necessity of an interpretation that will lead to a transformed society. Alternatively, to quote Klare, one can define it as “a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”.¹⁷ It is important to note that transformative constitutionalism sees the need to give credence to both the text and the political context. This two-dimensional approach is especially of value in a new democracy with an undemocratic oppressive past such as Namibia.

I begin with a brief overview of traditional and liberal positivism and its presence in apartheid South Africa. I will also look at the two most prominent legal philosophers in the South African context, Oxford professor and liberal legal philosopher, Herbert Hart, and his successor Ronald Dworkin and their influence on

¹⁵Mureinik, E. 1994, *10 SAJHR*, p. 31.

¹⁶Klare, K. 1998. Legal Culture and Transformative Constitutionalism, *14 SAJHR*, p. 146.

¹⁷Ibid, p. 151.

South Africa. I will also look at the dilemma of moral judges in applying immoral laws in South Africa, and by implication in Namibia. I will also look at the ground breaking work of John Dugard – the first significant deviation from rigid positivism of the apartheid era as an early attempt to formulate transformative constitutionalism.

I will then turn to Klare and his version of transformative constitutionalism, backed by Justice Pius Langa, Dennis Davis and others, as well as some developments in the field, followed by the constitutional defenders of positivism like Roux, a critic of Klare, Cockrell and others.

This will lay the foundation for my evaluation of Namibian constitutional jurisprudence. I will, where possible look at judgments from two competing interpretive models, liberal positivism and transformative constitutionalism.

Finally, I will consider the success of Namibian constitutional jurisprudence in terms of maintaining legal clarity on the one hand and constructing a just society.

Like any academic researcher, I have specific preferences such as transformative constitutionalism, based on my sympathy for both the American Realists and the critical legal studies movement. However, my objective is not to enforce a transformative interpretation on every Namibian case. The approach that I follow is somewhat ‘Dworkinian’ in that I look at the legal and socio-political consequences of the Constitutional cases in the Namibian courts and value the transformative effects thereof rather than dealing with methodology as a philosophical or academic venture.

1.2.1 The inclusion of the Supreme Court of SWA/Namibia judgments during the time of the Transitional Government of National Unity

The inclusion of a section on the pre-independent judgments of the Supreme Court of South West Africa/Namibia during the time of the transitional government of national unity may surprise some. However, constitutionality was not an entirely new concept in Namibia. When international opinion turned against South Africa, it instituted a “transitional government of national unity” involving the so-called internal parties, in an attempt to obtain a political settlement without the participation of the major liberation movement. The founding document of the transitional government, Proclamation 101, included a Bill of Rights, annexed to the Proclamation.

The international community never acknowledged the transitional government and Proclamation 101 was not a Constitution. The courts did not have review

powers, the South African Appellate Division was still the final legal authority, and even the government themselves did not hesitate to undermine the human rights embedded in the Bill of Rights when it suited their political agenda.¹⁸

Despite the shortcomings of Proclamation 101, the Supreme Court of South West Africa/Namibia had to take cognisance of constitutional interpretation. At more or less the time when they were first confronted with the Bill of Rights attached to Proclamation 101, some of the so-called homelands or Bantustans in South Africa gained '*independence*' and accepted Bills of Rights as part of their Constitutions.¹⁹

The Supreme Court of South West Africa/Namibia had to deal with constitutionalism, and the positive constitutional developments in the courts of the so-called independent "states", the divide-and-rule ethnic homelands of the apartheid system. Several good constitutional judgments came from that environment and assisted in laying foundations for a constitutional dispensation in Namibia. Unfortunately, the Appellate Division of the Supreme Court of South Africa was still the final authority in Namibia and the Supreme Court of South West Africa/Namibia could not ignore their supremacy as the final decider of facts and law.

The exercise was extremely positive. Some of the judges like Berker, Strydom and Levy prepared themselves for the new dispensation. They struggled with the hermeneutical issues before independence. When independence came, the Namibian High Court was already prepared for their Constitutional mandate. The other judges followed suit. It seems as if the Bench was unanimous in embracing a value-based approach to Constitutional issues. The Supreme Court, which consisted of mainly foreign acting judges under the leadership of Namibian Chief Justice Berker, followed suit.

It is safe to say that the German and Afrikaans-speaking Namibian judges and the South African judges, all appointed during the apartheid era, made a genuine effort to accept the judicial realities of independence. They immediately started to develop a jurisprudence befitting the transition from a South African-dominated

¹⁸See: *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A), *Cabinet for the Interim Government for the Territory of South West Africa v Bessinger and Others*, 1989 (1) SA 618 (SWA), *Chikane v Cabinet for the Territory of South West Africa* 1990 (1) SA 349 (A). But see also *Ex Parte Cabinet for the Interim Government for the Territory of South West Africa: In Re Advisory Opinion in Terms of S 19(2) of Proc. R101 of 1985 (RSA)* 1988 (2) SA 832 (SWA).

¹⁹The independent homelands – Transkei, Ciskei, Venda and Bophuthatswana, were never officially recognized by the international community. They were reintegrated into South Africa in 1994.

parliamentary sovereignty to a constitutional democracy. The Supreme Court with its predominant foreign bench did not differ much from the High Court in the initial stages of the new republic.

After independence, the prosecutorial authority and especially the judges had to operate within the framework of the Constitution. While they were at ease interpreting the laws and common law of the country, the impact of the Bill of Rights, democracy and the supremacy of the Constitution, posed new demands on them.

1.2.2 Analysing the judgments with reference to the Bench

The specific reference to presiding judges in Namibian cases needs some clarification. In some jurisdictions – Germany is a good example – the specific judges on the bench are generally ignored. In the United States, scholars and interpreters discuss the political conviction and other alliances of presiding judges. German Constitutional law gained attention in South Africa in the judgments, writings and choices of the library material of the Constitutional Court of former Constitutional Justice Laurie Ackermann. Namibia was likewise influenced through the judgments of High Court Judge O’Linn and Chief Justice Berker. Despite the strong influence of the German Basic Law and German adjudication on South Africa and Namibia, interpreters and observers of the South African and Namibian Courts follow the American pattern and take notice of the compilation the bench.²⁰

It seems important to take cognizance of the bench if there is a clear indication that the two competing interpretive models in Namibia were driven in the early years by two strong personalities as well as other factors. The adjudicative differences between Justices O’Linn and Mahomed were not co-incidental side issues. It goes to the crux of this thesis: the jurisprudential conservative approach of O’Linn versus the transformative methodology of Mahomed.

I have stated my sympathy for (albeit not absolute approval of) the American Realists, the CLS movement and the work of Karl Klare in South Africa. While the Realists were the first group to point to the influence of the personalities on the bench, Klare emphasised the fact that it is impossible to operate without a political

²⁰See the blog of constitutional expert and University of Cape Town law professor Pierre de Vos, Constitutionally Speaking. Available at <http://constitutionallyspeaking.co.za/>. See also Horn, N. 2012. Becoming Fred Rodell: Predicting the Result of the Second Supreme Court Appeal on the 2009 Election. *Namibia Law Journal (NLJ)* Vol. 4, no 1, p. 127.

framework. Conscientious acceptance of the transformative obligation of the judiciary in a young democracy does not make transformative constitutionalism more political than a conservative approach. A conservative approach will not necessarily result in a-political judgments. The hidden politics of the *status quo* – the politics of apartheid – clouded in judicial purity then serves as a cork to prevent transformation of the legal system. Klare made the following observation-

*A more political self-consciousness and candid legal process would surely be faithful to the Constitutional democratic ethos....*²¹

And again:

*In the common case, e.g. the US during most periods denying the politics of adjudication, legitimates the status quo and obscures the possibility, and therefore the desirability, of social change.*²²

The objective of the thesis is, however, not to declare either the Klare approach or Cockrell's "soft positivism" the best hermeneutical tool to unlock the Constitution. It is rather an evaluation of the success of the superior courts to engage in transformative constitutionalism.

1.2.3 The Choice of Cases

I tried to look at the most important cases of the period, important in the sense of its contribution to constitutional development and jurisprudence. These choices are always subjective and there may be cases I selected that will seem to be irrelevant choices for some, while good arguments can surely be made out for those cases that I left out.

I did not specifically choose cases with high public interest or political opposition to the judgments, although both considerations played a role in the process. Cases are not of interest to the public and the politicians without good reason. While it may be based on the sensational aspects of a case, the clashes between the courts and public opinion or the judiciary and the executive are based on the understanding of the functions of the courts, or their independence or the battle between majoritarianism and counter-majoritarianism.

²¹Klare, K. 1998. Legal Culture and Transformative Constitutionalism, 14 SAJHR p. 165.

²²Ibid, p. 167.

I am nevertheless convinced that the choices cover the most important cases and enough of the debates and controversies of the first fourteen years of constitutional democracy to understand the jurisprudential development of the era.

1.2.4 The South African Debate

Namibia has been occupied by South Africa since 1915 and officially governed since 1919. Its common Roman Dutch law dates back to those times. Since 1919, the Appellate Division was also the highest court of appeal for South West Africa.

Namibia did not have a national university before independence and Namibian legal practitioners were never known to be public debaters or academic authors. Consequently, the debate of Namibian cases took place in the South African journals. After independence, Namibia was the focus of several academic articles and the Namibian constitutional cases were regularly reported in the South African Law Reports, the South African Criminal Law Reports and the Butterworth Constitutional Law Reports.

When the democratic process started in South Africa with the Codesa multi-party negotiations in 2002, the focus of the academic debate moved away from Namibia. The decision of Namibian stakeholders to have their own law reports, led to the disappearance of Namibian cases from the South African Law Reports and the South African Criminal Law Reports. South African academics and practitioners do not subscribe to the Namibian Law Reports in big numbers. Consequently, by the mid nineties Namibian case, legislation and jurisprudential development, were scarcely found in the South African law journals.

At the same time, the South African interim constitution and later the final constitution were the subject of fierce debates in South African and international law journals. Even after the founding of a law faculty at the University of Namibia under the leadership of Zimbabwean academic Walter Kamba and Bremen law professor Manfred Hinz, debates in articles and books on the Namibian Constitution remained limited to contributions of a small band of academics.

The South African debate deals with issues relevant to Namibia such as the big positivist debate between progressive academics, many followers of the Critical Legal Studies movement (CLS), personified by Karl Klare, and academics believing that a positivist approach does not necessarily exclude transformative jurisprudence.

For this reason, I have incorporated some of the South African debates in my analysis of Namibian judgments and jurisprudential development. While these debates seldom refer to Namibia, they nevertheless shed light on issues that should be debated, and often are debated in the corridors of the High and Supreme Court or even in the courts themselves, albeit without using academic jargon and without references to the likes of Herbert Hart, Richard Dworkin or Duncan Kennedy.

Admittedly, inviting the South African academics to the Namibian debate while they are commenting on a different (although somewhat similar) constitution in an entirely different environment is a challenging endeavour. The possibility to hear something the South African authors never said, or would have said differently if they commented on their neighbours, is always there. Yet, the issues are so interrelated that one cannot ignore the South African debates.

The South African connection, however, is not merely based on the similarity of the Namibian and South African constitutions. The peoples of the two countries also share a common history of oppression. Not only were both countries victims of the 19th century European scramble for Africa which brought with colonialism its inherent racism and oppression, the majority of South Africans and Namibians also shared a common history of oppression and humiliation under the apartheid policies of the Nationalist Party from 1948.

Apartheid was more than institutionalised racism. It was an all-embracing ideology affecting every aspect of the lives of the people and the political and administrative actions of government. Education, religion, cultural expressions, language, habitat were all pressed into the racial moulds of inferior and superior races and ethnic groups.

Like the constitutional issues, the debate on the influence of apartheid on the judiciary took place in South Africa. The President of South Africa appointed the pre-independent judges in Namibia or South West Africa. Moreover, the Appellate Division with its seat in Bloemfontein, South Africa, was the court of final instance of the Supreme Court of South West Africa/Namibia.

The apartheid system with its tentacles in all sectors of society still hovers over the jurisprudence of both the apartheid era and the post-apartheid era. The role of positivist judges in advancing apartheid laws remains an ongoing debate in South Africa.

Even the debate on transformative constitutionalism is not devoid of a fierce debate between those who accuse positivism of supporting apartheid laws or even creating a framework to justify or give legality to apartheid laws, and the neo-positivists who argue that positivism, was not inherently an ally of oppressive political ideologies. Like any other jurisprudential model, it can be abused.

As I have already noted²³ this debate is ongoing, both in South Africa and to a lesser extent, in Namibia. Consequently, the thesis will start with an overview of the positivist/apartheid debate.

²³See 1.1 above.

CHAPTER 2

LEGAL HERMENEUTICS, OPPRESSION AND APARTHEID

2.1 Introduction

I do not intend to go over the field of interpretation as it is taught in southern African universities. This thesis is not an exercise in comparing the Namibian Constitution with the post-1994 academic constitutionalism in South Africa with its different hermeneutical approaches. The main emphasis here is to look at the narrow, hard line positivism of the pre-independent era and look at the changes and confirmations of the process that took place after 1990 in Namibia.

The independence of Namibia and the democratisation of South Africa changed the way in which the courts, scholars and practitioners approached legal interpretation. In Namibia, the Supreme Court of South West Africa/Namibia had an opportunity before independence to lay some foundations for the democratic era.

Namibian independence in 1990 was followed by democratisation in South Africa four years later. If the process of constitutional jurisprudence was a slow process until 1994, the South African judgments and the systematic evaluations and interpretations of the academic community in the former colonial power, developed new opportunities for Namibian constitutional development. Numerous articles, books and judgments appeared, introducing a radical break with the jurisprudence of the apartheid era.

In the pre-democratic South African and the pre-independent Namibian courts, the issue of interpretive models or hermeneutical rules seldom featured. Understanding the law was not a complicated process. The standard books on interpretation of statutes or the common law, laid down the rules and the courts, after developing some more rules, found the *truth*.²⁴

If any interpretive model was prominent, it was an uncomplicated legal positivist approach of legal philosophers like HLA Hart. Hart was often misinterpreted as a conservative, which made him a comfortable ally in the apartheid era. His theory that law and justice had no direct relation with one another also made it easy for the South African and South West African judges working under an apartheid government and sometimes severe oppressive legislation not to ask too many

²⁴ See Steyn, L. 1974. *Die Uitleg van Wette, (The Interpretation of Statutes)*, Cape Town: Juta and Co. for a typical example of the approach of the South African legal fraternity before democratisation. Justice Steyn was the Chief Justice of South Africa from 1959 – 1971.

questions on justice and morality. Hart also discarded the idea that politics should play any role whatsoever in jurisprudence and interpretation.

The English case *R v A Wimbledon Justices: Ex parte Derwent*²⁵ describes the approach followed unchallenged by almost all South African courts before 1994 as well as South West African courts before 1984.

Although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there . .

Pierre Schlag²⁶ compares this approach to the pre-enlightened theological argument for the proof of God. More specifically, he asserts that the formal structure of the legal argument resemble the “cosmological proof, the argument from design, and the ontological proof of God”.

Schlag quotes the early twentieth century Justice Joseph Beale who defended the dictum “Judges do not create law, they just interpret it”. According to Beale, the decisions of common-law courts are guided by a common law that is always already changing and progressive. Judges do not make law; they find it. If the opposite was true, Beale asserts, it would “be a usurpation of sovereign authority”.²⁷

It is the formal structure of these legal arguments that is in question here. My claim is that these legal arguments bear an uncanny and disturbing similarity to various proofs of God. Specifically, they resemble
Thus, despite its secular pretensions, legal thought is in part a kind of theological activity. A more controversial and perhaps more surprising point is that, for those who believe in law, there is no alternative but to participate in this covertly theological discourse. For those legal academics that find this prospect unappealing, the alternative is clear: stop trying to "do law," or more accurately, stop pretending to "do law".

²⁵1953 (1) QB 380, 1953 (1) All ER 390 (QB).

²⁶Law as the Continuation of God by Other Means, *California Law Review* 1997 Vol. 85, p. 27.

²⁷Beale J. 1935. Treatise on the Conflict of Laws, *California Law Review* 1935, p.38. See also the judgment of a serving US Supreme Court judge, Scalia, J, in *James B. Beam Distilling Co. v. Georgia*, 1991 501 U.S. 529: *I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were "finding" it--discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.*

Clearly, the reluctance of judicial officials to do anything but *finding* the law is not an invention of the South African law under apartheid. Apart from being one of the basic tenets of several jurisprudential theories²⁸, it has always been a safe haven for the bench in times of moral uncertainty. The now well-known *Jones v Van der Sandt case*,²⁹ dating back to the slavery controversy in the pre-civil war United States of America, embodied the intense conflict between two legal mind-sets that were to be repeated in future generations.³⁰

The moral justification for slavery was under severe attack at the time of the *Jones case*. In several federal states, slavery was abolished. Jones, a slave owner in Kentucky, where slavery was legal, sued Van der Sandt, a resident of Ohio, an abolitionist state.

The Supreme Court confirmed the judgment of the Circuit Court of Ohio in favour of Jones.³¹ The Constitution acknowledged the property rights on slaves, and guaranteed these rights. The Courts enforced it in abolitionist states in terms of acts of Congress. Consequently, the Court ruled it had no right to consider an alleged invalidity and inexpediency of laws recognizing slavery.

Dworkin pointed out that the arguments posed on behalf of Van der Sandt centred around the validity of laws contradicting natural law or the onus on the courts to enforce unjust laws.³²

.... that is a political question, settled by each state for itself; and the federal power over it is limited by the people of the States in the constitution itself, as one of its sacred compromises, in which we possess no authority as a judicial body to modify or overrule.

²⁸The basic tenet of natural law and natural justice is the relationship between morally good or approved actions and that which comes natural. See for example Harris, J. 1980. *Legal Philosophy*, London: Butterworths, p. 6 f, Christie, G and Martin P, 1996 (first edition 1973). *Jurisprudence, Texts and Readings on the Philosophy of Law*. St. Paul, MINN: West Publications, p. 118ff. The religious sanction of the law suited the religious foundation of the apartheid ideology well. If a specific interpretation of Calvinism sanctioned apartheid from the perspective of a religious worldview, it is not difficult to sanction the law from the same perspective. In both cases, a basic logical understanding of the system ruled critical thinking and critical interpretation out.

²⁹46 US (5 How.) 1847 215, 12 L.Ed. 122.

³⁰See for example the submissions of Chase, S and Governor S, quoted in Finkelman, P (ed). 1988. *Fugitive Slaves and American Courts*, New York: Garland Publishing Co, pp. 433 and 434.

³¹Judgment of the Supreme Court, delivered by Justice Woodbury.

³²The Law of Slave-Catchers, 5 December 1975 *New York Times Literary Supplement*, New York, p. 1437.

The interpretive issue however lies much deeper than a mere choice between legal positivism and natural law. The legal philosopher Ronald Dworkin suggests that the real issue at stake is the principles of justice and fairness embodied in the general structure of the Constitution itself.³³ The general structure of the American Constitution, asserts Dworkin, is one of individual freedom antagonistic to slavery. Further, the Fugitive Slave Act is inconsistent with the American conception of federalism by disallowing an abolitionist state the right to supervise the capture of slaves in its territory.

In other words, the hermeneutical key to interpret the Constitution is the values it represents. Consequently, it cannot be said that an anti-slavery interpretation was based on the morality of some judges. It was an error in law. *They were rather.... more central to the law than were the particular and transitory policies of the slavery compromise.*³⁴

Although Ronald Dworkin used natural law principles and relied on the inherent legitimacy of the judicial tradition, he is not a proponent of natural law as such. Neither is he a legal positivist. For him legal theory has its foundation in *the rights of the individual* rather than a moral standard or a system based on rights.

Without going into Dworkin's legal philosophy here, it is clear that the fundamentalist literalist interpretation of the texts is seldom a neutral academic exercise. In nineteenth century America, it served the interests of the wealthy slave owners. In pre-independent Namibia or pre-1994 South Africa, it served an unjust political system.

Schlag correctly pointed to the weakness of the formalist approach. It operated from a premise that legal interpretation is always based on law rather than less jurisprudentially appealing such as power, politics or rent seeking.³⁵ In other words, its point of departure is an outdated nineteenth century understanding of truth and interpretation of texts. It assumes that the interpreter can somehow distance herself/himself from all other influences and approach a text subjective.

³³Dworkin, R.1985: *Law's Empire*. Cambridge, MASS: Harvard University Press, p.91.

³⁴Ibid.

³⁵Schlag, p. 430.

2.2 Hart and Dworkin, interpreters between the times

The Oxford scholar, Herbert Hart, was in some ways a continuation of the positivism of the second half of the nineteenth century with its emphasis on a general theory of jurisprudence that can be applied to all legal systems. In addition, when it comes to legal certainty, Hart denies that there can be more than one answer to an interpretive issue. While Hart acknowledges that in certain cases there may be a penumbra of doubt or a fringe of vagueness, the core of certainty is clear.³⁶

Central to his understanding of law, Hart followed the eighteenth and nineteenth century positivists in their search for a general theory of jurisprudence applicable to all legal systems.³⁷ He also followed the basic idea that there is a clear dividing line between law and morality, or the law as it is and the law as it ought to be.³⁸ This separation of law and morality has been a shield for conservative jurists in South Africa for much of the nineteenth and twentieth century to concentrate almost exclusively on the law as it is without developing a concern for what the law ought to be.

In his debate with legal realist Len Fuller, Hart defended this separation. Fuller asserted that some laws were so iniquitous that they cannot be classified as law at all. In other words, even if a norm will be accepted as law on all other grounds, if it includes all elements necessary to be called law, except for moral acceptability, it cannot be classified as law.

This disqualification goes beyond Fuller's well-known thesis that laws which did not meet the procedural requirements, his eight attributes,³⁹ were not law at all. Fuller's example of the wife of a Nazi dissent soldier, who reported him for dishonouring the Führer and the Nazi state during the war, is well known. After the war she was charged with illegally depriving her husband from his freedom. Her defence was that she merely reported him for contravening the law as it was at the time. She was eventually only convicted for malicious conduct. Fuller, however,

³⁶1961. *The Concept of Law*, Oxford/New York: Oxford University Press, pp. 119-120.

³⁷For a comparison between Hart and the nineteenth century positivists such as Bentham and Austin, see Duxbury, N. 2004. *English Jurisprudence between Austin and Hart. Public Law and Legal Theory Working Paper Series, Paper 9*. Charlottesville, VA: University of Virginia.

³⁸Fuller, L. 1958. Positivism and Fidelity to Law: a Reply to Professor Hart. *71 Harvard Law Review* 630.

³⁹See Fuller, L. 1964. *The Morality of Law*, Revised edition. New Haven: Yale University Press.

contended that she should have been convicted for her invalid moral behaviour. Before doing that, however, the Court had to find the Nazi laws invalid.⁴⁰

Hart was at pains to point out that he did not condone unjust laws and did not hide behind the separation between law and morality to condone injustice. On the contrary, people will be better equipped to resist iniquitous laws when they understand that “the certification of something as legally valid is not conclusive of the question of obedience”.⁴¹

The insistence of the judges in the apartheid era that they did not have the authority to set a “minimal threshold of moral appeal” (Mureinik quoting Dworkin) before they can acknowledge the legality of statutes, was certainly inspired by Hart’s clear black-and-white positivism, which does not mean that Hart presented an ideological foundation for apartheid.

One of the major ideological foundations of apartheid was the principles of core values or a common morality of the people (volk), which the Nationalist Party wanted to protect with a series of laws. One of the most vulgar of these laws was section 16 of the Immorality Act, 23 of 1957, which classified sexual intercourse over the colour line as an immoral act and criminalised such sexual intercourse, even if it was practiced in privacy between two consenting adults.

While Hart opposed morality deriving from natural law, his views on values, norms and convictions can easily be interpreted by the proponents of apartheid as an approval of their “volksmoraal” (peoples or national morality).

Hart, debating with British judge Lord Patrick Devlin⁴², vigorously opposed the idea of natural law as a source for morality⁴³. Yet, he distinguished between positive morality and critical morality. The so-called morality keeps a society together, i.e. the values, norms and convictions of society, Hart refers to as positive morality, while critical morality are the attributes allowing society to evaluate and criticise the structures and institutions of society.

⁴⁰Fuller, 1958, p.648ff.

⁴¹Hart, H. 1961. *The Concept of Law*. Clarendon Law Series. Oxford: Clarendon Press, 202ff.

⁴²For a summary of the debate see Sixth Form Law, 2000 – 2008. *Hart-Devlin Debate*. Published on the Sixth Form Law blog, published at http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm, accessed on 10 January 2012.

⁴³The debate started because of Hart and Devlin working together on a committee considering legalizing consensual homosexual acts and prostitution in Britain. Hart agreed with the conclusion of the committee, embedded in the Wolfenden Report, released in 1957.

The influence of Hart's determinism on the apartheid era has some merit. Interpreters bound by the text, especially statutes, were also bound by determinism. The discretion of the judge or the interpreter remains on the fringes and do not deal with conflict or gaps, the penumbra, in a discretionary manner. This sounds very much like the submission of the South African legal fraternity before the Truth and Reconciliation Commission. The strong element of determinism in Hart's thinking made it possible for South African positivists to hide behind the literal meaning of the text of apartheid legislation.

However, it must be remembered that Hart was no conservative in any sense of the word, least in the sense of the South African/Namibian political thought. He was a liberal thinker and his legal philosophy emanates from his basic liberal philosophy. Hart was an astound opponent of conceptual jurisprudence, a movement that accepts there can be more than one valid norm applicable to a set of facts, and in applying different norms, it will lead to different results in a case. Conceptual jurists also believe that there will be new situations for which no norm or value has been developed earlier.⁴⁴

Liberal constitutional interpreters following Hart's positivism will argue that there is nothing intrinsically wrong with his distinction between morality and law. On the contrary by emphasising critical morality creates the opportunity for opposition against unjust and oppressive regimes.

Hart, in his criticism of Devlin, retrieved to a basic natural law concept. Societal values, Hart held, should be limited to a "minimum content of natural law". In other words, the state should not legalise for more than the basic morals needed for survival. In this regard rules enforcing moral values should be limited to restricting violence, theft and deception.⁴⁵

Hart also objected to any notion that society would be destroyed if the core common morality were destroyed. Oelsen compared the way in which the common morality doctrine operated under apartheid with the 'blindness' of the United States Supreme Court to the injustices of the slave trade.⁴⁶ The apartheid government used the doctrine of common morality of the white community (more specifically the

⁴⁴ See the insightful article of Kramer, M. Coming to Grips with the law. In Defence of Positive Legal Positivism. Cambridge: *Legal Theory*, Vol 5, issue 2, June 1999, pp.171 – 200,

⁴⁵Hart, H. 1963. *Law, Liberty and Morality*. Stanford, CA: Stanford University Press, p. 51.

⁴⁶Oelsen, J. 2007. The Antigone Dilemma: When The Paths of Law and Morality Diverge. *Cardozo Law Review* Vol. 29:2, p. 690ff. on pp. 670 and 694.

Afrikaners) to make laws such as the Immorality Act⁴⁷, even when they offended one specific group in the broader South African society, namely people of mixed descent.

However the prohibition of mixed marriages and the specific section 16 of the Immorality Act⁴⁸ were sold to the white voters as needed moral values to protect the culture and possibly the future existence of whites in South Africa, more specifically the Afrikaners.

After 1994 with the arrival of democracy, the Constitutional Court in South Africa was faced with fact that the death penalty seemed to be in contradiction of the Constitution while the majority of the people supported it. Chaskalson had the following to say in that regard:

If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is to be exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the ...Constitution.⁴⁹

The two examples above are probably not enough to understand exactly what Hart meant by the distinction between critical and positive morality. Marmor suggested that realism relies on this distinction when it distinguishes between critical and positive aspects of law.⁵⁰ A legally valid norm may turn out to be legally false from the perspective of critical normative values, as we have already seen.

In his determinism, however, Hart's position was open for abuse by positivist conservative judges. Yet, even in his application of the so-called difficult cases, Hart was all but fundamentalist in his approach. In the case of the core, the results were determined. When it comes to the penumbra, there is an element of discretion, or even judicial law making. Yet, the judge's discretion is limited.

Hart rejected the sceptics who accept that in the difficult cases (Hart's penumbra of doubt) the judge's ideology and own opinions will determine his or her judgment. Legal rights, Hart maintained, exists when they are "manifestly accepted" by the bulk of the relevant community in the sense that they flow either from rules

⁴⁷Act 23 of 1957.

⁴⁸*Immorality and Prohibition of Mixed Marriages Amendment Act of 1985*. The Act, which was preceded by the *Prohibition of Mixed Marriages Act of 1949*, among other things, prohibited sexual relationships between black and white.

⁴⁹*State v Makwanyane*, SALR, 1995 (3) SA 391 (CC), par. 88. Also published in 1995 (6) BCLR 665 (CC).

⁵⁰Marmor, A. 1992. *Interpretation and Legal Theory*. New York: Oxford University Press, p. 98.

which are themselves accepted or from rules which are valid according to other accepted rules.⁵¹

When Hart looked at the controversial cases, those rare occasions when there is no answer to be found in the manifestly accepted rules of a community, the judge may have some discretion or even an option of law making. These functions, however, is never arbitrary, but flows from the generally accepted rules and norms of society.

Dworkin radically opposed Hart in his approach to difficult or controversial cases. According his understanding the British/American legal system always provide for one right answer in controversial cases.⁵² One can expect of all “modern developed and complex legal systems” to follow this basic principle.⁵³

A right that cannot or do not exist in controversial cases, must be construed as a claim made from within the enterprise:

*We can only make sense of (a) philosopher’s claim if we take it to report the special conditions of an enterprise.*⁵⁴

In other words, a logic answer or philosophical conclusion to a question of law in a controversial case cannot be answered merely as a result of good and logical argument and reason. Such and answer will only be good and philosophically correct, but can never be a legal answer. The philosopher’s claim must come from within the legal community.⁵⁵

However, one cannot assert as true, every proposition of law in a controversial case, but only a proposition consistent with the theory of law that justifies settled law the best. In other worlds, the judge will weigh all the proposed positions in the light of the theory of law and settled law. Positions less consistent with the theory of law or the settled law may be denied as false positions.⁵⁶

The judge then, is not creating law and does not have any discretion. The penumbra that Hart refers to is not really a penumbra since there is existing law (the

⁵¹Hart, 1961. Chapters iv – vi.

⁵²Dworkin, R. 1977. Why Bakke has no case. *New York Review of Books*, November 10, 1977, p. 32. See also 1977. *Taking Rights Seriously*. Cambridge, MASS: Harvard University Press, pp. 289ff.

⁵³Dworkin, R. 1977. *The Philosophy of Law. Oxford Readings in Philosophy*. New York: Oxford University Press, p. 84. See also 1975. Hard Cases, *Harvard Law Review*, Vol. 88, No. 6, p. 1057.

⁵⁴Dworkin, R. 1977. *Taking Rights Seriously*, p. 289.

⁵⁵See Dworkin, R. 1977. *The Philosophy of Law. Oxford Readings in Philosophy*, Oxford: Oxford University Press, p. 81 and, 1977. Why Bakke has no Case, *New York Review of Books*, p. 28.

⁵⁶Dworkin, R. 1977. *Taking Rights Seriously*. Cambridge. p. 283.

position consistent with the theory of law and settled law). The judge needs only to apply it.

The debate between Hart and Dworkin goes much deeper than this. Hart has a special liberal approach to law. Unlike Dworkin, Hart was not so much interested in the criticism of law or legal policy. His interest was in the classification of the general framework of legal thought.⁵⁷ For Dworkin the external aspect of a rule is the mere regulatory aspect of behaviour that is common to both rules and habits.⁵⁸ He used the phrase *external attitude* to describe those humans who are only concerned with the rules “when and because they judge that unpleasant consequences are likely to follow violation”.⁵⁹ For Hart on the other hand, the internal point of view or attitude is not a prediction of behaviour, but an accepted standard of behaviour to which humans conform and demand others to conform.

The Hart/Dworkin debate created an opportunity for conservative and liberal scholars to remain within the realm of positivism or liberalism without carrying the burden of a legal philosophy that serves interests of the apartheid regime. The harsh approach of the post 1948 (the year when the Nationalist party came to power and introduced apartheid) superior court benches⁶⁰ was generally accepted as a typical amoral fundamentalism linked to Austin’s understanding of law as the command of the powerful.

It is, however Dworkin’s approach to the difficult cases (Hart’s penumbra) where Dworkin comes with a different approach. Even the hard cases have only one possible solution, which Dworkin refers to as “the best constructive interpretation”.⁶¹ In this sense Dworkin is perhaps even further removed from more recent interpretive experiments such as realism and CLS than Hart. However, Dworkin nevertheless gave an opportunity to progressive jurists in South Africa to move away from the rigid positivist approach of the courts of the apartheid era.

As early as 1971 Witwatersrand law professor John Dugard challenged the positivism of the courts for its negative impact on civil liberties.⁶² The demise of

⁵⁷1961. p. vii.

⁵⁸Ibid, p. 55ff.

⁵⁹Dworkin.1977, Why Bakke has no case, p. 88.

⁶⁰See *S v Adams* 1979 4 SA (T) 801, confirmed by the Supreme Court of Appeal in *S v Adams, S v Werner* 1981 (1) SA 187 (A). See also *R v Sader* 1952 4 SA 392 (A) and *R v Sachs*, 1953 (1) SA 392.

⁶¹Dworkin, 1975. *Hard cases*, p. 1075. See also *Law’s Empire*, 1986. Cambridge, MA: Belknap Press of Harvard University Press, p.224ff.

⁶²Dugard, J. 1971. The Judicial Process, Positivism and Civil Liberties, in 88 *SALJ*, pp. 181 – 200.

natural law in the mid twentieth century and the influence of English law, Dugard argued, created a South African legal system concerned only with rules. This extreme reliance on the command theory of nineteenth century positivists is the main reason for the South African judiciary's inability to protect civil liberties.

Kroeze observed that the influence of Hart and other "soft" positivists in Europe and the United States did not influence South African system.⁶³ Dugard, she pointed out, was however, not clear on the alternative. In 1971 he did not consider Hart as an option that will soften nineteenth century positivism and Dworkin was not yet known in South Africa. Consequently he suggested a combination of natural law and realism.⁶⁴ Dugard and Mureinik's alternative to positivism will be discussed as a transformative model for constitutionalism below.

In the subsequent debate Forsyth and Schiller⁶⁵ defended positivism by referring to the difference between positivism and authoritarianism or by explaining positivism in terms of the Hartian development rather than the nineteenth century insistence on law as the command of the powerful. Dyzenhaus,⁶⁶ not a positivist, made an important contribution in removing the caricatures of positivism and critically introduced Hart as the twentieth century face of positivism. Dworkin and Hart remained part of the interpretive debate, despite new trends in Namibia and South Africa after independence and democratisation.

2.3 Hinz (Allott) and the limits of law

Manfred Hinz, founding Deputy Dean and later Dean of the Faculty of Law at the University of Namibia, brings a different perspective on the Hart/Dworkin debate.⁶⁷ Relying on Antony Allott,⁶⁸ he suggests a third way. According to Hinz the law does not always present only one answer in every possible case (Dworkin) neither does the judge has discretion in all cases on the penumbra.

⁶³Kroeze, I. 2004. Legal Positivism, in Roederer, C and Moellendorf, D. 2004. *Jurisprudence*. Cape Town: Juta and C. Ltd. p. 84.

⁶⁴Dugard. 1971, p. 200.

⁶⁵Forsyth, C and Schiller, J. 1981. The Judicial Process, Positivism and Civil Liberties. 98 *SAJHR*, pp. 218 - 230

⁶⁶Dyzenhaus, D. 1983. Positivism and validity. 100 *SALJ*, pp. 454 – 457. See also Dugard's answer: 1981. Some Realism about the Judicial Process and Positivism – A Reply. 98 *SALJ*, pp. 372 – 374.

⁶⁷Hinz, M. 2010. Justice: Beyond the limits of law and the Namibian Constitution, in Bösl, A, Horn, N and Du Pisani, A. 2010. *Constitutional Democracy in Namibia. A Critical Analysis After Two Decades*. Windhoek: Macmillan Education Namibia, pp. 149 -167.

⁶⁸Allott, A. 1980. *The limits of law*. London: Butterworths.

Hinz sees in Allott's "limits of law" a *very particular element of the concept of legal pluralism*. In other words, the law does not present a legal answer for every thinkable legal problem. Hinz refers to a South African Constitutional Law case⁶⁹ where the bench affirmed the constitutional rights and status of the status of same sex couples, but gave the legislator the opportunity to correct the issue rather than "simply read the appropriate gender-neutral language" into the existing legal instrument⁷⁰, as suggested by an article in *Business Day*.⁷¹

Hinz sees a very specific legal and jurisprudential meaning in the concept of the limits of law. While he does not elaborate on the issue, he hinted that an "open-ended" (my phrase – JNH) limitless concept of law where only human rights determines the boundaries of law, can eventually lead to law without rules and law without any philosophical foundation. In other words, even human rights principles need to be based on rules and principles.

While Allott (and Hinz?) basically agreed with Hart's general concepts of law and legal institutions, he also looked at the "effectiveness or ineffectiveness of law" as a yardstick in assessing the limits of law.⁷² Since law is a system of communication, it carries the same limits of communication in general. Consequently, communication disturbances will affect the implementation and enforceability of law. Hinz points to several such disturbances such as

- legislators imposing "ambitious legal innovations while modern society fail to respond to it;
- social and cultural environment such as imposing colonial laws on people with no Western culture or background; and
- the influence of other normative statements such as religious, moral and habitual. If society aligns itself with these statements, it weakens law and frustrates legal norms.⁷³

Hinz bemoans the fact that Allott's understanding of the limits of law was generally ignored by legal philosophers. He assigned it to the inability of legal interpretation to take cognisance of the "functioning and backgrounds of law and

⁶⁹ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC).

⁷⁰ Section 9(30) of the Constitution of the Republic of South Africa of 1996, quoted by Hinz on p. 150.

⁷¹ *Business Day*, 13 December 2005, quoted by Hinz in *ibid*.

⁷² Hinz, p. 152.

⁷³ *Ibid*, pp. 152, 153

political institutions”, which was left to anthropology.⁷⁴ Allott has, as Hinz pointed out, predicted that his theories will be ignored by the legal fraternity because of its populist approach.⁷⁵

I will return to Hinz’s theories in chapter 6.8. Suffice it to say that Hinz (relying on Allott) opens the door for looking beyond the dispute between Hart and Dworkin in dealing with difficult cases.

2.4 Southern African Judiciary and Apartheid

Namibia never had a Truth and Reconciliation Commission. The transition from colonialism was extremely smooth in the Namibian courts. One of the reasons for the smooth transition was undoubtedly the role of the Supreme Court of South West Africa in the 1980’s.

While the transition of the highest court in South West Africa made it relatively easy for the Supreme and High Courts of Namibia to adapt to the demands of a constitutional bench after 1990, it prevented any analysis of the political role of the judges of the High Court of South West Africa.

The South African superior court judges were not so privileged. They, together with other interest groups such as the churches, civil society and the politicians of the apartheid era, had to appear before the Truth and reconciliation Commission. Their judgments and interpretations were scrutinised and their support for an unjust political system severely evaluated.

Since South West Africa was such an integral part of the South African legal system under colonial rule, it is appropriate to look at the defences and explanations of the South African judiciary after apartheid. The Supreme Court of South West Africa was subjected to the South African Supreme Court of Appeal in Bloemfontein, the vast majority of South African statutes were made applicable in South West Africa, and the countries shared the same common law and jurisprudence in terms of the *stare decisis* rule. Most of the judges were South Africans.

The legal profession in South Africa defended the judiciary on grounds very similar to the defence of liberal judges implementing slavery legislation in the United States during the 19th century. The chief justice at the time of the hearings of the

⁷⁴Ibid, p. 155

⁷⁵Allott, p. 289, quoted in ibid, p. 154.

Truth and Reconciliation Commission (TRC), Judge Corbett, made several submissions in defence of the bench's submissive role during the apartheid era.⁷⁶

Firstly Corbett pointed out that during the apartheid era the judges bound themselves to laws and customs of the Republic of South Africa by their oaths of loyalty, whereas under the new dispensation they bind themselves to uphold the Constitution. In the parliamentary democracy of the old order, the courts had no authority to review statutory laws or common law. The Courts could not declare it unconstitutional or refer it back to parliament.⁷⁷

This, according to the former chief justice, does not mean that the courts did not play a role in limiting the effects of the unjust laws of its time. Whenever courts were required to interpret unclear laws, it always opted for an interpretation that did not produce inequity. The judge did not give examples of such cases.

His own *bona fides* cannot be doubted. Human rights watchers have often recognized his human rights record.⁷⁸ While it is possibly true of Corbett, there were also several unfortunate events where judges uncritically applied the inhumane laws of the apartheid government. Even Judge Corbett's understanding of the role of the judiciary did not give much hope that the courts could be institutions of change and justice in the apartheid era. Only if there was no traditional interpretation available, could the courts opt for a fair and just interpretation.

Secondly, the courts generally interpreted legislation in the light of the Roman Dutch law presumption that the legislature does not intend to interfere with the jurisdiction of the courts or to change the common law more than was clearly and unambiguously intended. The effect of all this, Corbett states, was that the courts often ameliorated harsh laws.

However, as early as 1989, Arthur Chaskalson, known for his defence of political offenders since the 1960's, and later President of the Constitutional Court and chief justice of South Africa, stated that the judiciary not only had the power to

⁷⁶Corbett, M. 1998. *Presentation to the Truth and Reconciliation Commission*, 115 SALJ 18, p. 20. See also Dyzenhaus, D. 1998. *Truth, reconciliation and the apartheid legal order*. Cape Town: Juta and Co., p. 16ff, and Davis, D, Marcus, D and Klaaren, J. 1997. *The Administration of Justice in Annual Survey of South African Law, 1997*. Cape Town: Juta & Co, p. 786.

⁷⁷ Ibid.

⁷⁸See for example Dyzenhaus, D. 1998. *Truth, Reconciliation and the Apartheid Legal Order*, p. 40f; Ellman, S. 1992. *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency*. Oxford: Clarendon Press, chapter 3. However, it is a known fact that the judge himself was often side-lined exactly for his human rights record. See Dyzenhaus, 1998; Dugard, J. 1987(3). Omar: Support for Wack's ideas on the Judicial Process, SAJHR, p. 295.

play a role in dismantling apartheid, but also the judicial obligation. In a paper in 1989⁷⁹ Chaskalson pointed to the discrepancy between the common law heritage requiring judges to interpret statutes in such a way that it denies all forms of discrimination and a demand from the legislature to apply repugnant laws without questioning.

They were at one and the same time being asked to articulate and give effect to equitable common law principles, and to uphold and enforce discriminatory laws: at one and the same time to be an instrument of justice and at another to be an instrument of oppression.⁸⁰

Thus, while Chaskalson portrayed an element of understanding the dilemma of the South African judges under the apartheid regime, he nevertheless dismissed the myth that the judges were merely interpreting the discriminatory statutes as humane and broad as possible. The common law with its interpretive presumptions laid a burden on the courts to treat all humans equal and to give maximum effect to equality. The statutory law, erecting the pillars of the apartheid society, made a mockery of these principles. The judiciary largely opted to ignore this contradiction. Rather than interpreting the repugnant laws in the light of the common law heritage of South Africa, the judiciary allowed the oppressive laws to sit judgment over the common law.

Consequently, Corbett defined the role of the judiciary extremely narrow. Its only positive contribution was to interpret ambiguous laws in such a manner that principles of justice, equality and liberty is served. For Chaskalson, the duty of judges in the apartheid era went further than that. In all aspects of interpretation they had to interpret from a basis of the Rule of Law.

Corbett works with a narrow understanding of the role of the judiciary, and a broad understanding of the role of Parliament. For him statute law takes precedence over common law. Consequently, common law changes when the political ideologists introduce a new framework for society. That framework, he asserted, is a given for the judiciary. They cannot change it. Chaskalson saw a basic principle of justice embedded in the legal system and in this case in the common law. If the

⁷⁹1989. Law in a Changing Society, in *SALJ*, 1989 (5), p. 293. I am indebted to Dyzenhaus, 1998, pp. 14 ff. for the insights in the relevance of Chaskalson's paper for judicial interpretation during the apartheid era.

⁸⁰*Ibid*, p. 294.

sovereign undermines this foundation, the judiciary has a duty to speak up. This duty operates in both a parliamentary democracy and in a constitutional dispensation.

Dugard observed that the South African judges approached their judicial function in an unduly narrow manner.⁸¹ The positivist approach of the judiciary resulted in a juxtaposition between rules and values. Consequently, the pre-democratic courts made a radical distinction between law and morality. Already in the 1970's Dugard proposed that judicial positivism should be replaced by a value-based approach.⁸² Dugard's approach, however, should not be seen as radical in the sense of the rising critical legal studies movement that developed in the 1970's in the United States and Europe. While his leanings was towards the creativity of the bench proclaimed by the American Realists, linked with an acknowledgement of natural law values,⁸³ Dugard was never a radical thinker.

He blamed the positivist approach of the South African judges under apartheid for the narrow interpretation of the law. The result of this positivism was a self-imposed blindness or as Dugard calls it, a "jurisprudential cloak of concealment" which is paraded as analytical jurisprudence, while it is in fact the judicial expression of conservative politics.⁸⁴

Dugard suggested that this damning influence of political conservatism could have been countered by what he calls "traditional natural law values". Dugard described these natural law values as freedoms and rights:

- Freedom from arbitrary arrest and detention without trial;
- Freedom from cruel and unusual punishment;
- The right to legal representation;
- The right to be heard before one's liberty is taken away;
- Freedom of speech and literary expression;
- Freedom of the press;
- Freedom of assembly; and
- Freedom of movement.⁸⁵

⁸¹Dugard, J. 1971. The Judicial Process. Positivism and Civil Liberties, *SALJ*, Vol. 88, p.181 ff.

⁸²Dugard, J. 1978. *Human Rights and the South African Legal Order*. Princeton: Princeton University Press, p. 400ff.

⁸³Ibid, p. 197.

⁸⁴Ibid, p. 189.

⁸⁵Ibid, p. 197.

An insistence that these rights are based on natural law principles sounds somewhat conservative and even ridiculous in the 21st century. These rights and freedoms are given entities in modern constitutions. They usually refer only to civil and political rights. However, it serves as a reminder of exactly how oppressive the apartheid *cum* colonial government was in the 1970's.

At the University of the Witwatersrand, where Dugard was a professor, Etienne Mureinik, joined in Dugard's criticism of positivism and his plea for a return to natural law. Mureinik introduced Ronald Dworkin, the liberal successor of positivist icon HLA Hart at Oxford. In an almost prophetic pre-empting the excuses of the judiciary before the Truth and Reconciliation Commission, Mureinik suggested in the late 1980's when it became clear that the apartheid government was at the end of the road, that legislation in terms of Dworkin's philosophy should satisfy a certain adjustment after 1994.⁸⁶

While Dugard and Mureinik addressed a specific problem of non-resistance of the courts to the unjust apartheid regime, it can also be seen as a transformative model for the new, democratic South Africa. Mureinik's metaphor of the Constitution being the bridge from the old regime of oppression to a new democratic dispensation, expresses the idea of constitutional transformation in an enlightened way.

Dugard had a very specific problem with South African judges who followed their counterparts in England in concealing *conservative politics in the guise of analytical jurisprudence*.⁸⁷

Dugard's alternative to the positivist judges of the apartheid era was the creativity of the bench proclaimed by the American Realists, linked with an acknowledgement of natural law values.⁸⁸

While the apartheid laws of the Nationalist government did not comply with the moral expectations for justifiable legislation, the apartheid statutes were only a small component of the corpus of South African legal resources.⁸⁹ If the bench was willing to consider to the Dworkinian test of a minimal threshold of moral appeal, they

⁸⁶Mureinik, E. 1988. Dworkin and Apartheid, in Corder, H (ed.), *Essays on Law and Social Practice in South Africa*, Cape Town: Juta and Co, p. 207.

⁸⁷Ibid, pp. 181 – 200.

⁸⁸Ibid, p. 197.

⁸⁹Ibid.

could apply laws and common law with a moral basis as a counter for the oppressive laws.

In the same vein, Dyzenhaus suggested that the real problem of the era was the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation. In other words, the judges explicitly chose not to give heed to values in their judgments, even those obligated upon them by the common law.⁹⁰

The power of the ruling party and its influence as the overwhelming majority in Parliament made it difficult for the judges to rock the boat. If they interpreted an ambiguous statute in such a way that it defeated the aims of the government, the Parliament could simply draft an amendment to obtain its initial goals.⁹¹

This does not mean that none of the judges had a moral inclination. However, Dyzenhaus correctly pointed out that the general inclination was not to explore alternative models of interpretation. Dworkin's allegations against the American judges of the 19th century have some application here. If the judges of the apartheid era saw the broader picture of the common law, and its demands for equality, freedom and justice, they could have posed a stronger challenge to the suppressive apartheid laws. Referring to *Minister of Interior v Lockhart*,⁹² Dyzenhaus showed that the courts opted for a narrow interpretation of statutes and found power to discriminate unreasonably clearly implied in a discriminatory statute, although the Nationalist Party parliamentarians denied in Parliamentary debates that it was the intention of the legislation to discriminate.⁹³

While the new constitutional dispensation in Namibia and South Africa opened the doors for new models of legal interpretation, it would be wrong to assume that the pre-independent Namibian courts had no option but to follow the wishes and whims of the South African legislators. As Chaskalson pointed out, the common law further provided precedents for the bench to resist oppressive legislation.

It will be an oversimplification to assume that the difference between Corbett on the one hand and Chaskalson/Dugard/Dyzenhaus on the other is a mere political

⁹⁰Dyzenhaus, D. 1998. *Truth, Reconciliation and the Apartheid Legal Order*. Cape Town: Juta and Co, p. 16ff.

⁹¹The so-called Modderdam squatters are a case in point. The informal settlement received eviction orders. The squatters challenged the orders several times in court and won, only to be defeated by new legislation. See Surplus People Project. 1985. *The Surplus People. Forced Removals in South Africa*. Johannesburg: Ravan Press, pp. 143 ff.

⁹²1960 (3) SA, 765 AD.

⁹³1950. Hansard, cols. 7810 and 7827.

issue. On the contrary, Corbett can hardly be defined as a political conservative in the South African context. Neither can Dugard, for example be identified as *left* or any other political tag beyond centrist liberal. It is not even a question of two political systems, constitutionalism or parliamentary democracy. At the crux of the difference lies opposing schools of thought. It may be that the positivism of the judges in the apartheid era was escapism for some, but it can also be a judicial choice for some variation of positivism, or 'soft positivism' and against the post-modernist judicial activism. The 'soft positivist' line of thinking emphasises legal clarity and a clear distinction between the roles of the legislator to make law *vis-à-vis* the role of the judiciary to interpret law.

The other school is primarily interested in justice. Law and the legal system should not only order and maintain society, it must do it in a just and fair manner. Where the legislator fails to legislate according to the underpinning historical principles of justice, equality and fairness, the courts have an obligation to interpret the laws in the light of the novel (Dworkin) written by the legal system over centuries.

In a more radical form, the legal realists and later the critical legal studies movement (CLS) doubt that legal clarity is possible. For the Realists it did not make sense given the different models of interpretation and especially the different personalities and backgrounds of the judges to think that five or more US Supreme Court judges can come to an unanimous decision or a concurring judgment. CLS sees the reasons for judgments – legal principles, previous rulings, abiding by the *stare decisis* rule - merely as smokescreens for ideological bourgeoisie choices (mostly at the cost of the poor and powerless).

The judgments of the Appellate Division overturning judgments of the Supreme Court of South West Africa/Namibia between 1986 and independence in 1990 is an indication of the tremendous influence of political ideology and the ideological framework of apartheid on the judiciary.⁹⁴ On the other hand, the Supreme Court of South West Africa/Namibia proved that the South African oppressive laws could be challenged successfully, despite the fact that the judges like the South African Supreme Court benches, were products of the system.

⁹⁴See chapter 3.

2.5 Transformative Constitutionalism

It came as no surprise that academics took up the challenge of the likes of Mureinik and Dugard against positivism after Namibian independence and democratisation in South Africa. Several academics challenged the heritage of the apartheid era for its alliance with Western legal positivism and liberalism.⁹⁵

Even the term liberalism became suspect after 1994. It was no longer seen as an expression of progressive thinking challenging the ideological apartheid heresy. The natural law approach of Dugard and the liberal Dworkinian model of Mureinik came under the same scrutiny as positivism.⁹⁶

As stated earlier, an article by Karl Klare set the scene for the jurisprudential debate on the role of a post-modernist or CLS approach (or at least an approach sympathetic to CLS insights) *vis-à-vis* traditional liberal jurisprudence.⁹⁷

The challenge did not go unanswered. Traditional liberals and positivist thinkers eventually challenged the initial strong appreciation of what is now known as transformative constitutionalism. They did not suggest that the post-apartheid society should give up all the victories of the constitutional jurisprudence either. However, they strongly challenged the idea that liberal positivist jurisprudence of the likes of Herbert Hart or the liberal natural law approach of Ronald Dworkin is necessarily unfit for a progressive constitutional jurisprudential model.⁹⁸

Karl Klare's article stirred the South African constitutional debate.⁹⁹ His attack on a liberal literalist interpretation of the South African Constitution and the insistence that a post-liberal constitution justifies a post-liberal interpretive model found wide support, so much so that a conference was organised in 2008 to evaluate

⁹⁵ See the articles of Klare and Woolman/Davis below.

⁹⁶ The articles of Karl Klare and Woolman and Davis, discussed below, are indications of the changed understanding of the word liberalism or the phrase legal liberalism after 1994. In the apartheid era, it identified the political centre left, i.e. the proponents of non-racial democracy who opted to work for an inclusive democracy within the structures of government in Namibia and South Africa. The non-racial Namibia National Front of Bryan O'Linn in Namibia and the Progressive Party led by Van Zyl Slabbert but personified by Helen Suzmann, are proponents of these groups. While they were not part of the liberation movements, they were seen as allies in the struggle for justice and democracy. After 1994, activist often saw liberalism as an obstacle to progressive thinking and reform.

⁹⁷ 1998. Legal Culture and Transformative Constitutionalism, in 14 *SALJHR*, p. 146 ff.

⁹⁸ The strongest challenge came from Theunis Roux, now professor at the University of New South Wales. Other proponents of the positivist challenge are Alfred Cockrell and Anton Fagan.

⁹⁹ Klare, E. 1998. Legal Culture and Transformative Constitutionalism, 14 *SAJHR* 146.

the development of transformative constitutionalism in ten years since the appearance of his article.¹⁰⁰

Klare used Mureinik's article to elaborate on the significance and uniqueness of constitutional interpretation and more directly the transformative role of the new constitution in South African adjudication.¹⁰¹ The democratic transition of South Africa, personified and spearheaded by the constitution, "is intended to be a bridge from authoritarianism to a new culture of justification, a culture in which every exercise of power is expected to be justified".¹⁰²

Klare used a long quote of Mureinik to introduce his understanding of exactly what in the South African legal system needs to transformation. Mureinik looked at the repression and the serial state of emergencies in the last years of the apartheid government and questioned the role of a conscientious judge. Without mentioning Chief Justice Corbett, Mureinik refers to the dilemma Corbett discussed in his representation to the Truth and Reconciliation Commission. If the conscientious judge, faithful to his oath to uphold the laws of the day, yet forced to do it in such a way that he/she nullifies or at least minimize the effect on the victims, Mureinik saw no way that such a legal system still has a place for justice.¹⁰³ The fetters of unjust law will eventually destroy such judges' capacity of justice. The constitutional dispensation, Klare commented, needs a new way of looking at the role of the legal system in general and judges in particular. Klare defined transformative constitutionalism as follows:

*.. a long term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through large scale nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but short of or different from 'revolution' in any sense of the word.*¹⁰⁴

¹⁰⁰University of Stellenbosch: *Conference of Transformative Constitutionalism after Ten Years*, held on 8 August 2008.

¹⁰¹See p. 147. Mureinik, E. 1994. A Bridge to Where? Introducing the Interim Bill of Rights. *10 SAJHR*, p. 31.

¹⁰²Klare, p. 147, quoting Mureinik, p. 32.

¹⁰³Mureinik, E. 1988. Dworkin and Apartheid, in Corder, H (ed). *Essays on Law and Social Practice in South Africa*, p.181 on p. 182.

¹⁰⁴Klare, 1998.p. 150.

Klare's point of departure is that the South African Constitution signifies a break with traditional liberalism and the creation of what he calls "an empowered model of democracy".¹⁰⁵ The South African constitution should therefore not be read as if it is just another product of liberalism. Klare called it a post-liberal constitution. He identified the features that signify the break as "multiculturalism, close attention to gender and sexual identity, emphasis on participation and governmental transparency, environmentalism and the extension of democratic credentials into the private sphere".¹⁰⁶

Klare is not always clear on how important it is for issues of adjudication to accept a post-liberal reading of the constitution. On the one hand he states that his article is not meant to convince everyone that a post-liberal reading is the correct interpretation of the constitution, but rather to invite dialogue.¹⁰⁷ However, he also raised the problem with opting for a liberal interpretation without dialogue. Since the liberal approach has always been seen as the correct "legal" interpretation and post-liberalism as "political", Klare doubted that transformative interpretation would get a fair hearing if post-liberalism *vis-à-vis* liberalism, as foundations of interpretation were not debated.¹⁰⁸ The political dimension of interpretation is the real issue that Klare dealt with. One gets the idea that transformative constitutionalism is closely linked to a post-liberal reading.

Klare stated that the drafters of the Constitution, by dramatically moving away from liberalism, expected the interpreters not to interpret the South African Constitution through the lens of "classical legalistic methods".¹⁰⁹ Consequently, he sees it as a legal necessity that that a "transformative conception of adjudicative process and method" be applied to interpret the South African Constitution.¹¹⁰

The critics of a transformative constitutional model emphasise the problematic relationship between law and politics in adjudication, and the tension between judicial constraint and judicial activism. Klare opted not to use the word "activism" but rather spoke of the freedom of judges "to accomplish justice".¹¹¹ The constitution so

¹⁰⁵ *Ibid*, p. 152.

¹⁰⁶ *Ibid*, p. 151.

¹⁰⁷ *Ibid*, p. 152.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*, p. 21.

¹¹⁰ *Ibid*, p. 156.

¹¹¹ *Ibid*, p. 149.

dramatically altered the substantive constitutional foundations and assumptions that it is impossible to believe that the drafters assumed that the constitution would be interpreted “constraint by the intellectual instincts and habits of mind” of the lawyers of the apartheid era.¹¹²

*But we balk at the idea of transformative adjudication, because this suggests an invitation to judges as distinct from legislators, to attempt in their work to accomplish political projects.*¹¹³

Klare, quoting CLS scholar and Harvard professor Duncan Kennedy,¹¹⁴ repeated the old argument against a reliance on the text only: Texts do not self-generate their meaning, but need to be interpreted. Constraint, however, is not an objective legal rule with defined rules and therefore hardly measurable. If anything, constraint is culturally constructed. In other words, they are constrained less by the clear and unambiguous language than by a traditional fear to enter the political arena.

Yet, judges, lawyers and academics, in the words of Duncan Kennedy, have no specific legal criteria to come to correct conclusions apart from the persuasive “deployment of the argumentative tools that legal culture makes available to judges trying to generate the effect of legal necessity”. Consequently, in contested cases it is hardly possible to speak of a correct, non-strategized legal solution, or a solution derived only from legal argument rather than strategic use of the law.¹¹⁵

Klare dedicated one section to go over the old arguments that constraint and judicial activism are equally political. He used the realist argument that judges cannot exclude the personal and political values from the interpretive process. The question is no longer, to what extent can a judge distance herself from her *a priori* convictions, since “the traditional rule-of-law ideal is quite simply impossible”.¹¹⁶ Further, not only the Realists or CLS advocates rely on external extra-legal personal or political sources to adjudicate in matters where there is no clear legal answer. Klare points to

¹¹²Ibid, p. 156.

¹¹³Ibid, p. 157.

¹¹⁴Ibid, p. 161, quoting Kennedy: 1980. Towards An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850 – 1940, *Research in Law and Sociology, Volume 3*, pp.3-24. It is interesting that Kennedy thanks Klare for his helpful comments in his Acknowledgements, an indication of the close relationship between Kennedy and Klare.

¹¹⁵Ibid, p. 164, quoting Kennedy: 1996. Strategizing Strategic Behavior in Legal Interpretation. *Utah Law Review*, p. 787. See also Kennedy, D. 1997. *A Critique of Adjudication (fin de siècle)*, Cambridge, MASS: Harvard University Press, p. 2.

¹¹⁶Klare, p. 163.

Hart's solution for the penumbral question, or Dworkin's method of coherence and integrity.¹¹⁷

Klare saw his position as a direct response to the philosophy embedded in the constitution, which he defines as post-liberal and perceived transformative constitutionalism as something more than adjudication and interpretation of the wording of the constitutional text. The adjudicators need constant reminders through the process of adjudication to be aware of the values and objectives of the constitution and to consider it. The interpreting, adjudication and implementing the constitutional text must lead to fulfil the ideals of the constitution: a non-racial, non-discriminatory, democratic society. In this process it is inevitable to include political issues and conclusions.

Klare's interpretive model closely relates to the values and views of the American Realists and to some extent the CLS movement, more specifically the position of Duncan Kennedy. He warned that the constraint literalist approach of the apartheid era could hardly be duplicated in the new constitutional dispensation. One cannot speak of a broad, purposive interpretation of rights and at the same time ignore the clear objectives of the constitution envisaged in the Preamble and the total structure of the document. An activist judge, or as Klare chose to call it, a progressive bench, is the tool to implement transformative constitutionalism.

The known models of interpretation that encourage an activism searching for truth beyond the written text, and what is known as legal issues, are American Realism and CLS. Duncan Kennedy has become synonymous of CLS. Realism and CLS are both open to include other disciplines such as philosophy, sociology and even political science to interpret the constitutional text. In addition, it does not shy away from an open-minded understanding of the political consequences texts to be interpreted.

When it comes to post-1994 jurisprudence, the South African Constitutional Court has stated on several occasions that constitutional interpretation demands more than a literalist approach:

- Kriegler stated that "the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal

¹¹⁷Ibid, p. 158.

- considerations may loom large”,¹¹⁸
- Mahomed, CJ in the same case stated that the South African constitution “represents a decisive break from and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos, expressly articulated in the Constitution,”¹¹⁹
 - Mandala, J refers to “...a document that seeks to transform the *status quo ante* into a new order”.¹²⁰ The list goes on.

The need for transformative constitutionalism is clear. What Klare has done is rolling out a model that will fit the demand of transformation. While Klare repeated several times that he is not necessarily advocating a post-liberal constitutional tag, neither does he want to sell a specific interpretive mode, he only gave attention to the post-liberal understanding of the constitution and only used the basic approach to judicial activism usually identified with American Realism and CLS.

Klare is at pains to point out that he does not use the terms *progressive* and *conservative* in a political sense of ‘left’ and ‘right’. A progressive judgment in the USA often comes from a political conservative bench and *vice versa*.¹²¹

Coming back to Klare’s initial rejection of the dichotomy between pure legal arguments and results on the one hand and political arguments and results on the other, Klare concluded that the constraint judgment is also political and influenced by the judge’s own environment, personality and understanding. The difference between the judge constraint by the *status quo* and an activist, or progressive judge is not a legal approach *vis-à-vis* a political approach. The progressive judge or scholar has a clear understanding of the process of incorporating other scientific fields, and the necessity of political judgments and political consequences of his/her judgments. The conservative judge, however, bound by perceived constraints, locks anything out of his/her consideration that does not fit his/her traditional understanding .of the watertight separation between law and politics.

¹¹⁸S v *Makwanyane*. 1995 (6) BCLR 665 (CC), par 207. See also the judgment of Mokgoro, J at par 302 – 304.

¹¹⁹Ibid, par 262.

¹²⁰*Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), par. 157.

¹²¹Klare, p. 170.

Klare observed that the initial process of transformation in South Africa was marked by a strong element of legal conservatism.

*In this context “conservatism” does not refer to political ideology. I mean rather cautious traditions of analysis common to South African lawyers of all political outlooks. Even the most optimistic proponents of progressive social change often display the same jurisprudential habits of mind as shown by their more pessimistic or political conservative colleagues.*¹²²

Klare suggests that the hermeneutical key for constitutional interpretation is to be found in the political framework and structure of the constitution. He further contends, in the same line of thinking as Judge Chaskalson that it is not a case of the post-independent interpretation being political and the interpretation of the previous dispensation being pure legal interpretation. The apartheid interpretation was as political as any value-based interpretation can be.¹²³

As we have seen, he opted for an *a priori egalitarian* point of departure. Since the South African constitution like the Namibian one, is in the first place the bridge to take South Africa from apartheid to a just, inclusive society, one cannot interpret subdivisions without constantly being reminded of the foundation and intention of the document as a whole.

Klare’s point is well taken. One cannot speak of values as if they are eternal, non-changing universal principles that are somewhere out there for the judges to discover. This rigid, natural law approach does not have that followers in a post-modern pluralist society.

Klare further demonstrated that a *pure legal argument* does not exist. He uses the concepts *legal constraint* and *adjudication* to explain the conflict between aspects of law that a judge deals with and the extra-judicial material that comes into play to determine values.¹²⁴ All legal texts maintain elements of constraint that binds the interpreter. However, even the constraints are not clear-cut legal principles, but matter of interpretation, “not an innate, (i.e. uninterpreted (sic) property of the material themselves that we can know objectively)”.¹²⁵

The adjudicators are not subjective interpreters who come to the text in total objectivity. They work with the materials of previous adjudicators (an important

¹²²Ibid, p. 152.

¹²³Ibid, p. 150f.

¹²⁴Ibid, p. 160ff.

¹²⁵Ibid, p. 160.

aspect of the common law with its *stare decisis*-rule). They also bring their culture, history and personal values to the table.

In a lecture at Stellenbosch University former Chief Justice Pius Langa looked at transformative constitutionalism in a broader sense.¹²⁶ Without the reliance on American Realism or CLS, Langa nevertheless dealt with most of the issues raised by Klare. He gets his definition of transformative constitutionalism from the Epilogue of the constitution:

...a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

Langa shared most of Klare's criticism of the courts in the apartheid era. His emphasis on economic transformation is even stronger than that of Klare. For him the skewed "provision of services to all and the levelling of the economic playing fields" must be central to any concept of transformative constitutionalism.¹²⁷ For Langa socio-economic justice are more than protecting individuals from state interference. It is not enough to burden the state to allow formal equality without doing anything. Transformation means access to education and an active obligation on the State to implement structures such as affirmative action to create opportunities for those left behind in the previous unjust system.¹²⁸ Langa bemoaned the fact that the South African legal culture emphasises a formalist approach to law rather than substantive argument.¹²⁹ The role of judges in the new dispensation must be a total round about turn -

*..., judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.*¹³⁰

Quoting Botha and Van der Walt,¹³¹ Langa questioned Mureinik's constitutional metaphor of a bridge. While the interim constitution could be seen as a

¹²⁶ Prestigious Lecture delivered in Stellenbosch on 9 October 2006. Printed as Langa, P. 2006. Transformative Constitutionalism. *17 Stellenbosch Law Review*, p. 351.

¹²⁷ *Ibid*, p. 352.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*, p. 357.

¹³⁰ *Ibid*, p. 353.

bridge or a space between an unstable past and an uncertain future, real transformative constitutionalism does not fit the metaphor. It is a permanent ideal and not a temporary route to equal access to resources and services. The constitution will always create the space for dialogue and contestation where no practice or idea is cast in stone and where new “ways of being are constantly explored and crated”.¹³²

Quoting several examples, Langa opines that the Constitutional Court of South Africa has made the transition to a progressive, transformative court, without throwing away the baby with the bathwater. Where words are clear, he asserts the courts have no rights to enter the arena of the legislator.

*Were the courts to completely discard any adherence to the text they would enter squarely into the domain of the legislature as creators rather than interpreters of the law. That is clearly not what the Constitution envisages.*¹³³

It falls outside the scope of this thesis to analyse the South African Constitutional Court or its judgments. Suffice it to take note of the fact that a respected chief justice of South Africa embraced the principle of transformative constitutionalism without simultaneously opted for an interpretive module linked with the American Realists or CLS. Referring to the accusation (of Klare?) that the South African legal culture is generally caught in the web of formalism and conservatism, Langa stated that not all the members of the legal fraternity are like that. He quoted the resistance against apartheid by the legal fraternity as evidence of the opposite.¹³⁴

Woolman and Davis, like Klare, see the Constitution as a radical break with liberalism. Interpreting the case of *Du Plessis v De Klerk*,¹³⁵ the authors found the ideological position of the Court as the key to understand a judgment. The first appellant was the editor of the newspaper *The Pretoria News*, the second the owner and publisher of the newspaper and the third a journalist writing some disputed articles for the newspaper. The articles claimed that the first respondent, one Gert de Klerk and his company, the second respondent, were transporting arms to the Angolan rebel movement, UNITA. In doing so South African citizens contravened air

¹³¹Botha, H. 2004. Freedom and Constraint in Constitutional Adjudication. *20 SAJHR* p. 249; Van der Walt, A. 1995. Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law, *11 SAJHR* p. 169.

¹³²Langa, p. 354.

¹³³Ibid, p. 357.

¹³⁴Ibid.

¹³⁵*Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

regulations and destabilised Angola. The Transvaal Provincial Division of the Supreme Court referred two issues to the Constitutional Court:

- Whether chapter 3 (the Bill of Rights) of the interim South African Constitution had horizontal application;
- Whether the Constitution can operate retrospectively (the Interim Constitution came into operation after the act in question was executed, but before the case of De Klerk against the appellants went to court).

The Constitutional Court answered both questions in the negative and stated that the South African Constitution, unlike the Namibian Constitution, does not provide for the horizontal application of the Bill of Rights.¹³⁶ However, the fundamental questions are extremely relevant: What role does an *a priori* ideological position play in the interpretation of the Constitution? Or, to look at it from the perspective of the Bench: Is it imperative for the Court to take notice of the basic values or ideological foundation enshrined in a constitution?

Woolman and Davis¹³⁷ began their argument by finding the ideological foundation of the South African constitution. They call the ideology underpinning the South African Constitution 'Creole Liberalism'¹³⁸. Their Creole liberalism is reminiscent of what Klare called post-liberalism. One can also call it liberalism with a human face, or liberalism with a heart, *vis-à-vis* classical liberalism with its conservative faith in the positive powers of the free market system and the almost messianic faith that the market and market power will order society for the best.

Creole liberalism opposes the pretext of classical liberalism that the government only has a negative responsibility not to interfere in the private lives of individuals and only protects the individual from interference of their fundamental rights. Classical liberalism remains neutral in the contest of different rights. Creole liberalism, on the other hand demands that the State provides active support to the vision of meaningful life for those who are not dominant in society, thus also giving preference to the rights supporting the weakest members of society.

¹³⁶Article 5 of the Namibian Constitution.

¹³⁷Woolman, S and Davis, D, *12 SAJHR*, p. 361ff.

¹³⁸The term can be best understood by referring to the Creole language in Mauritius, which is a combination of French and the traditional vernaculars of the islands. The Constitution has a liberal foundation, but the liberalism is changed by the emphasis on freedom in the bill of rights and the caring chapter on social and economic rights, giving it a totally new character.

While Klare is at pains to place his article within a mosaic of interpretive keys,¹³⁹ in other words, within the framework of post-modernist thinking, Woolman and Davis are clearly moving towards *Dworkinian* certainty.¹⁴⁰ However, Davis disagreed with Dworkin on one very crucial point: Dworkin does not leave room for different results in constitutional interpretation. If the judges follow the interpretive rules of Hercules, J., even the divide between conservative and liberal becomes irrelevant. Right moral application inevitably leads to correct answers. Woolman and Davis, on the other hand, maintained that the a priori application of political model determines the outcome of the interpretation. The correct hermeneutical interpretive keys and a correct *a priori* political understanding of the Constitution equally guarantee the correctness of the interpretation.¹⁴¹

Woolman and Davis were explicit in their rejection of Justice Kentridge's judgment. They did not argue that Creole liberalism is a better option than classical liberalism. For them Judge Kentridge erred in law in *De Klerk v Du Plessis*¹⁴² by unlocking the constitutional right to freedom of expression with a liberal key.

The authors discussed several flaws in Kentridge's judgment. His fundamentalist emphasis on the text does not allow the text to speak for itself and his use of foreign authorities is susceptible.¹⁴³ Woolman/Davis does not appreciate his conservative approach to the role of the Constitutional Court in developing the common law at the hand of the Constitution and the judge's rejection of the horizontal application of the Bill of Human Rights. However, the misdirection of the

¹³⁹While Klare believed in the value of his post-liberal model, he stated that it is not the only possibility (p.152). See also his discussion on cultural values p. 160 ff. and legal culture, p. 166 ff. Roux, however, criticised Klare for changing one basic principle of the Critical Legal Studies movement, the unofficial custodians of post-modern legal thinking, with whom he identifies. While Critical Legal Studies has emphasised the impossibility of a bench of more than one judge to come to exactly the same conclusion in a given case, Klare proclaimed a dispensation where all South African judges are compelled to use the same interpretive model. See Roux, T. 2009. Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference? In *Stellenbosch Law Review*, Vol. 20, No 2, pp. 258 – 285.

¹⁴⁰I use the term *Dworkinian* for lack of a better word to describe the legal philosophy of American thinker Ronald Dworkin, who maintained that even when the traditional sources of law are uncertain, the law can still provide an answer without allowing judicial discretion to become a source of law *per se*. See for example 1967. The Models of Rules, University of *Chicago Law Review*, Vol. 35. See also 1972. Hard Cases, *Harvard Law Review*, Vol. 88, p. 1057 ff.

¹⁴¹See also their later article, 1998: Democracy and Integrity: Making Sense of the Constitution, 14 *SAJHR*, p 127 ff. on pp. 137ff.

¹⁴²1996: (3) SA 850 (CC).

¹⁴³The authors point to the anomaly that the Court refers to the Namibian Constitution where horizontal application of the Bill of Rights is clearly determined by the direct words. However, when he discussed foreign jurisdictions, it ignored Namibia.

judge is the result of the hermeneutical key that he (and the concurring judges of the Constitutional Court) used to unlock the law.

*Classical liberal political theory and the application of the doctrine enunciated by the court in Du Plessis v De Klerk are clearly linked to one another. Classical liberal theory takes a view of individual freedom which depends upon a minimal state refraining from interference in the 'private' affairs of individuals, while simultaneously protecting individuals from such interference by other members of society.*¹⁴⁴

While the interim Constitution was still uncertain on the position of horizontal application, the wording of the final Constitution left no uncertainty. Since the common law still significantly restricts the life choices of many South Africans, and determine their lives, the authors concluded that classical liberal theory does not unlock the intention of the Constitution to transform society into a radical, free society. Consequently, the judgment is wrong, not only because the judge or judges erred or misdirected themselves in applying the law, but especially in opting for a specific hermeneutical pretext, in this case, classical liberal political theory. Lastly, the authors pose Creole liberalism as the hermeneutical key to unlock the Constitution.

While they obviously have a personal preference for Creole liberalism,¹⁴⁵ their choice is posed by the Constitution itself.¹⁴⁶ Three useful insights of Woolman and Davis, on the one hand and Klare on the other, are important when we look at Namibian judgments -

- Klare's thesis that the literal interpreters are no less political than those who work with a value-based hermeneutics;
- Both Klare and Woolman/Davis' theses that political theory often operates as a pretext or hermeneutical *a priori* in constitutional interpretation; and
- Woolman/Davis's insistence that value based judgments is not discretionary decisions as suggested by post-modernist theorists.

Woolman/Davis' article did not intend to analyse the political and economic realities of the new South Africa. However, at the time of the judgment all indications were pointing to a market economy with some control structures that will allow

¹⁴⁴Woolman and Davis, p. 382.

¹⁴⁵They propose Creole liberalism as the response to the great ideologies of the 20th Century. See p. 395.

¹⁴⁶Ibid, p. 400 ff.

government the final say in all economic matters. There was little or no signs of a caring liberal market economy or even less a moderate social-democratic interventionist economy based on the needs of the most vulnerable people in society.

2.6 Positivism a Problem?

The value of a positivist approach in a constitutional democracy remains a debatable point. I have pointed out that John Dugard saw positivism as the main reason for judges to ignore the immorality of the apartheid laws.¹⁴⁷ However, South African scholars such as Cockrell, Fagan and Roux disputed the negative role of positivism. Roux asserted that positivism could be a valuable model in constitutional interpretation and transformation.

In the international arena scholars regularly blame positivism for the rise and maintenance of ideological heresies. The German law professor Gustav Radbruch blamed positivism for the total surrender of the legal fraternity to Hitler.¹⁴⁸ However, Thomas Mertens challenged the thesis of Radbruch.¹⁴⁹ He pointed out that Radbruch himself as a positivist, was never attracted to the Nazism. His support of the Weimar Republic is but one indication that Radbruch's positivism was not popular amongst the German legal fraternity when Hitler came to power.¹⁵⁰ He also pointed out that the positivist Kelsen lost his post immediately when the Nazi's took over, while the fierce opponent of positivism, Carl Schmidt's post-1933 articles are filled with anti-Semitism.

In South Africa Klare¹⁵¹ with his concept of transformative constitutionalism, and other interpreters such as Woolman and Davis¹⁵² made huge inroads into the original domain of legal positivism. However, it soon became clear that positivism is not dead yet. Moderate positivists such as Fagan¹⁵³ and Cockrell¹⁵⁴ do not operate

¹⁴⁷Dugard, J. 1971. The Judicial Process, Positivism and Civil Liberties, in 88 SALJ, pp. 181 – 200.

¹⁴⁸See Radbruch, G. 1946. Gesetzliches Unrecht und übergesetzliches Recht, originally in *Süddeutsche Juristenzeitung* 1 (1946), 105–108; Radbruch, G. 1957. *Der Mensch im Recht*. 1957. Göttingen: Vandenhoeck und Ruprecht.

¹⁴⁹Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice. 2003. *Law and Critique* 14, pp. 277–295.

¹⁵⁰*Ibid*, p. 280 f.

¹⁵¹Klare, p. 146.

¹⁵²Woolman and Davis, p. 361ff.

¹⁵³Fagan, A. 1995: In Defence of the Obvious: Ordinary Language and the Identification of Constitutional Rules, 11 SAJHR, p. 545 ff.

¹⁵⁴See: Cockrell, A. 1966. Rainbow Jurisprudence in 12 SAJHR, pp. 1 – 38.

with an old-fashioned view of law. Cockrell challenged the anti-positivist interpreters to lift both the academic debate and the judgments of the superior courts to the level of substantive legal issues rather than structural law. The test for good or bad judgments, Cockrell held, should not be an ideological shibboleth test for or against value-based or positivist judgments.

Not every interpreter or constitutional theorist was ready to depart from the *clear words* of the legal text. The old middle-aged white Afrikaner jungle judges were not the only ones protesting against the value-based approach. In the English-speaking world and to a lesser extent, amongst the so-called Scandinavian positivists, literalism does not equal political conservatism.¹⁵⁵

In the South African context, the analytical positivists entered the constitutional debate on the side of legal scholars who found the value-approach of the post-democratic South African courts, especially the Constitutional Court, somewhat overboard. The strongest attack against Klare came from Theunis Roux, constitutional scholar, presently professor of law at the University of New South Wales.¹⁵⁶ Roux presented a paper at the conference in Stellenbosch celebrating ten years of Klare's article on transformative constitutionalism, joining Anton Fagan and Alfred Cockrell in defence of positivism.

Roux's main thesis is that Klare's transformative constitutionalism was based on the claim that the methodology and political commitments of the American Critical Legal Studies movement (CLS) was the only legitimate interpretive method to unlock the potential of the South African constitution. The flaw in Klare's position, Roux maintained, is the absence of any real alternative and an explanation on how transformative constitutionalism deviates from classical positivism or the liberal interpretation methods of Dworkin and others (mainstream traditionalist liberals, as he calls them).¹⁵⁷

Roux set out to prove that the methodology of Dworkin is as a good approach to transformative constitutionalism, and possibly "a more easily defensible way of

¹⁵⁵Two prominent analytical positivists, Joseph Raz and HLA Hart, were drawn into the South African debate. As noted earlier, none of them fit the conservative tag. Hart's methodology can hardly be called conservative. His elucidating of concepts of law and the legal system were progressive, as we have seen.

¹⁵⁶Roux, T. 2009. Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference? In *Stellenbosch Law Review*, Vol. 20, No 2, pp. 258 – 285.

¹⁵⁷*Ibid*, p. 258.

giving effect to the progressive values underlying the Constitution than the method Klare advocates".¹⁵⁸ The first contradiction in Klare's approach, Roux asserted, is the fact that he sells his interpretive method, which he defines as a post-liberal reading, as the only plausible method to interpret the South African constitution, which will lead to an empowerment model of democracy. Roux, however overstated his position here. Klare left no doubt in the mind of the reader that he interpreted the South African constitution as a post-liberal rather than a traditional liberal document. However, he also made it clear that he is open for a debate on a liberal reading *vis-à-vis* his post-liberal statement. The debate was necessary to prevent the traditionalists to use a liberal position to cut off any political adjudication without considering the necessity of a transformative model of interpretation.

Roux asserted that reading of the Constitution according to the accepted conventions of legal reasoning would provide for an empowerment model of democracy.¹⁵⁹ Further, CLS has always asserted that it is impossible for several judges to use the same model of interpretation and come to the same conclusion. Klare, however came up with one interpretative method, grounded in the thinking and philosophy of CLS, as "the best interpretation and therefore the one that should guide South African judges and lawyers". The CLS movement rejects the idea of one original intent as an interpretive point of departure. Yet, Klare used this argument, usually posed by the proponents of what he calls the "classical legalist method".¹⁶⁰ Only, in his understanding the intention of the constitutional mothers and fathers was not the pursuance of a conservative agenda, but a post-liberal transformative agenda of building a participatory democracy on the principle of empowerment.

To put it differently, Klare, while rejecting the legalism of the apartheid era, opened the backdoor for another form of legalism and determinism. Consequently, while Klare often refers to the Constitution as a radical break with the past, he came up with an interpretive methodology that is so general that it poses no substantive legal challenge for the traditionalists, liberals and classical legalists, and falls in the same structural and procedural pitfalls as the methodology he wished to challenge at its core.

¹⁵⁸Ibid.

¹⁵⁹Ibid, p. 262.

¹⁶⁰Ibid, p. 264.

In defence of the traditionalist method of adjudication, Roux pointed out that the traditional division between politics and law, or a conservative legal agenda will not result in a South African judge concluding very different from Klare's transformative constitutional results.

...a mainstream liberal could read the Constitution as a transformative Constitution using a Dworkinian best-interpretation approach. A hartian legal positivist could do the same thing. There is nothing particular penumbral, after all, about the "essential features" Klare identifies....both of these mainstream liberal interpretive methods... could be used to read the Constitution in an interpretive way.¹⁶¹

Roux also rejected Klare's contention that liberal legalists favour opaque forms of legal reasoning, or that they objected to judicial value choices.¹⁶² He then went on to apply Dworkinian legal reasoning to the constitutional issues discussed by Klare to point out that in all cases a Dworkinian judge or lawyer will be able to develop transformative constitutional jurisprudence.

It is not necessary for this study to go into the detail of Roux's article. It is true that the South African and Namibian judges operated with an extremely narrow and a-political interpretive methodology. However, the condemnation of all liberal models, reminiscent of the post-apartheid rejection of all forms of pre-independent, pre-democratisation liberal politics as insignificant, does not tell the whole story. It does not give credit to those liberal scholars such as Dugard and Mureinik, and the progressive bench of the South West African Supreme Court for their valuable contribution to a critical legal fraternity and an independent judiciary.

In addition, it is a somewhat over breath to identify all positivist and liberal expressions of jurisprudence with the North American over-politicised Supreme Court bench.

Anton Fagan applied the philosophies of Joseph Raz, Israeli Oxford scholar, to answer the strong value driven approach of the South African Constitutional Court.¹⁶³ Fagan links his thesis with Raz' concepts of conformity and compliance. He underlines the superior achievements of a court by relying on the textual moral

¹⁶¹Ibid, p. 266.

¹⁶²Ibid, p. 269

¹⁶³Fagan, p. 545 ff.

position rather than the morals of the external rules of constitutional interpretation. The external rules merely open the door for the moral position of the judges.

The Constituent Assembly had the power and the ability to frame constitutional rules in any way it wanted, yet did not do it. Therefore, the Courts must accept the text itself as the interpretive rules and honour this rule-making act by giving the text its original meaning.¹⁶⁴

Consequently, Fagan concluded that since the source of the constitutional rules is the constitutional text, the interpreter needs no external assistance from non-legal sources. The text, more specifically, the original meaning of the words of the text is also the legal source of the interpreter. Thus, it is the linguistic words of the text that needs to be interpreted, not even the original intention, derived from extra-textual sources, such as the minutes of the Constituent Assembly.

Fagan saw legal stability and certainty in keeping to the text rather than importing so-called constitutional rules. It makes no sense to work from a set of constitutional rules unless one is convinced that following the rules is a morally better choice than following its own moral judgments.

Davis observed that the theory of language that Fagan used works well as long as there are no ambiguities or difficulties in the text itself.¹⁶⁵ But the theory of semantic autonomy falls apart the moment words create symbols, ideas and meanings that neither the user nor the interpreter conceived.

Davis further pointed out that it was exactly this contradictory semantic possibility that lead HLA Hart to make provision for the preservation of clarity on the core, while an element of discretion is allowed on the periphery.¹⁶⁶

Cockrell aimed his criticism not only at the Constitutional Court, but also at what he called *positivism bashing*.¹⁶⁷ Using a differentiation between formal reasoning and substantive reasoning, Cockrell maintained that the South African legal system has not moved from an extreme formal reasoning to a substantive form of reasoning since the coming of democracy, and especially the acceptance of a Constitutional dispensation.

¹⁶⁴Ibid, p. 599.

¹⁶⁵Davis, D. 1998. Democracy and Integrity: Making Sense of the Constitution, 14 SAJHR, p. 127 ff, on p. 130.

¹⁶⁶Ibid, p. 130.

¹⁶⁷Cockrell, pp. 1ff.

The title of the paper, *Rainbow jurisprudence*, is somewhat misleading. It has nothing to do with the overused metaphor of a rainbow to personify the new reconciled South African *rainbow nation*. Cockrell's rainbow is a metaphor of confusing and contradictory judgments.

Cockrell did not criticize value-based judgments *per se*. Rather he opted for what he calls *soft positivism*.¹⁶⁸ Soft positivism allows for a substantive form of reasoning if the text itself requires a value judgment. As an example, he referred to the Bill of Rights in the South African Constitution. The Bill is structured in such a way that it is impossible to interpret it by merely formal reasoning.

Cockrell quoted *Virginia State Board of Education v Barnette*¹⁶⁹ to address the issue of public opinion in interpreting the Constitution. Since a Bill of Rights is designed to take certain issues out of the public domain and out of the hands of the legislature, public opinion can have no bearing on the reasoning of the Court in deciding on these issues. Consequently, norms and values must derive from the constitution. The soft positivism that Cockrell relied on, falls outside the domain of rigid, literalist interpretation.

Roux's insights are important correctives on Klare's vision for transformative constitutionalism. The point that the likes of Roux, Fagan and Cockrell make is that transformative constitutionalism can also become a rigid and fundamentalist approach. While CLS and fundamentalism are two extreme opposites, if the hermeneutical tool based on CLS becomes an absolute, the two opposites can move dangerously close to each other.

Roux's criticism of transformative constitutionalism is not a rejection of CLS insights or a plea for the return to Dworkin's Reconstruction theory, or positivism. Roux asserted that the South African constitution is so obviously transformative that both Hart's positivism and Dworkin's liberalism fit the development of a transformative jurisprudence.

In the same vein Cockrell identified the option for procedure over substantive argument as the real problem of constitutional interpretation. Cockrell (and Fagan) further criticized the general perception that positivism is per definition against value-based judgments. The problem is not with bringing values into the process, but the

¹⁶⁸ *Ibid*, p. 30.

¹⁶⁹ 319 US 624 (1943) at p. 638.

structural way in which values are brought in. Determining the values is often *ad hoc* without any substantive justification for the process.

2.7 Summary

In its crudest form positivism and transformative constitutionalism stand in total opposition against each other. If one reads Klare's dictum as a defence of classical realism or CLS that excludes all other interpretive models, the critical comments of Roux become crucial.

On the one hand, positivism can criticise transformative constitutionalism, for not being honest to its own roots since CLS and Realism have always denied the idea of a conforming single legal position. Consequently, they are giving a distorted view of positivism. Or the positivist can see transformative constitutionalism as an express deviation from the constitutional text to open the door for political reasoning. Alternatively, one can refuse to see the need for a transformative approach to constitutional interpretation, working with the myth that even Hart rejected, assuming that the words of the constitution will always be clear.

On the other hand one can operate with a bias against positivism *per se* – the complaint of both Roux and Cockrell. Roux has convincingly argued that a "soft" positivism or a liberal followers of Dworkin's theories do not necessarily oppose the principle of transformative constitutionalism.

While one can never use the term middle ground when working with diametrically opposed methodologies, a third way is possible. Klare opened the way for such an approach when he stated that while he strongly believes a post-liberal reading of the South African constitution is the way to go, he is open to debate the issue with others. Roux has opened that debate. The third way is to be open for both Klare and Roux's approaches. Whether the courts opt for a cautious approach to social and economic rights using Dworkin's theory of the best solution or working more progressively with a clear objective to develop the individual's right to socio-economic rights, both will work towards transformative adjudication and a model for transforming society.

The approach of the late Justice Pius Langa, former chief justice of South Africa and at the time of his death, an acting judge of the Namibian Supreme Court is a good example of exploring transformative options without making the clear wording of the constitution or legislation with constitutional relevance obsolete. On the one

hand, he expected judges to “bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values”. At the same time he cautions courts to “...the consequences of completely discard any adherence to the text” since they would then “enter squarely into the domain of the legislature as creators rather than interpreters of the law”.¹⁷⁰

In dealing with the constitutional jurisprudence I will constantly look at the way in which the judgments adjudicate on and develop the rights and freedoms of the Namibian people.

¹⁷⁰Prestigious Lecture delivered on 9 October 2006. Published as Langa, P. 2006. Transformative Constitutionalism. *17 Stellenbosch Law Review*, p. 351 on p.353.

CHAPTER 3

THE TIME BETWEEN THE TIMES: CONSTITUTIONAL INTERPRETATION IN PRE-INDEPENDENT SOUTH WEST AFRICA/NAMIBIA

3.1 Historical Background

Not all of civil society and the churches supported the efforts of the South African government, the Democratic Turnhalle Alliance and other internal parties to establish independence from South Africa without including SWAPO. The Council of Churches, their alleviated denominations, and several civil society organisations did not see the reforms of the interim government as a significant development. The internal wing of SWAPO and pro-SWAPO groups in Namibia played a dual role between 1978 and 1990. They boycotted all efforts that exclude SWAPO in exile from a negotiated settlement. At the same time, they used the interim structures to further their objectives for a free, democratic Namibia.¹⁷¹

When the interim government introduced a type of a constitution with an annexed Bill of Rights, the pro-SWAPO forces tested the constitutional principles in Court. Proclamation 101 did not comply with all the requirements for an internationally recognised constitution. South West Africa/Namibia, as the country was called under the interim government, was not a sovereign state, and the Bill of Rights was only an annexure.

However, it was a significant and historical development. While SWAPO was still excluded from the process, the South African government made their intention clear to put Namibia on the road to independence. Once Proclamation R101 of 1985 with its Bill of Rights came into operation, Namibians did not hesitate to claim those rights and to approach the Supreme Court to enforce them. The Courts interpreted it as if it was a Constitution.

Between 1978 and 1985, several South African attempts failed 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,¹⁷² issued South West Africa Legislative and Executive Authority Establishment Proclamation R101 to establish a so-called Transitional

¹⁷¹ See Tonchi V, Lindeke, W and Grotperter J. 2012. *Historical Dictionary of Namibia*. Lanham, Maryland: Scarecrow Press, p. 401ff.

¹⁷² Act No. 39 of 1968.

Government of National Unity (TGNU).¹⁷³ 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.¹⁷⁴ As we shall see, the Supreme Court of SWA/Namibia approached the Bill of Rights in a liberal, purposive manner. Despite the political pressure of the armed struggle and a transitional government that 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.

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 several more years for the interim government and the internal parties to catch up with the insights of the Supreme Court of South West Africa/Namibia.

Although the judges of the Supreme Court of South West Africa/Namibia never saw themselves as a constitutional court, they nevertheless took the Bill of Fundamental Rights serious and in more than one way prepared the way for a constitutional democracy. The phrase “transformative constitutionalism” has not been generally known within the southern African legal fraternity in 1985. Yet, the judgments of the Supreme Court were transforming in several facets of legal thinking and changed adjudication in Namibia.

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.

Proclamation 101 and its attached Bill of Rights was in more than one way the first taste of transformative constitutionalism. Zaaruka points the importance of Proclamation 101:

The period from 1985, witnessed a change in the Supreme Court of South West Africa/Namibia as they started questioning some of apartheid laws application in Namibia with the adoption

¹⁷³The Traditional Government of National Unity (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.

¹⁷⁴See article 34, Proclamation R101 of 1985.

*of Proclamation R101 of 1985. This marked a major departure from the earlier period as the country prepared for transition to independence*¹⁷⁵.

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. It ignored the challenge of the Namibian Court to evaluate the values and aims of the Bill of Rights and followed the traditional, rigid approach by looking primarily at the intention of the legislator and the legal interpretation surrounding the issues. Their constant rejection of the transformative judgments of the Supreme Court was a typical example of the old order clinging to a diverged form of fundamentalist positivism.¹⁷⁶

While the Transitional Government and South Africa possibly saw Proclamation 101 and its attached Bill of Rights as an instrument in the so-called battle for the soul and the mind of the people, activists were quick to use it in their struggle for independence. To use Mureinik's metaphor, it became a bridge from oppression to freedom. While the judges of the Supreme Court of South West Africa/Namibia may never have heard the phrase "transformative constitutionalism" they were indeed transforming the legal system and to some extent, the Namibian society.

3.2. 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 1978.¹⁷⁷ The latter Proclamation severely restricted the rights of people

¹⁷⁵Zaaruka, B. 2012. *Institutional Dynamics and Impact on Capital Formation: Evidence from Namibia and Tanzania*, Unpublished PhD thesis in Economics. Johannesburg: University of the Witwatersrand.

¹⁷⁶See the cases of Chikane, Eins, and The Free Press of Namibia below.

¹⁷⁷Section 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,*

(H)e may issue a warrant for the arrest and detention of such person.

detained without trial or access to a court of law.¹⁷⁸ The Katofa 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.

Katofa¹⁷⁹ was the brother of Josef Katofa, a detainee under Proclamation AG 26 Of 1978. The applicant brought a typical *habeas corpus* writ,¹⁸⁰ 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 to a lawyer, Josef Katofa's attorney was not allowed to see him. Since the detainee 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

¹⁷⁸*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).

¹⁷⁹The case record identifies the applicant, Katofa, as the brother of Josef Katofa, the detainee. He made the application on behalf of his brother. See *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA), p. 213.

¹⁸⁰The 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.

convinced that the detainee was a person as provided for in the stated section, without referring to any specifics that confirmed this conviction.¹⁸¹

The Supreme Court of SWA/Namibia would have nothing of this. 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 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”.¹⁸²

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 –

*... 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.*¹⁸³

The court made it clear that the *habeas corpus* writ or the Roman Dutch remedy of *de homine libero et exhibendo*¹⁸⁴ intend to protect the liberty of subjects. Quoting *Principal Immigration Officer and Minister of Interior v Narayansamy*, the court stated that every individual –

*... 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.*¹⁸⁵

The fact that a court does not have jurisdiction “to pronounce upon the functions or recommendations of the review committee”¹⁸⁶ does not mean that a detainee cannot approach the court if he/she desires a remedy other than reviewing a recommendation of the review committee.

In this particular case, the Court found that the Administrator-General was convinced at the time of the arrest and the time of the application, that the detainee

¹⁸¹ 1985 (4) SA 211 (SWA), pp. 215–216.

¹⁸² *Ibid*, p. 224.

¹⁸³ *Ibid*, p. 216.

¹⁸⁴ Following *Principal Immigration Officer and Minister of Interior v Narayansamy* 1916 TPD 274, the Court made no difference between the two remedies. In the Supreme Court of Appeal, the differences became a cause of disagreement.

¹⁸⁵ *Ibid*, p. 222.

¹⁸⁶ Proclamation AG 26 of 1978, section 4(d).

was a person provided for in section 2 of the Proclamation. However, that was not reason enough to relieve him of the burden to prove that the detainee had been legally detained. Since the Proclamation provided for the Administrator-General to furnish the detainee with reasons for the detention, it does not make sense that a Court be deprived of that information.¹⁸⁷

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

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*¹⁸⁸ 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.

¹⁸⁷ *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA) note 15 at 222.

¹⁸⁸ 1983 (1) SA 938 (A) at 957D.

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.

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* was 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”.¹⁸⁹ The Court rejected his plea:

*The question is then whether or not the plea rose by Mr Bezuidenhout that “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.*¹⁹⁰

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.¹⁹¹

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 Appellate Division 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 R101.¹⁹²

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 Appellate Division ruled that existing legislation remained in place after the enactment of Proclamation R101 –

¹⁸⁹*Katofa v Administrator-General for South West Africa and Another* 1986 (1) SA 800 (SWA), p. 805.

¹⁹⁰*Ibid.*

¹⁹¹Section 4(2) of the Proclamation.

¹⁹²*Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A).

... 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:¹⁹³

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 repeated in the years between 1985 and 1989, when the transition to an independent Namibia started under UN supervision.

3.3 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 Eins¹⁹⁴ – 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, Act 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 because SWA was not a sovereign country. Eins alleged that section 9 of the said Act was unconstitutional because it unreasonably discriminated

¹⁹³Ibid, p. 710.

¹⁹⁴In both cases, the Transitional Government appealed against the judgments. See *Chikane v Cabinet for the Territory of South West Africa* 1990 (1) SA 349 and *the National Assembly for the Territory of South West Africa v Eins* 1988 (3) SA 369 A. The cases in the courts a quo were not reported.

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.¹⁹⁵

Eins attacked section 9 of the Act because it was in conflict with Articles 3, 4, 9 and 10 of the Bill of Rights.¹⁹⁶ The Cabinet opted to dispute Eins' *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/Namibia 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? 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.

The Supreme Court of SWA used its powers in terms of article 19(1)¹⁹⁷ of Proclamation R101 and declared section 9 of Act 33 of 1985 –

¹⁹⁵Section 9(1) made 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 excluded persons born in the territory (section 9(1) (a), 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).

¹⁹⁶Article 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

¹⁹⁷The 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.*

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

On the day that the Court 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, transformative 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 Appellate Division 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 Appellate Division again began with the intention of the legislation. As a point of departure, it also worked with the rule of *ut res magis valeatquam pereat*, i.e. that the legislator is presumed to have made a valid and effective provision.

From here, it attempted 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*' challenge in the same manner. It 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, it pronounced, and *Eins*

could have faced deportation in terms of the security legislation. It 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 derogation from the Bill of Rights was permissible.

Hence, the Appellate Division 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 in the limited scope of the apartheid government. The 'total onslaught',¹⁹⁸ 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:¹⁹⁹

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]

(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 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 agreed rights in as far as they have agreed not been limited or removed by an Act.) Emphasis added. (Translation JNH).

¹⁹⁸The South African Government and the ruling party used the term to define what they called the communist onslaught against South Africa.

¹⁹⁹*Eins v The National Assembly for the Territory of South West Africa*, p. 371.

Both examples in the quotation referred to government action against apparent political activism. 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' mind-set of the ruling Nationalist 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, Act 51 of 1977 is a case in point. Acting Supreme Court of Namibia Judge Leon (as he then was) made the following observation regarding the implementation of section 3 of the Act to SWA/Namibia:

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.²⁰⁰

There is an irony in the regularly quoted dichotomy between pure legal judgments based on the meaning of the words of a text and value judgments, which allows political thinking to blur the clear legal approach with political considerations. The reliance on political policy comes from the positivist Appellate Division while the Supreme Court of SWA/Namibia, despite its clear transformative approach, based its judgments on constitutional principles.

3.4 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*²⁰¹ the Court set aside an order in terms of section 6 bis of the Internal Security Act, Act 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

²⁰⁰*Ex Parte Attorney-General: In re The Constitutional Relationship Between The Attorney-General and The Prosecutor-General*, 1998 NR 282 (SC) (1), p. 301.

²⁰¹1987 (1) SA 614 (SWA).

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*.²⁰²

3.5 The Supreme Court of SWA/Namibia 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.²⁰³

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, Act 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 –

²⁰²See. Du Preez, M. 2003. *Pale Native*, Paarl: Zebra Press, p. 171ff.

²⁰³See *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).

- (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.²⁰⁴ 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, the then SWA Supreme Court 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 Court found 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. It not only withdrew the certificate, but also set aside the decision of the Attorney General not to proceed with the prosecution against Vorster.

This was a brave decision in the period of state oppression and a brutal enforcement of security legislation. 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.²⁰⁵

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 of the liberation movements, but was later extended to members of the security forces.²⁰⁶

²⁰⁴Ibid.

²⁰⁵O'Linn, B. 2003. *Namibia. The Sacred Trust of Civilization*. Windhoek: Gamsberg Macmillan, p. 278.

²⁰⁶Proclamation AG 13 of 1989.

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.²⁰⁷

The defence objected to the indictment on the grounds that section 2 of the Terrorism Act²⁰⁸ 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 Courts 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 therefore could have retrospective application, the Court found that Proclamation 157 was a substantive amendment to prevent the SWA/Namibia Courts from reviewing the validity of South African Acts, and had no retrospective application. Therefore the change in law did not affect the case before the Court.

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:²⁰⁹

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

²⁰⁷ *State v Heita and others* 1987 (1) SA 311 (SWA).

²⁰⁸ The section created presumptions that affected the presumption of innocence.

²⁰⁹ 1987 (1) SA, p. 324.

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. The Court did not answer the question as to whether the State President did indeed close the gap.²¹⁰

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 come under scrutiny by the Supreme Court of SWA/Namibia, the chances were good that the Court would have declared them unconstitutional.

The Supreme Court of SWA/Namibia did not waver. 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 Cabinet of the interim government again appealed the judgment.²¹¹

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 followed 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 –

... (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.²¹²

Even more fascinating is the contribution by Acting Justice Henning, who relied primarily on the *Rechtsstaat* (the rule of law) concept.²¹³ He acknowledged

²¹⁰Justice 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.

²¹¹*Cabinet for the Interim Government of South West Africa/Namibia v Bessinger and Others* 1989 (1) SA 618 (SWA).

²¹²*Ibid*, p. 622.

²¹³The judge quotes both German and Dutch legal philosophers to state his case (*ibid*, p. 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*

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 quoted the *Katofa* case²¹⁴ 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.²¹⁵ He nevertheless suggested that, on the road to a justice state, power had to be limited by power: *le pouvoir arrête le pouvoir*.²¹⁶

In addition, 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 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.²¹⁷

In yet another case²¹⁸ 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, Act 16 of 1988, unconstitutional since it contradicted entrenched rights such as freedom of expression and freedom of assembly. The Court commented, –²¹⁹

de rechtsstaatsidee tot werkelijkheid wordt, destemeer zal de Overheid volgens regels van recht handelen” [Stellinga].

²¹⁴*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 contradicts the rights of Namibians protected by the Bill of Rights.

²¹⁵*Cabinet for the Interim Government of South West Africa/Namibia v Bessinger and Others* 1989 (1) SA 618 (SWA), p. 631.

²¹⁶*Ibid.*

²¹⁷*Ibid.*, p. 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.

²¹⁸*Namibia National Students’ Organisation and Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA.

²¹⁹*Ibid.*, p. 627.

[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 unconstitutional²²⁰ 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 eleven 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.

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 –²²¹

... 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.²²² 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 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

²²⁰*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).*

²²¹*Ibid.*, p. 835.

²²²*Ibid.*

Fundamental Rights. Alternatively, to use Justice Henning's terminology in the *Bessinger* case, a *Rechtsstaat* cannot be built on the pillars of a *Wetstaat*.

3.6 Conclusion

The Supreme Court of SWA/Namibia 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.

The judgments of the Appellate Division are typical of the fundamentalist approach of Courts in South Africa before 1994. This is a good example of what Dyzenhaus calls "the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation".²²³

However, the political influence on the judgments cannot be ignored. Justice Rabie's examples in the *Eins* case are anything but neutral.²²⁴ 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.²²⁵

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.

²²³Dyzenhaus, D. 1998. *Truth, Reconciliation and the Apartheid Legal Order*. Cape Town: Juta and Co, p. 16ff.

²²⁴See *Eins v The National Assembly for the Territory of South West Africa*.

²²⁵Cf. his words:

Artikel 2 van die Handves handel met die persoonlike vryhede van die individu wat nie deur die bepaling 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 JNH).

In South Africa, Kruger and Curren²²⁶ only took notice of the positive constitutional interpretations after Namibia's independence. Nico Steytler took it for granted that the white judges of the Namibian High Court would be the protectors of the old order.²²⁷

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 record of accomplishment in protecting the rights of Namibians during the struggle, they can hardly be seen as part of the governing elite.

O'Linn criticised the judges in the interim period for their over-enthusiastic evaluation of Proclamation R101 of 1985.²²⁸ 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 Appellate Division. The fact that Proclamation R101 was so closely linked to the transitional government and its 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 R101.²²⁹

²²⁶Kruger, J and Curren, B. 1991. *Interpreting a Bill of Rights*. Cape Town: Juta and Co.

²²⁷Steytler, N. 1991. The Judicialization of Politics. 9 *SAJHR*, p. 488.

²²⁸O'Linn, *Namibia. The Sacred Trust of Civilization*. p. 278.

²²⁹*Ibid*, p. 280.

CHAPTER 4

THE NAMIBIAN CONSTITUTION

4.1 Introduction

In this chapter I will look at some internal guidelines in the Constitution and some historical landmarks in the development of a specific constitutional format.

Erasmus²³⁰ correctly pointed out that the Namibian Constitution is much more than a futuristic document to organize a post-independence Namibia. The document itself was an instrument to obtain sustainable peace. Consequently, the new Constitution was not fully negotiated by the Constituent Assembly. The Assembly often opted for a compromise rather than enter into bitter debates between former military opponents.

The United Nations, as successor of the League of Nations, was involved in settlement talks for many years. Both the General Assembly and the Security Council maintained constant pressure on South Africa since the 1960's. A Namibian settlement was extremely important for the international community, not only to bring peace to a war-stricken country, but also to stabilize the region. The Namibian experiment was used by the South African government to path the way for meaningful negotiations and eventually the replacement of the apartheid-based society with a democratic dispensation.²³¹

In this atmosphere the Constituent Assembly completed the huge assignment of writing a Constitution for a nation ready to be born. The Constitution was to replace the oppressive apartheid system with a constitutional, democratic society. Moreover, it was done by a theory of inclusion,²³² rather than an *exclusionary shadow*.

²³⁰2002. *The Impact of the Namibian Constitution After Ten Years*, in Hinz, M, et al, *The Years of Namibian Nationhood*, Pretoria, VerLoren van Themaat Centre, UNISA, p. 9f. See also Keulder, C (ed.), 2000, *State, Society and Democracy in Namibia*, Windhoek: Gamsberg Publishers.

²³¹It was not a co-incidence that Pres. FW de Klerk made his dramatic speech announcing the unbanning of the ANC, South African Communist Party, the PAC, AZAPO and other movements, and the release of Nelson Mandela on 1 February 1990, shortly after the Namibian Constituent Assembly unanimously accepted the Constitution. The smooth and peaceful elections and the acceptance of a liberal constitution with an entrenched Bill of Human Rights broke new grounds for negotiations in South Africa.

²³²I borrow the metaphor from the French philosopher, Michel Foucault. He based his philosophy of power on the conflict between the in-group, and the vagabonds, the outcasts, who are always shifted to the periphery of society, or the *exclusionary shadow*, as Foucault calls it. However, contrary to popular belief, Foucault did not believe in the inevitability of exclusion. See for example his positive view of the people's revolution in Iran. Foucault, M. 1978. What are the Iranians Dream About? Initially published in French in *Le Nouvel Observateur*, October 16-22, 1978. Published in English as

The social democratic dream of a community of equal people sharing resources runs like a golden cord throughout the document. This is especially true of Chapter 3, called Fundamental Human Rights and Freedoms. The Chapter is clearly based on the Universal Declaration of Human Rights.

The high value assigned to human rights and social democratic values were the result of this negotiated settlement. The demise of communism, the inability of Eastern Europe to fund the war in Angola, and especially the Cuban military presence, all contributed to a milieu conducive to negotiations. Under these circumstances it was undoubtedly necessary for both parties to compromise. But since South Africa was in power, one can assume that most of the compromises came from a liberation movement, eager to return to Namibia and contest UN supervised elections.

Two important international decisions paved the way for Namibian independence, but also had a decisive influence on the content of the Namibian Constitution. Firstly, in 1978 the Security Council of the United Nations accepted Resolution 435 as a basis for Namibian independence. While Resolution 435 elaborated into an extensive plan including UN supervised elections, the disarmament of the South West African Territorial Force and the confinement to base of the Peoples Liberation Army of Namibia, it was not implemented for another eleven years.

The reasons for the delay were numerous. While South Africa initially agreed to the implementation of Resolution 435, it eventually introduced the controversial linkage policy (with the backup of the United States), linking independence of Namibia to the withdrawal of Cuban troops from Angola. However, the deep distrust of both the South African government and its Namibian allies, especially the Democratic Turnhalle Alliance, in SWAPO, was possibly the main reason for the failure of negotiations in 1978.²³³ Back in 1978 SWAPO was still perceived to be a communist movement and as such the door for the Soviet Union to enter into southern African regional politics²³⁴.

an addendum to Afary, J and Anderson, K. 2005. *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism*. Chicago: University of Chicago Press, pp. 203 – 209.

²³³ See *Historical Dictionary of Namibia*, p. 264 ff. for a description of Dirk Mudge's opinion that SWAPO was a communist movement. Mudge was a prominent white leader in the Interim Government and the Democratic Turnhalle Alliance.

²³⁴ See for example Du Preez, M. 2003. While Du Preez, a liberal-minded Afrikaner journalist, accepted the inevitability of a democratic Namibia (and South Africa), he had misgivings about

The DTA remained deeply sceptical of SWAPO throughout the negotiating and independence process.²³⁵

The second important international initiative was the drafting of the Constitutional Principles by the Western Contact Group or the Eminent Persons Group, consisting of the Canada, France, Germany, Great Britain and the United States. The Constitutional Principles was an attempt by the western group to ease the fears of both South Africa and the internal parties (the DTA and some smaller parties who co-operated with South Africa in the Transitional Government for National Unity).

South Africa, the DTA and its allies embraced the Constitutional Principles from the outset. The principles also form the basis of a proposed plan for independence by the Security Council of the UN.²³⁶ SWAPO on the other hand, did not accept the Principles immediately and in 1988 still did not see the necessity to accept it.²³⁷

4.2 The Influence of Namibian Groups in the Development of a Constitution

The role of the foreign stakeholders is extremely important in constitutionalism. If one can establish that the Namibian Constitution is a product of the Eminent Persons Group, and international forces such as the Security Council of the United Nations, transformative constitutionalism would be a meaningless phrase. Why would the executive or the judiciary strive to transform the legal system and even society to conform to constitutional principles that were not birthed by the Namibians themselves?

The Zimbabwean experience is a good example. The government could not wait for the time restrictions imposed by the Lancaster Agreement to lapse before they discarded the independence constitution. Let us presume that a constitution

Communism and went to Lusaka to meet Sam Nujoma to find out if he and his party were communists (which, he found out, they were not). The South African Government sold its fight against SWAPO and the ANC as a struggle for survival against the total onslaught of communism and imperial Soviet policies.

²³⁵Weiland, H and Braham, M. 1992. *The Namibian Peace Process: Implications and Lessons for the Future*, Freiburg: Arnold Bergstraesser Institut. See also Doubell, L 1998: *SWAPO's Struggle for Namibia, 1960 – 1991: War by Other Means*, Basel: P Schletwein Publishing.

²³⁶1982. *Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia*. Security Council Document S15287/12, July 1982.

²³⁷Erasmus 2002. p. 10.

needs a people who can wholeheartedly buy into the principles. The political parties and alliances who stood against each other politically for many years, agreed to a compromise. The liberation movements wanted to participate in democratic elections, and the internal supporters of the South African forces wanted the war to end. However, the Constitution must be more than a compromise. Future stability demanded a document that will influence political, social and economic life in an independent, free Namibia.

I will first look at the 1982 Principles and its influence on the final Constitution. Thereafter I will discuss the constitutional developments in the two major opposing factions around the constitutional table in 1990. Both the exiled liberation movements, represented predominantly by the SWAPO Party, and the so-called internal parties²³⁸, had their own constitutional experiments.

4.2.1 The Constitution and the 1982 Principles

In January 1981 the UN sponsored a conference in Geneva where a South African delegation under the leadership of the Administrator-General for South West Africa, Mr Danie Hough, including thirty Namibian leaders from internal parties, met Mr. Sam Nujoma and a SWAPO delegation, the so-called pre-implementation conference for Security Council Resolution 435.

The conference was aimed at getting the negotiations for Namibian independence back on track. At that stage South Africa was no longer convinced that an international settlement was possible in Namibia without the participation of SWAPO. The election victory of ZANU-PF under Robert Mugabe in Zimbabwe in March 1980 was a major shock for the South African government. The fact that the moderate compromised leader Abel Muzorewa was politically destroyed by ZANU-PF, did not strengthen the hopes for a recognised DTA government in Windhoek.

The conference came to naught because the South African/internal parties' delegation used the opportunity to attack the UN for its partiality. The Western Five planned to introduce a three-phase negotiation proposal for the Namibian question,

²³⁸Those groupings did not go into exile and opted to work within the structures created by South Africa. They became part of the Democratic Turnhalle Alliance (DTA) and other Turnhalle parties.

but the process broke down when the DTA presented the UN with a list of demands to stop their pro-SWAPO approach.²³⁹

After the Geneva conference, the Western Contact Group started working on constitutional principles that will ease the fears of whites and will be acceptable to all the parties involved. They released a first draft in October 1981.²⁴⁰

The Contact Group established minimum guarantees for the constitutional process and the eventual Constitution, including a Bill of Rights as part of the Constitution, an independent judiciary and a multi-party democracy. Eight supplementary points were added to Security Council Resolution 435.

Although SWAPO initially rejected the Constitutional Principles, they eventually agreed that it could become the foundation for the independence process and the Namibian Constitution. Since SWAPO has confirmed similar principles back in 1976, their rejection was possibly based on the fact that they did not trust the Western powers and did not appreciate the idea that North American and European states and former colonial powers played such an important role in the future of Namibia.²⁴¹

The Principles eventually became the foundation on which the Constitution was built. At the first meeting of the Constituent Assembly on 21 November 1989, Theo-Ben Gurirab of the SWAPO Party proposed that the Assembly adopted the Principles as a framework to draw up a constitution for Namibia. The proposal was unanimously adopted.²⁴²

Since the Constitutional Principles became an official annexure to Resolution 435 in 1982, it was mentioned in the note of the UN Secretary-General to the Security Council on 16 March 1990:

The Constitution is to enter into force on Independence Day. As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the "Principles for a

²³⁹See the *United Nations Security Council Report Concerning the Implementation of Resolutions 435 (1978) and 439 (1978)*. 1981. Document S14333, 19 January 1981.

²⁴⁰United Nations Organisation. 1982. *Principles for a Constituent Assembly and for a Constitution of an independent Namibia*. New York: UN document (S/15287), accepted by the Security Council as part of Resolution 435 on 12 July 1982.

²⁴¹Doubell, L 1998. *SWAPO's Struggle for Namibia, 1960 – 1991: War by Other Means*, Basel: P Schletwein Publishing p.69.

²⁴²On 21 November 1989 Namibia's Constituent Assembly had unanimously adopted UN resolution 435, including the constitutional principles of the Western Contact Group. See Mudge, D. 2010. The art of compromise: Constitution-making in Namibia, in Bösl, A., Horn, N and Du Pisani, A. 2010. *Constitutional Democracy in Namibia. A Critical Analysis After Two Decades*. Windhoek: Macmillan Education Namibia, p. 133.

*Constituent Assembly and for a Constitution of an independent Namibia." Adopted by all parties concerned in 1982 and set out in the annex to document S/15287 of 12 July 1982.*²⁴³

According to Wiechers the Principles remains part of Namibian and international law even after the independence of Namibia and the implementation of the Constitution.²⁴⁴ They acquired international law status when they were included into Security Council Resolution 435. They are now legally enforceable resolution of the Security Council, which can be invoked by interested parties, and State members of the United Nations.

While the Principles were only guidelines in the pre-independence era, Wiechers is of the opinion that it became *the pre-conditions upon which the Namibian Constitution and the institutions of State were to be founded* when the Constituent Assembly adopted them the 1982. Wiechers calls it a "fundamental constitutional impediment" on the Namibian Legislature which prohibits their abolition, repeal or amendment".²⁴⁵ Consequently, Wiechers argues, the 1982 Principles cannot be changed or amended and any amendment to the Constitution that goes against the 1982 Principles will be *de facto* unconstitutional.

While Wiechers goes too far in his evaluation of the 1982 Principles, it remains an important document for understanding the Foundations of the Namibian Constitution. However, despite the fact that it became a Security Council Resolution, it was never intended to have a life of its own. Once the Namibian Constitution has drafted and accepted the Namibian Constitution in compliance with the 1982 Principles, it had no further role to play.

In the early years after independence, the status of the 1982 Principles was raised on a regular basis. In *State v Heita*, where the preceding judge considered to recuse himself *mero motu*, the Court did not go into the correctness of Wiechers' position, but nevertheless stated that it "at least serve as the background against which, and the context within which, the Namibian Constitution should be interpreted and applied".²⁴⁶

²⁴³United Nations Organisation. 1990. New York: *Note by Secretary-General to Security Council, 16 March 1990, (S/20967/Add.2)*. See also *S/20967/Add.1 of 29 November 1989*. The text of the Constituent Assembly Proclamation for Namibia was attached.

²⁴⁴Wiechers, M. 1991. Namibia: The 1982 Constitutional Principles and their Legal Significance, in the *South African Yearbook of International Law*, Vol. 15 (1998/90), p. 1 ff.

²⁴⁵Ibid.

²⁴⁶1992 NR 403 (HC) on p. 407.

In *Ex Parte Attorney-General: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*²⁴⁷ counsel for the Prosecutor-General relied strongly on the Principles in his argument in favour of an independent Prosecutor-General. While Justice Leon did not explicitly refer to the Principles in his judgment, it is interesting that he referred to the separation of powers as a *foundation of a Rechtsstaat*. In this sense the judge defined the prosecutorial authority of Namibia as part of the functions of the judiciary rather than the executive. To compromise the independence of the judiciary would be a violation of the Constitution²⁴⁸.

While the Court did not refer to the 1982 Principle, one of the major tenets, the independence of the judiciary, is not only strongly protected, but also interpreted broadly to include the prosecutorial authority. In *Kauesa v Minister of Home Affairs and Others* the High Court again relied on the 1982 Principles, but also stated that Wiechers' position is questionable.²⁴⁹

Since then the debate on the legal position of the 1982 Principles has died. It is doubtful that any Namibian Court will in future rely on Wiechers' dictum. Nevertheless, it will remain a key to understand the foundation of the Constitution.

Apart from the independence of the judiciary, the protection of land (or property rights) also formed part of the 1982 Principles. The SWAPO government has often referred to the fact that the struggle was about land and therefore real reconciliation can only take place if it goes hand in hand with an aggressive land reform programme that will assist the government programme of poverty alleviation.

The white farmers on the other hand, refer to the negotiations of 1989 and the eventual settlement in which South Africa and SWAPO agreed that property would be protected. Thus, although they seldom refer to the 1982 Principles, they often quote the protection of property rights in Article 16 of the Constitution.

One of the aims of the 1982 Principles was to ease the fear of the white minority community. In that sense, it was part of the settlement agreement between the predominantly white Namibian farmers and the SWAPO Party. While the SWAPO Party always insisted to negotiate with South Africa and not an internal political faction, the 1982 Principles did not protect South African interests.

²⁴⁷1998 NR 303 (SC). Heads of Arguments of State.

²⁴⁸Ibid.

²⁴⁹1994 NR 102 (HC) on p. 137

After independence the Constitution became the foundation for property rights. The 1982 Principles, however, will always feature in the background of the land issue, either as motivation for the thesis that foreign countries have prevented Namibia to deal in a responsible manner with the land issue, or as part of the idea that protection of property rights was part of the settlement that led to independence.

The negotiations with South Africa were moved to the background once both the SWAPO Party and the internal parties represented at the Constituent Assembly accepted the 1982 Principles as a *sine qua non* for the Namibian Constitution. The Principles created stability and eased the fears of whites for a negotiated settlement to succeed. The bold decision by the SWAPO Party to make the 1982 Principles and eventually the protection of property rights part of the constitutional foundation of the new state changed it from an external international proposal to an agreed negotiated principle.

4.2.2 Constitutional developments in SWAPO from 1976

While no one will deny the role of the Constitutional principles of the Eminent Persons Group, the idea of a Bill of Rights as part of a future Namibian Constitution did not originate with the Eminent Persons Group. Neither was it an alien idea to the two major political powers involved in the drafting of the Constitution. Katjavivi²⁵⁰ observed that the debate started within SWAPO as early as the early 1970's.

In 1975 the South African government started preparations for a national conference of internal political parties, to pave the way for an international acceptable independence process without negotiating with SWAPO. The initiative paved the way for the Turnhalle Conference, which later led to the transitional government. At the time the internal SWAPO movement was part of an internal pro-independence alliance, Namibia National Convention, with SWANU and three smaller parties.²⁵¹

²⁵⁰Katjavivi, P 1988. *A History of Resistance in Namibia*, London: Jams Curry and UNESCO, p. 240. See also Van Wyk, D. 1991. The Making of the Namibian Constitution: Lessons for Africa, *CILSA*, Vol. XXIV, pp. 341 ff.

²⁵¹Doubell, L 1998. *SWAPO's Struggle for Namibia, 1960 – 1991: War by Other Means*, Basel: P Schletwein Publishing p. 45.

In response to the Turnhalle Conference SWAPO released a *Discussion Paper on the Constitution of an Independent Namibia*.²⁵² The document was a draft constitution. It closely resembled the draft that SWAPO eventually took to the Constituent Assembly after the United Nations supervised elections in 1989.

In strong reaction to the South African policies, the document opted for a unitary state and rejected *any notion of Bantustans masquerading as federalism*. The democratic and human rights stance is the point of departure for the rest of the document.

*Our experience of persecution and racialism over many years has deepened our unqualified commitment to democratic rule, the eradication of racialism, the establishment of the rule of law and the entrenchment of human rights.*²⁵³

All the proposals of the Eminent Persons Group are embedded in this document. It opted for a parliamentary democracy, with regular elections, an Executive President, a one or two chamber parliament, an impartial public service and an independent judiciary, an entrenched Bill of Rights and detailed anti-discrimination legislation. While no economic policy is spelled out, the document included a paragraph protecting *vested legal rights and titles in property*. It even states that the pensions of public servants will be preserved after independence.²⁵⁴ The only radical aspect of the document was a proposal that the South African Roman Dutch law is to be replaced by a new system, incorporating certain elements of customary law.²⁵⁵

²⁵²The internal SWAPO leader, Danny Tjongarero, played a prominent role in the process. See Serfontein, H. 1977. *Namibia?* London: Collins. Serfontein stated that Tjongarero drafted the document, sent it to the leadership in exile, who drafted the final document with the assistance of western lawyers, including British lawyer, Cedric Thornberry. Katjavivi, p. 246 confirmed this interpretation when he said the document was the result of consultations between the internal and exiled leadership of SWAPO. Doubell p. 45 seemed to overstate Thornberry's contribution. He was probably no more than a legal and technical constitutional adviser.

²⁵³Quoted in Doubell, p. 45.

²⁵⁴Ibid, p. 45f.

²⁵⁵Ibid, p. 46. The reaction against Roman Dutch Law is understandable, since it was the instrument used by the South African Government to oppress the people. Since the courts confirmed the actions of the executive, it is inevitable that the perception will develop that Roman Dutch law is oppressive and unjust *per se*. At the deliberations of the Constituent Assembly, several reputed academics advised the Assembly, amongst others, Arthur Chaskalson, later to become the President of the South African Constitutional Court and Chief Justice, and Gerhard Erasmus, Namibian born Stellenbosch academic. It became clear that a total change in the legal system would create uncertainty and involve unnecessary state expenses. The Constituent Assembly eventually opted to maintain the South African Roman Dutch law. See Article 140 of the Constitution.

The document was released in August 1975, shortly before the Turnhalle conference assembled in Windhoek.²⁵⁶ In hindsight, it seems almost tragic that neither South Africa nor its Namibian partners in the Turnhalle deliberations, or SWAPO understood the significance of the moment. SWAPO indirectly extended a hand of friendship and co-operation to South Africa, Namibian whites and the Turnhalle groupings. The message was clear: SWAPO is not the Marxist/Leninist demon they are made out to be by South African propaganda. They were at pains to point out that the interests of whites will be respected, that expatriate expertise will be welcomed in an independent Namibia – a reference to South Africans in the civil service, the police, the defence force, banks and other private enterprises – and that national reconciliation will be an integral part of a future constitutional dispensation.²⁵⁷

The document was a clear indication that SWAPO would have been a meaningful and responsible negotiating partner, as observed by the South African press.²⁵⁸ Unfortunately, some observers, and the South African government were still pre-occupied with the harsh separation between east and west during the cold war.

Even the centre left Rand Daily Mail was sceptical, not so much of what the discussion paper said, but rather of what it did not say. It argued that SWAPO often used the rhetoric of African socialism in their speeches and propaganda. The discussion paper contained nothing that explicitly revoked the pro-communist SWAPO image. In other words, despite the positive elements of the document, the unwritten ghost behind the letters was a socialist demon.²⁵⁹

When South Africa and the pro-South African parties ignored the hand of negotiations, SWAPO's attitude hardened. In the years that followed, SWAPO radically opposed the Turhalle movement²⁶⁰ and its political and social agenda.

In August 1976 an enlarged Central Committee of SWAPO adopted a *Constitution and Political Programme* in Zambia. Doubell observed that the

²⁵⁶ Ibid, p. 46.

²⁵⁷ Ibid, p. 45.

²⁵⁸ See the reactions of David Martin of The Star and Hennie Serfontein of the Sunday Times, quoted in *ibid*, p. 46.

²⁵⁹ Imrie, J, in Rand Daily Mail, 31 August 1975, quoted in *ibid*, p. 46.

²⁶⁰ I use the term "Turnhalle movement" here as a collective name for all the role players who foresaw a possible future in an internal settlement through negotiations of internal political parties without SWAPO.

document had a predominantly internal purpose, to ease the struggle between the old guard and the stream of young people crossing the border to Angola after the fall of Portuguese rule. It also served as an instrument of negotiations and reconciliation with the then ruling party in Angola, the MPLA. SWAPO was eager to move its headquarters from Zambia, which was under immense pressure from South Africa, to Angola.²⁶¹

Where the *Discussion Paper* maintained a neutral or non-aligned stance on foreign relations, the 1976 SWAPO constitution opted to work with “national liberation movements, world socialist, progressive and peace-loving forces in order to eliminate all forms of imperialism, colonialism and neo-colonialism”.²⁶² The document is highly critical of Western governments and its support of the *Turnhalle circus*, while it stood for building a classless, non-exploitative socialist state.²⁶³

While the *Political Programme* was never intended to be a proposal for a future independent Namibian state, it totally overtook the 1975 Discussion Paper. From 1976 onward the *Political Programme* was seen internationally as a statement of SWAPO’s political ideology and perceived as the foundation of an independent Namibia. The *Political Programme* did not include any reference to a Bill of Rights. In the international world SWAPO was seen as a hard-core Marxist movement intending to transform Namibia into non-democratic socialist state.²⁶⁴

Doubell asserted that the *Political Programme* did not harm SWAPO in any material way, since it was vague enough to adapt the interpretation to its audience. Further, its donors from the Scandinavian countries did not care much about the ideological streams within SWAPO, and the West could not afford to ignore SWAPO after Zimbabwe and the former Portuguese colonies, Angola and Mozambique, were alienated from their influence sphere in southern Africa.²⁶⁵

SWAPO themselves did not care much about the tags of the cold war. It must be remembered that much of the socialist rhetoric was part of a genuine concern for the oppressed people in Namibia. It was common for liberation movements in Africa and Latin America to look at the oppression of authoritarian states with a Marxist/Leninist class struggle perspective.

²⁶¹Doubell, p. 55ff.

²⁶²Central Committee of SWAPO. 1976. *Political Programme of the South West African Peoples Organisation*, Lusaka: Central Committee of SWAPO. Adopted 1 August 1976, p. 137.

²⁶³Ibid, p. 6 ff.

²⁶⁴See Doubell, p. 57 for the reaction of the international press and the West in general.

²⁶⁵Ibid, p. 58ff.

SWAPO, like all liberation movements of its time, received the bulk of assistance (both financially and in terms of training and capacity building) from the Eastern European communist countries and Cuba. In the sixties and seventies neither the old communist bloc nor the growing number of independent African states were over enthusiastic about human rights.

Klenner,²⁶⁶ an academic from the German Democratic Republic (East Germany) expressed the view of many Marxists when he claimed that human rights are neither universal nor identical everywhere in the world. Human interests, he claimed, are determined by position in society *under the conditions of the system of private ownership of the means of production*. The class struggle was the foundation of all abuse and oppression. Taking care of the needs of humankind focused on the revolutionary overthrow of the bourgeois state. Individual rights were not a major issue.

At the same time there was a strong feeling amongst African leaders that the outgoing colonial powers had a hidden agenda insisting on the inclusion of an entrenched human rights bill in the constitutions of newly independent African states. The colonial master wanted to protect the property of settlers and companies owned by the *motherland*.²⁶⁷ Human Rights Bills - especially if they are entrenched in new African constitutions – is seen as an instrument to keep post-colonial Africa enslaved. Ironically, Britain, who insisted on an entrenched constitutional bill of rights for its former colonies, did not even have a written constitution.²⁶⁸

History seems to be pointing to a growth in the human rights awareness, which made an enshrined Bill of Rights in the Constitution not only acceptable, but also desirable. SWAPO provided the working document of the Constituent Assembly. It included a Bill of Rights.

It is however, unfortunate that SWAPO's commitment to democracy, an independent judiciary, national reconciliation and the recognition of property rights

²⁶⁶1977. *Human Rights: A Battle Cry for Social Change or a Challenge to Philosophy of Law?* Unpublished paper presented at the World Congress of Philosophy of Law and Social Philosophy, Sydney/Canberra, Aug 1977, quoted in Shivji, I. 1977. *The Concept of Human Rights in Africa*, London: Codesria Books, p. 19.

²⁶⁷See Shivji, p. 19 and Legal Aid Committee. 1985. *Essays in Law and Society*, Dar-Es Salaam: Faculty of Law, University of Dar-es-Salaam, pp. 12ff.

²⁶⁸See *ibid*, p. 19. See also Ramose, M. 2003. *Philosophy and Africa's struggle for economic independence*, unpublished paper presented at the Annual Philosophy Day, 20 Nov. 2003, Windhoek. Organized by UNESCO and the Human Rights and Documentation Centre, University of Namibia.

was not fully appreciated by the West and especially South Africa and its Namibian allies in 1975. Critics of SWAPO will point to the fact that the liberation movement never included a Bill of Fundamental Rights in the organization's own constitution during the exile years, neither did they lay emphasis on a Bill of Rights after 1976. However, as Katjavivi and Doubell pointed out, SWAPO presented a democratic constitutional plan to the world several years before the Eminent Peoples Group came with the constitutional principles.

Without claiming that SWAPO had a worked-out plan on human rights in the 1970's, it is clear that discussions in the party started before 1975. This process was necessary to pave the way for the recognition of individual rights. It was this process lead to the acceptance of a Bill of Rights by SWAPO in 1982.²⁶⁹ That there were dissenting voices in SWAPO during the liberation struggle opposing a Bill of Rights, is understandable and should be seen in its historical context.

4.2.3 Constitutional Developments in the Turnhalle grouping

The Windhoek Declaration

The internal political parties are often seen as mere puppets of the South African colonial government. The Transitional Government of National Unity, often seen as a South African initiative, was a compromise. The relationship was, however much more complicated.

In the early 80's the South African Government wanted to create a state council similar to the Presidents Council in South Africa. To regain the initiative, Moses Katjuongua of SWANU initiated a Multi-Party Conference (MPC) on 12 November 1983.²⁷⁰ On 18 April 1984 the MPC accepted and released the Windhoek Declaration. The Declaration contained a Bill of Fundamental Rights and Objectives.

Wiechers pointed out that this was not the first political grouping in Namibia to accept a Bill of Rights – SWAPO and the Frontline States accepted the African

²⁶⁹See O'Linn, B. 2009. *The Sacred Trust of Civilization*, Windhoek: Gamsberg/MacMillan p. 173 and Namibia Peace Plan 435. 1987. *The Choice. Namibia Peace Plan 435 or society under siege*. Windhoek: Namibia Peace Plan Study and Contact Group, p. 15.

²⁷⁰Mudge invited the DTA, SWANU, The National Party, the Labour Party, the Rehoboth Liberated Democratic Party, SWAPO-Democrats, the Damara Council, Namibia's People Liberation Front (NPLF) and SWAPO. When SWAPO declined the invitation, the Damara Council and the NPLF also withdrew. See Van Wyk, A. 1999. *Dirk Mudge. Reënmaker van die Namib*, Pretoria: JL van Schaik, pp. 153 and 159.

Charter on People's and Human Rights in 1982.²⁷¹ The Windhoek Declaration was a typical Western liberal document. It protected political and civil rights vigorously.²⁷²

In 1985, the State President of South Africa, acting in terms of section 38 of the South West Africa Constitution Act, 1968,²⁷³ issued Proclamation R101 to establish a so-called Transitional Government of National Unity (TGNU).

As I noted in chapter 3, Proclamation R101 included a Bill of Fundamental Rights and Objectives as an annexure. The Windhoek Declaration provided South Africa with that Bill of Rights and Objectives.

The Bill of Rights and Objectives were all but an ideal foundation for a fresh democratic state. However, the innovative and brave interpretations of the Supreme Court of SWA/Namibia gave credibility to this premature, weak action and helped to create a human rights culture amongst the followers of the Democratic Turnhalle Alliance and other internal parties. The Bill of Fundamental Rights and Objectives played a positive role to further human rights in conservative communities in both Namibia and South Africa.²⁷⁴ The Windhoek Declaration, despite severe criticism by SWAPO and the international community, contributed to the growth of a human rights culture in Namibia.

The Hiemstra Constitution²⁷⁵

The MPC only accepted the TGNU on the condition that the South African Government create the political forum for Namibians to start writing a constitution for a future independent Namibia.²⁷⁶ On 30 August 1985 the Constitutional Council was created. PW Botha appointed former Chief Justice of the South African Bantustan Bophuthatswana, Victor Hiemstra, as the chairperson. He was known for his

²⁷¹Ibid, p. 150.

²⁷²Potgieter, P. 1991. Human Rights in Namibia, in *Theological Forum*, Vol. XIX, No. 1, March 1991, Grand Rapids: Reformed Ecumenical Council, published on <http://www.recweb.org/TF-March91potgieter.html>, accessed on 3 January 2010.

²⁷³Act 39 of 1968.

²⁷⁴Wiechers pointed out that since transgressions of the Bill were challenged in both the South West Africa/Namibia Courts and the South African Appellate Division, the courts were forced to make a number of human rights judgments, which "*proved to have been a valuable learning process*". 1991 (72), p. 110.

²⁷⁵Dirk Mudge felt that the name is a misnomer. The document was a political document, drawn up by politicians and based on specific political convictions. Judge Hiemstra played the important role to put the Constitution in a legal framework. *Telephone Interview with Dirk Mudge*, Windhoek/Otjiwarongo: 30 January 2010.

²⁷⁶Dirk Mudge and the DTA did not want another transitional government, which they thought would be used to slow down the process. See Van Wyk, 1998, p. 152 ff.

constitutional and human rights judgments in the so-called Republic of Bophuthatswana.

The draft Hiemstra constitution, like the Supreme Court of South West Africa, rejected the idea of ethnic second tier governments or territorial ethnic local governments. It did not include sections protecting minorities. Consequently, the South African government ignored its own creation. It refused to give any legal or political status to the draft constitution, despite the money provided for the project, and after Judge Hiemstra had spent two years of his life in chairing the council.

However, the Hiemstra constitution played an important role in the development of Namibian constitutionalism. After the Supreme Court's judgment declaring second tier ethnic governments a violation of the TGNU's Bill of Rights, and the Hiemstra constitution rejecting it as a constitutional principle, the sectarian ethnic thinking of the National Party was destroyed. It never played any role in the Namibian Constituent Assembly.

The Hiemstra constitution also became the official draft of the DTA at the Constituent Assembly. The Hiemstra constitution and the SWAPO draft constitution were so similar that Mudge proposed the SWAPO draft to be used as the working document of the standing committee of the Constituent Assembly.²⁷⁷ Constitutional scholars involved in the drafting of the Namibian Constitution are of the opinion that as much as 80% of the content of the Hiemstra constitution correlates with the Namibian Constitution.²⁷⁸

4.2.4 Conclusion

Modern critics of the Constitution are possibly correct in asserting that SWAPO only accepted the Constitutional Principles to reach their objective: the withdrawal of South Africa from the territory and an independent Namibia. They are also correct in pointing out that the Constituent Assembly went into the constitutional chambers with their hands tied. However, as we have seen, the basic tenets of the Constitutional Principles were all part of the SWAPO's Discussion Paper of 1975.

²⁷⁷Constituent Assembly of the Republic of Namibia. *Constituent Committee Documents*, pp. 1 - 2, quoted in Van Wyk, p. 181 and 194.

²⁷⁸These include Marinus Wiechers and Dr. Paul Szasz, legal advisor of Martti Ahtisaari. See Van Wyk, p. 183 and 194.

Since SWAPO was extremely critical of the role and objectives of the Western powers in southern Africa, it is hardly surprising that they were slow to accept the Constitutional Principles of the Eminent People's Group.

The Constitutional Principles went much further than describing the transitional process, the UN supervised elections and the working rules of the Constituent Assembly. It also prescribed elements that had to be included in the Namibian Constitution. These included the principle of constitutional democracy and an entrenched supreme constitution, the independence of the judiciary, including the function of constitutional review and the separation of powers.

The principle of constitutional supremacy *vis-à-vis* a parliamentary democracy has been a cause of disagreement in many circles. Ramose saw it as a vote of no confidence in the new government, which in a sense it was.²⁷⁹ Erasmus correctly pointed out that the strong constitution was necessary to ease the fears of the DTA and smaller internal parties (and possibly those of South Africa).²⁸⁰

However, it is also possible to see constitutional democracy as a victory over the oppressive parliamentary "democracy" of South African rule where the South African Parliament ruled supreme. Okpaluba²⁸¹ remarked that even attempts by the Appellate Division of the Supreme Court to review one of the racially-based acts, was dealt with contempt by the South African Parliament. They simply repealed the specific legislation and followed it up with a subsequent strongly worded new clause.²⁸²

One cannot deny the role of the Western Contact Group, neither that of the UN and the international community in drafting the conditions for Namibian independence and the content of the Constitution. However, the Namibian people, represented by both internal parties and the SWAPO leadership that came from exile, eventually agreed to the inclusion of these principles in the Constitution. The participants to the constitutional process engaged in a real democratic process of compromises and exchanges that prevented any of the parties to manipulate the process.

²⁷⁹*Ibid.*

²⁸⁰Erasmus, 2002, p. 10.

²⁸¹Okpaluba, C. 2003. Constitutionality of Legislation Relating to the Distribution of Governmental Powers in Namibia: A comparative Approach, in Hinz, et al, *Ten Years of Namibian Nationhood*, pp. 110 ff.

²⁸²See for example *Harris v Minister of Interior*, 1952 (2) SA 428 (A), which overruled *Ndlwana v Hofmeyr*, NO 1937 AD 229

The mere involvement of the Western Contact Group and the international community do not make the Constitution a foreign document. Werner Ustoff's approach to the missionary churches in Africa is helpful to understand the dynamics of cultural adaptation²⁸³. Since the missionaries have kept the liturgical and dress code inheritance of the mission churches long after the missionaries had left, it is wrong to assume that they are concepts and codes alien to African culture and tradition. Those traditions may have originated in Europe, but when the Anglicans in the north of Namibia or the Lutherans in the south, sing the hymns of the Reformation, they are expressing the cultural values of the Namibian people. In the same way, the Constitutional Principles embodied in the Namibian Constitution became Namibian once the people had embraced it.

Erasmus's view that the Namibian Constitution should be seen as a process rather than a mere document is helpful. If the Constitution is seen as part of an important process, its value does not only lie in its post-independent application. Without the Constitutional Principles, the negotiation process could not go forward.

The dynamics of the negotiations, the history of the process and the international participation are part of the unwritten texts of the Namibian independence. Several constitutional documents of the different parties played a role in the process. The Constitutional Principles, the 1976 Discussion Paper of SWAPO, the Windhoek Declaration and the Hiemstra draft constitution all paved the way for the consensus constitution that gave birth to the Namibian nation.

While the Constitution wrote a new history, it was only partially the history of the conquerors, or to use Foucault's words, the *exclusionary shadow*²⁸⁴ of the apartheid history. The preamble clearly defines the Namibian state as the conglomerate of a people "emerged victorious in our struggle against colonialism, racism and apartheid, the emphasis is on the inherent dignity and the equal and inalienable rights of all members of the human family".²⁸⁵

²⁸³Ustoff was professor of missions at the University of Birmingham when the author spent a sabbatical as William Paton Fellow at the University of Birmingham and Selly Oak Colleges in 1992. This extract of Ustoff's thoughts is based on his lectures during the time. Personal notes in possession of author.

²⁸⁴Foucault, Michel 1967: *Madness and Civilization, A History of Insanity in the Age of Reason*, London: Tavistock, 1967. Originally published in 1961 in French: *Folie et déraison. Histoire de la folie à l'âge classique*. Paris: Plon.

²⁸⁵Preamble to the Namibian Constitution

The struggle for independence is not defined as a struggle against groups or people, but rather a struggle against destructive ideas and ideologies:

*Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid...
The victory over these forces of evil is a victory for all the people of Namibia. And the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace.*²⁸⁶

Even in dealing with the construction of an independent, post-colonial, post-apartheid state, the fathers and mothers of the Constitution approached the demons of the past with great caution. While the Constitution makes provision for affirmative action, it does so in a restrained manner. Rather than using racial language, the Constitution speaks of “persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices”, and goes on to include all women irrespective of race in the category of the disadvantage.²⁸⁷

The most controversial aspect of the Constitution, the protection of property in article 16 was initiated by the 1982 Principles. Despite the strong protective element in article 16 (1), article 16 (2) makes provision for expropriation of property in the public interest subject to the payment of just compensation. Consequently, the new government of an independent Namibia was not left powerless in dealing with the huge inequalities of land ownership created by colonialism and apartheid.

In summary: The Constituent Assembly represented two diametrically opposed centres of power. However the settlement between the SWAPO Party and the South African Government meant that all members of the Assembly were elected by the Namibian people. The 72 members of the Constituent Assembly became the mothers and fathers of the Namibian Constitution. No one can deny that the Constitution was a compromise between two opposing factions who stood on different sides of the war for liberation. But both sides represented Namibians and accepted a Namibian Constitution.

²⁸⁶ Ibid.

²⁸⁷ Article 23.

The first Namibian government chose not to have a truth commission in the tradition of Chile or Argentina to deal with the atrocities of the past.²⁸⁸ The only *political truth*²⁸⁹ that existed after March 1990 was the Constitution. Like Zimbabwe ten years earlier, they opted to pursue a policy of national reconciliation. The most visible expression of this policy was seen in the formation of the Namibian Defence Force. Members of both the former pro-South African South West African Territorial Force and Plan, the military arm of SWAPO, became part of the Namibian Defence Force.

Namibia boasted at the time with possibly the most democratic constitution on the continent. The Constitution includes a Bill of Rights based on the Universal Declaration of Human Rights, and among other things, provided for a division of power between the legislative, executive and judicial powers. It also includes an independent judiciary and an independent, non-political Prosecutor-General (Article 88) and prohibits the death penalty.

4.3 The Namibian Constitution as a Transformative Instrument

One can accept that despite the international influences, the constitution is a document by the Namibian people. As a compromise document with an objective to stop the war, allow the exiles to come home and to form a government where former enemies can work together, the Namibian Constitution had to be transformative to succeed. If it did not produce a “new nation”, in other words be transformative, an independent Namibia could have been a failed state from the outset.

In that sense “transformative constitutionalism” needs a somewhat broader definition than Klare’s “long term project”. It also entails a short-term project that will end the war and enmity and creating an immediate platform for former political enemies, and warring groups, to work together in the forming of a new nation. To reach this objective even the so-called compromise articles carries an element of transformation. Article 16 (1) may have been included to protect white interests – the

²⁸⁸When South Africa reached an internal settlement a few years later, they followed the example of Chile and Argentina and made provision for a Truth and Reconciliation Commission. Several activists, amongst them the movement Breaking the Wall of Silence, a fellowship of former SWAPO detainees, have called upon the Namibian Government to follow the South African example. Namibia has not only decided against it, but also refused the South African TRC to conduct sittings in Namibia. However, several submissions to the TRC and several amnesty applications, dealt with atrocities of the South African Defence Force and other South African agencies in Namibia.

²⁸⁹I use the term here in the sense of an ideological foundation. Foucault calls it *parrhesia*, the ancient Greek word used since Descartes.

protection of farmland owned by white farmers – but article 16 (2) gives the new government enough options to transform the racial uneven distribution of farmland.

As we have seen in Chapter 2, Klare in his ground-breaking article on constitutional democracy understands the South African constitution as a post-liberal constitution. In the same vein Woolman and Davis, refer to a *Creole* liberal constitution.²⁹⁰ I agree with Klare's observation that the reading of the constitution from a liberal or Dwokinian perspective does not necessarily exclude a transformative constitutional approach. I also agree with Roux and Cockrell that positivism does not necessarily equates conservatism and heresy. However, it is important to understand the philosophy behind the constitution, as Woolman and Davis pointed out in their discussion of *Du Plessis v De Klerk*.²⁹¹

Transformative constitutionalism is not a jurisprudential or interpretive model. It is an *a priori* point of departure to implement the values of the constitution in the lives of the people. With this definition we did not answer the issue of the political or ideological framework of the constitution. Woolman and Davis understood this exercise to be fundamental in the understanding and interpretation of the constitution.

The Namibian Constitution does not include economical and social rights in Bill of Rights (Chapter 3). It forms part of Chapter 11 (Government Policy). Is this not a clear indication that the Constitution identifies itself as a typical liberal constitution? The Constituent Assembly made it clear that they do not want to be accountable for providing economic and social rights.

One may well conclude that the Namibian Constitution cannot be classified as anything but a typical 20th century liberal constitution. There are undoubtedly strong liberal elements in it. The differentiation between enforceable civil and political rights on the one hand and 'soft' economic and social rights that cannot be enforced by a court of law,²⁹² are typical liberal traits, as is the exclusion of the latter from the Bill of Rights and its special entrenchments.

The Constituent Assembly followed the strict path of liberal constitutionalism in this regard. However, the inclusion of social and economic rights in chapter 11 of the Constitution is not meaningless. It places a burden on the State to be a caring,

²⁹⁰See chapter 2, above.

²⁹¹Woolman and Davis, p. 361ff.

²⁹²See Article 101 of the Constitution.

inclusive society. It may even be possible to enforce some of these rights in a court of law.²⁹³ Placing social and economic rights in the Bill of Rights, does not necessarily guarantee economic and social rights better than the Namibian Constitution. Access to basic rights is still a challenge in South Africa, despite including socio-economic rights in the Bill of Rights. As long as the availability of resources is a main consideration in providing economic rights, it will play the same role as Art 101 of the Namibian Constitution.

The emphasis on gender in articles 10 and 23(3), multiculturalism in articles 10, 19 and 23, environmentalism, transparent and participatory government and the extension of democratic principles to the private sphere are all elements of the Namibian Constitution.

One can argue that the Namibian Courts in interpreting the Constitution do not emphasise sexual identity, but opt for the more conservative fundamentalist Christian approach keeping sodomy as a crime in post-independent Namibia and turned down the option to recognise same sex unions as a constitutionally protected union. However, Article 10 (2) was meant to give close attention to sexual identity and the present conservative views of the Supreme Court²⁹⁴ are the result of President Nujoma's round-about-turn in the mid 1990's. Until then there were indications that the word 'sex' in the non-discriminatory clause includes sexual orientation. I shall return to this point.

Constitutionalism is never rigid. Progressive constitutionalists do not see the so-called doctrine of original intent (i.e. seeing the intention of the drafters or constitutional mothers and fathers) as the ultimate key to interpretation. I will return to attempts by the Namibian bench to use the values of the people as a tool to keep the Constitution alive and relevant. What is important at this stage is to accept that constitutional principles can lay the foundation for the interpretation of issues that was not envisaged by the original drafters and ideologues.

Article 95 created the opportunities for the disenfranchised Namibians to knock at government's door for relief. Even the non-enforceable clause, article 101, cannot undo the fact that certain economic and social rights have been given to the Namibian people. While the Supreme Court has already enforced an article 95

²⁹³See *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

²⁹⁴*The Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SCA).

right,²⁹⁵ the growing importance of state responsibility under constitutions worldwide will place more pressure on the Namibian courts to recognise and enforce social rights in future.²⁹⁶ The opportunities created by Art 95 of the Namibian Constitution, makes a social democratic reading or even a moderate post-liberal reading as defined by Klare a viable proposition, especially since the Constitution explicitly stands for a mixed economy.²⁹⁷

Taken these factors into account, it is not an over breath to emphasize the economic rights of Chapter 11. Even if one cannot call it a social democratic or Creole liberal constitution, transformative constitutional jurisprudence can be the tool to develop the responsibilities of the Constitution.

Without making Klare's transformative model the alpha and omega for southern African constitutional interpretation, and taking full cognisance of the criticism of liberal and "soft" positivist interpreters (especially Roux²⁹⁸ and Cockrell²⁹⁹), transformative constitutionalism can make a useful contribution to constitutional jurisprudence in Namibia.

The Constitution has definite elements of a caring community. The State is more than just a referee or observer. In the typical tradition of social democracy,³⁰⁰ Chapter XI, Principles of State Policy, declares that "(t)he State shall actively promote and maintain the welfare of the people". It then sets out proposed policies to secure equality for women, the health of workers, and the independence of trade unions, fair employment practices, right and access to public facilities for all, a decent standard of living for the aged, a living wage for all workers, and an acceptable level of nutrition and standard of living of the Namibian people.³⁰¹

²⁹⁵*Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial.*

²⁹⁶See for example Hinz' analysis of the development of the constitutional phrase 'social market economy' in Germany. Sixty years of social market economy in Germany – Legal sociological observations, in *Namibia Law Journal*, Volume 2, no. 1.

²⁹⁷Art. 98.

²⁹⁸Klare, pp. 258 – 285.

²⁹⁹Cockrell, p. 7.

³⁰⁰Social democracy is a political system with many faces. It falls outside the scope of this thesis to go into the debates on what constitutes a true social democracy. One could even use the term caring state. Suffice it that the emphasis of a caring state or social democracy is on the welfare of its entire people. In the process Government intervention is perceived to be part of good governance.

³⁰¹The mere fact that the Constitution sets the standard for a caring state does not mean that post-independent Namibia is indeed a welfare state. As a compromise, the Constituent Assembly included second-generation rights under state policy in chapter 11 rather than the enforceable Bill of Rights in Chapter 3.

The last word about chapter 11 has not been said. It remains a contradiction of a caring society when social and economic rights are not part of the Bill of Rights. While civil and political rights are entrenched in chapter 3, economic and social rights are carefully hidden behind state policy. Chapter 11, unlike the Bill of Rights (chapter 3) can be amended by a 2/3 majority even if it means the removal of rights.

While any violation of chapter 3 rights can be addressed by an application to the High Court in terms of Article 25 of the Constitution, Article 101 explicitly excludes legal action as a remedy to enforce so-called Article 95 rights. The “soft” rights of Article 95 remain vague policies, always dependent on state resources and the goodwill of the politicians.

Some observers may suggest that the way in which the Constitution deals with the two categories of human rights usually personified by the two international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, indicates a choice for a liberal democracy rather than a real social democratic option.

Like any compromise, the constitution did not meet all the expectations of the parties. The lack of trust, different parties represented in the Constituent assembly, and especially a deep distrust that the DTA had in the new government, led to explicitly strict rules for changing the Constitution. A two-third majority is generally needed for a constitutional change, while none of the rights protected in the Human Rights Charter (Chapter 3) can be limited or taken away.³⁰²

This rigid approach has been criticized by Steytler³⁰³ and in by the High Court in *S v Tcoelib*.³⁰⁴ Steytler suggested that this unrealistic protection could threaten the future of the Constitution since the rigidity could eventually frustrate the government and leads to its dismantling.

Judge O’Linn made the following comment on the fact that Article 3 is unchangeable:

To prohibit altogether the repeal or amendment of the provisions of Chapter 3 where the amendments diminishes or detract from the fundamental rights and freedoms, not only makes the Namibian Constitution excessively rigid, but also makes nonsense of the provisions of Art. 1(2), which provide: All power

³⁰²Art 131 and 132 (5) (a).

³⁰³1993, SAJHR, p. 477.

³⁰⁴1993 (1) SACR 274 (NM).

*shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.*³⁰⁵

The composition of the Judicial Service Commission (JSC) is another area of contention in its limitation of the power of the majority party. The JSC is very important since the President appoints the judges of the High and Supreme Courts, the Prosecutor-General and the Ombudsman *at the recommendation of the JSC*. The JSC consists of the Chief Justice, another judge appointed by the President, the Attorney General and two members of the legal profession. It is clear that it will not be easy for the government or the majority party to manipulate the body.³⁰⁶ As we noted, Steytler criticizes the composition as a strategy to keep the white judges of the old order in power and prevent the government through judicial intervention in politics to transform the new Namibian society. In practice, the white judges of the apartheid dispensation adapted to the new constitutional dispensation during the period of the TGNU before independence. Within the first ten years white male judges were no longer the majority on the Bench.

In conclusion: Without being legalistic, one can say the Namibian Constitution has enough elements of a caring constitution to be classified as a post-liberal, or if the term is not acceptable, a social democratic constitution.

³⁰⁵Ibid.

³⁰⁶This does not mean that the government has no power to determine the composition of the JSC. The second judge does not have to be a Supreme Court judge or the Judge President. The President has 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 independence of the JSC is the way in which the members of the profession are appointed. In terms of the Legal Practitioners Act, the Law Society of Namibia is the only legally recognized body representing legal practitioners. Initially after independence, the Law Society appointed a practicing lawyer and a member of the Society of Advocates to represent the profession on the JSC. Even after the fusion of the legal profession removed the separate roles of lawyers and advocates, the *de facto* operational division between lawyers (practicing with a fidelity certificate) and advocates (receiving briefs from lawyers rather than clients) remained intact.

The first Minister of Justice, Dr N Tjiriange, replaced the representative of the Society of Advocates with a member of the Namibian Lawyers Association (NLA). 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 representative of an organisation with a bigger and more representative constituency.

CHAPTER 5

TAKING OWNERSHIP OF THE CONSTITUTION

5.1 Introduction

The first government of the Republic of Namibia (1990 –1995) was possibly the most successful government in post-colonial Africa. The transition from colonial rule³⁰⁷ was the most peaceful transition then known in Africa with a extremely liberal Constitution, with some social democratic traits.³⁰⁸ I will use the term *liberal era* here to describe the term of the first government of the Republic of Namibia.

The Constitution was the cornerstone of the new dispensation and the euphoria of independence and power was still high. The Constitution was seen as a victory over apartheid and its vicious oppressive structures.

The lack of black faces on the Bench was initially a cause of disagreement and was perceived to be the reason for the conflict between the government and the judiciary.³⁰⁹ The on-going insistence that the Bench must be sensitive to the will of the people has often been raised when decisions went against government or when so-called enemies of the government got the best of a judgment: Two criminal cases soon tested the commitment of the Namibian Courts and the Namibian people to the Constitution. The one was *S v Acheson*, dealing with the murder of white SWAPO activist, Anton Lubowski,³¹⁰ and the other, *S v Kleynhans and Others* dealing with a group of white supremacists' unorganised attempted to overthrow the government.³¹¹

5.2 S v Acheson: The First Test for Constitutionalism

The Courts almost immediately established themselves in the new constitutional dispensation. The early judgments caught the attention of the international community.

³⁰⁷I use the term *colonial rule* in the ideological sense of the word. European colonial rule ended in 1918 when Namibia became a South African mandate of the League of Nations. However, South Africa soon exceeded the bounds of the mandate, Namibians and the international community saw the South African occupation, especially after World War II, as an extension of colonial rule.

³⁰⁸The South African Constitution is often heralded as “the best in Africa”. It must, however be remembered that Namibia prepared the way for the South African transition in many ways, not least in having a constitutional example when Codesa II (where the final Constitutional negotiations took place) needed one.

³⁰⁹This was, however, not only a problem for the Government or lay interpreters of the Constitution. See Steytler pp. 477 ff. for a critical analysis of the constitutional compilation of the Judicial Service Commission, the Bench, and its effect on society.

³¹⁰*S v Acheson*, 1991 (2) SA 805 (NM).

³¹¹*S v Kleynhans and Others*, 1991 NR 22 (HC).

The criminal courts were the first to demonstrate a new Constitutional spirit in its adjudication. In *S v Acheson*³¹² the High Court refused a postponement for the State in the highly emotional case against the alleged murderer of SWAPO activist, Anton Lubowski. Lubowski was fatally shot in front of his house in Luxury Hill on 12 September 1998, merely six months before independence.

The police suspected Acheson, an Irish citizen, to be the person who killed Lubowski or assisted the South African covert Civil Co-operation Bureau (CCB) to do so. The State attempted in vain to get the CCB accessories in Namibia for trial and the acting Prosecutor-General, Hans Heyman, did not want to go to trial without CCB members Staal Burger and “Chappie” Mare joining Acheson as accused.³¹³ He also wanted to call other CCB members who operated in Namibia at the time of Lubowski’s murder, as witnesses. These included convicted murderer Ferdi Barnard and two others, Slang van Zyl and Calla Botha.

Lubowski joined SWAPO in 1984 and played an important role in the mobilisation of the internal struggle against apartheid and the South African occupation of Namibia. He was a key figure in making the necessary preparations for the return of the SWAPO leadership from exile. He also spearheaded the election campaign with others.

The murder of Anton Lubowski was a highly emotional event. It shocked the Namibian community, especially the SWAPO Party. Judge Mahomed, later to become the second chief justice of Namibia, reflected on the emotional aspects of the case:

Firstly, the murder of Adv Lubowski is a matter of very fundamental public importance. It is common cause that Mr Lubowski was a prominent public figure who was a member of the present governing party and was during his lifetime generally perceived to be a vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism - ideals which are now eloquently formalised inter alia in the preamble to the Namibian Constitution and arts 10 and 23.

His cold-blooded murder is a serious matter. The vigorous prosecution of whoever might have been responsible for this deed is clearly in the public interest and crucial to the administration and image of justice in Namibia.

³¹²1991 (2) SA 805 (NM).

³¹³Ibid, p. 813.

*That image and that interest might prejudicially be impaired if there ever follows a perception in the public (legitimate or otherwise) that justice was defeated by procedural complexities, by legal stratagems, by tactical manoeuvres or by any improper collusion. The general community of Namibia must be able to feel that every permissible avenue to pursue the prosecution of whoever might be the killer of Mr Lubowski was followed.*³¹⁴

Referring to the difficult choice between the emotions of a nation and the constitutional rights of an accused, Judge Mahomed made the following comments on constitutionality:

*The Constitution of a nation is not simply a statute that mechanically defines the structures of government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the process of the judicial interpretation and judicial direction.*³¹⁵

It became clear that the suspected co-accused, Staal Burger and 'Chappie' Maree, without whom the acting Prosecutor-General did not want to start the hearing, were not going to be extradited by the South African authorities soon. The judge was confronted with the possibility to use the case to implement a constitutional approach to bail applications, or for that matter, criminal procedure, and suffer the consequences, or to toe the populist line.

The judge took the first option. He based his decision on a definite emphasis on constitutional rights. He made it clear that the law requires him "to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990".³¹⁶

If the Constitution becomes the foundation of all legal interpretation, especially in criminal procedure, the judge pointed out, no one can be in custody *ad infinitum*. The Constitutional insistence upon the protection of personal liberty in Art 7, the respect for human dignity in Art 8, the right of an accused to be brought to trial

³¹⁴Ibid, p. 820.

³¹⁵Ibid, p. 814.

³¹⁶Ibid, p. 813.

within a reasonable time in art 12(1) (b) and the presumption of innocence in art 12(1) (d) are crucial to its tenor and spirit.³¹⁷

The judge went on to say his judgment “should be influenced by the constitutional culture in the interpretation or application of the law or in the exercise of a discretion”. While the Court acknowledged the importance of justice, and recognised the emotional effects of the Lubowski murder on the psyche of the new Namibian nation, he did not close his eyes for the protection the Constitution grants to all people within the borders of Namibia – even if he or she is suspected of having killed a Namibian hero.

When Judge Mahomed refused a further postponement on constitutional grounds the State withdrew the case and Acheson left the country. The mystery of the Lubowski murder was never solved. The Acheson-case is important in the development of Constitutional development. If ever there was a case loaded with conflicting interests, this was it. Being one of the first high profile cases decided by the Namibian High Court, it was a real test for the independence and integrity of the Court. Public opinion was not in favour of bail for Acheson.

The future relationship between South Africa, the former colonial power and still under minority rule, and the new Namibian state, was also at stake. While the conspirators of the Civil Co-operation Bureau fled Namibia and found refuge in South Africa, the case was also a test of the willingness of the Pretoria government to extradite para-military units who operated in Namibia immediately before independence. However, the judge opted first to interpret the Constitution from the perspective of the constitutional values. While the murder it did not affect the decision of the Court, government responded by an amendment to the bail provisions of the Criminal Procedure Act.³¹⁸ The new section 61 makes provision that an accused arrested for a serious offence, listed in Schedule 2 of the Criminal Procedure Act, can be retained in custody. Even if there is no or little possibility that

³¹⁷Ibid, p. 813.

³¹⁸The amended section 61 of Act 55 of 1977 reads as follows:

*If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, **refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.*** (emphasis JNH).

he/she will abscond or interfere with witnesses or the investigation “if it is in the public interest or interest of the administration of justice” the Court may refuse bail..

The Constitutionality of the vague *interest* clause was not contested in the Namibian courts. A well-known Namibian criminal lawyer, Richard Metcalfe, is of the opinion that the clause is often used in the Magistrates Court as an excuse to deny accused their constitutional rights.³¹⁹

5.3 The Effects of the Release of Acheson on the Outcome of the Case

The early breakthrough of the investigators in arresting Donald Acheson shortly after the assassination on Anton Lubowski, was all lost when the State withdrew the case against Acheson and the latter left Namibia.

After his arrest, all the fingers immediately pointed to this notorious Irishman with links to Irish Republican Army. Acheson had the right credentials for an assassin: He had links with the IRA, he fought in the Rhodesian war, he was without work since the end of the war and he was recruited by convicted murderer Ferdi Barnard to work for the covert South African Defence Force Unit, the Civil Co-Operation Bureau.

The CCB was already suspected of eliminating anti-apartheid activists and opponents of the South African government, in 1989. Acheson was later handled and sent to Namibia by another well-known CCB member, “Chappie” Maree.³²⁰

If his credentials and his reasons for being in Namibia were highly suspicious, his conduct before and after the murder was even more so. The manager of the place where he stayed saw him leaving her house in a red Corolla shortly before the murder. He had something covered in a bag (which she said could have been an AK 47) with him.

Several eyewitnesses saw a red Corolla on the crime scene shortly before or after the murder.³²¹ There was, however, an exception. A young man living at the corner of the street saw a small red sedan, but he was sure that it was a Golf. He

³¹⁹Metcalfe, R 2003: *Bail and the Namibian Constitution*, unpublished open lecture at the Faculty of Law, University of Namibia, August 2003.

³²⁰See *Inquest into the death of the late ATE Lubowski*, unreported inquest presided by High Court judge, Justice Levy, delivered on 23 June 1994, (hereinafter referred to as the First Lubowski Inquest).

³²¹See *ibid*, the evidence of Mr. Kurz, an ex- German police officer, in the *Second Inquest into the death of the late ATE Lubowski and the unreported judgment* delivered in February 1998, presided by High Court judge, Justice N Hannah. (hereinafter referred to as the Second Lubowski Inquest).

stated that he was a car enthusiast and could not have made a mistake. But a former German police officer that lived next to Anton Lubowski, had no doubt that it had indeed been a Corolla.³²²

Even more convincing was the testimony of Inspector William Lloyd, who was the first Namibian officer to arrive at the scene. Lloyd found scrap marks on the roof of the Corolla Acheson drove. The marks were on the right hand side of the car above the driver seat. The marks gave the impression of an object that moved around.³²³ If the assumption is correct that Anton Lubowski was shot with a semi-automatic rifle from the right side of the car, the marks can easily be explained. The assassin took aim with the rifle on the roof of the car. When he pulled the trigger, the automatic rifle moved under the intense power of the semi-automatic rifle. That was also the assumption of Inspector Lloyd.

The murder weapon was never found. If Acheson was the murderer, he got rid of the rifle before he was arrested. But even that is not strange, bearing in mind that he was involved in at least two previous armed conflicts, one in Ireland and one in the former Rhodesia. The High Court never heard any evidence to consider Acheson's guilt. He felt compelled to develop jurisprudence faithful to the values of the constitution of the newly independent Namibia rather than allowing the emotional arguments to influence the legal issues.

Consequently, he rated the rights of an accused high, even if he was suspected of murder of a member of the SWAPO Party, who has just won the first democratic elections in Namibia. The prosecution, so it seems in hindsight, also had their doubts. When Justice Mahomed instructed acting Prosecutor-General Hans Heyman either to proceed against Acheson alone if the other CCB conspirators cannot be found, or to suffer the consequences, he decided to withdraw the case.

5.4 The Outcome of the Case

Acheson made an exculpatory statement to the police in which he not only denied having killed Lubowski, but also declared that he went to Namibia to kill Gwen Lister, the editor of the Windhoek daily, the Namibian.³²⁴

³²²See the evidence of Mr. Kurz in *ibid.*

³²³See *First Lubowski Inquest.*

³²⁴See the *First Lubowski Inquest.*

The Office of the Prosecutor-General believed that Acheson was framed.³²⁵ The evidence of the witnesses corroborate each other in one material aspect: the assassin or assassins drove up to Lubowski's house in a small red sedan car and the assassination took place either from the car or next to the car.

Here the similarities end. Some witnesses, as we have already seen, identified the car as a Golf, and others as a Corolla.

The office of the Prosecutor-General was not at all convinced that there was only one car involved in the assassination. They believed that there was a strong possibility that Acheson was used as a decoy.³²⁶

The Prosecutor-General never said that Acheson did not kill Lubowski. His argument was a legal one. Acheson denied having killed Lubowski. The only evidence at the State's disposal was circumstantial evidence – the witnesses who saw the Corolla at the scene of the murder, the marks on Acheson's rented car, his suspicious conduct in front of the manager of the place where he stayed, etc.

Although circumstantial evidence is admissible and not weaker than direct evidence,³²⁷ it needs to rebut reasonable doubt that the defence could raise.³²⁸

After Acheson left Namibia, he disappeared. Attempts to locate him through diplomatic channels, assistance from South African Truth and Reconciliation Commission and following up several leads and rumours were futile. For the same reasons that the acting Prosecutor-General did not want to prosecute Acheson without Maree and Burger, the Prosecutor-General did not want to request South Africa to extradite Burger and Maree if he could not get Ferdi Barnard, Abraham (Slang) van Zyl and Calla Botha as witnesses and Acheson as a co-accused.³²⁹

Justice Levy found in the First Lubowski Inquest that there was a *prima facie* case against Ronald Acheson, who probably shot Lubowski, that the Civil Co-Operation Bureau was involved and that the instruction to kill Lubowski came from

³²⁵ See the *Second Lubowski Inquest*, especially the examination of the investigating officer, Deputy Commissioner Smit, by State Advocate C Miller. See also the statement that the Prosecutor-General handed in at the first inquest.

³²⁶ Discussions with the Prosecutor-General, 1997. *Interview with Prosecutor-General, Heyman, J.* Pretoria: June 1998.

³²⁷ See *R v Blom* 1939 AD 188 at pp. 202 – 3.

³²⁸ *Ibid.*

³²⁹ *Personal notes in my files drafted during my time as junior advocate on the Second Lubowski inquest*, 1997 and *Interview with Prosecutor-General*, Pretoria: June 1998.

senior SADF officers.³³⁰ The judge, however, pointed out that test in the case of an inquest does not mean beyond reasonable doubt, neither -

*...that the test envisaged by the Inquest Act is whether the judicial officer . . . is of the opinion that there is evidence available, which may at a subsequent criminal trial be held to be credible and acceptable.*³³¹

Nevertheless, the *prima facie* test applied by the judge, gave a strong message to the Prosecutor-General, that he believed the way in which the Prosecutor-General dealt with the case, was incorrect. The judgment did not automatically follow that the State had enough *prima facie* evidence at its disposal to lead to a conviction of the people cited in the judgment.³³² But even if it did, the Prosecutor-General did not share this opinion and never requested the extradition of the South African accomplices.

Looking at the application of the Constitution by Judge Mahomed, the first conclusion can be that the legal process was frustrated and justice was not served. However, if one bears in mind that the Prosecutor-General never requested the extradition of the suspected CCB members, and even if he wanted to do so, chances are virtually null that any extradition would have taken place before 1994, the harsh insistence of the Court begins to make sense.

The so-called Outjo Three, which later became the Otjiwarongo Five, is another case in point. During the preparations for the United Nations supervised elections in 1989, two South Africans, Darrall Stopforth and Leonard Veenendal, and a German citizen, Horst Klenz, came to Namibia. The three killed a security guard when bombing United Nations offices in Outjo. When they escaped in December 1989, they killed a police officer.

Klenz served a sentence in South Africa and was not extraditable. Stopforth and Veenendal were declared extraditable on 30 April 1992 by Magistrate Roux in Johannesburg. The Minister of Justice in the old South African government never surrendered them.

The new ANC Minister of Justice ordered their surrender to in October 1996. They later applied to the Truth and Reconciliation Commission for amnesty. While

³³⁰See the *First Lubowski Inquest*.

³³¹Ibid.

³³²Judge Levy made no secret of his dismay with the conduct of the then acting Prosecutor-General, referring to his conduct as a demonstration of extreme incompetence.

the application was still pending, they launched motion proceedings in the then Transvaal Provincial Division of the Supreme Court of South Africa to suspend the order of their surrender pending the outcome of the amnesty hearing. The application was denied and on 27 September 1999 the Supreme Court of Appeal turned down an appeal.³³³ Yet, fourteen years down the road, they are still free, Veenendaal living in the United Kingdom.

If the South African extradition process became so entangled with side issues that even an order of the Minister of Justice of the ANC government has not been executed, chances that the State would have been able to get the CCB members to stand trial with Acheson, are very small. In hindsight the decision of the High Court insisting that the State either proceed with the case against Acheson or withdraw, cannot be faulted.

Consequently, the application of the constitutional principles did not work against justice or the legal process in this case. On the other hand, it would have been a travesty of justice to keep Acheson in custody while the State attempts to build a case.

American legal philosopher Richard Dworkin speaks of the judges as authors and critics.³³⁴ Each judge as novelist interprets the novels of previous novelists in layers of truth. From these layers the judge searches for an interpretation that best fits the bulk of texts.

The Acheson case was an important step in the creation of a constitutional culture in the Namibian legal history. It was so to speak the first novel or first chapter of the Namibian legal novel. By the tone of the judgment, the Court set the scene for further developments. The Constitutional interpretation that had to be followed operated from an emphasis on the Constitution as the foundation of the democratic State, the soul of the nation, and a refuge for the individual against nationalistic fervour, State abuse of power and prosecutorial indecisiveness.

5.5 Kleynhans and Others, a Different Scenario

Shortly after independence a few unorganized white right-wingers were arrested while planning a *coup d'état*. They were badly organized and they had no

³³³ *Stopforth v Minister of Justice and Others, Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA) A.

³³⁴ 1986: *Integrity in Law, in Law's Empire*, Cambridge, Mass: Harvard University Press.

sustainable structures, no support in society and hardly any weapons. While on bail the ringleaders fled the country and only a few minor accomplices eventually stood trial.³³⁵ Although the accused were convicted, the sentences were lenient.

The Prosecutor-General explained the lenient sentences in the light of the fact that the ringleaders managed to escape and were not prosecuted:

*For the most they played a minor and almost insignificant role. For instance, the conviction of Tietz was based solely on the fact that he did not inform the police of the whereabouts of his own brother. For the rest he took no part in the conspiracy whatsoever. Montgomery was convicted solely because he did not report the existence of the conspiracy to the police. The part played by Kleynhans went somewhat further in that he attempted to recruit support for the planned conspiracy. This is reflected in the sentences imposed. I have no doubt that, had the ringleaders stood their trial, severe sentences would have been imposed....*³³⁶

The SWAPO Party and other loyalists were *shocked* by the moderate sentence given to white conspirators against the government. Although the interpreters could possibly use several social or political elements as sources for deconstructing this judgment, the political interpreters chose the race card. It did not matter that Judge O'Linn was appointed in the transitional period with the approval of the SWAPO Party, that he had a history of defending Plan fighters and SWAPO sympathizers, that SWAPO considered him as an ally when the leadership returned from exile³³⁷ and that he was entrusted with the commission that monitored violence during the Resolution 435 elections. While he was one of the *communists* and *liberals*³³⁸ of the apartheid regime, he was never a member of the SWAPO Party.³³⁹ And his history added the necessary spice to make ethnic deconstruction work: he was a police officer in South Africa before entering the legal profession!

³³⁵ *S v Kleynhans and Others*, 1991 NR 22 (HC).

³³⁶ Statement of the Prosecutor-General, quoted in *S v Heita and Another*, 1992 NR 403 (HC) on p. 414.

³³⁷ See for example the letter written by Helmut Angula on behalf of SWAPO in response to O'Linn's criticism of the 1 April 1989 Crisis: "*It is not the habit of SWAPO to enter into polemic with opponents of apartheid, let alone with the distinguished President of the Windhoek Bar Council, whose personal integrity we respect.*" Quoted in O'Linn, B, 2009. *The Sacred Trust of Civilisation. Ideal and Reality. Volume 1*, (Revised issue, first issue 2003). Windhoek: Gamsberg Macmillan Publishers, 324.

³³⁸ While it does not make sense to use the words "communist" and "liberal" interchangeable in ideological terms, for the apartheid regime and its ideologists, it was two sides of the same coin. Depending on the mood, an opponent could on day one be a communist and the next a liberal.

³³⁹ See Judge O'Linn's comments in *S v Heita and Another* 1992 (3) SA785 (NM).

But there is also the emotional element. While Judge O'Linn was a progressive politician and a human rights lawyer who fearlessly defended SWAPO members and PLAN fighters, he was still part of the old political order.³⁴⁰ Unlike the SWAPO members who were constantly subjected to the negative side of the system, he worked in it all his life: first as a police officer, then as an advocate and finally as a judge. He did not share the distrust former political exiles and dissidents had in all the structures of the old order.

On the other hand, the non-resident judges of the Supreme Court were more critical of political structures of the old apartheid society. The critical approach of the non-residential Supreme Court towards the police – which still included traditional SWAPO enemies like the security police³⁴¹, Koevoet and former South African Police Force members – was more in line with SWAPO thinking.

The criticism of the judgment was severe. Even after the Judge-President and the Prosecutor-General issued statements explaining the reasons for the lenient sentences, the chief co-ordinator of the SWAPO Party, Moses Garoeb, answered with abuses:

In the past the Namibian judiciary system was an exclusive mutual admiration and private club of the white minority. The office of the Prosecutor-General was the dispenser of selective justice using its legal authority to the detriment of the majority of black Namibians. Is it not the best of times for a drastic change from old bones to new ones in our judicial system? Thus the demonstrators were not in contempt of court as suggested by the manipulators of the Namibian Constitution and the vultures of justice. How many black Namibian patriots found their way to the gallows in the Namibian High Court of colonial times, represented at that time by the Prosecutor-General for just being in the possession of a revolver?³⁴²

The Prosecutor-General threatened to prosecute for contempt of court, and Judge O'Linn called it a constitutional crisis.³⁴³ O'Linn made his own position clear in *S v Heita* -

³⁴⁰Judge O'Linn lead a progressive internal political party in pre-independent Namibia that campaigned for the implementation of Resolution 435, the return of SWAPO to Namibia and the withdrawal of South African troops from Namibian Territory.

³⁴¹The first Inspector-General, Genl. Piet Fouche, was a former security police officer. O'Linn describes him as *an officer in the best traditions of a civilised police force in Namibia. The Sacred Trust of Civilisation Vol. 1, p. 274.*

³⁴²*The Namibian*, 18 October 1991, quoted in *S v Heita and Another*, p. 786.

³⁴³See *S v Heita and Another*, p. 786.

*Two years ago some people called for my dismissal on the grounds of alleged sympathy with SWAPO. Now a SWAPO-leader and SWAPO-supporters ask for my dismissal, inter alia, on the ground of an alleged colonialist and anti-black mentality. According to them I have become irrelevant to black thinking in Namibia and I should not be on the High Court Bench at all.*³⁴⁴

The Prosecutor-General did not prosecute anyone and the case did not lead to total disillusionment amongst the people or the government. During this period the Constitution reigned supreme. New cases before the High and Supreme Courts raised the confidence of the people. The presence of Justice Mahomed, complimented by the appointment of the first black Namibian judge, Judge Pio Teek, and several acting black judges from Zimbabwe and Zambia, created a spirit of ownership amongst the people. International academics accepted that Namibia was a constitutional democracy³⁴⁵ and South African constitutionalists applauded the founding fathers and Namibian courts for laying a good foundation to be followed by a future democratic South Africa.

One question remains unanswered: Why did the people, especially the SWAPO Party, protested so vigorously against Judge O'Linn in the Kleynhans-case, while the dramatic release of Acheson hardly raised an eyebrow? The politicians dealt with their criticism much more orderly in the Acheson-case. They prepared an amendment to the Criminal Procedure Act and passed it through Parliament.

There is more than one reason for the different approaches. The Kleynhans-case was probably the opportunity for the people to express their frustration with the fact that so little changed in the chambers of the Courts and the offices of the prosecutorial authority.

When several senior South African prosecutors, including the Attorney General and his deputy, left Namibia at independence, the office was stuck without an obvious candidate to become the first Prosecutor-General in Namibia. With the composition of the Judicial Service Commission at the time,³⁴⁶ it came as no surprise that Hans Heyman the most senior prosecutor in the office of the former Attorney General, was appointed as Prosecutor-General.

³⁴⁴Ibid.

³⁴⁵See Naldi, G. 1995. *Constitutional Rights in Namibia*, Cape Town: Juta and Co.

³⁴⁶See the criticism of Steyler, supra, note 2, p. 6.

While Heyman played a positive role in establishing the independence of the Office, a golden opportunity was missed to begin the Namibian legal history with someone who were not involved in so-called terrorism trials and did not prosecute under the draconian apartheid laws.

As for the judges, in terms of the transitional clauses in the Constitution, all serving judges were maintained and those older than 65, were considered to have been appointed until the age of seventy.³⁴⁷ Judge O'Linn was the unfortunate symbol of a social order that changed too slowly to meet the aspirations of the people and the governing party. It is a travesty of fairness that Justice O'Linn, *the* human rights lawyer of the colonial era, was the victim of the frustrations of the politicians.

The lay interpretation of the Constitution did not care about new principles of fairness and justice and constitutional protection of the individual. They wanted to see change and were prepared to shout if the pace of change was slow. The legal arguments of a white trial judge, Judge-President and Prosecutor-General did not impress them. They wanted to see the will of the people respected by the courts.

The general amnesty granted to criminal offenders with political motives during the struggle for liberation, also played a role. Even during the sessions of the Constituent Assembly, some members hinted that they expected Nuremburg-like trials for the old apartheid ideologues.³⁴⁸ The fact that Namibians had to live with people from the old dispensation still in leadership positions was possibly the unwritten reason for the frustrations during the Kleynhans-trial.

5.6 Acheson, Kleynhans and a Hermeneutic of Justice

Given Namibia's colonial history and the lack of co-operation by the South African authorities, transformative constitutionalism can be interpreted in more than one way. The first would be the approach of the High Court in the Acheson and Kleynhans cases. In the Lubowski case, the Court explained its understanding of transformative constitutionalism (without using the term, but with the obvious understanding of a Constitution that needs to change the status quo). It referred to

³⁴⁷Article 138 (1).

³⁴⁸O'Linn, B. *Namibia. The Sacred Trust of Civilisation*, p. 336. O'Linn quoted an opposition member of the Constituent Assembly stating that they abolished the death penalty because they were afraid that the courts could impose it on people found guilty of war crimes after independence.

the Constitution as a 'mirror reflecting the national soul'.³⁴⁹ The Constitutional rights and freedoms remain intact, irrespective of the character of the persons involved.

In both cases the Court chose to embrace the values of the Constitution, more specifically article 12 (Fair trial). The approach is clear. The constitutional principle of a trial within a reasonable time and the presumption of innocence apply to all people. The judgments emphasised the duty of the state to convince the Court that there are reasons why an accused should remain in prison.

Constitutional rights, especially those involving the status of a person, cannot be limited by vague possibilities. In the Acheson-case the Court expected the acting Prosecutor-General to provide a date as to when the co-accused of Acheson would be extradited to Namibia.

If a transformative constitutional hermeneutic (working from the premise that constitutional values is for the benefit of all, even the former oppressors and worst criminals) resulted in favouring the defenders of the old apartheid regime, one may well ask if constitutionalism has anything to say about justice and fairness. Was it not possible to expect of transformative constitutionalism to eradicate all roots of apartheid, using a hermeneutic of reconciliation and justice?

In other words, why not use the preamble of the Constitution as the point of departure and then describe any action attempting to revive any form of apartheid as actions demanding extra-ordinary judgments to transform society?

From there the Court could have decided not to release Acheson immediately, and in the Kleynhans case, to impose stiff sentences, even if the attempted *coupé d'état* was badly organised, supported and executed and posed no real security risk?

The French defence lawyer Jacques Vergés developed a strategy to attack a system of law in his battle for justice after colonialism in France. This strategy of *rupture (Stratégie Judiciare)* rather than simply attacking elements of colonial legislation raised the question if the old colonial laws can be used as a foundation of the new constitutional system.³⁵⁰ While Vergés used the strategy in criminal cases, it is not far-fetched to develop his *Stratégie Judiciare* into a transformative constitutional interpretive model. Granted, one needs to have a very specific political objective. It is also true of Klare and Langa's understanding of transformative

³⁴⁹Supra, note 289, p 103.

³⁵⁰Vergés, J. 1968. *De la Stratégie Judiciare*. Paris: Minuit. I am indebted to Emilios Christodoulidis for his discussion of Vergés' book to complement my limited knowledge of the French language. See *Strategies of Rupture*. 2009, in *Law and Critique*, Volume 20, Number 1, 3-26, pp. 3 – 9.

constitutionalism. Think of Klare's *long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions*. If the "long-term project" is *to cherish and to protect the gains of our long struggle*³⁵¹ one can argue that for the individuals willing to use violence to defend apartheid, revenge its demise or attempting to derail the independence process, different rules to ensure transformation can be justified.

Vergés explained the strategy by referring to Saint-Just's answer to the question if King Louis XVI should stand trial. How, Saint-Just wanted to know, could such a trial be conducted within the framework of legal justice? There is no *rapport de justice* between humanity and the King, and concluded:

*Je ne vois pas de milieu: Cet homme doit régner ou mourir. (I see no middle point. The man must either rule or die.)*³⁵²

The question whether a trial is necessary to get rid of the King is answered by looking at two legal systems: the law of the republic *vis-à-vis* the law of the King. Between these two there is no form of justice spanning them both. Vergés used the strategy in his controversial defence of the Nazi Klaus Barbie, the Butcher of Lyon. Christodoulidis points out that Vergés avoided the traditional way of defending post-Nuremberg war criminals – looking for mitigating factors, stressing the sub-ordinary role of the French Gestapo, etc. Vergés went to the foundation of the French legal system.³⁵³

How, he asked, can Barbie stand trial for deeds, now defined as crimes against humanity, while France commonly implemented similar deeds and actions in keeping the French colonies in subordination? Commented Vergés in his closing statement:

*Racism, we know what that is. We bow our heads also in form of the martyrdom of the children of Izieu because we remember the suffering of the children of Algeria.*³⁵⁴

³⁵¹Preamble of the Namibian Constitution, par. 5(2).

³⁵²Vergés, p. 99. Translation Christodoulidis, p. 4.

³⁵³Christodoulidis, p. 7.

³⁵⁴Statement of Vergés on 1 July 1987. Reported in Chalandon, S and Nivelles, P. (eds.). 1998. *Crimes contre l'humanité. Barbie, Touvier, Bousquet, Papon*, p. 138. Translation: Koskeniemi, M. 2002. *Between Impunity and Show Trials*, in Frowein, J & Wolfrum, R. (eds.). 2002. *Max Planck Yearbook of United Nations Law*, Alphen an den Rijn: Kluwer Law International.

Rather than defending Barbie's action in any way, the defence attacked a system where French troops massacred 15 000 Algerians in Setif for joining the celebrations of the ally victory on 8 May 1945 and using the opportunity to demand their own liberation. Those actions were not even condemned, let alone leading to any criminal action in France or Algiers.³⁵⁵

While the strategy of rupture was developed by Vergés as a defence strategy in political trials, the parallels between post-colonial Europe and independent Namibia are striking. One can easily use Vergés' argumentation to challenge a constitutional call for the release of Acheson.

Is there any context of justice capable of spanning both the apartheid system not only allowing but initiating the assassination of Anton Lubowski? At the time such deed no longer had any political significance or any positive outcome for the anti-independents in South Africa. Should Acheson be allowed to stand on the newly acquired protection of an accused – the right to be presumed innocent, the right to be freed on bail pending the trial, the right to be treated fairly?

Should the Kleynhans case not have been treated in the same manner the apartheid system – for which Kleynhans and his co-accused stood up against the new democratic government – treated its dissidents? Granted, the rupture strategy was developed in a civil law jurisdiction as a defence strategy and not as an instrument for the prosecution. It is nevertheless possible to see the prosecution developing a line of action that based a request to deny Acheson bail on similar principles.

Why can the Court not consider the fact that Lubowski was killed before independence with possibly only one objective: to derail the independence process? Is it totally insignificant for the application of another postponement that the South African government, despite the political speech of President FW de Klerk on 2 February 1990,³⁵⁶ was still the minority government that illegally occupied Namibia before independence? Does it make a difference to the State's case that the South African government did not assist in extraditing the South African suspects to Namibia? The temptation to the Court was challenging. The quoted comment of Justice Mahomed on the hermeneutical battle between powers of justice and

³⁵⁵Ibid.

³⁵⁶On that day, De Klerk opened the door for negotiations that eventually lead to democratic elections and majority rule in South Africa.

constitutionalism was an indication that the Court considered a transformative approach based on the Preamble, yet opted for the ideals, spirit and tenor of the Constitution.

Koskenniemi, arguing against an emphasis on the historical context of a crime, pointed to the difficulty to get closure in any trial if the legal debate has moved to the level of historical investigations.

*The evaluation of history by the Court will be only one amongst many. The judgment will not provide the only prism through which the events.....will be read.*³⁵⁷

He makes the following comment on the Barbie case:

The defence tactic in the Barbie trial was to accept it as being about historical truth. By then choosing an appropriate interpretive context – European colonialism – the actions of the accused would necessarily be seen as a relatively “normal” episode in the flow of racial persecutions and massive suffering of which European history has consisted.

In the framework of Scandinavian realist theorists Carr and Morgenthau, Koskenniemi opted for a consideration of the broader contexts rather than an individualisation of the past.

*If the court start making assessments of the bigger interest and evaluate contextual data, it will move into the area of indeterminacy and political conflict.*³⁵⁸

In the Acheson case the approach of Justice Mahomed did not bring justice for the Lubowski family, neither did it seize the moment to address the issue of apartheid crimes in the courts. Interpreters like Koskenniemi will argue that it nevertheless saved the democratic process from indeterminacy and political conflict. And it did not totally close the door for a future attempt to address the injustices of the past by means of Vergés' rupture strategy.

Koskenniemi's point is well taken. One may well ask for how long strategies of rupture will stay in place? While the immediate need for justice and fairness would have been met by drastic sentences in the Kleynhans-case and a refusal to grant Acheson bail, the political effects of such actions could have been detrimental.

³⁵⁷Koskenniemi, 2002, p. 31.

³⁵⁸Ibid, p. 32.

The reaction of the late Justus Garoeb in the Kleynhans-case, gave the constitutional dream of non-racialism a severe blow. O'Linn was treated like a hanging judge,³⁵⁹ despite the role he played in opposition to South African occupation. A radical anti-constitutional approach in the Acheson and Kleynhans cases would have caused serious undermining of the Constitution and taken the Namibian judiciary on the route of *indeterminacy and political conflict* (Koskenniemi).

5.7 Value-Based Judgments: Ex Parte Attorney General: In Re Corporal Punishment by Organs of State

Not all the judges of the High and Supreme Courts of Namibia appreciated the new approach. But despite strong opposition,³⁶⁰ the value-based approach followed by Justice Mahomed in the Acheson case became an important cornerstone in the hermeneutics of constitutional interpretation in Namibia.

The Criminal Procedure Act 51 of 1977 and several other statutes made provision for whipping of both adult and juvenile male convicts.³⁶¹ Proclamation 348 of 1967 gave authority to the Customary Courts to impose corporal punishment “in accordance with Native law and custom”.³⁶²

The High and Supreme Courts of an independent Namibia, like Justice Mahomed in the Acheson case, took a radical different approach to the interpretation of constitutional issues. In a case questioning the constitutional validity of corporal punishment, the Supreme Court had the first opportunity to express itself on the values of the Namibian people.³⁶³ The constitutional issue at stake was “whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in legislation is in conflict with any of the provisions of chapter 3 of the Constitution of the Republic of Namibia and more in particular art 8”.³⁶⁴

³⁵⁹The often-used expression for judges who were willing to sentence convicts to death.

³⁶⁰See *S v Vries* 1996 (2) SACR 638 (NM).

³⁶¹See *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*, 1991(3) SA 76 NM 178 (SC). p. 181 – 185 for the full list of all the legislation quoted by the Court.

³⁶²See sections 3(2) and 4(2).

³⁶³*Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991(3) SA 76 NM 178 (SC).

³⁶⁴Article 8 reads as follows:

(1) *The dignity of all persons shall be inviolable.*

(2)(a) *In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*

(b) *No persons shall be subject to torture or to cruel, inhumane or degrading treatment or punishment.*

Schools in pre-independent Namibia followed a policy of corporal punishment approved by the Department of Education.³⁶⁵ The educational rules were often just a smokescreen. Namibian learners, including girls, received indiscriminate corporal punishment in the pre-independent era.³⁶⁶

The Court stated at the outset that the question whether a specific punishment is inhumane or degrading is a value judgment:

*It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic.*³⁶⁷

The emphasis on the “norms, aspirations, expectations and sensitivities of the Namibian people” is somewhat complicated. How can the Court establish exactly

³⁶⁵The text of the Ministerial Guideline reads as follows:

- (i) *The head of the school has the exclusive responsibility for the administration of corporal punishment.*
- (ii) *If circumstances so demand the head of the school may extend this responsibility to the deputy and departmental heads.*
- (iii) *The administration of corporal punishment by a teacher may only take place in the presence of and with the approval of the head of the school.*
- (iv) *No corporal punishment may be administered upon females.*
- (v) *Corporal punishment may only be imposed in respect of serious contraventions of which the following are examples: Bullying; continuous and serious failure to perform duties; swearing; indecency; abusive language; unbecoming conduct; truancy; insubordination; deliberate damage to property; assault.*
- (vi) *Corporal punishment must be administered moderately so that it does not cause permanent bodily injury or give rise thereto.*
- (vii) *The age and bodily condition of the student must be taken into account.*
- (viii) *Before any corporal punishment or any other punishment is administered there must be a proper investigation of the contravention which the student is alleged to be guilty of.*
- (ix) *No corporal punishment may be imposed in the presence of other students.*
- (x) *Only an ordinary cane may be used in the administration of corporal punishment. This cane may not be longer than 75 centimetres and thicker than 13 millimetres.*
- (xi) *The cane used for the administration of corporal punishment may not be the possession of a teacher in the classroom.*
- (xii) *Corporal punishment may not be imposed on the hands or the legs or any other part of the anatomy except for the buttocks.*
- (xiii) *Pulling the hair or ears of the student or smacking or pinching or knocking him or assaulting him in any other way is strictly prohibited.*
- (xiv) *A full written record of the imposition of the corporal punishment in all cases must be maintained in a punishment register which must show the name of the student, his age, the number of strokes imposed, the name of the person who administered the punishment, the date on which the punishment was administered and a full description of the contravention.*

³⁶⁶The author had personal interaction in 1989 with the principal and staff members of Jan Möhr Secondary School in Windhoek where both boys and girls as young as 11 years old, received corporal punishment – an arrangement approved by the Parents Committee.

³⁶⁷*Ex Parte Attorney-General, Namibia: in re Corporal Punishment*, p. 189.

what constitute these aspects of the Namibian soul? The question remained unanswered in the judgment.

The Court evaluated several other jurisdictions with similar provisions in its constitutions. It also considered international instruments and some South African judgments and comes to the conclusion that corporal punishment is indeed degrading and inhumane.³⁶⁸

Berker, in a short concurring judgment, commented that if norms and values are to play a role in the interpretation of Article 8 of the Constitution, it must be the norms and values of the Namibian people and not those of people in other jurisdictions. Since Namibia has been freed from colonialism only recently, they are “now in the position to determine their own values free from such imposed foreign values by its former colonial rulers”.³⁶⁹ While Berker does not elaborate on how to establish these norms and values, he nevertheless raised some soft criticism to Mahomed’s approach. Berker accepted it as a fact that the Namibian people have a deep revulsion in such treatment.

*It is not surprising that a deep revulsion in respect of such treatment, including corporal punishment, has developed, which ultimately became articulated in the Bill of Fundamental Human Rights enshrined in the Constitution, and in particular in art 8 thereof, which protects absolutely the dignity of every person, even in the enforcement of a penalty legally imposed, and further absolutely prohibits torture or cruel, inhumane or degrading treatment or punishment.*³⁷⁰

Berker used the historical context of oppression, which included both legislation that provided for cruel and inhumane punishment, and arbitrary torture, to explain why the Bill of Rights has included a prohibition on torture, cruel, inhumane and degrading punishment. Only within this historical framework can the attitudes values of the Namibian people be understood.

While juveniles and learners in schools received more protection than juveniles in other jurisdictions did, Mohamed and Berger agreed that once certain actions of state organs have been branded degrading and inhumane, the Court or the legislator could not ignore or allow such punishment for certain categories of

³⁶⁸Ibid, pp. 189 – 193.

³⁶⁹Ibid, p. 198.

³⁷⁰Ibid, p. 199.

people. Even the smallest element of degradation and inhumane conduct are enough to rule the application thereof unconstitutional.³⁷¹

Judge O'Linn, who was not part of the Bench in this case, opted to comment critically on the judgment in two cases where he was the presiding judge. In the first case he pointed out that the Supreme Court did not follow the accepted test in the corporal punishment case to determine the norms, values and aspirations of the Namibian people and for that reason the *Corporal Punishment-case* is possibly not binding in terms of the *stare decisis* rule.³⁷² He repeated his sentiment in the *Sipula case*,³⁷³ discussed below and again in the *Tcoeib case*.³⁷⁴

O'Linn turned to the corporal punishment case in his refusal to grant Tcoeib permission to appeal. Since Berker said in his concurring judgment that an enquiry is necessary to determine the norms and values of the people, it was mandatory for the court to hear all the interested groups in terms of section 15(50) of the Supreme Court Act. The judge pointed out that the Court did not adhere to several provisions of the Act. He emphasised that the national institutions such as traditional authorities, administrators of education, the teachers and parents' associations should have had the opportunity to be heard. The judge referred to the necessity of objectivity and complained that the term "civilised international community" is not defined.

He further complained that the test to determine the norms, values, expectations, aspirations of the people has not been set out clearly, which makes it impossible for inferior courts to follow. He also suspected that the justices took judicial notice of what the norms and values of the Namibian people entails.

O'Linn has a point when he criticises the Court for failing to enter into substantive argument on the issue of values. But he does not bring us closer to a solution. He does not present an alternative to Mahomed's lack of substantive law on the issues the Supreme Court did not consider - all the complex issues of juvenile punishment and the position of traditional authorities, to mention only two.

A weakness of O'Linn's criticism is his almost exclusive emphasis on formal law and procedure. The wording of legal texts is the foundation of his approach. It is doubtful that O'Linn was ever consciously following Herbert Hart's methodology or

³⁷¹Ibid, p. 198 ff. and 192 ff.

³⁷²*S v Vries* 1996 (2) SACR 638 (NM) on p. 655.

³⁷³1994 NR 41 (HC).

³⁷⁴*S v Tcoeib* 1993 (1) SACR 274 (NM).

his basic approach to interpretation. Yet, his insistence that the words of the texts are usually adequate to deal with all issues, he aligned himself with Hartian positivism.

The High Court (Judge O'Linn) refused the accused (Tcoeib) leave to appeal, but his petition to the Supreme Court succeeded. When the case came before the Supreme Court, Mahomed, who became Chief Justice after the death of Berker, was on the Bench with acting Supreme Court judges Dumbutshena and Leon. The new Chief Justice missed the opportunity to react to O'Linn's criticism. Instead, the Court looked at the sentence given by O'Linn as if the Constitutional debate never took place. His only reaction was a footnote.

Without referring to the moral values of the Namibian people or the civilised international community, he reacted to O'Linn's criticism that the Court did not conduct a proper enquiry by stating that such an enquiry is unnecessary since the values, norms, aspirations of the people is known through the Constitution.

*No evidential enquiry is necessary to identify the aspirations, norms, expectations and sensitivities of the Namibian people as they are expressed in the Namibian Constitution itself and in their national institution.*³⁷⁵

The argument of Mahomed does not make sense without any further explanation. The challenge of the Supreme Court in the corporal punishment case was to determine if Article 8 of the Constitution is broad enough to prohibit corporal punishment by organs of the State. Or, does Corporal Punishment by organs of the state constitute cruel and inhumane treatment? The Constitution does not give a direct answer, hence the test determining the values, aspirations and norms of the Namibian people. To say that the test is unnecessary leaves us with a circle argument.

The Court quoted a set of rules generally accepted by the civilised international community. By concentrating on rules rather than analysing the meaning and expression of norms and values the judgment moved out of the realm of substantive argument and right back into formal argumentation. Does Article 8 of the Namibian Constitution conform to similar worded articles in the constitutions of civilised international community? How does the civilised community interpret these articles? If they found similar actions to be inhuman and degrading, then we have

³⁷⁵1999 NR 24 (SC).

found the norms, values and aspirations of the Namibian people. In short, the inclusion of an article in other liberal democratic constitutions prohibiting torture or cruel treatment and punishment or inhuman treatment and punishment means *ex post facto* that Namibians share the aspirations, values and norms (and interpretations) of those societies.

The basic problem of judgment is that he does not really break with the old formalist approach. He found a new set of rules in comparative constitutional law and international law: “the emerging consensus of values in the civilised international community which Namibians share”. While he was willing to break new ground and initiate a hermeneutic of values, he seldom managed to make the transition from formal law to substantive law. Mahomed’s judgment was in many ways a failed attempt to introduce a modern hermeneutical approach to constitutionalism.

Berker came closer to define a core value namely the liberation from colonial bondage.³⁷⁶ He also makes the *historical context* a hermeneutical key. The norms and the values, he asserts, is linked to history.

The historical justification of Berker needs more attention. The majority of the tribal authorities (now known as traditional authorities) were supporters of the South African colonial structures and opposed to SWAPO and the liberation struggle. Consequently, the tribal authorities were often suspected of beating and torturing SWAPO members. In *Wood and Others v Ondangwa Tribal Authority and Another*³⁷⁷ two bishops and a third person applied for an interdict against the tribal authority to prevent them from detaining and inflicting punishment on members of SWAPO, and members of another anti-South African party, Demkop. The interdict was denied by the Supreme Court of South West Africa, but granted by the Appellate Division of South Africa.

It emerged in the case that SWAPO and Demkop members were arrested by the South African police and handed over to the tribal authorities who unlawfully detained the people and inflicted corporal punishment on them, even if they only executed legal functions on behalf of SWAPO.

It is not necessary to go into the details of this case. Suffice it to say that the South African institutions in Namibia used the legal system, the police and the

³⁷⁶*Ex Parte Attorney General: In Re Corporal Punishment*, p. 198 ff.

³⁷⁷1975 (2) SA 294 (A).

traditional authorities to maintain power. Corporal punishment was an instrument in their hands.

As noted in chapter 2, the metaphor of a constitution as the historical vehicle from oppression to liberation has found wide application in the South African constitutional jurisprudence and debate, following the late Etienne Mureinik's metaphor of a *bridge* that took the people *from a culture of authority to a culture of justification*.³⁷⁸ In the same vein De Vos argues for an historical understanding and interpretation of the present as a core value from whence constitutional interpretation can start.³⁷⁹

De Vos' argument is helpful to elaborate on Berker's understanding of constitutional values. The Constitution is the difference between the old and the new. Independence introduced a new core value. This core value is embedded in the Constitution, hence history is the hermeneutical key to interpret the Constitution.

Without knowledge and understanding of the role of corporal punishment in the oppression of the majority of the people, it may sound like an exaggeration to refer to corporal punishment as a form of torture. However, in the light of its application by the traditional authorities (and sometimes the Courts), it is not an over breath.

Interpreting the corporal punishment case in its historical context, helps to understand to why this specific "bridge" was necessary to bring the Namibian nation to accept a new morality and new core values. But it does not answer all the questions about value judgments.

While the value-based approach was not totally new in Namibia, the corporal punishment case moved the goal posts of legal interpretation drastically. One must bear in mind that South Africa did not have a constitution with a Bill of Rights at the time and no one really knew what would eventually happen at the Codesa negotiations. Consequently, the Namibian courts began the new path without precedents or simultaneous developments elsewhere.

Despite all the good that can be said about the corporal punishment case, the fact remains that the Supreme Court never explained how it came to the conclusion that corporal punishment is against the values, norms and aspirations of the

³⁷⁸Mureinik, E. 1994. A Bridge to Where? Introducing the Interim Bill of Rights, *10 SAJHR* 31.

³⁷⁹De Vos, P. 2002. A bridge too far? History as Context in the Interpretation of the South African Constitution, *17 SAJHR*, p. 2ff.

Namibian people. The case never assisted the Namibian people to create a new, radical hermeneutic of justice. If norms and values of the Namibian people are really the basic foundation of constitutional interpretation, there is little or no difference between constitutionalism and majoritarianism.

If constitutionalism is all about the norms and values of the people at a given time, the ideals of constitutionalism are defeated. The function of entrenched constitutional values is to protect society against the swinging moods and influences of society. Making the norms, values and aspirations of the nation without reservations, the constitutional hermeneutical key can eventually result in a return to majoritarianism.

However, despite the vocabulary of democracy, higher values and constitutionalism, the court remained stuck in the traditional way of thinking. We are reminded of the constant references in the apartheid past in both South Africa and Namibia where separation, white superiority and so-called Christian values were made the untested values of the South African people.

Looking at the judgment from this perspective, Judge O'Linn's criticism is valid. However, both Mahomed and O'Linn are still dealing with questions of form rather than substance. At face value the judges seem to agree to the importance of norms, values and aspiration as a hermeneutical key for constitutional interpretation. O'Linn is not necessarily against the idea of making norms and values the key. He eventually used it himself when he wrote a decisive Supreme Court judgment.³⁸⁰

Yet, there is another way to interpret Mahomed's judgment, especially if one sees the two concurring judgments as one. The norms, values and aspirations of the Namibian people are first and foremost found in the Constitution. It is the highest expression of the norms and values of the people, poetically referred to as *a mirror reflecting the soul of the nation*, by Mahomed in the Acheson case.

Looking at the Mahomed judgment from this perspective, the values, norms and aspirations of the people are to be found primarily in the Constitution itself. Those values do not necessarily conform to the general accepted norms and values of the majority. This is especially true of postcolonial Namibia. The history of Namibia is flawed by a violent oppressive regime. Interpreting values, norms and aspirations in a transformative manner will necessarily have to be the "bridge" (Mureinik) from

³⁸⁰*The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Another*. 2001 NR 107 (SC).

the old values to a constitutional dispensation where violence is underplayed and respect for all is emphasised. This applies especially to vulnerable members of society such as children, and the less respectable members of society such as convicted criminals.

It does not help to find out how the majority feels about the necessity of corporal punishment to determine if corporal punishment complies with the constitutional values, norms and aspirations of the people in terms of article 8.

Kriegler explained the tension between the values and aspirations *vis-à-vis* constitutional values. In the *Makwanyane* case he criticised value judgments based on the values of the people, commenting the mere fact that the majority of the South Africans are in favour of the death penalty cannot make it constitutionally acceptable if the process flies against the principles of the South African Constitution.³⁸¹

Approaching the judgment from this angle, it makes sense for Mahomed to look at how other jurisdictions interpret similar norms and values in their constitutions. It is not a matter of giving preference to the norms and values of foreign countries as an alternative for conducting a survey of how Namibians think about corporal punishment. It is an analytical process to find out how the will of the morals of the people embodied in the Constitution needs to be applied to questions of the day.

To suggest that the norms and values of the people can be found by external exercises rather than an analysis of the Constitution, would take constitutional hermeneutics away from transformative constitutionalism and back to majoritarianism.

5.7.1 Reactions

I discussed the “soft” response to the Acheson judgment and the more aggressive response of the politicians to the light sentences given to the Kleynhans treason trial accused in the previous chapter. Since the Attorney General forwarded the issue of corporal punishment to the Supreme Court in terms of a mandate under the Constitution, one can assume that the process was a Cabinet initiative or at least approved by them. Consequently, it came as no surprise that the government applauded the decision and the Minister of Basic Education at the time, Nahas

³⁸¹*S v Makwanyane* p. 391.

Angula, stated a few years later in a newspaper interview that he has always been opposed to corporal punishment in schools.³⁸²

The newspapers did not carry stories of annoyed parents, teachers or educational bodies at the time. The judgment did, however create some problems in the prisons. Namibia did not have enough institutions to keep all juveniles out of the prisons, a disadvantage raised by counsel during the trial. Consequently, juvenile offenders who could not be placed in a juvenile reformatory, were bound to spend time in prison.

The backlash against the decision only came in the late 1990's. In July 1999 The Namibian carried a story of the return of corporal punishment to some schools in the north.³⁸³ In March 1998 The Namibian reported on alleged corporal punishment and assault of learners at the Baumgartsbrunn Private Junior Secondary School.³⁸⁴

In October 2000, the Minister of Women Affairs and Child Welfare, Netumbo Nandi-Ndaitwah, blamed "too much human rights" for messing up the country, and the abolition of corporal punishment for the indiscipline in schools.³⁸⁵

However, there has never been an attempt to turn the clock back on corporal punishment in the schools or the justice system.

5.7.2 Traditional Authorities

Traditional authorities made a strong point against the judgment. They felt marginalized after independence. Before independence the South African government and especially the army, managed to win the loyalty of most tribal councils. They received generous financial assistance and respect from the government.

Several chiefs served in the second tier governments.³⁸⁶ SWAPO saw them as traitors at the time.³⁸⁷

³⁸²Amupadhi, T. 2004. The Contender Who Came from Nowhere, in *The Namibian*, 28 May 2004, published at http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=9344&no_cache=1, accessed on 20 March 2008.

³⁸³Schultz, H. 1999. *Teachers Lashed over Corporal Punishment*, in *The Namibian*, 2 July 1999.

³⁸⁴Shikweda, A. 1998. Pupils protest of mistreatment, in *The Namibian*, 17 March 1998.

³⁸⁵Amupadhi, T. 2000. Too much emphasis on rights 'messing us up', in *The Namibian*, 18 October 2000.

³⁸⁶The best known and influential traditional leaders were Ovaherero Chief Clemence Kapuuu and Pastor Cornelius Ndjoba, who was assassinated while serving as Chief Minister of the Tribal Ovambo Executive. Both were founder members of the DTA. See Derks, K. *The Namibia Library of Dr. Klaus Derks. 2005. Chronology of Namibian History*. Available at <http://www.klausderks.com/index.html>.

Shortly before independence rumours circulated that SWAPO planned to abandon traditional authorities because of their suspect role in the colonial era.³⁸⁸ However, once in government, they realized that the authorities were extremely influential and popular amongst the people. The government then introduced a system of recognizing authorities with whom they were willing to work. The recognized authorities received some compensation from the government, but not close to the royal compensation of the colonial era.³⁸⁹

The traditional courts received judicial recognition in the Constitution. It recognises both common law and customary law as a valid legal system in an independent Namibia.³⁹⁰ Consequently, the customary courts maintained their rights to hear cases and give judgments on the basis of their own customary law.

In *S v Sipula*³⁹¹ the accused, a tribal policeman, was found guilty of assault with the intent to do grievous bodily harm in the Magistrates Court after executing an order of a tribal court which had imposed a sentence of corporal punishment.

The High Court set the judgment and sentence aside. It, however, did not make a ruling on the question whether *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State*³⁹² - founding corporal punishment by state organs unconstitutional - was binding on traditional authorities and traditional courts.

The Court nevertheless discussed the issue. While the Court stated that the mentioned case did not necessarily declare corporal punishment in customary law unconstitutional, the Court, without deciding, assumed that the case was indeed binding on traditional courts and traditional authorities. The Court argued that it is not clear that traditional courts or traditional authorities are organs of the state.

The *obiter dictum* of the Court is difficult to understand. The corporal punishment case dealt with three basic issues: corporal punishment in the judgments of the Namibian courts, corporal punishment in prisons, and corporal punishment by teachers in Namibian schools. If customary law is a Namibian legal system in terms of

³⁸⁷See O'Linn, B. *Namibia. The Sacred Trust of Civilization*, Vol. 1, p. 305 ff. for a discussion of SWAPO's animosity towards traditional leaders during the struggle. See also *Wood and Others v Ondangwa Tribal Authority and Another*, 1975 (2) SA AD 294.

³⁸⁸See Haugh, W. 2014 *Lyrical Nationalism in Post-Apartheid Namibia: Kings, Christians, and Cosmopolitans in Catholic Youth Songs*, Boston: Mass. Lexington Books, p. 246 ff.

³⁸⁹Becker, H. 2006. New Things After Independence. Gender and Traditional Authorities in Postcolonial Namibia. *Journal of South African Studies*, Vol. 32 no. 1, March 2006, p. 40.

³⁹⁰Article 66.

³⁹¹1994 NR 41 (HC).

³⁹²1991 NR 178 (SC).

Article 66, the community courts or traditional courts cannot be anything but organs of the state and part of the corpus of Namibian courts.

5.7.3 Comments

The initial *liaises faire* attitude of the Namibian people and the later fierce reaction against the *Corporal Punishment* judgment makes sense if one analyses judgment in its historical context. The colonial government and the traditional authorities often used force, and more specifically corporal punishment, against its political enemies.³⁹³ The humiliation of adults receiving corporal punishment in the Magistrates Court for minor offences also discredited the application of corporal punishment after independence.

In his consenting judgment, Judge Berker mentioned the possibility that corporal punishment may be reconsidered for juvenile offenders. The decay of the circumstances in the holding cells of the police and the shortage of correctional institutions for juveniles revived the discussion on corporal punishment as an alternative for sending juveniles to prison in letters to newspapers and commentary on national radio talk shows. However, the government never gave any indication during the first fourteen years of nationhood that it considers bringing corporal punishment back for juveniles convicted in criminal courts.

The activism of the traditional authorities lies on a different level. It has to do with their understanding of their roles as custodians of their traditions and their authority as supreme leaders of their communities. Their requests for the return of corporal punishment in the community courts have not lead to any serious debate.

5.8 Interpreting the Independence of the Prosecutor-General in Independent Namibia

The Namibian Constitution introduced a constitutional dispensation where a new Office, the Prosecutor-General, is responsible for prosecutions. (Article 88). Article 140 (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.

³⁹³See again *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA AD 294.

However, the Constitution did not introduce a mere a name change for an old office. It also created a new Office of the Attorney General (AG).³⁹⁴ The AG follows the pattern of Britain and Wales. The AG “*exercises the final responsibility for the office of the PG*”³⁹⁵ and is “*in principal legal adviser to the President and Government*.”³⁹⁶ He is also responsible for the protection and upholding of the Constitution.³⁹⁷

There is also a difference between the appointment of the PG and the AG. The President appoints the AG in accordance with the provisions of *Article 32*.³⁹⁸ Article 32 (3) (1) provides for the appointment of the Prime Minister, Ministers and Deputy-Ministers, the AG, the Director-General of the Planning Commission “*and 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*”. Although the Constitution nowhere states that the Attorney General is part of the Cabinet, his/her appointment correlates with that of members of cabinet and the Constitution deals with the appointment in the same article as that of members of cabinet.

The “*President appoints the PG on the recommendation of the Judicial Service Commission*,”³⁹⁹ similar to the appointment of judges⁴⁰⁰ and the Ombudsman.⁴⁰¹ It is clear that the PG is a quasi-judicial appointee, while the AG is a political appointee. By creating the two posts, the Constituent Assembly made a distinction between the political official and the PG as a free agent.

In 1997 after the death of the first Ombudsman, the President appointed the then acting Ombudsman, Adv. Kasutu, as Ombudsman without waiting for a recommendation from the Judicial Service Commission. After a massive uproar from both the public and the judicial profession, the President withdrew the appointment and later appointed Adv. Bience Gawannas at the recommendation of the Judicial Service Commission.

In terms of Article 85 of the Constitution the Judicial Service Commission shall consist of the Chief Justice, a judge appointed by the President (not necessary

³⁹⁴Articles 86 and 87.

³⁹⁵Article 87 (1).

³⁹⁶Article 87 (2).

³⁹⁷Article 87 (3).

³⁹⁸Article 86.

³⁹⁹Article 88 (1).

⁴⁰⁰Article 82(1).

⁴⁰¹Article 90 (1).

the Judge President of the High Court), the AG and two representatives from the legal profession. The only political figure on the Judicial Service Commission is the AG. Political manoeuvring will be extremely difficult, especially since two different organisations, the Law Society and the Namibia Law Association nominates the representatives of the profession.

Thus, unlike South Africa, where the majority of the members of the Judicial Service Commission are members of Parliament, the Namibian Judicial Service Commission has only one politician in its ranks. Where politicians are the majority in the JSC and the ruling party has a substantial majority, the appointments of the committee can be compromised by political bias appointments. This is highly unlikely in Namibia.⁴⁰²

5.8.1 The Historical Independence of the Prosecutor-General

Until 1977, the South West African legal system maintained an element of independence and self-determination. Statutes of the South African Parliament did not become effective in South West Africa if it was not explicitly made applicable in the Act itself. Further, the Legislative Assembly of South West Africa and after 1978, the Transitional Government of National Unity had some legislative powers, though subjected to South African control.⁴⁰³

The implementation of criminal procedure legislation is a point in case of South West Africa maintaining an element of peculiarity and independence from South Africa. When South Africa took over the administration of South West Africa in 1918, the prevailing South African common law was made applicable in South West Africa. From then the greatest majority of South African laws were also made applicable to South West Africa over a period.

⁴⁰²This does not mean that no one can manipulate the Judicial Service Commission for political gain. However, the composition of the Commission makes it difficult. The fact that two members are judges and two others nominated by the profession creates checks that will make manipulation by the only political appointee, the Attorney General, very difficult.

⁴⁰³After 1978 South Africa accepted Resolution 345 in principle, it introduced two new structures of Government in South West Africa/Namibia, a South African Administrator-General (AG) with executive powers and later, in June 1985, a transitional government of national unity. Between 1985 and 1989, the RSA government transferred several ministries from the South African authority to the authority of the Transitional Government and the AG. The transferred powers took away the legislative powers of the South African Parliament.

Prior to the formation of the Union of South Africa, the prosecuting authority, at least in Transvaal, vested absolutely in the Attorney General.⁴⁰⁴ With the formation of the Union of South Africa section 139 of the South African Act of 1909 confirmed the independence of the prosecuting authorities.

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 AG 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 the independence of the office.

Thus, initially the prosecuting authorities in both South Africa and South West Africa had absolute autonomy and were free from political control. However, in 1926 the paths parted. The South African Criminal and Magistrates' Courts Procedure Amendment Act⁴⁰⁵ placed the AG's under the control and directions of the minister. For the next fifty-one years, the South African prosecutorial authority was under executive control, while the South West African authority remained autonomous.

On 22 July 1977, the AG of South West Africa lost his/her autonomy when the new Criminal Procedure Act,⁴⁰⁶ was made applicable in South West Africa. Section 3(5) of the said Act made political control mandatory. From 22 July 1977, the AG of South West Africa was in the same subservient position than his/her South African counterparts. Although the consecutive South African governments seldom respected the political integrity of South West Africa, the legislature acknowledged the integrity of the prosecuting authority until 1977.

The philosophy underlying the previous distinction between South Africa and South West Africa was based on an acknowledgment that South West Africa (Namibia) is not part of South Africa. As a Mandate C territory, a South African minister could not control the AG. With Act 51 of 1977, the last bastion of judicial independence was taken away from the people of Namibia or. In the period following the implementation of political authority and control from South Africa over the South West African AG, the minister of justice did not hesitate to use his authority when he

⁴⁰⁴ *Gillingham v Attorney-General and Others*, 1909 TS 572 on 573.

⁴⁰⁵ Act 39 of 1926.

⁴⁰⁶ Act 51 of 1977.

deemed it necessary. With the escalation of the liberation struggle, and the growing presence of the Defence Force in Namibia, the control of the prosecuting authority was part of a process of South African control.

5.8.2 The Independence of the Prosecutor-General vis-à-vis the Attorney-General

The fact that the AG and PG were vaguely based on the English system without the specific boundaries of the two positions being spelled out, soon lead to intense conflict between the two Offices, which was eventually settled by the Supreme Court.⁴⁰⁷ The conflict centred on the function of the AG to “exercise the final responsibility for the office of the Prosecutor-General”. The conflict had a strong social dimension. At independence there were no black prosecutors in managerial positions, the AG – the equivalent of the PG in a democratic Namibia – and his deputy were seconded South Africans who left the country, all the judges were white and male and there were two black legal practitioners, one lawyer and one advocate. Transformation of the judiciary was high on the government’s priority list, but with little chance to bring about immediate change.

Even the hands of the President were tied. As noted above, the PG is appointed by the President *at the recommendation of the Judicial Service Commission (JTC)*. Without questioning the integrity of anyone serving on the JTC at the time, the racial demographics tell it all. The Constitution did not leave much leeway for the JTC or the President to make a transformative appointment. In terms of the constitutionally prerequisites the PG must:

88(1)(a) possesses legal qualifications that would entitle him or her to practise in all Courts of Namibia:
(b)... by virtue of his or her experience, conscientiousness and integrity a fit and proper person to be entrusted with the responsibilities of the Office of the Prosecutor-General

As we noted, black lawyers were almost non-existent and there were not many black prosecutors – none in managerial positions. The Office of the Prosecutor-General has been a contentious issue from the outset and the appointment of the first PG was a cause of disagreement. The last AG of South West Africa/Namibia, Estienne Pretorius and his senior deputy, Tielman Roos, were both

⁴⁰⁷*Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General.* 1998 NR 282 (SC) (1).

South Africans seconded to Namibia. At independence, they both opted to return to South Africa.

The President appointed the only Namibian in the top management of the prosecutorial authority, Hans Heyman, Acting Prosecutor-General almost by default. For the sake of stability of the legal system, the President opted for an acting Prosecutor-General possibly to give the JTC time to consider a permanent appointment.⁴⁰⁸ Given the staff component of the Office of the Prosecutor-General, the absence of black lawyers in Namibia at the time and the composition of the JSC, the eventual appointment of Heyman as the first Prosecutor-General of Namibia was expected. Although he was not the exact role model for the post (middle-aged white male, conservative, part of the management of the pre-independent dispensation) the appointment was generally accepted. The government had the consolation that the AG had final responsibility over the Office and as such at least some authority over the deliberations thereof.

The government obviously expected the Office of the AG to drive transformation. The AG is, as noted above, a political appointee and member of the cabinet. The first AG, Mr. Hartmut Ruppel, was a member of the SWAPO Party Central Committee and before 1990, a prominent member of the internal wing of the Party. He was also a respected member of the legal fraternity.

The AG took his role as the final responsibility of the Office of the PG seriously. He appointed members of the PG's office to sit on several commissions, requested the PG to provide him with police dockets of pending cases and eventually took control of the decision to prosecute or not.⁴⁰⁹ In a dragging case of Racial Discrimination against the public broadcaster, the Namibian Broadcasting Corporation (NBC), the conflict came to a clash. The AG informed the PG that he

⁴⁰⁸The deliberations of the Judicial Service Commission took place behind closed doors and the minutes of the Commission is not accessible by the public. Consequently, one can only guess why the President appointed an acting Prosecutor-General, why the Commission did not advertise the post or head hunted a PG from the ranks of practising lawyers and advocates.

⁴⁰⁹In the *Heads of Argument on Behalf of the Prosecutor-General* (p. 119 ff.), counsel quotes a letter of the PG to the JSC on 27 March 1992, after the AG has laid a complaint of insubordination against the Prosecutor-General. The PG complains among other things that his staff receive instructions from the Office of the Attorney-General without his knowledge, that advocates in his office are appointed as investigators, which he considers to be undesirable and that he considers an instruction from the AG to withdraw a specific case as an attempt to defeat the ends of justice. (*Heads of Argument*, p.120 ff.)

has decided that prosecution should be withdrawn.⁴¹⁰ The PG informed the AG on the same day that he did not regard himself bound by the instruction.⁴¹¹

After deliberations in the High Court, the AG brought a petition to the Supreme Court in terms of Section 15(1) of the Supreme Court Act⁴¹² to determine the essence of prosecutorial independence and the relationship between the two offices.

If transformative constitutionalism is the objective and one considers the pre-independent history of the prosecutorial authority, or the ideological framework under which it operated, it seems as if strong leadership from the AG's office was a prerequisite for change. The colonial authority operated under apartheid laws, was stigmatised by so-called anti-terrorist legislation. To make sure that the prosecutorial authority conforms, the Criminal Procedure Act⁴¹³ allowed the minister of justice to take over prosecutions if he/she is not satisfied with the prosecutor's "independent decision". If the minister missed something, the Defence Act allowed the State President to intervene and stop any prosecution against a member of the police or defence force for acts committed in the operational area,⁴¹⁴ and if some sinister murder was committed outside the operational area, the President could retrospectively declare that area by proclamation part of the operational area.⁴¹⁵

As a practical consideration, one may well ask if it is logical to allow the prosecutors of the old order or the whites-only JSC to take the final decision in a new era.⁴¹⁶ Considering the role of personalities in legal processes, as the American Realists⁴¹⁷ has pointed out, one may well ask which of the incumbents will be able to

⁴¹⁰Ibid, p. 127.

⁴¹¹Ibid, p. 128.

⁴¹²The AG requested the Court 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.*

⁴¹³Act 51 of 1977, section 3.

⁴¹⁴See *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).

⁴¹⁵See *Shifidi v Administrator-General for South West Africa and Others* 1989 (4) SA 631 (SWA).

⁴¹⁶See the criticism of Steytler, *supra*, note 2, p. 6.

⁴¹⁷See the debate between Realist Len Fuller and Hart, *supra* p. 25, note 35.

foster transformation from the handmaiden of an oppressive regime to an independent prosecutorial authority with a human face: A Namibian state advocate who worked all his life for the South African ministry of justice and prosecuted under the offensive and oppressive states of emergencies or a human rights lawyer who himself was detained under the oppressive legislation for fighting for an independent Namibia?

Looking from this perspective Ruppel's action to get a firm grip on the office of the PG seems to be in line with his function.⁴¹⁸ However, instead of keeping the moral high ground in the arguments, the AG's legal team opted to claim the powers of the apartheid minister of justice as proclaimed in section 5(5) of the Criminal Procedure Act, for the AG in a constitutional democracy.⁴¹⁹ The PG adopted the stance that the real question that needs to be answered is: *Is the Prosecutor-General truly independent under the Constitution?* His legal team then made the question a rule of law issue.

The judgment was written by Acting Supreme Court Judge Leon, from South Africa and concurred by Judges Mohamed and Acting Judge Dumbutshena. The Supreme Court weighed question of the PG against the two presumptions of the AG:

- That Section 3 of the CPA still applies to Namibia; and
- that the words *final responsibility* also implies final authority to make final decisions on prosecutions.

The Court quoted the well-known *S v Acheson*⁴²⁰ and *S v Van Wyk* approvingly:

*I know of no other Constitution in the world that seeks to identify a legal ethos against apartheid with greater vigour and intensity.*⁴²¹

The Court also approved the method of interpretation followed in the *Minister of Defence, Namibia v Mwandighi* and *Ex Parte: Attorney General. In re: Corporal Punishment*. In the light of the above and in the light of the fact that the Namibian

⁴¹⁸Article 87(a) of the Constitution.

⁴¹⁹Section 5 (5) reads as follows:

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.

⁴²⁰1991 (2) SA 805 NHC.

⁴²¹1992 (1) SACR 147 (NMSC).

constitution contains a declaration of Fundamental Human Rights that must be protected, the Court made the following observation:

*I do not believe that allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted can protect those rights and freedoms. 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.*⁴²²

The Court also concluded that there is no reason for a conflict between an independent PG and an AG that has final responsibility. Final responsibility means more than financial responsibility, and includes his duty to keep to the President, the Executive and the Legislature informed on work of the PG.⁴²³

The Court discussed the whole issue of a *Rechtsstaat* and concluded that Namibia with its new constitution and its fundamental adherence to the Declaration of Human Rights complies with a modern *Rechtsstaat* where state authority commits itself to a set of higher juridical norms (*Grundsätze*).⁴²⁴ In the same way, the South African apartheid regime was not a *Rechtsstaat*.

The judgment was a big blow for the government. Firstly, the PG, who was not a politician and accountable to the judicial service commission, now had enough power to prevent the government from radically change the prosecutorial approach of the former regime.

In its own presentation before the Court, the AG emphasized the fact that only the government had the political will and the moral high ground to introduce a prosecutorial approach that will end the inequalities of the past and restore the people's trust in the judicial process.

The Prosecutor-General could use his constitutional victory in the Supreme Court, to portray his struggle as a legitimate struggle for a constitutional state (or a *Rechtsstaat*) where the people are governed by a constitution and human rights principles rather than by humans in a parliamentary democracy where the people are governed by the whims and moods of humans. However, the *Rechtsstaat*-approach was never visible in the prosecutorial philosophy (or approach in so far as there was an identifiable philosophy).

⁴²²Ibid, p. 14.

⁴²³Ibid, p. 38.

⁴²⁴Ibid, p. 32.

While one has to applaud the young Namibia for taking prosecutions out of the political arena, it also had its negative side: The result was that the government, and especially the AG, had no power to implement a *prosecuting philosophy with a human face*. The Supreme Court ensured that the Constitutional values and spirit was protected, even if it benefitted the *enemies of the state* (Acheson) or a stubborn middle-aged white male from the previous dispensation (the newly appointed PG). Yet the reactions of the populist SWAPO Party cadres were reasonably mild in comparison with the later actions against the PG.

5.8.3 A Different Approach: The Supreme Court was wrong⁴²⁵

Not everyone in the legal fraternity agreed with the Supreme Court judgment. Despite the conclusion of the Court that there is no uniformity in the Commonwealth, the dissenters believe that the AG has final responsibility in deciding on prosecutions.

It is possible that the South African situation, especially the interference of the state in prosecution influenced the thinking of the Court. This historical reality may be important in interpretation, but it should not contradict the clear wording of a constitution. While the Court took cognisance of the historical environment of the Constitution, it went too far.

It is not possible to have final responsibility for the office of the PG and exclude one of the main functions of the office: The decision to prosecute or decline to prosecute. To prevent the AG to execute such function, the PG becomes the only constitutional office that is not accountable to Parliament.

Uuanivi also raised this issue in a different context in a LLM thesis at the University of Namibia. Uuanivi pointed out that the PG is the only functionary of the State that is not subjected to judicial review.⁴²⁶ The first PG, Hans Heymann, was of the opinion that the right to a fair trial and the right of appeal are sufficient checks and balances in cases where the PG decides to prosecute. The right to institute private prosecutions once the PG declines to prosecute, is another check to the powers of the prosecutorial authority.

⁴²⁵The evaluation is based on a discussion with a member of the AG's office at the time. For professional reasons he/she does not want to be quoted. Windhoek: July 2011.

⁴²⁶Uuanivi, U. 2007. *Alternative to State dominated criminal prosecutions in Namibia*, unpublished LLM thesis, Windhoek: University of Namibia.

There are, however, several problems with what Uuanivi called authoritarian prosecution. For one, the PG does not give reasons for his/her decisions to decline prosecutions. This makes it extremely difficult for the professional legal practitioners to determine if there is a *prima face* case. Secondly, the PG may take over the private prosecution at any stage.

Financial considerations are however, the main reason for placing private prosecutions outside the reach of most aggrieved complaints. The Criminal Procedure Act provides that a private prosecutor must provide security before he/she can start a prosecution.

Constitutional experts generally see prosecution as an executive function. The *Ex Parte AG/PG* case places prosecution outside the functions of the executive and not under the authority of the Chief Justice. Consequently, it is neither an executive nor a judicial function. This leaves the office accountable to no one. The solution can be found in the other constitutional office, the Ombudsman. The Ombudsperson is not accountable to any Ministry, although it falls under The Ministry of Justice for administrative purposes, mainly because the AG's office did not have its own administrative officers. The Ombudsperson presents his/her reports directly to Parliament. The Ombudsperson and the PG can be seen as *sui generis* Constitutional Offices. If the PG complies with the suggestion of the Court and keeps the AG informed of all sensitive cases, the AG can develop a process of accountability.

The battle between the AG and the PG raises the question as to where transformative constitutionalism is to be found. Is the Supreme Court judgment an example of transformative constitutionalism? Did it establish a strong foundation for an independent prosecutorial authority based on the expectation of the Rule of Law or did it prevent a progressive new government from transforming the old prosecutorial authority closely related to the authoritarian state?

Proponents on both sides of the debate claim that their positions were based on the ideals of transformative constitutionalism. The personalities involved made the issue even more difficult to evaluate. Hans Heyman was a prosecutor from the old dispensation. He had no history of being sensitive to human rights issue. When the activists and practitioners started taking constitutional issues to court, the PG vigorously opposed it.

Mr Ruppel, on the other hand was an elected member of the Constituent Assembly and the National Assembly of Namibia. He had a history as a human rights activist. His motives and seriousness in wanting to transform prosecutions are beyond reproach. If anyone, Mr. Ruppel had the credentials and background to transform prosecution. The problem with the AG's argument in court was possibly his reliance on the powers of the South African minister of justice in the pre-independence period. The abuse of the South African government and specifically that of the minister of justice is well documented. The Supreme Court saw the necessity to delink the prosecutorial authority from political control. The judgment possibly served transformative constitutionalism in the long run.

5.8.4 The Prosecutor-General as an Independent Office

The judgment in the *Ex Parte AG/PG* case was not good news for the government. The approach of the first AG was a clear indication that government wanted a strong member of Cabinet who could transform the prosecutorial policies of the past. Mr. Ruppel was the right person to be in control of such a process.

There is no reason to question the *bona fides* of Mr Ruppel or the government, for that matter. The PG was a senior official in the Office of the Attorney General (the equivalent of the post-independence PG), he prosecuted several members of government under the notorious security legislation of the colonial regime and most of his staff members served in the old dispensation, as did the vast majority of the investigation officers in the Namibian Police.

One of the means open for the AG to execute change was to make sure that the right people are appointed. However, as I will point out, the PG believed that the Office could only be independent if the prosecutors are not public servants. The AG never confronted Heyman on this issue.

A mutual understanding developed between the PG and the administrative functionary of the AG, the Permanent Secretary of Justice. The PG appointed staff members *de facto* and the Permanent Secretary performed the administrative duties (giving the new staff members contracts, arranging for medical insurance, etc.). Even when staff members complained about transfers, the Permanent Secretary answered letters, but always written by the PG.⁴²⁷

⁴²⁷The author worked in the office for several years. Confidentiality prevents me from quoting examples. However, I was appointed after an interview with the Prosecutor-General, and I believe

While the criticism of Heyman abounded throughout his term of office, he managed to strike a balance between male and female prosecutors. He appointed several blacks. He was nevertheless criticised for maintaining a predominant white staff, deploying only a few junior black female prosecutors as tokens in the High Court.⁴²⁸

One of the underlying problems is the relationship between the Office of the AG and the Ministry of Justice. While the AG was a new constitutional office, the Ministry was an inheritance of the previous dispensation. However, the division of labour between the offices were blurred. Initially the Office of the AG did not have its own administrative staff. At the beginning of the term of President Pohamba, the same person occupied the Offices of AG and Minister of Justice. In the last year of the President's first term he assigned ministerial positions to two persons.

One of the unanswered questions is the position of prosecutions in the framework of the separation of powers. The Court did not specifically address the issue of the place of prosecutions as such. Yet it linked the Office of the Prosecutor-General closely to the judiciary. The PG, like the judiciary, derives his/her independence from the same basic understanding of their offices and independent entities.

While the Supreme Court did not say the prosecutorial office is part of the judiciary, it nevertheless is closer to the judiciary. The legal fraternity does not accept this interpretation. Neither is the emphasis on independence shared by all. Even the Namibian Constitution does not use the word *independence* as such.

5.8.5 South Africa: a short comparison

South Africa took a very different approach. The final constitution is somewhat ambiguous. On the one hand, it dictates "[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice,"⁴²⁹ while on the other, it regulates that the "Cabinet member responsible for the

without going through the procedures of the Public Service Commission. When the Prosecutor-General transferred me to Katima Mulilo, my letter of complaint was answered by the Permanent Secretary. The language and style was clearly that of the Prosecutor-General. Similar cases abound in the office during my time of my employment.

⁴²⁸The criticism against Adv. Heyman was severe throughout his time in Office. However, his pragmatic approach always won the day. While it is true that the senior staff members were predominantly white, he was one of the first government agencies that employed more females than males. The number of white and black prosecutors in the High Court was always fairly balanced.

⁴²⁹Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), section 179(4).

administration of justice must exercise final responsibility over the prosecuting authority”.⁴³⁰

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 AG 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, most standard Thesauri use 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 of for carries the authoritative, commanding meaning of the preposition *over*.

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, Act 51 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 South Africa repealed section 3(5), and although the words *control* and *direction* do not appear in the Constitution, the element of political control remained in the Constitution. The Constitution did away with the minister’s right to take over

⁴³⁰Section 179(6), South African Constitution.

the functions of the National Director of Public Prosecutions (NDPP), but the minister maintained strong control over the prosecutorial authority.

The broken relationship between President Mbeki and the first NDPP, Adv. Pikoli, became a test for the NDPP's independence. When Adv. Wim Trengrove, advocate for suspended National Director of Public Prosecutions, cross-examined the then Deputy Minister of Justice, Johnny de Lange, the latter stated that political control was indeed built into subsection 179(6).⁴³¹ De Lange called the South African minister of justice and constitutional development agree the "champion" of the NDPP, adding that –

*[w]e tried to create a structure where the NPA and the executive work closely together, with, of course, a degree of autonomy.*⁴³²

The independence further differs from the Namibian PG in that the President appoints the NDPP. As noted above, in the *Ex Parte: Attorney-General* case, 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 South African president without consultation or recommendation from any constitutional body appoints the deputy president, ministers and deputy ministers.⁴³³

The president, however, appoints judges in South Africa, 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.⁴³⁴ The South African president appoints 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 at the recommendation of the National Assembly.⁴³⁵ Thus, in the South African

⁴³¹The cross-examination took place on 8 May 2008, after the testimony of Adv. De Lange before the Ginwala Commission of Inquiry into National Prosecution Authority boss Vusi Pikoli's fitness to hold office.

⁴³²Maughan, K and Webb, B. 2008. Pikoli slams 'fabricated' accusations. *The Star*, 9 May 2008. See also Maughan, K and Webb, B. 2007. The Desperate Bid to Shield Selebi. *Mail & Guardian*. 5 October 2007.

⁴³³Sections 91–93, South African Constitution.

⁴³⁴See section 174, South African Constitution.

⁴³⁵See 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 than political appointments.

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 AG often wears two hats. It is not exceptional for the AG to have the final say in prosecutions and to serve in cabinet as well.⁴³⁶

At the certification of the constitution of South Africa was certified, someone complained that the independence of the NDPP is compromised since the president as head of the executive appoints him/her.⁴³⁷ It was argued that –⁴³⁸

... 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:⁴³⁹

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.

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 South African president appoints the NDPP 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 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,”⁴⁴⁰ and the minister of justice and constitutional development “must exercise final responsibility over the prosecuting authority.”⁴⁴¹

⁴³⁶See the court’s comments in *Ex parte Attorney-General*, 1998 NR 282 (SC) (1). pp. 287ff.

⁴³⁷Section 179(1) (a), South African Constitution.

⁴³⁸*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.

⁴³⁹*Ibid.*

⁴⁴⁰Section 179(5) (a).

⁴⁴¹Section 179(6).

During 2007/2008, the South African prosecutorial authority went through two crises. The detail of the crises falls outside the spectre of this study. A short summary of the outcome demonstrates the consequences of a prosecutorial authority operating as part of the executive functions of the State.

5.8.6 The Pikoli and Simelane saga

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 South African president may provisionally suspend the NDPP pending a final decision by that country's Parliament.⁴⁴² The then South African President Thabo Mbeki suspended NDPP Adv. Vusi Pikoli and appointed his deputy, Mokotedi Mpshe, as acting NDPP. According to the official communiqué of the President's office, the president suspended Pikoli was 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.⁴⁴³

Neither the Constitution nor the National Prosecuting Authority Act,⁴⁴⁴ mention a prerequisite relationship of trust between the minister and the NDPP for the functioning of the National Prosecuting Authority. Further, a breakdown of relationships is not listed in the said Act as a ground for suspension. Consequently, the government submitted new allegations and reasons to the Ginwala Commission, appointed to decide on the matter of the National Director's suspension.

Dr. Frank Chikane, Director-General in the presidency, alleged that Pikoli's bad management of politically sensitive cases was the reason for his suspension. The Director-General of the Department of Justice, Menzi Simelane alleged 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.

⁴⁴²Section 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.

⁴⁴³Released by Chikane as a *Communique of the President's office*.

⁴⁴⁴Act 32 of 1998.

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.⁴⁴⁵ Deputy Minister De Lange raised the issue of plea bargains as the reason for the suspension,⁴⁴⁶ 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.⁴⁴⁷

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 Selebi 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.⁴⁴⁸

While the Ginwala Commission exonerated Pokoli of any wrongdoing, the new president removed Pikoli from office. The Ginwala Report is extremely critical of the evidence given on behalf of the then President Mbeki. Adv Simelane, the Commission found, was untrustworthy and openly lied in his evidence.

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. The minister and even the director-general of the Justice Department believed they could control the National Prosecuting Authority.

⁴⁴⁵Basson, 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 on 10 July 2008.

⁴⁴⁶Omarjee, H. 2008. South Africa: Pikoli axed to frustrate prosecution of Selebi. *Business Day*, 8 May 2008.

⁴⁴⁷Anonymous. 2008a. Scorpions 'didn't have clearance. News 24 Online. Available at [http://www.news24.com/News24/South Africa/Politics/0,,2-7-12_2349491,00.html](http://www.news24.com/News24/South%20Africa/Politics/0,,2-7-12_2349491,00.html), last accessed 17 July 2008.

⁴⁴⁸Anonymous. 2008b. Inquiry told of desperate scramble to prevent Selebi arrest. *Legal Brief Today*, 2064, 9 May 2008, available at <http://www.legalbrief.co.za/article.php?story=2008050908143157>; last accessed 17 July 2008.

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.⁴⁴⁹ 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 Constitution⁴⁵⁰ 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 consequent successive National Directors to prosecute him.⁴⁵¹

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:⁴⁵²

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

The court was extremely suspicious of the role played by the minister of justice and constitutional development in the whole process. 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*,⁴⁵³ the court did not go into different approaches of the Constitutional Court's statement, but found the presidential appointment of the NDPP

⁴⁴⁹ *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.

⁴⁵⁰ 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).

⁴⁵¹ *Ibid*, pp. 74ff.

⁴⁵² *Ibid*, p. 103.

⁴⁵³ 1995(8) BCLR 1070 (NMS).

unacceptable. Neither did 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 because of the judgment.⁴⁵⁴

The saga of the NDPP did not end there. Once in power President Zuma appointed the director-general of justice, Adv. Menzi Simelane, as the NDPP. Given the negative comments of the Ginwala Commission and his lack of experience, the Democratic Alliance (DA) launched an application in Constitutional Court, questioning the constitutional correctness of his appointment. The Constitutional Court found in favour of the DA. Simelane, they found, was not a fit and proper person in terms of the Constitution.

Looking at the negative results of the political influence on the prosecutorial authority in the appointment of Adv. Simelane and other obnoxious cases, De Vos commented-

*Remember the firing of Vusi Pikoli on spurious grounds and the appointment of Menzi Simelane as new NDPP, despite the fact that the latter had an adventurous relationship to the truth, having previously been found to have misled not only our courts but also a formal inquiry appointed by the President? Remember the mysterious dropping of charges of fraud and corruption against ANC high flyers...
Would any of these decisions have been made if the NPA had not been captured politically and if some appointments to the NPA had not been made on the basis of political loyalty instead of on the basis of suitability for the job?⁴⁵⁵*

5.8.7 Concluding Remarks on the Case

There are several differences between South African and Namibia. South Africa has a minister of justice with a defined function and a powerful director-general, but no office of an attorney-general. The role of the minister of justice in Namibia is undefined. The AG takes administrative responsibility for the PG's office,

⁴⁵⁴The President offered his resignation on 21 September 2008, and the ANC structures elected an interim State President on 25 September 2008. President Mbeki did not appeal.

⁴⁵⁵De Vos, P. 2012 NPA Problems Part of Larger One Party Dominant Pathology, *Constitutionally Speaking*, blog of Pierre de Vos, 5 September 2012.

the Chief Justice controls the functions of the superior courts (with assistance from the judge president in the High Court), the Magistrates Commission controls the activities of magistrates in the lower courts and the Ministry of Local Government and Housing takes responsibility for the community courts. In South Africa, the administrative responsibility for the NDPP lays with the minister of justice and a powerful director, in Namibia the Permanent Secretary of Justice acts as the functionary of the AG and the Minister and Ministry of Justice have no legal link with the PG.

The big difference between the two seems to lie in the procedure of appointment. The Democratic Alliance case corrected the misunderstanding of the Certification case that the NDPP does not have to be independent. However, the fact that the President alone appoints the NDPP will remain a thorn in the flesh of an independent prosecutorial authority. There is logic in the argument that '*final responsibility*' cannot linguistically be limited to administrative responsibility and a good relationship, especially if one operates from a hard positivist approach. However, the Supreme Court realised that an independent appointment procedure does not political exclude manipulation, if a political functionary has the final say to prosecute or not to prosecute.

Taking cognisance of the personalities of the PG and the AG, their political history, sensitivities and human rights record into consideration the judgment of the Supreme Court did not assist transformation in the short term. If the AG had the powers to appoint the staff of the PG, develop a prosecutorial philosophy of change and firmly ground the office in a human rights approach, he would possibly have placed the transformation of the office on a fast track. Progressive legal practitioners could have been encouraged to join the Office, women and young black lawyers might have been part of management of the Office in bigger numbers and prosecutors would not have opposed all applications to declare obvious unconstitutional laws and sections of the Criminal Procedure Act unconstitutional.

However, the developments in South Africa, and other jurisdictions⁴⁵⁶ in Africa are examples of the risks involved in a compromised judiciary or prosecutorial

⁴⁵⁶It falls outside the scope of this thesis to look at other jurisdictions where the judiciary and prosecutorial authority are subordinate to political appointees or appointed by the president. Nevertheless, there are several countries in Africa where political interference spoiled good reputable judiciaries and prosecutorial authorities.

authority. The narrow interpretation of *final responsibility* by the Supreme Court was a long-term guarantee against political interference.

Two things 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 states that the prosecutorial function must be executed without prejudice, fear or favour. Yet, 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. Prosecution, according to the Constitutional Court, remains an executive function.
- The Namibian Constitution provides for a fully independent functionary. The responsibility that the AG exercises expects nothing more of the PG than to inform the AG of sensitive cases and assigns the financial and administrative duties of the office to the political administration of the AG.

The strong emphasis in Namibia on the independence of the PG 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 PG'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 PG 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 PG the power and authority to operate independently from executive interference. In this regard, the independence of the judiciary and the PG is guaranteed to make the final decision in all matters of law. This independence entails the heart of the transformation from a prosecutorial authority subordinated to the colonial government to an independent authority accountable only to the Constitution.

5.8.8 The Ongoing Issue of Independence: Are the Employees of the Office Prosecutor-General Public Servants?

Although the decision of the Supreme Court on the independence of the PG, removed the first uncertainty regarding the independence of the PG, it did not answer all the questions. The PG does not have his own law in Namibia. Thus, the only sources of his/her functions are the Constitution, the Criminal Procedure Act, which is colonial South African legislation, and recent case law.

The President appoints the PG in the same manner as judges and the Ombudsman, and shares their salary scale and benefits. The PG does not fall under the auspices of the Public Service Commission, but like judges and the Ombudsman, under the Judicial Service Commission.

However, whereas the Constitution clearly provides for the retirement age, removal from office, of the judges and the Ombudsman, it is quiet on the position of the Prosecutor-General. From the above it seems clear from both the Constitution and the judgment of the Court in *Ex Parte: Attorney-General and Prosecutor-General* that the PG is not a public servant. This is also in line with his/her independence.

Even if the independence of the PG is clear, the same is not true of his/her staff. It is not clear if Section 4 of the Criminal Procedure Act is still valid in Namibia. Although the Supreme Court only dealt with Section 3(5) (the power of the minister over the PG) of the Criminal Procedure Act, the Prosecutor-General makes a case that the whole of sections 3 and 4 forms part of one corpus. Since section 3(5) was declared unconstitutional by the Supreme Court because its foundation lies in the old parliamentary order, and does not form part of the basic principles of a *Rechtsstaat*, the rest of sections 3 and 4 are also unconstitutional and no longer binding. The Constitution elaborates extensively on the functions of the Prosecutor-General in Article 88 (2).⁴⁵⁷ Section 4 of the Criminal Procedure Act regulates the delegation of

⁴⁵⁷*The power and the functions of the Prosecutor-General shall be:*

- 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.*

local public prosecutors.⁴⁵⁸ The first PG, Adv. Heyman, held the opinion that whereas sections 3 and 4 of the Criminal Procedure Act ruled and regulated the actions of the prosecuting authority in Namibia before independence, Article 88 of the Constitution repealed both sections.⁴⁵⁹

The Court explicitly stated *Ex Parte AG. In Re: The Constitutional Relationship between the AG and the PG* that the Constitution repealed section 3 of the Criminal Procedure Act. One cannot but conclude that it implicitly also includes section 4.

The PG refers to the American decision *Gorham v Lockett*, quoted in *New Modderfontein Gold Mining Company v Transvaal Provincial Administration*.⁴⁶⁰

And if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former Acts, so far as it differs from them in prescriptions. The great object, then, is to ascertain the true interpretation of the last Act. That being ascertained, the necessary consequence is that the legislative intention thus deduced from it must prevail over any prior inconsistent intention to be deduced from a previous Act.

Applying this case, the PG concluded that the discrepancies between sections 3 and 4 of the Criminal Procedure Act and Article 88 of the Constitution, makes it impossible for sections 3 and 4 to remain in force.⁴⁶¹ Section 4(a) gives the PG authority to delegate “any person to conduct any prosecution”, while section 4(b) gives him/her authority to appoint any “officer of the State” to act as public prosecutor to any lower court to institute and conduct any state prosecution on his behalf.

⁴⁵⁸4. Delegation, and local public prosecutor.-

An attorney-general may in writing -

(a) *delegate to any person, subject to the control and directions of the attorney-general, authority to conduct on behalf of the State any prosecution in criminal proceedings in any court within the area of jurisdiction of such attorney-general, or to prosecute in any court on behalf of the State any appeal arising from criminal proceedings within the area of jurisdiction of such attorney-general;*

b) *appoint any officer of the State as public prosecutor to any lower court within his area of jurisdiction who shall, as the representative of the attorney-general and subject to his control and directions, institute and conduct on behalf of the State any prosecution in criminal proceedings in such lower court.*

⁴⁵⁹This section is based on an opinion of a former staff member of the staff of the Office of the Prosecutor-General, Prollius, S. 1998. *The Independence of the Prosecutor-General*. Windhoek: Unpublished opinion, with which the PG concurred. (Personal conversation with the Prosecutor-General, 4 November 1999).

⁴⁶⁰1919 AD 367 at 397:

⁴⁶¹Prollius. 1998: p. 2.

The PG maintains that section 4 (a) refers to the High Court where the PG *institutes* prosecutions in his/her own name. Those delegated to appear on his/her behalf only need to be authorised to *conduct proceedings*. Since the PG cannot be physically present in the lower courts across the country, he/she has to delegate lower court prosecutors to *institute and conduct* prosecutions in terms of section 4 (b).

Article 88 (2) (d) of the Constitution which authorises the PG to “delegate other officials..... to conduct criminal proceedings in any court”, repeals section 4(a), but not 4(b), since it does not refer to the function of the lower court prosecutors to institute criminal proceedings.

The authority of the PG to delegate persons to institute and conduct criminal proceedings in the lower courts is according to this interpretation given by Article 88(2) (c): “... to perform all functions relating to the exercise of such powers...” This Article, according to the PG, has replaced section 4 (b) of the Criminal Procedure Act. Thus, Prollius made the following observation concerning the appointment of public prosecutors:

It is important to understand that once a person is appointed as a public prosecutor by the Prosecutor-General, authority to institute and/or conduct criminal proceedings is immediately delegated to that specific public prosecutor, hence the principal that delegation of such authority is inherent in an appointment as public prosecutor.

..once the (Prosecutor-General) has appointed an officer of the State as public prosecutor, that officer becomes vested with the powers and duties appertaining to his post as public prosecutor in different statutory capacities.⁴⁶²

Further, Prollius pointed out that if the PG is independent and if the appointment of public prosecutors is an essential function of the Prosecutor-General, it follows that public prosecutors and deputy prosecutors-general cannot be public servants. Thus, section 5(1) the Public Service Act⁴⁶³ giving the Prime Minister the authority to appoint, promote, transfer or discharge public servants on the recommendation of the Commission, does not apply to public prosecutors.⁴⁶⁴

⁴⁶²Ibid, p. 3.

⁴⁶³Act 13 of 1995.

⁴⁶⁴Prollius, p. 4.

Since section 3(3) of the Criminal Procedure Act gives the Minister of Justice (possibly the AG in Namibia) the authority to appoint deputy prosecutors-general, this section was also repealed by the Constitution.

*If a 'political appointee cannot be allowed to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted...' (Ex Parte Attorney-General, supra at p. 14), how can the appointment of those who prosecute under the direction of the Prosecutor-General, by a political appointee be justified?*⁴⁶⁵

Not every observer or scholar agree with the interpretation of the late PG. If the PG was correct in his interpretation, the powers and functions that go with the duties of the PG are all attributed to one person without any checks or balances.

The interpretation of the PG can be challenged on two points:

1. The need for checks and balances;
2. The explicit use of the word "official" in the Constitution.

The Minister of Justice made the following comment on the Offices of the PG and AG during the debates in the Constituent Assembly on 31 January 1990:

The question of subordination comes in here. Traditionally under the system of Commonwealth countries the Prosecutor-General is within the Office of the Attorney-General for subordination reasons, but when he does his work, he is independent.....

*...when it comes to his work to prosecute, he is absolutely independent, he does not get his instructions from the Attorney-General. But there must be a certain kind of subordination within the system.*⁴⁶⁶

The argument of the Minister did not carry much weight with the Supreme Court, as we have seen. However, there can be no doubt that unchecked power in the hands of one person is never the ideal. Yet, in the absence of legislation to regulate the functions and powers of the Office of the PG, it is not good enough to refer to a desirable situation. It is possible that the Supreme Court will opt for a

⁴⁶⁵Ibid.

⁴⁶⁶Quoted in *Heads of Argument of the Counsel for the Prosecutor-General*, p. 98, *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*, 1998 NR 282 (SC) (1).

different interpretation based on the values of the Constitution. We have already seen that the Supreme Court laid emphasis on the kernel values entrenched in the Constitution. The whole philosophy of the separation of powers is based on the limitation of power.

One will only know if the late PG's interpretation is correct once the Supreme Court gets the opportunity to adjudicate on the issue. If the Supreme Court is convinced that Article 88 of the Constitution did not repeal section 3(3) and section 4 of the Criminal Procedure Act, the staff members of the Office are public servants. Then only the PG is independent and not his staff.

According to Article 88 (2) (d) the Prosecutor-General delegates *other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court.*

There is a long history of using the word *official* as meaning a state official or civil servant. However, the only definition for official in the Constitution is found in Chapter X:

Chapter X The Ombudsman

Article 93

For the purposes of this chapter the word "official" shall, unless the context otherwise indicate, include any elected or appointed official or employee of any organ of the central or local Government, any official of a para-statal enterprise owned or managed or controlled by the State, or in which the State or the Government has substantial interest, or any officer of the defence force, the police force or the prison service, but shall not include a Judge of the Supreme Court or the High Court or, in so far as a complaint concerns the performance of a judicial function, any other judicial officer.

Although Article 93 refers explicitly to Chapter X, dealing with the Ombudsman, in the absence of any definition for *official* in Article 88, the word should bear the same meaning as elsewhere in Constitution (Article 93).

The exclusion judges and any other judicial officer as *officials* gives credence to an interpretation where the PG, like a judge is considered to be independent of government, while his subordinates who are called *officials* in Article 88 (2) (d) do not have the same level of independence.

If this interpretation is accepted, the Constitution is on this point a continuation of the practices by the South African government under the Criminal Procedure Act of 1977. However, it does not explain why the Constituent Assembly did not include

the instituting of criminal proceedings, together with conducting criminal proceedings, under the functions of the *officials* delegated by the PG.

Until the Office of the PG is regulated by legislation, the position of sections 3 and 4, with the exception of section 3 (5) of the Criminal Procedure Act will remain unclear.

The foundation for a transformative prosecutorial authority was laid in the *Ex Parte AG: In re AG/PG* judgment of the Supreme Court. Despite the uncertainty of effect of the judgment, the most logic and acceptable interpretation is that Article 88 of the Namibian Constitution has repealed sections 3 and 4 of the Criminal Procedure Act. The spirit of the Namibian Constitution, as ably interpreted by the honourable Justice Leon, and understood by the PG, seems the way to prevent political intervention in the prosecuting endeavours of the country.

Further transformative developments can begin with an Act to clarify the uncertainties. The problems that might arise out of the uncontrolled and untested authority and power of the PG can be encountered by legislation. Such legislation can provide for a committee consisting of the PG and his/her senior deputies to handle appointments, transfers, promotion and other administrative issues. Like any other administrative actions of government, the decisions of the PG should be reviewable by the High Court. The legislation should also confirm the independence of all prosecutors, with legal protection of their term of office, their salaries, etc. to warrant their independence. The judgment of the Supreme Court turned out to be a good example of transformative constitutionalism despite initial misgivings.

5.9 Due Process and the Constitution

Article 12 of the Namibian Constitution guarantees a fair trial. Over the years South African government introduced amendments to the Criminal Procedure Act, and other legislation to assist the State in its prosecutorial effort. The amendments and other legislation created presumptions, reversed the onus of proof, limited access by the defence to evidential material before the trial (maintaining that the police docket is privileged), and allowing inadmissible evidence under certain circumstances.

The adversarial legal system added to the vulnerability of accused persons. If one bears in mind that the new Criminal Procedure Act was promulgated in 1977, the political agenda becomes clearer. It was the time of the so-called total onslaught,

a term the then State President, PW Botha, used to emphasise the international “communist” attack on South Africa and its policies.

The *enemies of the state*, which included all opponents of the apartheid ideology, posed a *communist threat* to South Africa. The draconian security and anti-terrorist legislation could not secure convictions if certain procedural aspects (conservative as they were being an inheritance of the British colonial rule in South Africa) limited the State. Consequently, the State used even procedural law to secure convictions, especially in cases with political undertones.

Before 1977 South West Africa had a Criminal Ordinance under which criminal prosecutions took place. While the ordinance and the CPA were similar, there were a few substantial differences. The most important being the fact that the independence of the SWA/Namibian AG⁴⁶⁷ (then the head of prosecutions).

It was inevitable that the new emphasis on rights and the powers of judicial review would move Criminal Procedure to the main arena of constitutional jurisprudence. The court was the place where people experienced the power of the State. It is not surprising that most of the constitutional cases in Namibia involved the rights of convicted criminals, and alleged foul play in the course of the criminal investigation or the early stages of the trial.

In the courts accused people felt the effects of a reverse onus, or a presumption aiming at preventing the accused to exercise some of his/her most fundamental due process rights such as the right to remain silent, the right not to incriminate oneself or the right to know the full spectre of the State’s case against you.

While the Constitution did not necessarily introduce rights unknown before independence, they lifted due process rights to a new level. Since the competent courts could review laws and strike them down if they were unconstitutional, the legislator could no longer take away fundamental rights and maintain a false image of legality.

Consequently, the Bill of Rights became an important instrument in the hands of criminal defence lawyers to ensure a fair trial for their clients. The courts became champions of human rights. However, there was also a backlash. Victims of crime, the police and the prosecutorial authority experienced the new dispensation as

⁴⁶⁷The South African/South West African Attorney General was the equivalent of the post-independence Prosecutor-General in Namibia and the Director of Public Prosecutions in South Africa.

criminal-friendly. Criminals got off the hook because of what they perceived to be technical constitutional issues. The escalation of crime did not help to create a spirit of understanding and appreciation for the Bill of Rights amongst ordinary Namibians. The politicians were not helpful either. After every high profile criminal case they called for the death penalty or made statements like criminals have given up their human rights by doing crime.

The prosecutorial authority took a while to make peace with the Bill of Rights. Initially, the State vigorously opposed all applications of a constitutional nature. However, in 1999 at the Annual Conference of the International Association of Prosecutors in Beijing, China, the Namibian delegation signed the Human Rights Charter for Prosecutors.⁴⁶⁸

Several elements of a fair trial were argued before the High and Supreme Courts in the first five years of independence. There were, however, issues that only came on the agenda of the Namibian Courts after it has been resolved in favour of accused persons in South African courts. A case in point is the right to be warned of the right to legal representation.

While the issue of legal representation was raised in several cases before 1997, only in the *S v Kapika and Others*⁴⁶⁹ the Court in following a South African judgment seriously looked at the right of an accused to be warned that he has a right to legal representation. I shall return to this issue below.⁴⁷⁰

In one of the first cases concerning a reversed onus, *S v. Titus*⁴⁷¹ a full bench of the High Court concluded that the mere reversal of onus does not negate the presumption of innocence and the right not to testify against oneself. The Court used the so-called rational connection test, and quoted the American case *Tut v the United States of America*.⁴⁷² The Supreme Court overturned the decision in *S v. Shikunga and Another*.⁴⁷³

The argument of the Court in *S v Titus* fails to address the real issue, namely the question if the reverse onus demands of the accused to *de facto* proof his/her innocence. However, as the Court pointed out in the *Pineiro case*, the American test

⁴⁶⁸Myjer, E, Hancock, B and Cowdery, N (eds.) 1999. *IAP Human Rights Manual*, The Hague: International Association of Prosecutors.

⁴⁶⁹1997(1) NR 286 (HC).

⁴⁷⁰*S v Melani and Others* 1996 (1) SACR 335 (E).

⁴⁷¹1991 NR 318 (HC).

⁴⁷²319 US 463.

⁴⁷³1997 NR 156 (SC), 2000 (1) SA 616 (NMS).

that the Court relied on, deals with a somewhat different scenario, namely where evidence has already been lead, and the Court has to decide if the evidence can be allowed despite the fact that the onus of proof shifted.⁴⁷⁴

The High Court was quick in *S v Pineiro*⁴⁷⁵ to make a better choice from the jurisprudential novel of Namibia. The rigid approach in the *Titus* case was abandoned after a constitutional test. The test as set out by the Court is a simple one. To put it in my own words: Who is obliged to carry the final burden of guilt, the presumption or the State? Consequently, the Court ruled that the presumption of guilt in the Sea Fisheries Act,⁴⁷⁶ contradicts the presumption of innocence contained in Art. 12(1) (d) of the Constitution.

The old question concerning the conclusions that a court can make from the decision of an accused who fails to testify came up in *S v Haikele and Others*⁴⁷⁷ and *S v. Kamajame and Others*.⁴⁷⁸ In the latter case, which was specifically overturned by *S v. Shikunga and Another*,⁴⁷⁹ the High Court still held that that silence by the accused person where an innocent man would have spoken, could amount to an admission. More sound and in line with the developments since 1990, the Court ruled in the *Haikele* case that the privilege of an accused against self-incrimination means that the State has to prove all the elements of the crime. The mere fact that an accused does not give evidence, cannot remedy deficiencies in the State's case.

The High Court stated in an *obiter dictum* In *S v D and Another*⁴⁸⁰ that the cautionary rule for single female witness in sexual offences could be contrary to the non-discriminatory clause. The presumption accepted that female complainants are likely to lie and lay false charges. The presumption was however only declared unconstitutional in *S v Katamba*⁴⁸¹ eight years later.

Not all attempts to adapt the common law went the way of the defence. In *S v De Bruyn*⁴⁸² the High Court was invited to accept the defence of entrapment, developed in the United States, and declare evidence so obtained inadmissible. The defence of entrapment does not deal with all police traps, but only those *of a person*

⁴⁷⁴ *ibid*, p. 416.

⁴⁷⁵ 1991 NR 424 (HC).

⁴⁷⁶ Act 58 of 1973.

⁴⁷⁷ 1992 NR 54 (HC).

⁴⁷⁸ 1993 NR 193 (HC).

⁴⁷⁹ 1997 NR 156 (SC).

⁴⁸⁰ 1991 NR 371 (HC).

⁴⁸¹ 1999 NR 348 (SC).

⁴⁸² 1999 NR 1 (HC).

not otherwise predisposed to commit an offence by government official who then instigates prosecution against such person. While the Court stated that such action would be intrinsically unfair, it assumed (without deciding) that such conduct is so unfair that evidence so gathered should be excluded. The Court stated it was prejudicial to the right of the accused to a fair trial as intended in Article 12(a) of Constitution. Yet, the Court decided that not all police traps are illegal.

In other cases the common law obligation of a presiding officer to assist an accused, especially if he/she is undefended, were placed within a constitutional framework. In *S v KhoeiNMab*⁴⁸³ the Court held that it is a gross irregularity not to allow an accused person to address the Court. Since it affects the fairness of the trial, it cannot be remedied.

While the results of constitutional issues in criminal cases were thoroughly reported in the press, its effect on the outcome of criminal cases was not as big as the public believed. The perception that the Constitution is criminal friendly is not supported by the facts. One must remember that the concept of a fair trial was not created by the Constitution, but is a heritage from both the Roman-Dutch common law and the procedural law inherited from the English law.

This does not mean that the Constitution did not play a role at all. The South African legislator was extremely political since the mid 1970's. Many of the changes to the Criminal Procedure Act (including making it applicable in Namibia) had a political pretext. The Constitution assured that the apartheid laws and practices in particular, but also older laws and common law practices did not make it possible for accused people to be convicted without the State proving the case. The Constitution fulfilled the expectation of the people to rid the criminal process from political abuse.

This does not mean that all the needs of the Namibian people related to due process were met. The crucial right to legal representation was never met in the first fourteen years, although the necessity in serious, complicated cases were recognised and enforced in 2002.⁴⁸⁴

Criminal justice in Namibia had some transformative instances, especially after the Office of the PG has signed the Human Rights Charter for Prosecutors in 1999. The human rights friendly approach of the Office, linked to a number of cases

⁴⁸³1991 NR 99 (HC).

⁴⁸⁴See *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC) for a later case where the Supreme Court eventually recognised the right to free legal representation in some cases.

of the South African Constitutional Court, brought a new appreciation for fair trial rights to both defence lawyers and the Bench.

5.10 A Clash of Theories and a Hierarchy of Rights: The Kauesa Cases

One of the first clashes between two diametrically opposed methods of interpreting constitutions occurred in the epoch-making *Kauesa cases*.⁴⁸⁵ The Supreme Court did not only overturn the High Court judgment, but also severely criticized it.

The case had all the elements of a high drama post independent case with allegations of racism and a disloyal white police force leadership supporting the accused in the *Kleynhans*⁴⁸⁶ treason trial. Kauesa, a warrant officer in the police, made all these allegations on a television talk show. The police charged him internally with misconduct in terms of Police Regulation.⁴⁸⁷ They alleged that he undermined the authority of the police leadership structures by alleging that “the command structure of the Namibian Police Force is determined to undermine the government's policy of national reconciliation and if possible to cripple the government through corruptions and other irregularities”. Kauesa further accused the leadership of supporting the accused in the *Kleynhans* case and supplied them with weapons and ammunition.

Before Kauesa could be prosecuted, he applied on notice of motion for a declaratory order declaring the said regulation 58(32), to be invalid and without force and effect. The applicant's legal basis was that the regulation restricts his constitutional right to freedom of speech. He alleged that he was the chairperson of a committee in the Namibian Police (Nampol) responsible to implement affirmative action and transformation in the force – an allegation denied by the Namibian Police – and that he is an aggrieved person as contemplated by Art 25 of the

⁴⁸⁵*Kauesa v Minister of Home Affairs and Others*, 1996 (4) SA 965 (NMS) and *Kauesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (NM).

⁴⁸⁶*S v Kleynhans and Others*, supra, p. 113, note 309.

⁴⁸⁷Published under *Government Notice R203 in Government Gazette 791* dated 14 February 1964.

Constitution.⁴⁸⁸ The High Court went far beyond the application and considered several other issues.⁴⁸⁹

The Court dismissed the application on the premise that there is a specific difference between fundamental rights and fundamental freedoms. Fundamental rights *form part of 'the law of Namibia'*, while fundamental freedoms are exercised, subject to or limited by the fundamental rights whenever they may be in conflict. The Court then made the following conclusion:

*Freedom of speech and expression, including that of the press and the media, are therefore also subject to or limited by, inter alia, fundamental rights such as those provided, for example, in arts 8(1) and 10 relating respectively to the inviolability of the dignity of persons, the guarantee of equality before the law and non-discrimination. It is important to note here that equality before the law also includes equal protection by the law. The converse, however, is not true. Fundamental rights, such as those aforesaid, are not subject to or limited by the fundamental freedom of speech and expression.*⁴⁹⁰

⁴⁸⁸Art. 25 reads as follows:(1)Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid; provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed valid;

(b) any law which was in force immediately before the date of independence shall remain in force until amended, repealed or declared unconstitutional.

⁴⁸⁹See p. 54. The court answered the following questions:

Section A: Jurisdiction - a general approach and onus.

Section B: The issues of fact, findings thereon and some legal implications.

Section C: The distinction between fundamental rights and fundamental freedoms in the Namibian Constitution and the significance thereof when considering a conflict between fundamental freedoms and fundamental rights.

Section D: The main similarities and distinctions between the Namibian Constitution and that of the USA, Canada, the European Union, the Federal Republic of Germany and India.

Section E: Relevant provisions of the Namibian Constitution relating to dignity, equality and non-discrimination and similar and/or relevant provisions in the Constitutions and/or criminal codes of other countries, as well as in relevant international conventions and treaties.

Section F: Is s 11(1) (b) of the Racial Discrimination Prohibition Amendment Act 26 of 1991 (NM) unconstitutional?

Section G: Is the speech relied on by applicant protected speech in terms of the Namibian Constitution?

Section H: Is reg. 58(32) of the Police Regulation constitutional?

⁴⁹⁰Ibid, p. 57.

Consequently, freedom of speech is subject to fundamental freedoms such as dignity, which the Court classified as the all-embracing constitutional right. The Court stayed clear of the trends in earlier cases where rights of individuals were concerned and where the Namibian Courts opted for a broad, purposive interpretation of the rights. Rather than beginning with the meaning of the specific right at stake, the Court went extensively into the question of limitations that might affect the application of freedom of speech.

A supposed hierarchy of rights and freedoms, where the freedoms are subjected to fundamental rights, forms the heart of the Court's reasoning. However, it is by no means clear that the Constituent Assembly intended to create such hierarchy. The argument is based on a formalistic interpretation of the Constitution. The lists of rights in Articles 5 to 20 and fundamental freedoms in Article 21 are interpreted as two definite and different groups, listed in order of priority. In other words, the fundamental freedoms become subordinate rights, or less important rights.

While the drafters of the Constitution made a difference between fundamental rights and fundamental freedoms, there is no indication that they wanted to put freedoms and rights on different levels. It seems more likely to be a practical differentiation between positive and negative rights. This interpretation is confirmed by the fact that there is only one limitation clause in the Constitution and it covers both freedoms and rights.⁴⁹¹

The interpretation of the Court is suspect. The idea that certain rights enshrined in the Bill of Rights are subjected to the general laws of the country does not make legal sense. Article 25 prohibits the abolition or abridgment of both freedoms and rights by Parliament or subordinate legislative authorities. The statement of the judge, "In Namibia, the highest legislative body, namely the National Assembly, as well as other legislatures may make laws in terms of art 21(2) to abridge freedom of speech", is a contradiction of Article 25 (1).

The argument of the Court then went in circles. Dignity is not explicitly mentioned as one of the fundamental rights – which the Court saw as an emulated list. However, since dignity restricted freedom of speech under the common law, it

⁴⁹¹ Article 22.

calls for protection. Since these restrictions are fair and in the interest of national security, it is not unreasonable.

The right to dignity, in Article 8, becomes a filter for freedom of expression. Once one has opted for such a hierarchical scheme, it is inevitable that the second class right or freedom will become less important. In this case the Court created the hierarchy and found that freedom of speech, like other freedoms, are subjected to the laws of Namibia – including pre-independent laws – despite the fact that the historical context of those laws are not in line with the Namibian Constitution or the new democratic society.

Yet, the Court is not comfortable to make a judgment based on its own categories. It then went into issues that the parties did not raise. Without going into the elements of the crimes of criminal defamation and a contravention of the Prohibition of Racial Discrimination Act 26 of 1991 (which the Court also found is constitutional), the Court concluded that the applicant is *prima facie* guilty of these crimes. The Court then assumed that Kauesa claimed his right to a fair trial in the application – although such claim is not in the written or *viva voce* submissions.⁴⁹²

The Court only referred to foreign jurisdictions, notably the United States and Canada,⁴⁹³ to point out why their standards are not applicable to the Namibian situation and Constitution. When the Court referred to international treaties as part of Namibian Law in terms of the Constitution, it opted for the notorious Article 10 of the European Charter on Human Rights, which is not a treaty that Namibia is entitled to ratify.⁴⁹⁴

As for the facts of the case, Kauesa agreed to submit to reg. 53(38) when he joined the police. The Court missed the point that he joined the force in a time before Namibia was independent and before he had the protection of the Constitution. Had he refused to sign the regulations, the old South West African Police Force would have turned him down.

⁴⁹²*Kauesa* (HC), pp. 59 – 60.

⁴⁹³There are two references in passing to India and Germany, but it plays no significant role in the judgment.

⁴⁹⁴While the Court referred to the Universal Declaration of Human Rights, which is not a treaty, it did not discuss or refer to the International Covenant on Civil and Political Rights, ratified by Namibia. The choice of the European Charter is somewhat strange, especially since several Western European countries have opted to go to the Human Rights Committee, the treaty body of the ICCPR, rather than to the European Court, because of the problems in the European Charter.

What seemed to be a straightforward question - whether Regulation 53(38) is unconstitutional – was only addressed by the Court after it had answered several unrelated questions. It is important to understand the *Kauesa* case within its historical context. If it is possible to cut through the over breath of the High Court judgment, the result seems to be reasonable and fair in a democratic society. In military and police disciplinary codes, junior officers are demanded to submit to instructions of commissioned officers. Few, if any democratic society will fault the decision of the High Court. When a junior officer criticises the senior command and accuses them of racism, it will undoubtedly lead to disciplinary action in most democratic societies.

The Supreme Court took a different approach. Although the term *transformative constitutionalism* and post-modern models of constitutional interpretations were hardly known in southern Africa then, the Court clearly understood the principles, albeit not as an academic model. Karl Klare's article in which he popularised the term, only appeared in 1998.⁴⁹⁵ And Woolman/Davis' article on Creole liberalism appeared in 1996, but possibly too late for the Supreme Court to take cognisance of it.⁴⁹⁶

However, the bench did not address constitutional issues with the usual reliance on technical and textual issues alone. The Supreme Court opted to approach the problem from the demands of transforming the oppressive colonial society, even if it meant a radical new understanding of the rights of the individual. Or to use Klare and Woolman/Davis' terminology, a post-modern or Creole liberal constitution cannot be interpreted as if it is a typical liberal document of the 1960's. The Namibian and South African constitutions introduced a dispensation where constitutional interpreters have to interpret documents intended not merely as rules and principles, as the liberal models of Hart and Dworkin suggested. The transformation of society is an important focus of both. In emphasising the need for transformation, the Supreme Court shared a post-modern interpretive approach with the likes of Klare and Woolman/Davis.

The Court pointed out that it was inappropriate for the court *a quo* to rely for the decision on matters not put before them by litigants. If the judge wanted to

⁴⁹⁵Klare, K. 1998. Legal Culture and Transformative Constitutionalism, *14 SAJHR*, p. 146.

⁴⁹⁶Woolman, S and Davis, D. 1996. The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions. *12 SAJHR*, p. 361.

consider issues not argued before him, he was compelled to give both parties the opportunity to submit arguments. It is undesirable for Court to deliver judgment while the litigants never canvassed some important issues.⁴⁹⁷

The Supreme Court then turned the focus away from the Namibian Police to the rights of Kauesa. What does the Constitution have to say about legislation that will not only prevent a previously disadvantaged police officer to speak his mind about the necessity of transformation in the police force, but may even suffer criminal prosecution for doing so? When and under what circumstances will a limitation of the right to free speech be a reasonable restriction? Or, to use the language of the Constitution: When is it “necessary in a democratic society and ... 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” to limit or restrict free speech?⁴⁹⁸ Are the restrictions imposed by section 52 of the police regulations reasonable?

Section 52(38) of the regulation reads as follows:

*58. A member shall be guilty of an offence and may be dealt with in accordance with the provisions of chap 11 of the Act and these regulations if he –
... (38) comments unfavourably in public upon the administration of the force or any other government department.'*

The Court took extensive notice of the approach to the limitation on freedom of expression in the USA, India and specifically the Canadian Charter and the benchmark case of *R v Oakes*.⁴⁹⁹ In the *Oakes* case the Canadian Supreme Court suggested that in order to determine if a restriction is reasonable, a *sufficiently significant objective* for the restriction ought to be identified. In other words, the objective with the limitation should not be trivial or irrelevant.

⁴⁹⁷ *Kauesa v Minister of Home Affairs* 1996 (4) SA (NSC) p. 965, on p. 974.

⁴⁹⁸ See Article 21(1)(a) and (2):

(1) *All persons shall have the right to:*

(a) *freedom of speech and expression, which shall include freedom of the press and other media...*

(2) *The fundamental freedoms referred to in sub art (1) hereof shall be exercised subject to the law of Namibia, insofar 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.*

⁴⁹⁹ 1986 26 DLR (4th) 200.

Once the Court has established the objective, the Court ought to apply a proportionality test to determine if the means to obtain the objective is reasonable. The test, while it may vary from time to time, will usually consider three aspects:

- The measures adopted must not be arbitrary, unfair or irrational;
- The restriction should impair *as little as possible* of the right or freedom in question; and
- There must be proportionality between the effects of the limitation and the identified objective.⁵⁰⁰

Article 22 of the Namibian Constitution laid down the following prerequisites for a reasonable limitation of freedoms:

Whenever or wherever in terms of this Constitution the limitation of and fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall: (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.

Section 52(38) of the regulations failed all these tests, the Supreme Court found-

*Does reg. 58(32) specify the ascertainable extent of the limitations it imposes? It does not. All comments which are unfavourable to the administration of the force restrict the exercise of a right or freedom. Any comment in public, which is unfavourable, about any government department equally restricts the exercise of a right or freedom. There is no ascertainable extent of the limitation.*⁵⁰¹

The Supreme Court rejected the position of the court *a quo* that whenever there is an infringement of a fundamental right the freedom ought to be interpreted restrictively. Instead, the Court opted “to be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights.”⁵⁰²

With reference to the reasonability and proportionality of the Oakes test, the Court contended that in this case there is no rational connection between the

⁵⁰⁰Ibid, p. 227.

⁵⁰¹*Kauesa* (NSC), p. 980 H.

⁵⁰²Ibid, p. 981 G.

limitations and the object. Reg. 52(38) is arbitrary and unfair and the objective is almost unidentifiable because of the over breath.⁵⁰³

It is unfortunate that the Supreme Court only referred indirectly to the important statement of the *court a quo* that dignity is the most important right in Chapter 3. Referring to the German Basic Law the Court *a quo* commented that *freedom of expression* “must be interpreted subject to the fundamental right to the dignity of man”.⁵⁰⁴ The Supreme Court merely referred to the importance of freedom of speech as a right. It accepted that the statements of Kauesa on national television might have been slanderous. However, it went on to say that the indiscretion of a speaker cannot frustrate such an important right as freedom of expression. The Constitution does not only protect speeches that are favourable to the government, “but also to those that offend, shock or disturb the State or any sector of the population”.⁵⁰⁵

The Supreme Court made an important comment regarding the context of the applicant’s speech:

*In the context of Namibia freedom of speech is essential to the evolutionary process set up at the time of independence in order to rid the country of apartheid and its attendant consequences. In order to live in and maintain a democratic State the citizens must be free to speak, criticise and praise where praise is due. Muted silence is not an ingredient of democracy, because the exchange of ideas is essential to the development of democracy.*⁵⁰⁶

Consequently, the question of the limitations of freedom of speech needs to be answered not by finding a hierarchy of rights and freedoms or to consider the possibility that some legislation may limit freedom of speech. Rather, within the context of an independent Namibia, the question is more restrictive: Does society need the interactions that lead to the appellant being disciplined? While it may be true that some of the utterances of the appellant was indeed offensive, the necessity to deal with “the practice of racial discrimination and the ideology of apartheid

⁵⁰³Ibid, p. 981 H.

⁵⁰⁴*Kauesa (HC)*, p. 57 E.

⁵⁰⁵*Kauesa (NSC)*, p. 983.

⁵⁰⁶Ibid, p. 983 H and J.

....expressly prohibited by art 23(1) of the Constitution”, are more important.⁵⁰⁷ Further, Article 23(2) protects affirmative action as a constitutional principle.

The milieu where the discussion on transformation in the police took place was conducive for freedom of speech and interaction of ideas. The Supreme Court pointed out that Inspector Shawn Geysler, the spokesperson of the Namibian Police, was part of the panel. Since Geysler was on the panel, the police command was part of the television debate.⁵⁰⁸

The approach of the Court fits perfectly in the definition of transformative constitutionalism that Klare used: “...*“a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive (sic) political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”*.”⁵⁰⁹ The Namibian Constitution is more than a rule book. It intends to break the principles and resulted practices of the oppressive apartheid regime. If the Supreme Court has to make a choice between the dignity of senior police officers and freedom of speech, the transformative need to break the historical “silence” of the majority of the Namibian people turns the scale in favour of freedom of speech. Consequently, the emphasis on transformation rather than the categorising of rights forms the heart of the Supreme Court judgment.

The Supreme Court took cognisance of the fact that the practice of racial discrimination and the ideology of apartheid are prohibited by the Constitution, while the practice of affirmative action is protected.⁵¹⁰ It confirmed the right of the appellant to participate uninhibited and robust in a debate of public concern such as the lack of transformation and affirmative action in the police. Debates such as these, the Court commented, are the essence of democracy.

The Court rejected the request of the respondent to preserve the good parts of the regulation from the bad ones and retain only the limitation “...comment unfavourably in public upon the administration of the force”. Even that section, the Court found, is vague and overbroad. It also rejected the request to read down the section by including the words “in a manner calculated to prejudice discipline within

⁵⁰⁷Ibid, p. 982.

⁵⁰⁸Ibid, p. 982 F.

⁵⁰⁹Ibid, p. 151.

⁵¹⁰Ibid, p. 993.

the force” following the phrase “comment unfavourably in public upon the administration of the force”.

*Respondents are inviting the Court to legislate, that is, to perform the constitutional function of the Legislature.*⁵¹¹

The *Kauesa judgment* of the Supreme Court managed to move away from formal argument to solid substantive argument. Following the corporal punishment case, the Court based its judgment on values. However, the values are clearly defined and the foundation of the values comes from the Constitution.

The last word on the *Kauesa* case has not been spoken. Shortly after the Supreme Court judgment, the High Court judge, Justice O’Linn, wrote a memorandum to the Chief Justice explaining his discomfort with the Supreme Court’s approach.⁵¹² He felt offended by the Supreme Court judgment, which he stated “lacked constitutional legality”.⁵¹³ O’Linn criticised the Supreme Court for not taking the position of the senior officers, who were defamed, into consideration. Important for this study, is his discomfort with the Supreme Court’s broad interpretation of freedom of speech. He found the hierarchical reverse of the Court illogical and out of line with both the clear wording of the Constitution and the interpretation of foreign courts, notably India.⁵¹⁴

In an article in 2001 University of Cape Town constitutional scholar Pierre de Vos, using Mureinik’s metaphor of the South African constitution being a bridge from oppression to democracy, wondered if the development in transformative constitutionalism is not a bridge too far.

...the judges of the Constitutional Court often turn to South Africa's history and use it as a 'grand narrative' — a universally accepted, meaning-giving story about the origins and purpose of the Constitution. This 'grand narrative' or 'super context' purports to limit the discretion of judges by providing the context within which the various provisions of the Constitution can be understood without recourse to the personal, political or philosophical views of judges. This attempt to deploy South Africa's recent history cannot be successful, however, because it

⁵¹¹Ibid, p. 298.

⁵¹²The letter is in his book, *Namibia: The Sacred Trust of Civilization. Ideal and Reality. Vol. 2*, pp. 101 ff.

⁵¹³Ibid, p.103.

⁵¹⁴Ibid, p.105.

*ignores the emerging view of history as a profoundly subjective account of selected events in the past.*⁵¹⁵

De Vos's article attempts to answer the difficult question of constitutional interpretation. O'Linn's letter to the Chief Justice of Namibia is an example of the discomfort South African and Namibian legal practitioners had in treating a constitution different from any other legislation. South African trained legal practitioners were trained to follow a positivist interpretive approach by follow the known meaning of words and phrases in legal texts. The idea of treating a constitution differently, challenged their basic understanding of the law. De Vos explained the dilemma as follows:

*Most judges, lawyers and legal academics in South Africa, however, seem profoundly uncomfortable with the notion that judicial decision-making in the constitutional sphere is not (always) aimed merely at discovering a 'true', 'objective' or 'original' meaning of the text and is hence not based (solely) on predictable and neutral principle... The dilemma of constitutional adjudication within this traditional liberal paradigm is that it threatens to blur this purported boundary between subjective and partisan politics, and 'neutral' and 'objective' legal interpretation.*⁵¹⁶

De Vos points out that the mere idea that a constitutional text “does not have one objectively determinable meaning” may remove all the traditional constraints on judges preventing them to be guided by subjective opinions and “will open up the judicial process to criticism of arbitrariness, politicisation and even bias”.⁵¹⁷

The nature of constitutional language makes the traditional liberal reading complicated. Constitutions generally give guidelines and unlike statute law do not elaborate on acts violating it. In South Africa the Constitutional Court struggled with the issue of values as an interpretive key from the outset. The judges were constantly defending their own objectivity and the centrality of the constitutional text, while at the same time justifying their reliance on extra-textual sources.⁵¹⁸

⁵¹⁵De Vos, P. 2001. A bridge too far? History as context in the interpretation of the South African Constitution. 2001 SAJHR 2.

⁵¹⁶Ibid, p.4.

⁵¹⁷Ibid, p.5.

⁵¹⁸See De Vos' reference to Justice Kentridge in the very first case of the Constitutional Court, State v Zuma, and the judges in the Makwanyane case. Ibid, pp. 6 – 7.

The Constitutional Court, De Vos concludes, while not uniform in its interpretive modules came up with what he calls a 'contextual approach' to the interpretation of the South African constitution. By constantly referring back to the social and political context of the constitution, De Vos asserts that Constitutional Court developed what he called a 'grand narrative' that places the *constitutional text within the context of a universally accepted structuring, meaning-giving story about the origins and purpose of the interim and 1996 Constitutions.*⁵¹⁹

The South African grand narrative derived from the text of the constitution. De Vos points out that the late Etienne Mureinik got his inspiration for the bridge metaphor of the constitution from the post-amble of the 1993 Interim Constitution of South Africa. The constitution was a bridge *from a culture of authority to a culture of justification*. Since the metaphor relies on the constitutional text itself, the Constitutional Court, beginning in the *Makwanyane* case, developed the grand narrative around the end of the oppressive apartheid system and the dawning of a democratic dispensation.

In developing the grand narrative the negotiations between the 'old' government and the democratic forces which eventually led to the drafting of the interim constitution, took centre stage. De Vos, points out that historians and interest groups do not necessarily view the 'old' and 'new' South Africa, and the change from apartheid to democracy in the same light. However, the metaphor of Mureinik, and the grand narrative developed by the Constitutional Court, is the only narrative that relies on both the interim and final South African constitutions. Despite all its shortcomings, the grand narrative gave clear direction in constitutional interpretation, as De Vos puts it:

*The constitutional texts may be vague and must be interpreted, yes, but the grand narrative as set out in the Constitutions closely and irrevocably binds the Court into a fairly fixed interpretation of their provisions. Although this version of South Africa's recent past is not shared by all South Africans, it is the one thrust upon any interpreter of the Constitutions by the constitutional texts themselves.*⁵²⁰

⁵¹⁹ Ibid, pp. 8 – 9.

⁵²⁰ Ibid, p. 15.

However, despite the entire positive that the grand narrative holds for constitutional interpretation, one cannot but agree with De Vos that it also holds profound dangers for future interpretation. It closes the door of discovering new meanings of the constitutional text in changing circumstances. It is not necessary for this study to go into De Vos' criticism of making historical events the permanent focal point of understanding a constitution. Suffice it to say that history, like law, is never an absolute description of truth. It needs to be interpreted in the context of available knowledge. The grand narrative based on an historical reconciliation and a metaphor of a bridge from hell to wonderland is too narrow to prescribe one infallible interpretive key.

De Vos refers briefly to Karl Klare's reference to the constitution as a transformative document. Klare, as we have noted above, defines transformative constitutionalism as "a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction".⁵²¹ This definition makes it impossible to link constitutional interpretation to a single historical event, as if transformation was set and done with the drafting of the interim constitution in South Africa or the finalisation of the Namibian Constitution by the Constituent Assembly in 1990.

The development of a grand narrative of constitutional interpretation in South Africa assisted the Constitutional Court to move away from the static liberal approach looking for an absolute objective and clear understanding of constitutional texts. Transformative constitutionalism reminds the interpreter that the constitution is a living document that needs to be interpreted in the light of new questions not necessarily linked to the historical context of the initial drafting process.

The Kauesa judgment of the Namibian Supreme Court should be read in that light. The judgment to prioritise freedom of expression does not set a new rule that freedom of expression is the most important right or freedom of the Namibian Constitution. It is what Klare calls 'interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships'. The

⁵²¹ Ibid, p. 151.

criticism of O'Linn that the police officers who were defamed by Kauesa is fair if one does not take notice of the context of silencing opposing voices, more specific black voices, in the colonial apartheid era. A junior officer will probably not be as fortunate as Kauesa if he repeats the allegations twenty years into democracy and independence. The new dispensation has opened the door for aggrieved citizens, including police officers, to make their grievances known. The Kauesa judgment played no small role in this transformation of society.

A transformative approach to constitutionalism will not be static. It will take cognisance of the historical context of both the constitution and the time of adjudication.

It is unlikely that the transformative interpretive model was known to the Supreme Court bench of the Kauesa case. However, the Supreme Court judgment will remain a school book example of the role the highest court played in normalising the Namibian society.

5.10.1 The Process of Deconstruction in Kauesa

5.10.1.1 Understanding Deconstruction

If one accepts that the Supreme Court jurisprudence in the Kauesa case fits a post-liberal approach to interpretation – even if the bench did not intentionally use critical legal methodology to come to its conclusion, - it should be possible to read the judgment as a post-modern example of deconstruction as a legal tool. It provides an opportunity to compare two approaches, the positivist approach of the High Court and the value-based approach, using the post-modernist insight of the French philosopher, Jacques Derrida.⁵²² The apartheid regime with its suppressive legal system did not leave much place for freedom of speech. The new Namibia, in its transitional stage, needed a culture of free speech. It needed a radical approach to the Bill of Rights to break down the limitations that apartheid and the South African legal system placed on the fundamental rights of the individual.

The Kauesa judgment of the Supreme Court did not answer a universal question on the rights of a junior officer to criticise the senior command on national television. The issue is the role of Regulation 53(38) of the Police Regulation in the new Namibian society in the light of the Namibian Constitution.

⁵²²See some of the important works of Derrida on the subject in footnotes 502 and 503 below.

While discipline is an important element of effective policing, overcoming the racist past is a constitutional principle. The Constitution is, as Mahomed called it, a radical break with the apartheid past. In this context, the Supreme Court opted for freedom of speech as a preferential human right, since it has the potential to and is necessary to bridge the divide of the past. It falls outside the objective of this thesis to do an intensive study of new hermeneutical experiments in law. However, the *Kauesa case* is a textbook example of deconstruction where an interpreter can turn a classical interpretation upside down.

Critical legal thinkers such as the Marxists⁵²³ and feminists⁵²⁴ have challenged the justice of law or the legal systems over the years. They have argued that there is no neutral ground in law and even the assumed neutral structures serve some interests.

Deconstruction is a hermeneutical key developed by the French philosopher Jacques Derrida, for the critical reading of texts, or more correctly, listening to language.⁵²⁵ Deconstruction provides a method for analyzing and reviewing existing old doctrines and theories. In that sense deconstruction is a neutral hermeneutical tool. Although Derrida at times equated deconstruction with justice, some of the early proponents came from a racist right wing background.⁵²⁶

Deconstruction is mainly developed and tested in the field of literary criticism and hermeneutics. It also found its way into the interpretation of legal texts. For the so-called Critical Legal Studies (CLS) movement in the USA, economic legal sceptics and feminists, deconstruction became a way to expose the racial, capitalist and male bias in legal theory and legal structures

⁵²³See the dualistic and somewhat difficult construction of the Marxist position by Thompson, E. 1975. *Whigs and Hunters: The Origin of the Black Act*. London: Allen Lane, p. 264.

⁵²⁴Littleton, C. 1987. Reconstructing Sexual Equality, 75 *California Law Review*, p.1729ff.

⁵²⁵Derrida seems to have little interest in finding truth, or even a "correct" understanding of language or texts. The different interpretive possibilities of texts or language are central to his argument. See Derrida J, 1973. *Speech and Phenomena and Other Essays on Husserl's Theory of Signs*. Evanston, IL: Northwest University Press, originally published in 1967 as *La Voix et le Phénomène*. Paris: Universitaires de France; 1976. *Of Grammatology*. Baltimore: John Hopkins University Press, originally published in 1967 in French as *De la Grammatologie*. Paris: Editions de Minuit; and 1981. *Dissemination*. Chicago: University of Chicago Press, originally published in 1972 in French as *La dissémination*, Paris: Editions du Souil.

⁵²⁶Next to Derrida, Paul De Mann is possibly the best-known deconstruction scholar. As a journalist, he supported and made propaganda for Nazi Germany during World War II. Derrida, who came from a Jewish background, defended De Mann when public opinion turned against him in the late 1980's, and even used deconstruction methods to do so. See Derrida, J. 1988. *Like the Sound of the Sea Deep Within a Shell: Paul de Man's War*, 14 *Critical Inquiry*, p. 590.

Harvard scholar Jack Balkan, while critical of the leftist application of deconstruction in the USA, has written extensively on the possibilities of deconstruction in dialogue.⁵²⁷ It is within this context that I want to look at the dialogue between the High and Supreme Courts in the Kauesa cases.

Deconstruction, as pointed out above, has no ideological bias or consistency. Neither can it guide the interpreter to the “truth”, which does not mean that it has no meaning at all, or that it is essentially a nihilistic approach. It is important to understand that legal texts (including Constitutions) have several possible interpretations.

A precondition for applying the insights of deconstruction would be what Kennedy calls an atheistic approach to the Constitution, or constitutionalism.⁵²⁸ Since the USA constitution is not only seen as an analogy of religion, and since many Americans see the constitution and constitutionalism as a civil religion, the constitution operates as a holy writ and the courts as custodians of the truth.⁵²⁹

The Supreme Court acts as the Papal authority that can make *ex cathedra* pronouncements of truth that is binding on all. Since the Supreme Court decisions are backed up by state force, even the USA bears traits of a theocracy. There are, off course better examples of legal systems functioning in theocracies such as Khomeini’s Iran.⁵³⁰ We find an even better analogy of the deification of nature in Greek mythology where natural events like the wind that preventing the Greek fleet to go to Troy, gets legal significance..

If faith in the religious truth falls, the explanations and the structures go down with it. Since modern humans do not believe that the gods stopped the wind, they have to reject the interpretation that the gods were angry. Sacrificing Ipighenia would have made no difference.⁵³¹ The priests and the gods lose their authority and power over humans. While Americans still believe strongly that the original framers of the Constitution determined the destiny of the nation, most interpreters are no longer

⁵²⁷While Balkan did not call it a dialogue, he pointed to the fact that since deconstruction is open-ended, the deconstructed text can then be deconstructed *ad infinitum*. See Balkan, J. 1994 Being Just with Deconstruction, 3 *Social and Legal Studies*, p. 393.

⁵²⁸Kennedy, D. 1995. American Constitutionalism as Civil Religion: Notes of an Atheist, 19 *Nova Law Review*, p. 909.

⁵²⁹Ibid, p. 909.

⁵³⁰Ibid, p. 911.

⁵³¹Ibid, p. 915.

sure interpretative methods can reveal the original intent of the framers in every possible scenario.⁵³²

Although somewhat overstated, the satirical analogy of Kennedy makes sense. All constitutions are overloaded and Namibia is not an exception. The Bill of Rights becomes a “religious document” that should not only organize the Namibian society, but also epitomize national reconciliation, and reflects the soul of the nation.⁵³³ In this sacrilegious context, it becomes indicative to think of the Constitution as a Holy Writ with one meaning, one interpretation and all other possibilities as heresy. The legal conflict of the first fourteen years of jurisprudence in Namibia was typical of the development of a civil religious culture.

The problem, however, lies in the fact that the competent courts, the High and Supreme Court, did not speak with one voice.

5.10.1.2 Deconstruction in Kauesa

French philosopher Jacques Derrida developed his theory of deconstruction because of his disillusionment with Western philosophy.⁵³⁴ Derrida attacked one of the most basic elements of Western philosophy, namely the central place of identity. For Derrida identity is only possible if one takes the notion of difference into account. Something can only be identical to itself if it has already been established that it is, at the same time different from something else. Identity can only be understood in terms of difference, and *vice versa*.

While identity took preference in philosophy, Derrida turns it around. Identity and self-identity are dependent on difference. Which brings us to the basic element of deconstruction: to identify hierarchies and hierarchical opposition. Once these hierarchies have been identified, it can be reversed in the same way as Derrida reversed the identity/difference hierarchy, or one of his favourite examples, to reverse the hierarchy of speech/writing to writing/speech.

⁵³² *ibid*, p. 916.

⁵³³ See Mahomed in *S v Acheson* 1991 (2) SA 805 (NM).

⁵³⁴ See n 509. See also 1981. *Positions*. Chicago: University of Chicago Press, originally published in 1972 in French as *Positions*. Paris: Editions de Minuit; 1979. *Spurs: Nietzsche's Styles/Eperons: Les Styles de Nietzsche*. Chicago: Chicago University Press; and 1980. *Writing and Difference*. Chicago: University of Chicago Press, originally published in 1979 in French as *L'écriture et la différence*. Paris: Éditions du Souil.

Hierarchies are part of the basic structures of society. Sometimes they are structured in principles such as rules and exceptions, or as generalities and specifics. Alternatively, one can base it on logical conclusions: perceived facts and conclusions, or a typical legal hierarchy, direct evidence and circumstantial evidence. In all these examples, the first mentioned aspect takes precedence over the second indicates hierarchy.

Consequently, every hierarchy is an opportunity to do reversal deconstruction. The deconstruction is never permanent and can always be deconstructed again by reversing the new hierarchy, or even using a third component as the new primary in the hierarchical pyramid of components. Once reversed, the exception will stand in relation to the rule just as the rule stood in relation to the exception before the deconstruction.⁵³⁵

This is by no means a full description of Derrida's ideas. It will nevertheless make it possible to look at the application of deconstruction in Namibian constitutional jurisprudence.

We can now look at the hierarchies in the *Kauesa* case. For the High Court *dignity* is the most important right, not only in the German Basic Law, but also in the Namibian Constitution. Consequently, on top of his list of protected rights stands the right to dignity. The Court acknowledged and gave preferential status to the need for discipline in the police as a necessity in a democratic state. It also found a hierarchical structure between rights and freedoms in the Namibian Constitution where in terms of the wording of the Constitution, freedoms ought to be exercised subject to the Namibian laws, while no such a limitation is placed on rights.

While Chapter 3 of the Constitution does not create a hierarchical order of rights, the High Court derived its preference for dignity from the German Basic Law, and possibly by drawing logical conclusions.⁵³⁶ If a constitution is a document defending the rights of citizens and protecting it against violations by the state and other citizens, it makes sense to see dignity as the foundational right in the Constitution. Every other right and fundamental freedom in Chapter 3 ensures that the dignity of all is respected. Even the perceived criminal (article 12) or the convicted murderer (article 6) are treated with dignity. It is common in democracies

⁵³⁵See Derrida, *Of Grammatology* for an extensive explanation of hierarchies and reversal deconstruction.

⁵³⁶*Kauesa v Minister Of Home Affairs and Others* 1995 (1) SA 51 (NM), p. 78 (HC).

all over the world that police and military discipline are necessary limitations of the right to freedom of speech.

For most observers, even legal critics, the High Court's hierarchical structure will be acceptable. However, the deconstructionist will look at opposite and competing rights and interests as an opportunity to reverse the hierarchical order. Deconstruction will give the interpreter the opportunity to look at the hierarchical order, but also the components in the order from a different perspective.

The Supreme Court did not refer to Derrida or any of the Critical Legal Studies authors. It is doubtful that Judge Dumbutshena even consciously deconstructed the hierarchies used by the High Court. However, what emanates from the judgment is a well-defined deconstruction of the earlier judgment.

While Derrida did not intend to develop a tool for critical leftist use, and while there is nothing specifically leftist in deconstruction, it found its legal life in the circle of the CLS movement in the United States and its sympathisers in the United Kingdom and Europe. The agenda of CLS in the United States is almost without exception leftist with a bias for the oppressed, gender equality and justice. Consequently, it is a challenge of the generally accepted ground rules of the legal system in a liberal democracy. It also questions the older liberal jurisprudential schools such as legal positivism, legal realism and Dworkin's Reconstruction.

The Supreme Court turned the first hierarchical order of the High Court around by using a different lens. The Court considers the apartheid history of Namibia and the need for affirmative action and open debate. In that context, the Supreme Court opted for freedom of speech to be more important than dignity. It then reversed the logical hierarchy of first dignity then all other rights used by the High Court. The hierarchy can always be reversed again once the constitutional State has overcome the impediments of the past.

For the Supreme Court judgment, freedom of speech takes precedence over dignity. The senior white police officers were possibly defamed, but the need for free speech and transformation (catered for in the Constitution) overrides the importance of dignity, said the Court.

In the same way, by applying the test of the Oakes case, the Supreme Court reversed the hierarchy to give freedom of speech precedence over police discipline. The regulations are simply too broad to be seen as protecting the values and discipline of the Namibian Police.

Finally, the Court ignored the strong reliance of the High Court on the words of the Constitution for creating (or acknowledging) a hierarchical relationship between rights and fundamental freedoms. It is no wonder that the Supreme Court came to a diametrical different conclusion than the High Court. They reversed every hierarchical structure. Moreover, in every instance the insignificant subordinate component became the superior and changed the foundation of the judgment.

The *Kauesa judgments* are a clear indication that different approaches to interpretation can result in very different conclusions. Political positioning plays a role in the process. Or to put it differently, to link with the theme of this thesis: The Supreme Court, conscience of the need for transformation, rather than taking the safe route of the clear meaning of the text, opted for an interpretation that breaks rank with the colonial bias for the powerful, an interpretation that empower the previously oppressed Namibians.

However, one needs to bear in mind that transformative constitutionalism requires a very different approach to the text than the traditional positivist approach. The *Kauesa cases* are examples of the difficulties for the legal fraternity schooled in a presumption of a-political adjudication to accept what they perceive as political rather than legal hermeneutics.

Shortly after the Supreme Court judgment, the High Court judge, Justice O'Linn, wrote a memorandum to the Chief Justice explaining his discomfort with the Supreme Court's approach.⁵³⁷ O'Linn's discomfort with the Supreme Court's broad interpretation of freedom of speech is relevant for this study. To put it in the framework of deconstruction, he found the hierarchical reverse of the Court illogical and out of line with both the clear wording of the Constitution and the interpretation of foreign courts, notably India.⁵³⁸

O'Linn's comments underline the difficulty of interpreters to determine the right or wrong of contradicting High and Supreme Court judgments. For Derrida the answer would possibly be whatever the interpreter wants to be right and wrong, or if he/she is not sure, the interpreter can reject both and deconstruct again. I will elaborate on the question in the next sub-chapter.

⁵³⁷The letter is in his book, *Namibia: The Sacred Trust of Civilization. Ideal and Reality. Vol. 2*, pp. 101 ff.

⁵³⁸*Ibid*, p. 105.

5.10.2 Concluding Remarks

It will be wrong to see the *Kauesa* judgment of the High Court as a continuation of the literalist positivist approach of the apartheid courts. While the High Court thinking clearly fits the typical positivist approach of Hart, it did not follow Hart's dictum that law has nothing to do with morality or that immoral laws are still law. On the contrary, Judge O'Linn never opposed value judgments *per se*. His understanding of the Constitution was that its basic tenure was to protect the dignity of all people. O'Linn was not the first interpreter to start with dignity. In the *Corporal Punishment case*, the Supreme Court had the following to say about dignity:

*The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law.*⁵³⁹

Dignity was the unseen right in the background of all the arguments. This is not surprising since Article 8 deals with violations of dignity. However, Judges Mahomed and Berger did not define dignity and did not explain how it sits with the other rights and freedoms listed in Chapter 3 of the Namibian Constitution.

In the *Kauesa case*, the High Court interpreted freedom of expression in the light of and subjected to the right to dignity. Quoting Eric Barendt stating that in Germany, "*freedom of expression must be interpreted subject to the fundamental right to the dignity of man*", the Court stated "these words are *mutatis mutandis* applicable to the interpretation of the provisions of the Namibian Constitution".⁵⁴⁰

The High Court did not work without a constitutional perspective. He makes an effort to work with the Constitution. Its point of departure is dignity. The Court's choice can even be justified in terms of moving away from the colonial dispensation towards a free and democratic society. The bridge must take Namibia from colonialism where the dignity of the majority of the people was not honoured to an appreciation of the dignity of all people.

To come to his *a priori* point of departure, the judge works with a pyramid of rights and a differentiation between rights and freedoms. In his interpretation of the

⁵³⁹1991 (3) SA p. 79.

⁵⁴⁰*Kauesa*, (HC), p. 57.

two, he concluded that freedoms ought to be exercised subject to the laws of Namibia, while rights are not subjected to the other laws of Namibia.

In other words, the High Court created a pyramid of rights with dignity on top. Woolman and Davis will possibly call this a typical liberal approach.

In this case, the protagonist of reform (Kauesa) is punished for speaking out in the interest of debate and transformation. While The Supreme Court, in overturning the High Court judgment did not work with the categories of previously advantaged and disadvantaged, it emphasized different rights, more specifically freedom of speech *vis-à-vis* the dignity of the white police officers.

The Supreme Court worked with a different pyramid structure than the High Court. In the light of Article 81 of the Constitution and the *stare decesis* rule, the Supreme Court interpretation needs to be followed by all courts.⁵⁴¹ But that does not answer the substantive legal question: Which one is the best novel (Dworkin

If we are willing to accept the Hartian notion that in the case of the penumbra judges make law, the O'Linn/Dumbutshena contradictions in *Kauesa* pose no legal problem. The relationship between Chapter 3 rights of the Constitution is a difficult case which demands judicial activism. While both the High and Supreme Courts created law here, in terms of the *stare decesis* rule determines the Supreme Court judgment is the final authority and thus the correct interpretation.

The Dworkinian School on the other hand, will insist that the judges do not create law. Taking all the facts into consideration, there is a correct interpretation.

In South Africa Woolman and Davis used an analysis of the ideological framework of the constitution to determine the relationship between dignity and freedom of speech. I shall now apply the Woolman/Davis approach to the *Kauesa* cases.

As we have noticed, Woolman and Davis work with an ideological understanding of the different approaches to constitutional interpretation. The insights of Woolman and Davis can assist the analyst to discover the real frustrations of the lay interpreters, specifically the politicians of the ruling party. It is bad enough when the application of Constitutional principles frustrates the clear will of the majority party, or the democratic process. When the judgments of the Courts are based on political theory that is not to be found in the Constitution, or when the

⁵⁴¹Art.81.

Constitutional principles are not what the Party perceived them to be at the sittings of the Constituent Assembly,⁵⁴² the politicians and the people feel they are cheated by the system.⁵⁴³

If confronted with the Namibian Constitution, Woolman and Davis will probably invite the courts to see the Constitution as a Creole liberal document. However, while the Namibian Constitution has several Creole traits, it also has some very distinct classical liberal features. The classical liberal approach includes:

- A Bill of rights concentrating almost exclusively on civil and political rights;
- Seeing economic, social and cultural rights as part of state policy rather than entrenched rights;
- Excluding the enforcement of social and economic rights from the provisions of article 25 which provides remedies for aggrieved citizens;
- The recognition and entrenchment of property rights;
- The total silence of minority rights and group protection, to mention a few.

Creole traits include:

- The recognition of both common and customary law as valid legal systems;
- The provision for affirmative action;
- The provision for expropriation of private property in the interest of the State;
- The recognition of a mixed economy for Namibia;
- The abolishment of the death penalty;
- The recognition of economic and social rights in article 95. Although the enforcement of these rights is limited by article 101, the Courts can still enforce it.⁵⁴⁴

⁵⁴²See the reaction of the SWAPO Party to the judgment of Justice Levy in the first *Frank case* in the High Court of Namibia. When Judge Levy ruled in the High Court that law recognizes permanent same sex relations, Home Affairs Minister Jerry Ekandjo commented that the SWAPO Party never intended to protect homosexuals or lesbians by including the word sex in the non-discriminatory clause.

⁵⁴³The so-called moral majority in the United States regularly complain that “reactionary judges” interpret the American Constitution with a liberal framework that the founding fathers never intended and that the majority of the people in 21st century USA do not want and do not condone. In an talk show on the TV programme Praise the Lord, broadcast on Trinity Broadcasting Network Africa on 15 October 2004 at 23h00, Christian celebrity Pat Boone interviewed several Christian leaders. The intention of the programme was clearly to encourage conservative evangelical Christians to vote for Pres. Bush in the upcoming elections. Almost every speaker complained about reactionary judges, a political-inspired bench and the system denying the majority their democratic right to determine policy on issues like same sex marriages, abortion, the name of God in the Pledge of Allegiance and prayer in schools and other government institutions.

⁵⁴⁴*Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC).

If the ideological foundation of the Namibian Constitution is classical liberalism, Judge O'Linn was correct to emphasise dignity, if one follows the Woolman/Davis approach. However, if the Constitution got its inspiration from Creole liberalism, then the deconstruction of the Supreme Court makes sense. If the emphasis of interpretation is on transformative constitutionalism, Dworkin's Hercules judge may just decide in favour of Judge Dumbutshena's Supreme Court judgment as the best Namibian novel. While the Supreme Court did not explicitly refer to political ideology, it clearly opted for a transformative interpretation. While the white police officer's dignity was indeed impaired, the necessity to engage in debate over the restoration of the Namibian society was more important in the view of the Court.

In this case, the result of a Dworkinian interpretation does not necessarily differ from a Hartian approach, since the best moral option should be followed in cases on the penumbra. However, it does not close the debate. Positivists will argue that external factors which are difficult to evaluate, should not burden the legal text, while the post-modernist interpreters such as Klare will say the positivist exegete also brings his ideology to the table, be it consciously or sub-consciously. Judge O'Linn and other positivists will emphatically deny that they created law or that the Supreme Court judgment is the better Namibian novel.⁵⁴⁵

Without making a fundamentalist quasi-religious statement, one can conclude that the *Kauesa judgment* made transformative sense at the time.

⁵⁴⁵See O'Linn's discussion in Namibia. *The Sacred Trust of Civilisation. Ideal and Reality*. Vol.2. Windhoek: Pollination Publishers.

CHAPTER 6

THE END OF EUPHORIA: CRITICAL CHALLENGES

6.1 Introduction

In the mid 1990's the political debate moved away from national reconciliation to transformation. The victories of the liberation struggle and the UN supervised elections were the foundations of a transformed society. However, the first constitutional challenge – the limitation of two presidential terms - raised its head soon after the ruling SWAPO Party gained a two-thirds majority in the second national elections in 1994. It was not an outright attack on the Constitution, rather a call for “*responsible interpretations*” of the Constitution. In Foucaultian terms, one can speak of a changing myth.⁵⁴⁶

In the legal fraternity, this should have been a time of consolidation. The South African Constitutional Court was operating parallel to the Namibian superior courts and the bigger neighbour gave the Namibian courts inspiration to develop its human rights jurisprudence. The active South African courts played an important role in the Namibian constitutional and human rights jurisprudence.

In the late 1990's the President decided not to extend the term of Chief Justice Mahomed. Judge Johan Strydom, the then Judge-President of the High Court of Namibia, replaced Justice Mahomed, as Chief Justice. No one expected much change. While he was diplomatic and careful not to offend anyone, his constitutional approach and human rights interpretation shared the same principles and values held by his predecessor and the Supreme Court judges “borrowed” from the South African and Zimbabwean benches.

The maverick on the Namibian High Court Bench, Justice O'Linn, had retired and the scene was set for a smooth transition of power and the development of Constitutional jurisprudence on the lines set out by the Namibian Supreme Court under the leadership of Chief Justice Mahomed.

The third term debate was short, but ended in a small split in the ruling party. A former Deputy Minister and Member of Parliament, the Namibian High Commissioner in London, Ben Ulenga, a former permanent secretary and other

⁵⁴⁶The international press see it as the beginning of another African president-for-life. The South African Mail and Guardian linked it with two DTA MP's joining some Caprivi secessionists in Botswana, and a SWAPO MP suggesting Pres. Nujoma should be made president for life. See Mail and Guardian. *Nujoma third term passed*, 20 November 1998. However, the idea of a president-for-life never got much support and Pres. Nujoma retired after his third term.

frustrated party members left the SWAPO Party to form the Congress of Democrats.⁵⁴⁷

The third term debate ended by interpreting the Constitution in such a way that it made constitutional sense. The President was not directly elected in the UN elections. He is constitutionally entitled to a second election.

While the attitude towards the Constitution was gradually changing, there was no sign of abandoning it. It was still an important document. It was, however, also a time when government officials for the first time clashed openly with the judiciary. Yet, at a conference to celebrate the tenth anniversary of the Constitution in September 2000, the Chief Justice stated that even in the conflict the Constitution came out as the winner.⁵⁴⁸

The majoritarian argument became more vigorous. The clearest landmark of a new approach was the explicit anti-gay rhetoric that marked the third republic. The argument against homosexuality, was not an attack on the Constitution *per se*, but an issue with the interpretation of Article 10(2):

- Homosexuals are only protected as individuals. (Unlike the South African Constitution, the Namibian Constitution does not refer to sexual orientation, but only states that no one shall be discriminated against on the grounds of sex.)
- Another tool for deconstruction is brought in – African culture. Certain issues of liberalism, including the modern concepts of democracy and individual freedoms ought to be seen as European or Western concepts. It does not necessarily comply with African concepts of morality and respect for elders.

Constitutional thinking by the politicians was deeply influenced by the atmosphere of transition prevalent in the country at the time. While the interpretations of the Courts frustrated Parliament and the executive, the frustrations inevitably also lead to new ideas to counter the powers of the courts.

⁵⁴⁷The Congress of Democrats won seven seats in the 1999 election, the second party after SWAPO. An alliance between two other parties, the DTA and the United Democratic Front prevented them from becoming the official opposition. Their influence and numbers declined over time. The COD is no longer represented in Parliament. (2015) See *Historical Dictionary of Namibia*, p. 77f.

⁵⁴⁸Strydom, J. 2002. Keynote Address, in Hinz, M, Amoo, S and Van Wyk, D, *The Constitution at Work. Ten Years of Namibian Nationhood*. Windhoek: University of Namibia Publishers, printed by VerLoren van Themaat Centre, UNISA, Pretoria, p. 1.

In the field of criminal justice, and especially due process, the South African influence was felt. The right to legal representation and especially the right to be warned of your right to legal representation became an entrenched part of Namibian criminal procedural law – despite prosecutorial arguments that unlike South Africa, the Namibian Constitution, does not explicitly give an accused the right to be warned of his/her right to legal representation.⁵⁴⁹

Judgments dealing with the rights of suspects in criminal cases had a negative effect on the Namibian people. For some human rights were working against law-abiding citizens. Politicians often fuelled the perception. For a small, but aggressive group, the Constitution was no longer the vehicle to take the nation to a new, liberal, democratic society, but a western document alien to the values and norms of Africa.

6.2 The Police Docket: A Break with The Past

In *S v Scholtz*⁵⁵⁰ the Supreme Court ruled that the State was obliged to disclose the content of the police docket. In the pre-constitutional era the docket was considered privileged.⁵⁵¹

Foreign case law, especially Canadian and the United States of America jurisprudence, played an important role in this process. The judgment of the honourable Justice Dumbutshena in *S v Scholtz* illustrates the way in which the courts dealt with jurisprudence from other jurisdictions:

*Any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at a disadvantage by allowing the prosecution to keep relevant materials close to its chest in order to spring a trap in the process of cross-examining the accused and thereby secure a conviction cannot be said to be fair and just. Full disclosure is in accord with articles 7 and 12 of the Constitution. It would be wrong to maintain a system of justice known to be, in some respects, unfair to the accused. The right to disclose has acquired a new vigour and protection under the provisions of articles 7 and 12 of the Constitution. English cases cited above are proof beyond doubt that non disclosure leads to the denial of justice.*⁵⁵²

⁵⁴⁹See *S v. De Wee* 1999 NR 122 (HC), *S v Kapika* 1997 NR 285 (HC).

⁵⁵⁰1998 NR 207 (SC).

⁵⁵¹See *R v Steyn* 1954 (1) SA 324 (A).

⁵⁵²*Scholtz v S*, p. 447.

The major feature of the judgment is the common custom of disclosure that developed in the England and Wales and Canada. In terms of constitutional interpretation, the judgment is somewhat of an embarrassment. It relies primarily on the development in England and Wales, which jurisdiction had the same privileged rules until 1961. However, the jurisdiction has no written Constitution, a fact that the judge acknowledged:

*But what is significant for our purposes is that these developments have taken place in England and Wales without a Bill of Rights and without the benefit of a written Constitution. England has in a very significant way moved away from the law in force on 31 May 1961, which in terms of our Criminal Procedure Act we still follow and enforce.*⁵⁵³

The Scholtz judgment was preceded by a High Court judgment *S v Nassar*⁵⁵⁴ where the latter has already established that while some aspects of the police docket may still contain privileged material.

The Scholtz judgment was an important transformative approach in criminal jurisprudence. Within the framework of article 12 dealing with a fair trial, the adversarial process can no longer be seen as a trial between two adversaries, the State and the accused. The State, in this case represented by the Office of The Prosecutor-General and supported by the Namibian Police, stands in the service of the people personified in the Constitution.

In *S v. Kandovazu*⁵⁵⁵ the Supreme Court raised the issue of conflicting interests whenever a constitutional irregularity occurs. In this particular case, the magistrate affirmed the refusal of the State to disclose the content of a police docket. Both the State and the magistrate misinterpreted Art. 140 of the Constitution to mean that the South African Appellate Division case of *S v. Steyn*⁵⁵⁶ is still binding despite the fact that the Supreme Court has declared docket privilege unconstitutional.

After *Scholtz* the criminal justice system no longer demands technical fairness. The *Scholtz case* ensured that substantive fairness is an imperative from the moment a criminal case is registered and not only when the case starts or the

⁵⁵³ *Ibid.*, p. 442.

⁵⁵⁴ 1995 (1) SACR 212 (NM).

⁵⁵⁵ 1998 (9) BCLR 1148 (NMS).

⁵⁵⁶ 1954 (1) SA 324 (A).

accused appears before a magistrate. However, even after 1999 when the Office of the PG signed the Human Rights Declaration for Prosecutors, and after the Scholtz case, the superior courts still struggled to develop a transformative jurisprudence that balance the rights of suspects and victims. While the *Silunga* and *Shikunga* cases do not contradict each other, the Court worked with opposite hierarchies and different fundamental approaches. The transformative challenge need to take cognisance of the need of the public to feel safe and to trust the justice system. Yet, public opinion may not negate the fair trial jurisprudence of the first fourteen years of constitutionalism.

6.3 Freedom of Expression and Hate Speech

The *Kauesa case* was in a benchmark decision for Namibia, both in terms of the *stare decisis* rule and the influence it had on later cases dealing with the limitation of constitutional rights. The first cases after *Kauesa* dealt with the restriction of freedom of speech to prohibit hate speech.⁵⁵⁷ *Kauesa* also set the guidelines used in determining the constitutional position on prostitution and other immoral practices⁵⁵⁸ and a limitation of the freedom of expression is cases of pornography and explicit sexual objects.⁵⁵⁹

The *Kauesa case* made a firm statement on freedom of expression. In the process, the Namibian Supreme Court followed the Canadian example, staying free of the egalitarian liberal approach of an almost non-derogated right to freedom of speech, but also limited the grounds for derogation extensively.

The content of freedom of speech has always been a cause of disagreement, especially in the United States. Is it absolute or can there be derogations? The egalitarian liberals such as Dworkin⁵⁶⁰ have always insisted that freedom of speech is absolute. Anti-Nazi legislation in West Germany influenced Western European countries after World War II. It became practice in many states to limit the scope of freedom of speech by enacting anti-hate speech legislation.

The German Penal Code is the extreme example of derogative measures limiting free speech. It makes a denial of the Holocaust a crime, prohibits even a

⁵⁵⁷*State v Smith*, 1996 (4) SA, 965 (NMS).

⁵⁵⁸*Hendricks and Others v Attorney-General, Namibia and Others*, 2002 NR 353 (HC).

⁵⁵⁹*Fantasy Enterprises CC t/a Hustler the Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others*, 1998 NR 96 (HC).

⁵⁶⁰Dworkin, R. 1977. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1985. *A Matter of Principle*. Cambridge: Harvard University Press.

debate about the values of Nazism and includes a clear prohibition of racial hate speech.⁵⁶¹

With the growth of the pornographic industry in the 1960's, voices went up in the United States to restrict the publishing and distribution of hard-core violent pornographic material. The discussion is on-going.

Kateb argued that pornography and racial hate speech may offend, but it does much less harm than political speeches and religious sermons. Political speeches are often just spinning and the politicians have no intention to fulfil their election promises. They can humiliate their opponents and create unrealistic expectations. Yet, no one will argue that political speeches should be prohibited. The same, he says, goes for religious sermons. It is often authoritarian, fundamentalist and without any scientific foundation. It can have extremely negative effects on its listeners. He doubted that pornography of hate speech could create nearly as much harm.⁵⁶²

Feminists on the other hand, have argued that the objectification of the female body is enough reason to limit the distribution of pornographic material legally. Langton argued that egalitarian liberals such as Dworkin should be in favour of the action against pornography. It is destructive because of the degrading and inferior attitude towards women.⁵⁶³

Brugger pointed out that neither constitutional law nor international law explicitly and consistently permits or prohibits hate speech.⁵⁶⁴ He identified two possibilities to look at hate speech from an *a priori* acceptance of the basic principles of freedom of speech. The one is the radical American view seeing freedom of speech and expression as an almost non-derogable right. These countries prioritise freedom of speech over interests such as privacy. On the other hand, several western European countries followed Germany and developed anti-hate speech legislation.

⁵⁶¹See Strafgesetzbuch, section 130 (3):

Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in § 6 Abs. 1 des Völkerstrafgesetzbuches bezeichneten Art in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören, öffentlich oder in einer Versammlung billigt, leugnet oder verharmlost.

⁵⁶²Kateb, G. 1989 The Freedom of Worthless and Harmful Speech, in Yack, B. (ed.) *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*. Chicago: University of Chicago Press.

⁵⁶³Langton, R., 1990. Whose Right? Ronald Dworkin, Women and Pornographers, in *Philosophy and Public Affairs*, 19, no. 4, p. 311 ff.

⁵⁶⁴Brugger, W. 2002. The Treatment of Hate Speech in German Constitutional Law (Part I), 3 *German Law Journal*, No. 12 (01 December 2002). Originally published in Bullinger and Starck (eds.) *Stocktaking in German Public Law*, pp.117ff. Baden-Baden: NOMOS Verlag.

*The opposing view, shared by Germany, the member states of the Council of Europe, Canada, international law, and a minority of U.S. authors, views hate-filled speech as forfeiting some or all of its free-speech protection. This group of nations assigns a higher degree of protection to the dignity or equality of those who are attacked by hate speech than to the verbally aggressive speech used to attack them. Under this system, hate speech is not only unprotected, it is frequently punishable under criminal law, and individuals or groups who are the victims of hate speech frequently prevail in court.*⁵⁶⁵

Brugger shows that this development is closely linked to the post-World War II experience of the Federal Republic of Germany. The new government and nation wanted to distinguish themselves from the previous regime and its hate speech and hate crimes. The Penal Code contains several sections concerning hate speech.⁵⁶⁶ The courts allow groups to launch complaints if they can be targets of defamation, if one can clearly identify them as a separate group and if every member of the group is clearly included in the insults or defamation. It does not have to be a public act, it only needs to be in the presence of a third person.⁵⁶⁷

Similarly, sections 84 - 91 deals with collective defamation, including propaganda by unconstitutional and National Socialist organisation, the display of Nazi symbols, including the Nazi salute and the swastika.

The prohibition of hate speech became the vehicle to get away from the sad history of the past. The hate speech provisions are not seen as contradicting the freedom of expression clause in the post-war constitution or Grundgesetz (Basic Law).⁵⁶⁸

⁵⁶⁵Ibid.

⁵⁶⁶Strafgesetzbuch StGB, promulgated on 13 November 1998.(Federal Law Gazette I, p. 945). See Chapter 14, sections 184 – 200 dealing with *Beleidigungsdelikte* or *Delikte gegen die persönliche Ehre*, (Libel and Slander), translated by Bohlander, M. 2012. Saarbrücken: juris GmbH.

⁵⁶⁷Ibid.

⁵⁶⁸*Grundgesetz für die Bundesrepublik Deutschland*. 1949. Accepted on 23. May 1949 (BGBl. S. 1), amended by Act No 28. August 2006 (BGBl. I S. 2034).

The freedom of expression clause is Article 5(1):

Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt.

Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the Press and freedom of reporting by means of broadcasts and film shall be guaranteed. There shall be no censorship.

Translated by Tomuchat, C and Currie, D. 2012. Saarbrücken: juris GmbH.

The *Kauesa case*⁵⁶⁹ did not deal with hate speech, but with personal defamation of senior police officers by a junior staff member of the Namibian police. The Supreme Court took an unequivocal decision in favour of the freedom of expression. Kauesa did not address the issue of harmful and hate speech in general. It dealt with a special case and a specific Act, which the Court felt would limit future discussions and debate on issues such as affirmative action and pro-active programmes to redress the past.

After the *Kauesa case*, Namibian courts were confronted with constitutional challenges based on anti-racial discrimination and anti-pornographic legislation, the first a product of the independent post-apartheid Parliament, the second based on the Calvinist moral legislation dated back to the colonial era.

In the case of *State v Smith and Others*⁵⁷⁰ the constitutionality of yet another Act limiting freedom of speech was tested.⁵⁷¹ This time it was section 11 of the Racial Discrimination Prohibition Act 26 of 1991. The specific section reads as follows:

(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with intent to
(a) threaten, ridicule or insult any person or group of persons on the ground that such person belongs or such group of persons belong to a particular racial group; or
(b) cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups; disseminate ideas based on racial superiority'

The case emanated from an advertisement in a Windhoek newspaper congratulating the Nazi Rudolph Hess on his birthday. In an obiter dictum in *Kauesa v Minister of Home Affairs and Others*, a full bench of the High Court found section 11 to be constitutional. However, the Supreme Court overturned the judgment.

⁵⁶⁹1996 (4) SA, 965 (NMS).

⁵⁷⁰1996 NR 367 (HC).

⁵⁷¹It is interesting that the first significant case of contravening the Act only started in 1996, five years after its enactment. Also in 1996 at the 47th session of the Committee of the Elimination of all Forms of Racial Discrimination (CERD), one of the commissioners, Adv. Andrew Chigovera, asked the Namibian representative, Mr. Utoni Nujoma, if the fact that the Prosecutor-General has to institute all prosecutions under the Act, does not limit its application. It is also clear from the State Report of Namibia that no significant prosecutions took place under the Act. The question was still on the agenda in 2007. Committee on the Elimination of Racial Discrimination. 1996. *Summary Record of the 1169th meeting: Namibia, Venezuela. 06/11/96.*

After defining the sufficiently significant object of the Act, the Court applied the tests of the Canadian benchmark case of *Rex v Oakes*,⁵⁷² (also applied in the Supreme Court *Kauesa* case). The test needs to determine if the derogations from Article 21 (1) and (2) of the Constitution are reasonable and rationally connected to the objective. It also established if the right to freedom of expression is impaired as little as possible. Lastly the Court looked at the reasonability of the derogation in a democratic society.⁵⁷³

The Court then went on and failed the Act on every requirement. The Court clearly saw the Act as a bridge from the old apartheid order to the new democratic, constitutional era.⁵⁷⁴ The significant objective of the Act is the prevention of a recurrence of the type of racism and its concomitant practices that prevailed prior to independence in this country. The Act is the bridge to take a racist society from the apartheid-based values and morals to a new democratic, constitutional era where people are respected, irrespective of the race of ethnic origin.

Consequently, the Court concluded that groups of persons who never featured in the pre-independence of this country and were never part of or a part to the social pressure amongst the different peoples cannot not be seen as objects justifying the restrictions of freedom of speech described in Article 21 (a) and (b) of the Constitution. The definition of a racial group goes beyond what is required. In this specific case the insult to the Jewish people by the heroic treatment of a Nazi war criminal and the sensitivities of the Jewish people are not justification enough to derogate from a broad interpretation of the constitutional freedom of speech.

It is not clear exactly what the Court has in mind when it excludes groups of persons –

⁵⁷²1986 (26) DLR 4 200

⁵⁷³See the quote in the text of *Rex v Oakes*:

... once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R v Big M Drug Mart Ltd, supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: R v Big M Drug Mart Ltd, supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

⁵⁷⁴See Mureinik, E. 1994.

*...who never featured in the pre-independence of this country and were never part of or party to the social pressure amongst the different people...making up the population that was occasioned by the erstwhile racist policies.*⁵⁷⁵

Does it mean that only previous disadvantaged groups can expect the Act to protect them from a continuation of the humiliation of the apartheid era? Alternatively, does it mean that the Act and its implementation are reserved for all the groups who represented different interests before independence?

In both these instances, the interpretation of the Court seems too narrow. While the sad colonial history of Namibia was undoubtedly the inspiration for and background to the Act, its objectives seem to be more than just redressing the past. It includes a preventative element, something like the slogan of the Jewish people after the Holocaust: Never again! In other words, the sufficiently significant objective of the Act also includes the prevention of discrimination against all groups, racial and ethnic, irrespective of their place and role in pre-independent Namibia.

The illustrations of the Court revealed the folly of its argument. The animosity that Namibians feel towards the Spanish pirating of Namibian fishing resources and negative feelings towards the Batswana people as a result of the island dispute between Botswana and Namibia,⁵⁷⁶ should not be protected by the Act. Protecting these two groups can clearly not be related to the prevention of racism or social pressure between groups of people within Namibia.

However, since these animosities can easily change into xenophobia and discrimination against all Batswana living in Namibia, or worst, including Tswana-speaking Namibians, a broad interpretation of the term racial group is necessary to cross the bridge from a racist to a non-racial society.

The Jewish community, once a major role player in the Namibian society, have dwindled to a very small, yet influential group in Namibia. Taken the Namibian history, including the strong National Socialist Party that operated in Namibia before and during World War II, as well as the fact that they are a very small minority, their sensitivities to the advertisement was not taken into account.⁵⁷⁷

⁵⁷⁵*S v Smith and Others*, p. 372.

⁵⁷⁶At the time of the judgment, Namibia and Botswana were at loggerheads over the ownership of the Kasikili Islands. The International Court of Justice later ruled in favour of Botswana.

⁵⁷⁷It seems as if the judge had problems with the case from the outset. David Lush of the Media Institute of Southern Africa reported that at the first day of the hearing the defence requested further particulars, more specifically which parts of the advertisement led to the charges, whereupon Judge

When the South African version of this Act, the *Promotion of Equality and Prevention of Unfair Discrimination Act*, was discussed in an open forum of the Joint Committee of Parliament, the Jewish Board of Deputies in South Africa, requested that hate speech be criminalised,⁵⁷⁸ a clear indication that the Jewish community still experience abuse in South Africa.

Following the Oakes case, the Court criticized the Act for not allowing language or publications that may be offensive to certain groups, if the facts contain therein are true. Offensive language or even views shocking and disturbing to the State or sectors of the population are needed to build a democratic society.

The Namibian Act, unlike the Canadian Criminal Code,⁵⁷⁹ does not make provision for statements that may cause disharmony, but are intended to oppose and remove racist practices. Consequently, the Court found that the Act as it stands does not impair as little as possible freedom of expression in that it inhibits and stifles public debate on important issues such as affirmative action and historical assessments. Section 11(1) is overbroad and unconstitutional.

The State did not appeal against the judgment and Parliament opted to amend the Act. The amendments followed the case almost to the letter.⁵⁸⁰ The new section 14 (2) exonerates racist language and publication envisaged in section 11(1) if it is a subject of public interest, part of a public debate and the truth or on reasonable grounds believed to be true. It also excludes prosecution if someone contravenes section 11(1) with the intention to improve race relations and to remove racial insult, tension and hatred.⁵⁸¹

Frank stated, "What is the case against these people and who did they insult?" See Lush, D 1995. *Editors appear before court on racism charges*, Action Alert Up-date, 20 December 1995, on <<https://listserv.heanet.ie/cgi-bin/wa?A2=ind9512&L=AFRIK-IT&P=4475>>, accessed on 3 July 2008, at 12h00.

⁵⁷⁸Parliamentary Monitoring Group. 1999. Equality Hearings. *Minutes Joint Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill*. Cape Town, 22 November 1999, published on <<http://www.pmg.org.za/minutes/19991121-equality-bill-hearings>>, accessed on 3 July 2008.

⁵⁷⁹Sections 318 and 319.

⁵⁸⁰The Racial Discrimination Prohibition Amendment Act 26 of 1998.

⁵⁸¹The full text of the changes reads as follows:

- (1) *No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to:*
 - (a) *Threaten or insult any person or group of person on the ground that such person belongs or such person belong to a particular racial group; or*
 - (b) *Cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or*
 - (c) *Disseminate ideas based on racial superiority.*
- (2) *No person shall be convicted of an offence under subsection (1) of section 11:*

The exclusions are extremely broad. It is no surprise that no prosecutions took place under section 11(1) since the Smith case. Even in cases where prosecution should at least be considered, neither the public nor the authorities even mentioned prosecution under the Act.

A case in point is the outburst of SWAPO councillor Mandume Pohamba against the Oukanyama Traditional Authority.⁵⁸² Pohamba called them sell-outs and traitors, having betrayed the liberation struggle. He added that they are working against the wishes of the majority. He also threatened that SWAPO will act against teachers and public servants who join the new political party, RDP.

The chair of the Traditional Authority, George Nelulu, complained in a letter addressed to the governor. Mr. Nelulu used the words of section 11(1) in his petition: People like Pohamba are sowing seeds of hatred, ethnic division and tension, and engage in hate speech that stirs political tensions.⁵⁸³

The background to the attack is the border tensions between the two major Ovambo tribes, the Ovakwanyama and the Aandongas, as well as a growing tension between a new political party of former SWAPO leader Hidipo Hamutenya, Rally for Development and Progress and the ruling party.

Human rights activist Phil Ya Nangolo saw it as part of a systematic marginalisation of the Oukwanyama people.⁵⁸⁴ While several people, including the Traditional Authority, took offense to the statements of Mr. Pohamba, no one even mentioned the possibility of prosecution under section 11(1) of the Act. Neither the police nor the Office of the Prosecutor-General made any effort to take the matter further. Did the Namibian public lose faith in the Act after it had been amended?

Alternatively, did the narrow understanding of the objectives of the Act by the bench in the Smith case play a role? Do the public and law enforcement agencies limit the Act to white on black hate speech? Do the historical disparity and the

-
- (a) *If the act complained of was, at the time of the commission thereof, relevant to any subject of public interest, the discussion of which was for public benefit, and if on reasonable grounds such person believed the statement or statements concerned to be true; or*
 - (b) *If such person, in good faith and with the intention of removing matters tending -*
 - (i) *To threaten or to insult any racial group or any person belonging to such racial group; or*
 - (ii) *To cause, encourage or incite hatred between different racial groups or between persons belonging to different racial groups, pointed out such matters; or*
 - (c) *If it is established that the language, publication or distribution complained of communicated the truth and that the main purpose thereof was to so communicate the truth and not to cause any of the acts referred to in that subsection.*

⁵⁸²Shivute, O. 2008. Kwanyama Chiefs Hit Back Against Insults, in *The Namibian*, 11 June 2008.

⁵⁸³Ibid.

⁵⁸⁴Ya Nangolo, P. 2008. *NSHR Newsletter*. Windhoek: National Society for Human Rights.

apartheid society determine what racism in Namibia is? While the Court's view that the Act should only deal with discrimination against previously disadvantaged Namibians did not find its way to the amendment of the Act, it seems to be an interpretive tool in deciding on prosecution.

In 2005 activist Methusal Matunda or Malcolm X Matutanda, carried a placard during a public demonstration in Windhoek saying: *Kill all whites*. He stated the reason for his placard at the court (after his first appearance)-⁵⁸⁵

The intention was to solicit the support of black people to employ that strategy, because the Mau Mau school of thought, of which I'm the head, believes that killing all white people is the only way that we will get people to take black people seriously.

While the facts seem to be clear, the case was postponed several times and eventually withdrawn to give the police more time for investigation. It is unlikely that the Prosecutor-General considered the facts of the case to be one of the exceptions of Art 14 of the Act that will make prosecution impossible. Mr. Matutanda can hardly be said to believe on reasonable grounds that the killing of whites is a practical necessity in Namibia. Neither can his harsh position be an invitation to meaningful debate, for his outrageous position obviously excludes debate. The only logical conclusion one can draw from the withdrawal of the case is that the unfortunate narrow perception of the objectives has limited the application of the Act to such an extent that aggrieved Namibians opted rely on the old common law remedy of *crimen injuria*.

In preparation for their eighth states report to Convention on the Elimination of all Forms of Racial Discrimination (CERD), the treaty body requested Namibia to explain why no prosecutions took place under the Racial Discrimination Prevention Act.⁵⁸⁶ In response, Namibia blamed the amendments to the Act.⁵⁸⁷ The report goes on to point out that it is no longer an offence to ridicule anyone on the grounds

⁵⁸⁵Menges, W. 2005. 'Kill all whites' call a strategy, says suspect, in *The Namibian*, 10 October 2005, Windhoek.

⁵⁸⁶It seems as if the Committee on the Elimination of Racial Discrimination was concerned that a white Prosecutor-General, having been part of the old apartheid dispensation, was not serious in prosecuting under the Act. In terms of section 18, the Prosecutor-General in person must instruct all prosecutions under the Act. However, developments after the retirement of Adv. Hans Heyman, indicated that the lack of prosecutions has more to do with the amendments to the Act than the person of the Prosecutor-General.

⁵⁸⁷International Convention on the Elimination of all Forms of Racial Discrimination. 2008. Eighth to twelfth State reports of Namibia, due on 11 December 1997, 1999, 2001, 2003, and 2005. Geneva, p. 10.

that such person belongs or such persons belong to a particular racial group as originally provided for in section 11 (1) (a) of the act. Neither is it an offence to cause, encourage and incite disharmony or feelings of hostility or ill will between different racial groups or persons belonging to different racial groups as originally provided for in section 11 (1) (b).⁵⁸⁸

Aggrieved people who were insulted and humiliated on the grounds of their race or belonging to a specific group lost the remedy of section 11 of the Racial Discrimination Amendment Act. The Prosecutor-General had to go back to the common law crime of *crimen injuria* to be able to prosecute in cases of hate speech, racial or group humiliation or offensive actions. The alternative was to follow the egalitarian position and see freedom of speech as an absolute right.

The existence of the Racial Discrimination Prohibition Act is a clear indication that government did not want to go that way. Both the *Kauesa Supreme Court case* and the *Smith case* agreed that freedom of speech is not absolute. However, the amendment of the Act almost closed the door on derogations in cases of hate speech and cases of racial or group ridicule or humiliation.

The Smith case, while following *Kauesa* in its broad interpretation of freedom of expression, made some crucial legal errors. The understanding of the Act as a mere bridge to take Namibia from its apartheid past to a democratic society is but one of the intentional objectives of the Act. Not only the oppressed of the previous dispensation need protection against racial discrimination. Examples of oppressed turned oppressor abound. Those groups who were not part of the Namibian scene in the pre-independent era – the economic refugees from other African countries, political refugees and foreigners working in Namibia, are all vulnerable and in need of protection against racial discrimination. Even the big Oukwanyama tribe may become vulnerable if political opponents attack them.⁵⁸⁹

It makes no legal sense to limit the application of the Racial Discrimination Act to the pre-1990 context. The Act itself needs a thorough redraft. To make truth an exception to the violations of Section 11(1) does not make sense either. In which form can the truth be justification for insulting a group or for creating disharmony,

⁵⁸⁸Ibid

⁵⁸⁹See open letter of Hidipo Hamutenya to Prime Minister Nahas Angula in *Republikein*, Historian Reacts to Prime Minister, 3 July 2008.

hostility or hatred between groups? Was the judge thinking of references to the historical oppression of the majority of the people by the white minority?

If so, why do we need the truth test? The mere fact that something is true does not mean that it cannot stir emotions and eventually result in abuse of people on the ground of their race or ethnic origin. Think of the mentioned *Kill all whites* placard. Would the placard be more acceptable if the author added, “Because they committed genocide against us during the German Herero War and oppressed us during the apartheid era”? Alternatively, if a public speaker claims that that whites can never be trusted because of the colonial and apartheid histories, will the utterance escape prosecution because of the historical truth of an oppressive pre-independent society?

The fact that the Act demands a public statement or publication (an expression of his constitutional right.....), also made it difficult to prosecute offenders. It seems as the Office of the Prosecutor-General interprets this section extremely narrow. The Namibian State Report comments that the public element of section 11(1) is also problematic for prosecutors and one of the reasons why no prosecutions were instituted.⁵⁹⁰

The problem lies in the interpretation of the word “publicly”. During the author’s period of employment in the Office of the PG, the police forwarded a docket to the Office for decision concerning racial remarks by headmaster of a school to a teacher.⁵⁹¹ The suspect’s lawyer submitted a request for withdrawal. He argued that the only way to give meaning to the word “publicly” is to interpret it as a statement in an open forum or publication accessible to the public.

In terms of this interpretation, a staff room of a high school does not qualify to be a public place. It is a closed meeting only for staff members. *Publicly* demands something more - a public lecture, speaking at a rally, etc. The prosecutorial authority possibly accepted this narrow interpretation, hence the comment in the state report. Usually speech legislation goes further than that. The Canadian Criminal Code uses the words *statements other than in private conversations*.⁵⁹² The German Penal Code makes provision for a heavier sentence if a conviction

⁵⁹⁰Ibid, p. 11.

⁵⁹¹In terms of the confidentiality of the relationship employer/employee, the detailed facts of the case cannot be disclosed.

⁵⁹²Canadian Criminal Code.RSC 1985. Section 319(2).

emanates from a public statement, but also criminalises private statements.⁵⁹³ The South African Act also excludes the word *publicly*.⁵⁹⁴

Since the Act only applies to public utterances, the most vulnerable people are not assisted in their quest for self-worth and the eradication of racist and discriminatory language used against them. The workers on a building site, or a farm, or in a factory, are extremely vulnerable. Yet, the Act does not help them. Their only remedy remains the common law crime of *criminal injuria*, as the Namibian State Report to CERD has indicated.

6.4 Reaction from the Government

Given the time of the judgment, it is surprising that the State did not appeal. The best explanation for their decision is possibly the fact that the *Smith* decision seems to be in line with the strong defence of freedom of expression in the *Kauesa* case. However, the *Kauesa* case never intended to be an egalitarian option for unrestricted freedom of expression. The proportionality test of the *Oakes* case was used and within the historical context of post-apartheid Namibia the Supreme Court decided that Regulation 58(32) was an over breadth, its *objective is obscured by its over breadth* and ... *there is no rational connection between the restriction and the objective*.⁵⁹⁵

The Court made it clear that an unfavourable report, which is true, cannot be seen in the same light as an untruthful unfavourable report. In terms of section 58(32) of the Police Regulation 58(32), however, any unfavourable report by a police officer constitutes a breach of the Regulation.⁵⁹⁶ As pointed out above, this should not apply to the Racial Discrimination Prohibition Act.

A better way to approach the Racial Discrimination Prohibition Act would have been to make the objectives clear in the amendment, which did not happen. The South African Prevention of Unfair Discrimination Act, 4 of 2000, did not only include a long preamble, but also a section explaining the objectives.⁵⁹⁷

⁵⁹³ Strafgesetzbuch-StGB), section 185 – 187.

⁵⁹⁴ Promotion of Equality and Prevention of Unfair Discrimination Act, section 10.

⁵⁹⁵ 1996 (4) SA p. 981.

⁵⁹⁶ Ibid, p. 984.

⁵⁹⁷ See for example the objectives that deal with hate speech and harassment:

2(b) (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;

A preamble, similar to the South African one, could have helped to clarify the differences between the Kauesa judgment and the Act. The first paragraph of the South African Act refers to the historical inequalities, the second points to the fact that progress has been made in restructuring and transforming society, *systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.*⁵⁹⁸ The last paragraph of the Preamble expresses the need caring and compassionate relationships and guiding principles:

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

If a Preamble similar to the South African Act and its objectives were made part of the Act, most of the amendments might have been unnecessary. While a democratic society needs an open interaction on ideas and ideology, and especially issues relevant to the restructuring and transformation of the post-apartheid society, it also needs to take cognizance of the importance of relationships built on equality, fairness, human dignity and freedom. In that sense the emphasis on a free and aggressive right to debate all aspects of a transforming process, and the simultaneous emphasis on the equality and dignity of the debating partners do not contradict each other.

In South Africa, the anti-hate speech sections of the Act survived an amendment in 2002. The academic debate moved away from the mere question on how to minimize the application of the restrictions on freedom of speech. It now deals with more substantive issues such as the question if the word “harm” in the Act refers to physical harm only or includes psychological harm as well, whether hate

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed.

⁵⁹⁸Preamble to South African Act 4 of 2000.

speech can advice freedom of expression.⁵⁹⁹ These issues have, unfortunately never been discussed in Namibia.

Another reason for the reluctance of Parliament or the executive to improve the Act and to make it a workable instrument in combating racism and ethnic prejudice may be the growing intolerance in the SWAPO Party at the time. From 1997 Namibian politicians often used language against homosexuals. At the opening of the third SWAPO Women's Council Congress at Gobabis in December 1996 Pres. Nujoma accused homosexuals of exploiting the country's democracy. He encouraged the Women's Council to condemn and reject what he described as foreign influences and corrupt ideologies.⁶⁰⁰

The attack of the President came as a surprise to many. Before this speech, most Namibians took it for granted that sexual orientation is protected by the non-discriminatory clause of the Namibian Constitution. It only later turned out in the Frank case that the Supreme Court thought otherwise.⁶⁰¹

Other ministers and prominent party members later joined Pres. Nujoma in regular attacks.⁶⁰² The verbal attacks against homosexuals and lesbians went on well into the 21st century.⁶⁰³

The possibility that senior politicians may find themselves on the wrong side of the law was a real threat if the Act was implemented aggressively. On the other hand, would the Courts go along with the *obiter dictum* of Judge Frank that the wording "a group of persons" is too broad? Would a case against Parliamentarians have failed because homosexuals and lesbians were not part of the previously

⁵⁹⁹See Marcus, G and Spitz, D. Expression, in Woolman, S and Bishop, M (eds). 1999. *Constitutional Law of South Africa*. Johannesburg: Juta and Co, p. 20 ff; De Waal, J and Currie, I. 2005. *Human Rights Handbook*, Cape Town: Juta and Co, p. 320 ff; Albertyn, C, Goldblatt, B and Roederer, C (eds). 2001. *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act*. Johannesburg: Wits University Press; Thechner, S. 2003. The Hate Speech Provisions of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly, 19 SAJHR, 2003 p. 349 ff.

⁶⁰⁰Windhoek Advertiser, 6 December 1996.

⁶⁰¹*The Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (NS). See also *Frank and Another v Chairperson of the Immigration Selection Board* 2001 107 (NS).

⁶⁰²In January 2000 Minister of Home Affairs Jerry Ekandjo, encouraged graduated police officers to eliminate gays and lesbians. National Society for Human Rights. 2000. Ekandjo Does It Again, *Press Release*. Windhoek: NSHR, October 2, 2000.

⁶⁰³Pres. Nujoma made some reconciliatory noises in an interview with a German newspaper on 13 June 2002. Asked about gays in Namibia Nujoma replied it is not part of the culture, but added: *I think human relationships must be promoted to respecting each other's culture and way of life*. Author Unknown. 2002. Behind the Mask, accessed at <http://www.mask.org.za/article.php?cat=&id=394>. Last accessed on 4 July 2008. When Pres. Hifikepunya Pohamba was sworn in as the second president of Namibia in March 2005, the verbal assaults against homosexuals ended.

disadvantaged groups? Alternatively, can one make out a case for the fact that many discriminatory laws existed in the colonial era and therefore the homosexuals should be allowed (unlike the Jewish community) to use the remedies of the Act?

The real question that needs an answer is if the outcome of the case strengthened the principles embedded in the Constitution. To use the ideological symbolism of Woolman and Davis: Is the ideology of the *Smith* case also the ideology of the Namibian Constitution?

As we have seen, Woolman and Davis identified the ideology of the South African constitution as Creole liberalism, in other words a liberalism embedded in the ideals and dreams of the majority. In the *Kauesa* case, the Supreme Court moved away from the individualistic morality of the High Court. In the High Court, liberal morality makes the unenumerated right of dignity the pinnacle of the pyramid of rights. The dignity of the police officers becomes the issue to be decided on. As the High Court put it in the earlier case of (*Col. Jumbo*) *Smit v Windhoek Observer and Others*:

*A (sic) organisation which, it is alleged, is the organisation responsible for a murder which that very same police officer was charged with investigating. If there is anything more damaging then it is to allege that that police officer, in the course of his investigation, was also responsible for charging an innocent man with the murder so as to enable the real culprits to evade punishment.*⁶⁰⁴

In this 1991 case, the Court did not even look at the political significance of the report in the Windhoek Observer. Acheson, the recently released Irish citizen suspected of killing SWAPO activist Anton Lubowski only a few months before independence, claimed in a South African newspaper that the investigating officer in the case, the late Col. Jumbo Smit was a member of the covert paramilitary organisation, the Central Cooperative Bureau (CCB). It emanated in the Acheson case that the Prosecutor-General could not go on with the case against Acheson without joining several members of the CCB. Since the South African government was not willing to extradite them, the Prosecutor-General withdrew the case.

If the Court followed the ideological approach of the Supreme Court in the *Kauesa* case, preference should have been given to open debate and a free flow of

⁶⁰⁴1991 NR 327 (HC).

information for the benefit of the truth. Many of the other statements made by Acheson turned out to be possibly true - especially that he did not kill Lubowski.⁶⁰⁵

Yet, because of the dignity of the police officer and the harm that the publication of the article may do to his career and his person, the Court decided not to go into the basic constitutional issues. The fact that both respondents opted not to defend the case also had an influence on the outcome. Since the defence did not raise the issue of constitutionality, the court was entitled to grant summary judgment. It is unfortunate for a jurisprudence of constitutional hate speech and defamation that the case did not go on trial. It could have given the Namibian people some guidelines on the legal position on freedom of expression after the first *Smith case*. It is, however an indication that the public will be reluctant to lay charges under the Prohibition of Racial Discrimination Act. Instead, they will retrieve to traditional remedies such as *crimen injuria* and civil defamation.

The *Smith case* closed the door on the hate speech section of the Prohibition of Racial Discrimination Act. If the intention of the Act was to create a non-racial society, it failed dismally. Even if the bar was set much lower and the intention was just to protect vulnerable people from racial abuse, the judgment is a disappointment. Instead of a transformative judgment, the Namibian people received an amended Act with limited scope to prevent verbal racial abuse.

6.5 Constitutional issues that did not end in Court

The late nineties can be described as a rising storm that passed by. Three major constitutional issues were solved outside the Courts:

- The third term for President Nujoma;
- The homosexual issue; and
- The proposed Abortion Bill.

6.5.1 The Third Term

The debate on the third term of the founding President resulted in a constitutional amendment without any real constitutional challenge. The reason the SWAPO Party presented to the people, made constitutional sense. While the

⁶⁰⁵The major clash between the Prosecutor-General and Justice Levy centred on this point. While Judge Levy concluded that Acheson shot and killed Lubowski, the Prosecutor-General, supported by the Attorney General, never believed that the State has enough evidence to prosecute Acheson alone.

Constitution restricts the terms of the President to two terms, the founding President was in a unique position. The people directly elect the President of the Republic of Namibia.

The majority of the people accepted the explanation that the people did not elect President Nujoma as the first president. As a transitional arrangement, the Constituent Assembly became the first National Assembly of Namibia and the leader of the majority party became the first President. Consequently, since the people of Namibia did not elect President Nujoma twice, he deserved the opportunity to make himself available for election a second election. The Congress of Democrats, an offshoot from SWAPO, used it as campaign tool without significant success.⁶⁰⁶

6.5.2 The Homosexual Issue

It is not clear why President Nujoma and others started an aggressive verbal campaign against homosexuals in the mid 1990's. The judgments of the High and Supreme Courts regarding the homosexual issue will be discussed below. Two issues in the region possibly resulted in the change of attitude towards homosexuals and lesbians:

- President Mugabe's aggression against homosexuals went off well in Zimbabwe (and the rest of Africa) after the disgust of the nation seeing their first president prosecuted for sodomy,⁶⁰⁷
- The South African approach to matters such as gay marriages, financial rights to gay partners of public servants and adoption rights by cohabitating gay couples, were just too liberal for the SWAPO lead government. Bearing in mind the influence of the South African Constitutional Court and other superior courts in South Africa on the Namibian jurisprudence, the sudden homophobic statements might have been an explicit attempt to stop a liberal approach in the Namibian

⁶⁰⁶The expectation of a strong opposition party with a powerful constituency in the North came to naught. It is possible that the attack on the third term for Pres. Nujoma was the reason why the Party fared extremely bad in the Northern regions. The Congress of Democrats won only seven seats and was prevented by the DTA/UDF coalition to become the official opposition.

⁶⁰⁷Canaan Banana, Zimbabwe's first President was convicted of homosexual assault (called sodomy in common law) and sentenced to Ten Years imprisonment of which nine were provisionally suspended in 1999. The case against Banana was part of a concerted campaign against homosexuals by the ruling Zanu-PF. Banana's legal team argued that sodomy should no longer be a crime in Zimbabwe. See *BBC News Online Network*. Banana sentenced for gay assault. 18 January 1999.

courts.⁶⁰⁸ As we shall see, if it was a strategy of the ruling party, it turned out to be successful.

Robson quoted the generally accepted neo-liberal concept of sexual freedom as the protection of *sex between two persons who are consenting adults committed in the privacy of the home and thus causing no harm to others*. This definition, she asserts, should exclude the criminalisation of adultery, miscegenation, and sodomy.⁶⁰⁹

The Namibian politicians managed to keep the contradiction between sexual freedom and not challenging the constitutionality of sodomy in balance during the nineties. The police did not arrest adult same sex partners for committing the crime of sodomy, as long as it happened in *the privacy of the home*. Although President Nujoma and several other senior ministers made derogatory statements against homosexuals, there was never a public debate on the necessity for legal action against homosexuals. Sodomy was still a common law crime in Namibia, but seldom enforced. While South Africans debated the constitutionality of the common law crime of sodomy, the issue came to the legal fraternity in Namibia as a secondary concern. The Legal Assistance Centre (LAC) wanted to distribute condoms in the male sections of Namibian prisons, but needed permission from the Office of the Prosecutor-General to do so. Public opinion was divided on the issue. The LAC and AIDS activists saw the distributions of condoms as an imperative to save lives. Since Namibia has been following South Africa in most constitutional issues, some members of the legal fraternity believed that it was only a matter of time before the crime of sodomy will also be declared unconstitutional.

The Windhoek Central Prison requested the Office of the Prosecutor-General to provide them with a legal opinion. The Prosecutor-General, against the advice of the majority of his staff,⁶¹⁰ decided against allowing the LAC to distribute condoms in the prisons. His motivation was clear: The Prosecutor-General cannot assist people committing a crime while serving a prison sentence.

⁶⁰⁸Although the Namibian Constitution preceded South Africa's interim constitution with three years, Namibian the courts followed several South African constitutional judgments in the 1990's. See *S v Kapika and Others* (1), 1997 NR 285 (HC), (the right to be warned of the right to legal representation), *S v Scholtz* 1996 2 SACR, NS 4 (the right of access to the police docket) and *S v Katamba*, SA/2/99, 1999/12/07 (the unconstitutionality of the cautionary rule for single female witnesses in sexual cases).

⁶⁰⁹Robson, R. 2007. Sexual Democracy, in 23 *SAJHR*, p. 415.

⁶¹⁰The author was a member of the staff at the time.

The reluctance of the Prosecutor-General had two sides: He possibly suspected that that the Supreme Court may eventually find that the word sex in the non-discriminatory clause of the Constitution did not mean sexual orientation, but only gender (male female). A stronger motivation for taking the conservative option was possibly because the common law crime of rape is gender exclusive. In other words, males could not be raped. Consequently, until the Combating of Rape Act,⁶¹¹ a male raping another male would not stand trial for rape. In those cases prosecutors preferred to prosecute the accused for committing the crime of sodomy rather than indecent assault, since sodomy was seen by the courts as a more serious crime.

However, the anti-gay rhetoric was not without legal and jurisprudential consequences. The fact that politicians used hate speech as a weapon against homosexual practices may have had some consequences for the Namibian legislation. The State did not appeal against the judgment of *S v Smith*, although there were good legal and moral reasons to do so. As I have pointed out, the limitations on criminal liability, set by the *Smith case*, suited the government well. If the High Court did not limit the application of the Racial Discrimination Prohibition Act, some politicians may have found themselves on the wrong side of the law.

In an ironic way, the anti-gay rhetoric of this period paved the way for the jurisprudence of the Frank case.⁶¹² When the Supreme Court had to determine the norms and values of the Namibian people in relation to same sex relationships, the Court made the following comment:

*In contrast, as alleged by the respondents, the President of Namibia as well as the Minister of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that when the issue was brought up in Parliament, nobody on the Government benches, which represent 77 percent of the Namibian electorate, made any comment to the contrary.*⁶¹³

⁶¹¹ Act 8 of 2000.

⁶¹² *The Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (NS).

⁶¹³ *Ibid*, p. 211.

Thus, while the initial hate speech and anti-gay rhetoric had no immediate legal consequences, it laid the foundation for the later interpretation of Article 10 (2) of the Constitution.

6.5.3 The Abortion Issue

When Namibia became independent, the South African Abortion and Sterilization Act (1975) dealt with legal issues of abortion. The basic rule amounted to the illegality of abortion, allowing specified exceptions. Exceptions were strictly monitored and limited to the following circumstances:

- (i) *When a pregnancy endangers a mother's life or constitutes a permanent threat to her physical health;*
- (ii) *When the continued pregnancy constitutes a serious threat to the mother's mental health;*
- (iii) *When there exists a serious risk that the child will be born with an irreparably seriously handicapped (physical or mental);*
- (iv) *When the pregnancy is the result of rape or incest;*
- (v) *When the mother suffers from a permanent mental handicap that makes her unable to comprehend the implications of the pregnancy or bear the parental responsibility.*

In 1996, government released a draft Abortion and Sterilization Bill for discussion. The Minister of Health and Social Services, Dr Libertine Amathila, and the Permanent Secretary of the Ministry, Dr Kalumbi Shangula, campaigned for three years to convince the Namibian people that the Bill – following a strong liberal, pro-choice approach – was the way forward for Namibia.⁶¹⁴

The churches reacted immediately. The opposition to the Bill was overwhelming across denominational and confessional lines. In the North, the respected pro-SWAPO Bishop Kleopas Dumeni of the Evangelical Lutheran Church in Namibia supported the opposition, as did Former Secretary General for the Council of Churches of Namibia and respected Lutheran pastor, Dr Ngeno Nakamhela.⁶¹⁵

⁶¹⁴The Namibian 20 April 1999, published on the website Euthanasia.com, *Namibia Drops Move to Legalise Abortion*, <http://www.euthanasia.com/nambia.html> accessed on 10 February 2008.

⁶¹⁵Ibid.

In April 1999, the Minister set out on a countrywide tour to address public meetings on the Bill. She only visited Otjiwarongo. The opposition was so strong that she cancelled her tour and dropped the Bill because she felt that 99% of the population was against it.⁶¹⁶ Women groups objected to the tabulation of 99%, which was an overestimation of the numbers of the pro-life group. The opposition to the Bill was nevertheless overwhelming.

In an editorial, the Namibian admitted that the vast majority of the population opposed the Bill, but blamed middle-aged male church leaders for the populist campaign against the legislation. The newspaper suggested that the abortion issue could compare with the South African Constitutional Court case of *State v Makwanyane*,⁶¹⁷ where the Court abolished the death penalty despite strong public support for it.⁶¹⁸ In November 2002, the Minister stated again that abortion will not be legalised in Namibia for at least the next ten years, because of the strong opposition against it.⁶¹⁹

The abortion issue was the first serious clash between government and the churches. The churches that supported the struggle and those who were conspiring with the South African occupational forces, stood together. It was clear from the outset that the Catholic Church cannot go against the Vatican's opposition to abortion. Yet, government hoped for the support of the leaders of the black Lutheran churches and the Anglican Church. Had they supported the Bill, government could have pushed the legislation through.

The strong values of the majority of the churches on abortion were never tested in court. The churches were willing to challenge constitutionality of the Abortion Bill in the light of Article 6 of the Constitution. The wording of Article 6 differs substantially from the South Africa protection of life section:

Namibia:
The right to life shall be protected.

South Africa:
Everyone has the right to life.

⁶¹⁶ibid.

⁶¹⁷*S v Makwanyane and Another*, 1994 (3) SA 868 (A).

⁶¹⁸Lister, G. 1999. Choice is the Better Option, Editorial, *The Namibian* 23 April 1999, published at <http://www.namibian.com.na/Netstories/Cols4-99/edit230499.html>, accessed on 10 February 2008, at 22h12.

⁶¹⁹Maletsky, C. 2002. Abortion Ruled Out. *The Namibian*, 28 November 2002, published at <http://www.namibian.com.na/2002/November/national/029C6A15DC.html>, accessed on 10 February 2009.

The differences are obvious. The Namibian Constitution gives an idea of a future right that is protected. For the moment, it is not necessary for the Courts to make a decision on the meaning of the words. Until the churches either changed their position or lost their influence, it is unlikely that the government will proceed with the Bill.

6.6 Conflict in the House: Government and the Judiciary

The first serious Constitutional conflict between the judiciary and the government erupted in *Ngoma v Minister of Home Affairs*.⁶²⁰ The accused were asylum seekers who played in a band, the Osire Stars, and appeared at a rally of the Congress of Democrats. The police obtained an arrest warrant and upon a motion application, Justice Shilungwe interdicted the Minister of Home Affairs from arresting the asylum seekers or removing them from the Osire refugee camp.

The Minister of Home Affairs reacted to the judgment by stating that he would withdraw the work permits of some foreign judges he perceived to be "working against the best intentions of the government".⁶²¹ A statement by the Minister of Justice, Dr N Tjiriange, that a judge performs his/her judicial functions based on a presidential appointment and not a work permit, soon followed his statement. Dr Tjiriange further said that the Minister reacted upon a factual incorrect report that he received from an official. He also stated that the minister apologized to the judges, a fact that the Chief Justice Strydom confirmed.⁶²²

The so-called *Sikunda case*⁶²³ was even more dramatic. Sikunda was one of a group of alleged UNITA members who were in police custody in Dordabis. On 10

⁶²⁰Case No. A 206/2000, unreported case of the High Court of Namibia.

⁶²¹Author not mentioned. 2000. Government Falls Silent on Jerry's Tirade. *The Namibian*, 1 August 2000, available at allAfrica website <http://allafrica.com/stories/200008010065.html>, last accessed on 1 June 2015. Amupadhi, T. 2000. Strydom Applauds Ekandjo, Says Constitution the Winner, *The Namibian*, 12 September 2000.

⁶²²Amupadhi, T. 2000. Strydom Applauds Ekandjo, Says Constitution the Winner, *The Namibian*, 12 September 2000, available at allAfrica website, <http://allafrica.com/stories/200009120122.html>, last accessed on 1 June 2015.

⁶²³Two High Court cases and the appeal case in the Supreme Court were reported: *Sikunda v Government of The Republic of Namibia And Another* (1) 2001 NR 67 (HC); *Sikunda v Government of The Republic of Namibia And Another* (2) 2001 NR 86 (HC); *Government of The Republic of Namibia v Sikunda* 2002SA5/0, NASC 1. The first two cases were not reported. I shall refer to them as *Sikunda v Government of the Republic of Namibia And Another* (unreported 1 per Justice Manyarara, judgment on 24 October 2000) and *Sikunda v Government of the Republic of Namibia And Another* (unreported per Justice Levy, judgment on 31 October 2000).

October 2000, the Minister of Home Affairs informed José Domingo Sikunda that his “*activities and presence in the Republic of Namibia endanger the security of the state and that he was declared a prohibited immigrant*” and his “*removal from the Republic of Namibia*” was ordered. A week later, the Minister issued a warrant of detention on his letterhead stamped by the Inspector-General.

On 24 October 2000 Sikunda’s son brought an urgent application for his release to the High Court of Namibia, which the High Court granted. The State did not defend the application. Despite the court order, Sikunda remained in detention.

Sikunda’s son brought a new application for his father’s release. Judge President Teek postponed the case in November without taking any action whatsoever. He was severely criticised by the Society of Advocates of Namibia and several newspaper editorials, which led him to withdraw from the case *mero motu*, claiming that his credibility as a Judge had been tainted.

On 9 February 2001, two junior judges of the High Court found the Minister guilty of contempt of court and ordered the immediate release of Sikunda. Sikunda was freed 108 days after Justice Manyarara initially ordered his release.

In giving his judgment, Justice Mainga made the following comment:

I have no doubt that he wilfully and contemptuously refused to comply with the court order. There is no authority, none whatsoever, for the proposition that an order which is wrongly granted by this court can be lawfully defied for whatever laudable motive.

All orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside...

Judgments, orders, are what the courts are all about. The effectiveness of a court lies in execution of its judgments and orders. You frustrate or disobey a court order, you strike at one of the foundations that established and founded the State of Namibia. The collapse of rule of law in any country is the birth of anarchy. The rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded and protected.⁶²⁴

Referring to international law, the Court rejected Ekandjo's claims that he had no choice but to disobey the court order because Namibia must first comply with its obligations under United Nations sanctions against UNITA. The UN resolutions or

⁶²⁴*Sikunda v Government of The Republic of Namibia And Another* (2) 2001 NR 86 (HC).

any international obligation that the State may have is still subservient to the Namibian Constitution, the Court ruled.

The Court quoted the late Chief Justice Mahomed with regard to the importance of the rule of law and constitutionalism. The government appealed against the judgment of Judge Manjarara (Judges Mainga and Hoff did not go into the merits of the case). On 21 February 2002 the Supreme Court confirmed the judgment of the High Court.

In a further blow, the court ordered Government to pay Sikunda's legal costs on an attorney and own client scale. The *Sikunda case* is an ironic repetition of the *Katofa saga* of the 1980's. Although the remedy that the Sikunda family asked for was never referred to as a *habeas corpus writ*, this is almost a textbook example of the writ. Unlike the previous Namibian cases, the Court did not concentrate on the form or structure of the application. The issue in the *Katofa case*, whether the application should be the English law remedy or the Roman Dutch *homine libero et exhibendo* did not feature at all.

While the political landscape has changed dramatically, the similarities between the two cases are obvious: An enemy of the state is identified and detained under special legislation – a security proclamation in the first instance and a United Nations Resolution in the second. In both cases, the special circumstances are supposed to justify the unconstitutional detention of someone perceived to be an enemy of the State. In both cases, the government based its refusal on procedural aspects rather than the one basic relevant question in a *habeas corpus* application: Is the prisoner in legal custody that complies with the Constitution?

In both cases, counsel for the applicants emphasised the importance of speedy procedures to limit the incarceration of the person. In both cases, the State claimed that there are procedural reasons why they cannot release the prisoner – even if the State cannot guarantee a trial in a reasonable time.

The insistence of the State to keep Sikunda in custody seems even more ridiculous than the *Katofa case*. At the time of the arrest, UNITA was no longer a threat to Namibia, and Sikunda had been in the country since the early 1970's. The insistence of the Minister that international law forces the government to keep Sikunda in prison, makes no legal sense either. Sikunda was not an insurgent. He was a legal Namibian resident and the Minister did not explain the exact threat that he posed to Namibia. Since the State did not file to defend the application, the Court

was compelled to give summary judgment in the initial application before Justice Manyarara.

While the Judge-President made a big issue about his *meru motu* withdrawal, Judges Hoff and Mainga ignored the issues that could blur the real question: Was Sikunda in legal custody? It was immaterial to the position of Sikunda whether the newspapers and the Society of Advocates who criticised Judge Teek were in contempt of court or not. More important was the question: Is the Minister in contempt?

The fact that the Judge-President was reluctant to release Sikunda, is a clear indication that it was a sensitive issue. While the High Court rejected the international law issue, there are indications that the African Commission was at least willing to give the issue a hearing had the Namibian government decided to go to the Commission for relief.⁶²⁵ However, before approaching the Commission, the Minister still had to exhaust all local remedies, including appealing to the Supreme Court.

The High Court gave a transformative judgment, breaking the technical “national security” approach of the pre-independent South African Supreme Court of Appeal in the *Katofa case*. The Sikunda case was transformative in many ways. It revived the *habeas corpus writ* and confirmed the independence and boldness of the Namibian High Court in its adjudication of the Namibian Constitution. The issue was clear – Was Sikunda in legal detention? The Court had no reason to move beyond the clear wording of the Constitution.

The Sikunda judgment was a clear message to government to honour the separation of power and that members of cabinet are not above the law. Since the Minister involved was also responsible for the *Ngoma* crisis, the ruling of the High Court finding that the Minister of Home Affairs was in contempt for not releasing Sikunda, is an important landmark in the jurisprudential development of an independent judiciary.

6.7 The Powers of the Attorney General and Prosecutor-General Revisited

The government’s discontent with the Prosecutor-General was growing during 2001. The conflict moved to the public sphere in January 2002 when the Prosecutor-

⁶²⁵Discussion with AU commissioners during a visit to Namibia, 2007.

General informed the press that although he had turned 65 the previous year, he could not resign since he received a letter from the President in 1996.⁶²⁶ changing his tenure of service to become the same as that of a judge, meaning that he has to serve for eight years in terms of the High Court Act. That left him with an additional two years before he can resign or retire.

The Minister of Justice and the Attorney General disputed his interpretation on national radio and television.⁶²⁷ The predominantly black Prosecutors Association of Namibia followed with several statements accusing the Prosecutor-General of racism and misconduct.

When it became clear that the Prosecutor-General was correct in his submissions, the Attorney General started a process of negotiations that lead to an agreement that the Prosecutor-General will terminate his services on 31 July 2002.⁶²⁸ The Attorney General simultaneously introduced legislation that would allow the Minister and Attorney General to issue certificates to long serving magistrates and prosecutors respectively. The certificates would give them entrance to the legal profession as legal practitioners without doing the prescribed course and the prescribed attachment to an admitted legal practitioner.

The opposition blocked the Bill initially on technical grounds. When it became clear that it would not be passed before the Prosecutor-General terminates his services, the Attorney General requested him to remain in his post until November 2002.⁶²⁹ The Attorney General made no secret of the fact she wanted to give the Deputy Prosecutor-General of the North, Adv M Imalwa an opportunity to be considered as successor for the Prosecutor-General, and that it was therefore necessary to pass the Bill, since Adv Imalwa was not an admitted legal practitioner – a Constitutional prerequisite for the post of Prosecutor-General.⁶³⁰

⁶²⁶Namibian Reporter. 2002. PG refuses to retire, *The Namibian* 15 January 2002.

⁶²⁷Namibian Reporter. 2002. The Prosecutor-General: The Minister of Justice and the Attorney General disputed his interpretation. *The Namibian*, 31 January 2002.

⁶²⁸Namibian Reporter. 2002. AG announces agreement with PG, *The Namibian*, 21 June 2002.

⁶²⁹Namibian Reporter. 2002. Law Society and Namibian Law Association block the amendments to the Legal Practitioner's Act; PG's contract is renewed until November 2002. *The Namibian*, 31 July 2002.

⁶³⁰Namibian. 2002. Bill passed and President appoints of Adv John Walters as acting PG. *The Namibian* 27 November 2002.

Parliament passed the Bill despite severe criticism from, the Law Society of Namibia and the black Law Association of Namibia.⁶³¹ When Adv Imalwa was still not admitted at the end of November 2002, the President appointed former Deputy Prosecutor-General, Adv John Walters as temporary Prosecutor-General from 1 December 2002.⁶³² The Attorney General denied that she favoured any specific candidate.

Both the Law Society of Namibia and the Namibian Law Association eventually challenged the Bill in Court because they believed it was tailor-made for one person, Adv Imalwa, and as such undermines the independence of the prosecutorial authority.

A full bench of the High Court of Namibia rejected the application. The Court concluded that the wording of the Act is such that one cannot conclude that the Act only benefitted Adv Imalwa. It had a broad application, including all experienced prosecutors and magistrates.⁶³³

The President appointed Adv Imalwa as the second Prosecutor-General of Namibia, a position she took up on 2 January 2004. The earlier case forced to deal with the succession process in terms of the law. Despite her dismay with the PG's refusal to leave office when he reached the age of 65, she had to respect the independence of his Office. While her preferred candidate eventually became PG, the role players in the judicial system did not make it easy. Only after the High Court has considered a constitutional challenge brought by both law societies, could the AG implement the amendment to the Legal Practitioners Act.

However, the judgment of the Supreme Court was extremely narrow. It only considered the wording of the Act. While the Chief Justice assigned acting judges from South Africa to sit on the bench, the opposition of both the Law Society and the Namibia Law Association was an indication of opposition within the legal fraternity to the amendment of the Legal Practitioners Act.⁶³⁴ Had the Supreme Court bench looked beyond the mere wording of the Amendment Act, and taken cognisance of the political significance of the Minister's conduct, it is highly unlikely that they could

⁶³¹ See articles related to the opposition of the Law Society and the Namibia Law Association: *The Namibian* 9 and 12 July 2002, 26 September 2002, 18 November 2002.

⁶³² Amupadhi, T. 2002. Walters will act as Prosecutor-General, *The Namibian* 3 December 2002.

⁶³³ *Ekandjo-Imalwa v The Law Society of Namibia & Another; The Law Society of Namibia & Another v The Attorney-General of the Republic of Namibia & Others* 2003 NR 123 (HC)

⁶³⁴ Legal Practitioners Amendment Act, Act 10 of 2002.

have concluded that the amendment was meant to serve all experienced magistrates and prosecutors rather than paving the way for one prosecutor to be ready for higher office. The extension of the agreed term of the PG and the appointment of an Acting PG could not have served any purpose other than allowing the amendment to become law before the Judicial Service Commission made a recommendation to the President for a new PG.

The Supreme Court judgment was an unfortunate formalistic interpretation, while the political circumstances called for a substantive investigative approach by the Court. However, the Minister still had to cross a final hurdle. The Judicial Service Commission (JSC), of which the AG is the only political appointee, had to recommend someone to the President. Since the members of the JSC represents the superior courts (the Chief Justice and another judge), two representatives of the profession and the Attorney General – thus only one political appointee - it is highly unlikely that the members can be politically manipulated. Since the JSC recommended only Adv Imalwa, she was clearly a popular candidate for the position.

However, an apparent good result does not give a judgment transformative value. The case was a return to “hard” positivism and did not serve the principle of separation of the powers of the Attorney General and the PG, or the independence of the PG. More serious, it left the public with the perception that the Attorney General is the *de facto* recommending power in the JSC.

6.8 The Gender Cases

In this section, I wish to look at two sets of judgments where the Courts were challenged to apply gender equality in terms of the non-discriminatory clause (Article 10 [2]) and the spirit of the Constitution to negate the old standard practices and rules of male superiority and discrimination against women.

The first dealt with the cautionary rule applied in cases of single female witnesses in rape cases and offences of a sexual nature. The second case dealt with the status of a lesbian co-habital relationship before the law in the light of the Constitution.

6.8.1 The Cautionary Rule Applicable to a Single Female Witness In Sexual Related Trials

The handling of cases involving women gives us an excellent opportunity to evaluate the Supreme Court's reaction to the constitutional spirit of gender equality and the prohibition of discrimination based on gender.⁶³⁵ Shortly after independence, the High Court dealt with the cautionary rule against single woman witnesses in rape cases.

The cautionary rule has a long history, both in South African and English law. In a constitutional dispensation where discrimination against sexes are prohibited, any legal rule based exclusively on the sex of a witness, is an obvious contradiction. In *S v D and Another*,⁶³⁶ the High Court remarked that the rule has no place in the constitutional dispensation. Although a single bench judgment of the High Court is binding on other judges of the high court sitting as a single bench, unless it is explicitly found to be wrong in law, *S v D and Another* was not binding, since the reference to the cautionary rule was an *obiter dictum*.

Several High Court judgments nevertheless followed the *obiter* until the High Court (again a single bench, but this time as part of the judgment) in *S v Katamba*⁶³⁷ found that the cautionary rule was still part of the Namibian law.

The State appealed against the judgment and the Supreme Court had the opportunity to revisit the issue. The Court decided that the cautionary rule had no place in Namibia. There can be no exceptions between women and men, neither in terms of the crime that was committed nor in terms of some inherent trend in one of the sexes. *Equality* means that the ordinary rules of evidence should apply in all cases. However, while the rule itself seems to be dead, its spirit is alive, when it comes to single women witnesses in rape cases. The reason for the sudden resurrection of the cautionary rule (or at least the spirit thereof) was an unfortunate case, *S v Rittmann*.⁶³⁸

Mr. Rittmann appealed against a conviction of rape in the Regional Court. The High Court confirmed the conviction on appeal. The appellant then appealed to the Supreme Court. The Supreme Court allowed him to bring evidence to the Court not

⁶³⁵Article 10(1) of the Namibian Constitution.

⁶³⁶1991 NR 371 (HC).

⁶³⁷1999 NR 348 (SC).

⁶³⁸An unreported case of the Namibian Supreme Court, delivered by Chief Justice Strydom on 11 August 2000, *Dumbutshena, A.J.A. and O'Linn, A.J.A.* concurring

available at the trial in the court *a quo* or the High Court. In the Supreme Court, counsel for the State conceded that the complainant is not a reliable witness. She made a statement after the trial stating that she was not raped. The appeal succeeded.

Although failure to apply the cautionary rule was one of the grounds of the appellant's appeal, the Supreme Court correctly pointed out that the cautionary rule for single witnesses in sexual offence cases no longer existed and the Court did not base its judgment on it. However, it seems that the fact that the appellant in the *Rittmann case* had to go to the Supreme Court to get justice somehow revived the spirit of the rule.

In *Hanekom v the State*⁶³⁹ the complainant was a young so-called coloured girl and the accused a white male. The facts were shortly as follows: The girl reported to her father that a white man, unknown to her, phoned her several times. She did not want to talk to him. Later a white man arrived at the house, forced her to have oral sex with him and then raped her. The medical evidence confirmed the presence of spermatozoa in her vagina.

Her father traced the telephone calls (and one made the day after the alleged rape) to the office of the accused at his place of employment. The accused acknowledged being at the house of the complainant, as well as the phone calls and some sexual activities, but denied that he raped the complainant. According to him, he met the complainant at a restaurant where she worked as a member of staff serving at the table. When she heard that he was looking for a friend of her to provide her with an application for employment at Trans Namib, she told him that she also wanted to apply for a job.

The accused acknowledged that he played no role in appointments or recruiting of staff. He nevertheless phoned her the next day (several times) and eventually went to her house to deliver the application form. After some discussions (and after the complainant has taken him on a tour through the house) the complainant undressed herself, touched his penis and asked him to have sex with her. He refused, but masturbated and when he ejaculated, the spermatozoa landed on the vagina of the complainant. A medical doctor, who was a state witness, conceded the possibility.

⁶³⁹SA 4(A)/2000, Supreme Court Judgment, Heard on 2 April 2001 and delivered on 11 May 2001. Coram: Strydom, C.J.; O'Linn, A.J.A. and Manyarara, A.J.A.

The accused was convicted in the Regional Court, and his conviction was confirmed on appeal in the High Court. The High Court took the abolition of the cautionary rule serious. There is no indication whatsoever in the judgment that the evidence of the single witness was dealt with in an extra cautionary manner

The Court followed a liberal, value-orientated approach. The Court seriously criticized the harassment of the witness by defence council. Many of the discrepancies in the evidence of the witness were evaluated in the light of this conduct. The Supreme Court, while still paying lip service to the abolition of the cautionary rule, loaded the complainant with responsibilities, amongst others:

- Why did she not bite the penis of the accused when he forced oral sex on her?

But there is no evidence or even an insinuation in the record (apart from the cross-examination of the defence council) that this is the correct action to be taken or even expected action for a small, young girl, threatened by a much bigger and stronger man.⁶⁴⁰

- Why did she contradict herself?

Again the fierce and often unfair cross-examination of the defence council is virtually ignored, despite the specific and convincing role it played in the judgment of the court of first appeal.

The court concluded that the complainant has only herself to blame for the fact that the conviction is finally set aside. It is not clear what the Court meant. Does it mean that the accused is guilty, but that the complainant has messed up the case by some of her actions? The consequences of such interpretation would be that the court *knows* that the accused is guilty, or that the case has been proved beyond

⁶⁴⁰Compare the reasoning of the Supreme and High Courts on this issue:

“Another part of the evidence of the complainant, which is conflicting, is her description of what had happened when the appellant put his penis in her mouth. Apart from the fact that it must have been exceedingly difficult to do so, as she was at that stage fighting the appellant and further bearing in mind that the penis was not a loose object which could be easily manoeuvred, it seems also to have been a very risky operation under the circumstances. Complainant could never explain why she did not utilize the opportunity to put her assailant out of action. She testified in this respect that at the time she felt like biting his penis. However under cross-examination and in an attempt to explain why she did not do so, she stated that she did not think of that possibility. Still later she said that she only thought about it afterwards”.

However, Judge Hannah disagreed in the High Court judgment. He blamed the lengthy cross-examination of the defence for the sometimes contradictory and unclear answers of the complainant. The contradictions had to be judged in the light of the lengthy cross-examination she had to face, he stated, commenting that her being able to successfully withstand unfair pressure from the defence said much for her credibility.

reasonable doubt, but because of her actions or conduct as a witness, the complainant needed to be punished.

Alternatively, does it merely mean that there is not enough evidence before the court to convict the accused? If that is the correct interpretation, why does the Court use the unfortunate phrase? Is she responsible for a lack of evidence by the State, or does it mean the complainant was an unreliable witness? If this is what we should make of the Court's statement, the case was not proved beyond reasonable doubt and the Court could not dismiss the version of the accused, or at least conceded to the possibility that his version of what happened may have been true (even if the Court does not believe him). But why put blame on the witness?

Alternatively, does it mean that apart from the ordinary rules of evidence the witness was burdened with extra obligations to make her story reliable. If this is the case, why is the complainant treated different from an ordinary witness in a criminal trial? At face value, it seems as if the Court applied the cautionary rule.

It is possible, as I have pointed out, that the Supreme Court was of the opinion that the State did not prove its case beyond reasonable doubt. Since Justice O'Linn concurred with the judgment, it seems unlikely that the Supreme Court re-introduced the cautionary rule.⁶⁴¹ O'Linn wrote the judgment of the Katamba case.⁶⁴² It is highly unlikely that he would have turned his back on his own, well-argued judgment without giving reasons for his decision.

It is more logical to accept that the Supreme Court did not apply the cautionary rule, at least not explicitly. If that is the case, the wording was unfortunate. Consequently, even if the Court did not apply the unconstitutional cautionary rule, the language of the Supreme Court in this case is an unfortunate return to a formalistic approach alien to the constitutional dispensation. Transformative constitutionalism expects of the Courts not only transformative judgments, but also transformative language. The Supreme Court must leave no doubt in the public's mind that the cautionary rule has been declared unconstitutional and will never return to Namibian jurisprudence.

⁶⁴¹Since the Supreme Court is not bound by its own judgments, it is possible to overturn a previous judgment (Article 81). However, in such a case one would have expected the Supreme Court to state explicitly that it overturned the Katamba judgment and to give reasons for its decision. This did not happen.

⁶⁴²1999 NR 348 (SC).

6.8.2 Sexual Orientation and the Constitution: The *Frank* Case

Although the government's verbal attacks on homosexuals and lesbians started in the mid-nineties, the Supreme Court had the first opportunity to consider the Constitutional rights of homosexuals in March 2001. Elizabeth Frank, a German citizen and a pro-Namibian independence activist in Bremen, Germany during the struggle for independence, filed a case against the Immigration Selection Board.⁶⁴³

The Immigration Selection Board (the Board) appealed against a review decision by the High Court. The High Court reviewed and set aside a decision of the Board, refusing a permanent residence permit to Erna Elizabeth Frank (the first respondent). The High Court directed the Immigration Selection Board to authorize the Ministry of Home Affairs to issue a permanent residence permit to Erna Elizabeth Frank within thirty days of the date of the order.

6.8.2.1 The High Court

Elizabeth Frank, a German national, was a close associate of SWAPO since her days as a student at the University of Bremen. The Immigration Selection Board turned down her application for permanent residence twice. Frank pointed out that her sexual orientation was lesbian and that if it were legally possible to marry she and second respondent would have done so. She felt that her lesbian relationship with the Elizabeth Kachas, a Namibian citizen, might have been the reason why her application for a permanent residence permit was unsuccessful.

However, if her relationship with a Namibian citizen was a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship in terms of Article 4(3)(a) of the Namibian Constitution, she alleged. She said that the Board did not consider this factor and therefore violated her right to equality and freedom from discrimination guaranteed by Article 10, her right to privacy guaranteed by Article 13(1) and protection of the family guaranteed by Article 14 of the Constitution.

She further stated that the decision by the respondent infringed her constitutional rights guaranteed by Articles 10, 13(1), 14(1) and (3), 21(1)(g) and

⁶⁴³*Frank v The Chairperson of the Immigration Selection Board*, 1999, NR 257 (HC) and *The Chairperson of the Immigration Selection Board and Erna Elizabeth Frank and Another*, 2001 NR 107 (SC).

21(1)(i).⁶⁴⁴ The Board denied that the homosexuality of Frank played any role in its decision. Her sexual preference was a private matter.

As far as the relationship between Ms Frank and her partner had bearing on the review application, the High Court⁶⁴⁵ concluded that the Board is wrong in its assumption that the Ms Frank's long term relationship was "not one recognized in a Court of Law and was therefore not able to assist the first applicant's application".

The Court relied on *Isaacs v Isaacs*,⁶⁴⁶ where a South African superior court found a relationship where parties put all their assets, both present and any they may acquire in future, in a pool from which they pay expenses incurred by both, is a relationship acknowledged and protected by the common law. Such an agreement is known as a universal partnership and can be a verbal undertaking, in writing, or even tacitly.

The Court *a quo* further pointed out that such partnership was a common practice recognized by the courts between a man and woman living together as husband and wife, but not married legally. The Court further referred to *Ally v Dinath*.⁶⁴⁷ Referring to Article 10 of the Namibian Constitution,⁶⁴⁸ the Court concluded that if a man and women can enter into such a relationship, and since the partnership is so strong that a court of law will divide the assets when it dissolves, in

⁶⁴⁴Article 13 (Privacy)

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

Article 14 (Family)

(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 21 [Fundamental Freedoms]

(1) All persons shall have the right to:

...
(g) move freely throughout Namibia;
(h) ...
(i) leave and return to Namibia.

⁶⁴⁵*Frank v The Chairperson of the Immigration Selection Board*, 199, NR 257 (HC).

⁶⁴⁶1949(1) SA 952(C)

⁶⁴⁷1984(2) SA 451 (TPD).

⁶⁴⁸Article 10

1. All persons shall be equal before the law.

2. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

terms of the constitutional equality principle of Article 10 (2), two lesbian women should also be able to enter into such a partnership.

While not discussing it in detail, the Court also relied on articles 16 (the right to acquire, own and dispose property individually or in association),⁶⁴⁹ and 21(1) (e) (the right of association).

Consequently, the Court found that a relationship between the applicants are protected by law and should have been considered by the respondent. In a bold judgment the Court did not refer the case back to the Board, but instructed the Board to grant Ms Frank permanent residence.

Cassidy⁶⁵⁰ criticized the judgment on two grounds. Firstly, she asserted that the word sex in art. 10(2) of the Constitution refer to gender only.⁶⁵¹ Secondly, since the alleged discrimination is not one of the enumerated rights listed in Article 10(2) she is of the opinion that the Court should have applied the rational connection test of the *Mwellie case*⁶⁵² or the unfair discrimination analysis of the *Müller case*.⁶⁵³

In the *Mwellie case* the applicant challenged the constitutionality of a section of the Public Service Act⁶⁵⁴ limiting the time for public servants to institute action against the State under the Act to twelve months, while non-public servants have 24 months. After confirming international human rights and constitutional municipal case

⁶⁴⁹Article 16

1. All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable or movable property individually or in association with others and to bequeath their property to their heirs or legatees.

⁶⁵⁰Cassidy, E. 2002. Article 10 of the Namibian Constitution: A look at the first Ten Years of the interpretation of the rights to equality and non-discrimination and predictions of the future, in Hinz, M, Amoo, S and Van Wyk, D. 2002. *The Constitution at work. Ten Years of Namibian Nationhood*. Windhoek: UNAM Publishers, printed by Pretoria by Veloren van Themaat, Unisa, p. 181.

⁶⁵¹The issue is presently a subject of heated debate amongst international human rights scholars and lawyers. It seems as if the Human Rights Commission is of the opinion that human rights prohibition against sex discrimination includes sexual orientation. See *Nicholas Toonen v Australia*. 31 March 1994. (Communication No. 488/1992), UN Doc. A/49/40, Vol. II, Annex IX, section EE, pp. 226-237; *Young v Australia*, UN Doc CCPR/C/78/D/941/2000 (12 August 2003). See also *Josling v New Zealand*, *Joslin et al. v. New Zealand*, Communication No. 902/1999, Views adopted 17 July 2002, where the Human Rights Commission concluded that the equality clause (article 23) of the ICCPR does not include the right to same sex marriages. In other words, the Commission accepted equality, but does not conclude that the concept of marriage should be extended to same sex relationships. The European Court for Human Rights seems to share Cassidy's interpretation.

⁶⁵²*Mwellie v Minister of Works, Transport and Communication*, 1995(9) BCLR, 1118, (NMH).

⁶⁵³2000 (6) BCLR655 (NMSC). Cassidy again seems to be at odds with the opinion of the Human Rights Commission. Müller took his case to the Commission alleging unfair discrimination based on sex, and thus a breach of article 26 of the ICCPR. The Human Rights Commission found that there was indeed a breach of article 26.

⁶⁵⁴Public Service Act, No. 13 of 1995.

law,⁶⁵⁵ the Court found that the classification of public servants as a special group is a justifiable and reasonable differentiation with a legitimate objective. Further, while the Act classifies public servants as a separate group, all public servants are treated equal. The Namibian High Court applied the test of the European Court in the *Mwellie case*.⁶⁵⁶ The Court struggled with the meaning of the word *discrimination*. Scholars have pointed out that the English word does not carry with it a moral condemnation.⁶⁵⁷

The European Court of Human Rights and the Human Rights Commission have both stated in their jurisprudence that discrimination as such does not constitute a violation of the anti-discrimination clauses of the European Charter or the International Covenant on Civil and Political Rights. The European Court created three criteria to determine if discrimination is a violation of the Charter-⁶⁵⁸

- i. If there is no objective and reasonable justification for a discriminatory act;
- ii. If the discrimination does not serve a legitimate aim; and
- iii. If the means of discrimination is disproportionate to the objectives or aims, discrimination is not legitimate and constitutes a violation of the European Charter.⁶⁵⁹

The European Court also refers to a *margin of appreciation* to determine if discrimination is admissible. Scheinin correctly pointed out that the use of vague terms like this can easily lead to cultural relativity, especially in the new Europe and the former socialist countries becoming part of the Council of Europe.⁶⁶⁰

The Human Rights Committee developed a different method to determine if discrimination is admissible not. In essence, it looked at the facts and evidence of every case.⁶⁶¹ The process is known as the facts and evidence test.

⁶⁵⁵See Cassidy's discussion of the absoluteness of discrimination in American and South African case law, pp. 171 and 172.

⁶⁵⁶*Mwellie*, p.1127 ff.

⁶⁵⁷See Scheinin, M. 2003. *Non-Discrimination and Minority Issues*, unpublished lecture at the Linguistic and Minority Rights Course, Institute for Human Rights, Åbo Akademi, Turku (Åbo), Finland, 10 – 14 November 2003.

⁶⁵⁸See the *Belgian Linguistic* cases: European Court of Human Rights. Application numbers 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64. Judgment of 23 July 1968.

⁶⁵⁹In this regard, see Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").

⁶⁶⁰2003: *Non-Discrimination and Minority Issues*.

⁶⁶¹See for example *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. ICCPR/C/35/D/196/1985 (1989), *Nicholas Toonen v. Australia*. 31 March 1994. (Communication No. 488/1992), UN Doc. A/49/40, Vol. II (1994), Annex IX, section EE, pp. 226-237; *Young v Australia*,

While the High Court in the *Frank case* did not go into international jurisprudence, it took an important step in interpreting the non-discrimination clause. Cassidy's criticism on the meaning of the word sex is out-dated. One can hardly speak of gender classification without including sexual orientation. Although the Court did not specifically mention any test, one can conclude that the Court applied the facts and evidence test in comparing Ms Frank's position with a heterosexual female. The heterosexual female can marry her partner, while a lesbian cannot.

The Court compared the two, added to it the possibility to accommodate the financial and assets issue, which is part of the common law. Consequently, even without any amendment to the present laws, Ms Frank and other lesbians could have been accommodated fairly had the Board applied the non-discrimination clause.

The transformative value of the judgment was immense. It created an opportunity to broaden the understanding and limitation of sexual discrimination extensively. It would have placed some pressure on Parliament to look at the laws and common law rules discriminating against homosexuals. An appeal to the Supreme Court ruined these prospects.

6.8.2.2 The Supreme Court

The procedural issues in the case (late filing by the appellant) as well as factual disputes blurred the real issue. The main issue, were somehow pushed to the periphery:

- The understanding of a permanent homosexual relationship in the Namibian legislation; and
- The Constitutional guarantee of non-discrimination based on sex in the Constitution.

It is not necessary for this thesis to go into the procedural issues of the case. The unprofessional conduct of the appellant (the Board) and the duress it caused Ms Frank (respondent in the Supreme Court) caused the chief justice in his minority judgment to refuse the appellant's application for condonation of late filing. Consequently, the minority judgment did not consider the homosexual issue.⁶⁶²

2003. UN Doc CCPR/C/78/D/941/2000 (12 August 2003); *Schmidt-De Jong v Netherlands*, Communication No 855/1999, 16 July 2001; and *Love et al v Australia*. CCPR/C/77/D/983/2001.

⁶⁶²*Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC), pp. 159ff.

The Supreme Court per Justice O'Linn found in its judgment that the Court *a quo* erred in *mero motu* considered the relationship between the first and second respondent as a universal relationship, since Frank did not tender this. He also found that the Court erred in its conclusion that law protects a lesbian relationship.

It does not fall within the parameters of this study to evaluate all the criticism of Supreme Court to aspects of the High Court's judgment other than the judgment on the issue of the lesbian relationship of Frank and Kachas.

The Court gave the Immigration Selection Board extremely wide discretionary powers, while at the same time limiting the review powers of the High Court.

*Although this Court, as well as the High Court, undoubtedly has wide powers to set aside the decisions of administrative tribunals and even to substitute its own decision on the merits for that of such a tribunal in appropriate circumstances, the present case is not one where the substitution of our decision for that of the Board is justified. In my respectful view, that would amount to usurping the function of the Board, entrusted to it by the Legislature of a sovereign country.*⁶⁶³

The Court took this tendency to the extreme when it eventually discussed the powers of the High and Supreme Courts to review old and new Namibian legislation. The Court assumed that counsel for Frank waved the issue of a lesbian relationship. However, both the attitude of Frank's counsel and the judgment of the Court *a quo* can also be understood in a different manner. Mr Taaipopi's words that a lesbian relationship is neutral and had no effect on the Board's decision could be understood to mean that under the new Constitution the sexual content of relationships is no longer the decisive factor. When counsel then stated that Ms Frank no longer relied on the lesbian relationship, he did not wave his reliance on the relationship between Frank and Kachas. For counsel, and apparently the Court *a quo*, the Constitution settled the matter of sexual orientation and Mr. Taaipopi, counsel of the Board, conceded to that.

The High Court went straight on to discuss the legal content of the relationship, which it found unnecessary to call a *lesbian relationship*. Instead, the Court called it a *universal partnership*. Universal partnerships, the Court ruled, is protected by law and specifically by the Constitution. Whether the High Court was

⁶⁶³ Ibid, p. 130.

correct in its submission will be discussed below, but the Supreme Court makes two wrong assumptions when it concludes:

(i) That the Court *a quo* did not consider the issue of the lesbian relationship between the first and the second respondents; and

(ii) That the issue of a universal partnership was considered *meru motu*.

The Supreme Court extensively investigated the issue of the protection given to lesbian couples in terms of the Constitution, especially Article 10 (2) and concluded that:

(i) It is only unfair discrimination which is constitutionally impermissible, and which will infringe Article 10 of the Namibian Constitution,⁶⁶⁴

(ii) A homosexual relationship does not have the same status and protection of a heterosexual marriage:

*A Court requiring a "homosexual relationship" to be read into the provisions of the Constitution and/or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted "purposively";*⁶⁶⁵

(iii) The review powers of the Supreme Court are limited:

... Parliament has the right to decide, in accordance with the letter and spirit of the Namibian Constitution, on the legislation required for the admission of aliens to citizenship and/or residence and or employment in Namibia.

*It is also the right and responsibility of Parliament to provide in legislation which classes or categories of persons should be given special dispensation and which not. In this function Parliament is entitled inter alia, to consider and give effect to the traditions, norms, values and expectations of the Namibian people, provided it does so in accordance with the letter and spirit of the Namibian Constitution.*⁶⁶⁶

The Court then does an egg dance and stated that:

*Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprived them of the protection of other provisions of the Namibian Constitution.*⁶⁶⁷

However, it fails to explain why Parliament should not protect the nation against people and a practice seen by customary law as *extremely wicket but*

⁶⁶⁴Ibid, Majority judgment, p. 156.

⁶⁶⁵Ibid, p. 155.

⁶⁶⁶Ibid, pp. 158.

⁶⁶⁷Ibid, p. 157.

rare,⁶⁶⁸ or to enforce the views of the President and Minister of Home Affairs quoted as value markers by the Court⁶⁶⁹ and actively oppress homosexuals.

6.8.2.3 The Interpretive Key of the Judgment

Judge O'Linn's preference for a formal, literal approach to Constitutional interpretation is well known, and well documented in his judgments. He initially served on the bench of the High Court, and later as an acting justice of the Supreme Court. He disliked the idea of treating human rights protections in the Constitution as a *sui generis* in need of a substantive value-based interpretation.

The honourable judge barely hides his disgust in dealing with this trend in the judgments of the Namibian Supreme Court.

*I am also mindful of the many Namibian decisions where the basic approach in interpreting a constitution has been expressed in poetic and stirring language.*⁶⁷⁰

It is not surprising that the innovative and highly acclaimed Constitutional jurisprudence (especially the judgments of the late Chief Justice Mahomed and Chief Justice Strydom) hardly received any attention in the judgment. Only one judgment of Judge Mahomed is quoted, *Government of the Republic of Namibia v Cultura 2000*⁶⁷¹ and then only to ridicule its poetic and stirring language.⁶⁷²

The then Chief Justice Strydom hardly got a better audience. When he is quoted, it is only short quotations to defend the literalist hermeneutics of Judge O'Linn.⁶⁷³ The bulk of Namibian and South African cases that paved the way for a purported hermeneutics and transformative constitutionalism in Southern Africa are ignored.

The only Namibian jurisprudence that received any attention worth mentioning are the judge's own High and especially Supreme Court judgments, from which he quoted extensively. Instead, the judge seeks support from Judge Kentridge, former judge of the Constitutional Court of South Africa. Judge O'Linn nevertheless pointed to the fact that both the Constitutional development and the two constitutions of

⁶⁶⁸Ibid, p. 153.

⁶⁶⁹Ibid, p. 151.

⁶⁷⁰Ibid, p. 134.

⁶⁷¹1994(1) SA 407 (NMS) at 418 F – G.

⁶⁷²*Chairperson of the Immigration Selection Board*, p. 134.

⁶⁷³*Minister of Defence, Namibia v Mwangingi* 1992(2) SA 355 (NMS) at 362.

South Africa and Namibia are so diverse that it is inconceivable for Namibian Courts to follow the South African jurisprudence and hermeneutics.⁶⁷⁴

The linkage to former Constitutional Court Judge Kentridge is questionable in the light Judge O'Linn's interpretation of the hermeneutics prescribed by the South African Constitution:

*The provision in the South African Constitution leaves no room for the positivist school of thinking in the interpretation and application of the constitution and not even room for a "golden mean" between the "positivist" and "libertarian" schools as expressed by Friedman, J. in Nyamkazi v President of Bophuthatswana, referred to supra.*⁶⁷⁵

Does this mean that Kentridge was actually in error in *S v Zuma & Others*, which the judge quoted with approval? In addition, was Kentridge wrong in supportively quoting *R v Big M. Drug Mart Ltd*?⁶⁷⁶

The fact is that the hermeneutical jurisprudence in both South Africa and Namibia accepted, if not exclusively, at least as an option, the path of a substantive, valued-based Constitutional approaches.⁶⁷⁷ Even the proponents of a different hermeneutical key for constitutional interpretation recognize this.⁶⁷⁸

From a hermeneutical point of view, this is clearly Justice O'Linn's reaction to the Mahomed era. He made no secret of his disapproval of a jurisprudence that was the opposite of his own reliance on the text of the Constitution. The result however, is a legalist, literalist interpretation that does not look at the issues at stake in terms of the values that the Constitution protects.

Rather, the words of Section 10 (2), and even worse, the absence of the words *sexual orientation*, became the key for understanding. While the early

⁶⁷⁴See *Chairperson of the Immigration Selection Board*, p. 141.

⁶⁷⁵Ibid.

⁶⁷⁶1995(2) SA 642 (CC), at 651.

⁶⁷⁷The list of authors are numerous: See articles of Du Plessis, L and De Ville, J in *Stellenbosch Law Review* 1993; several contributions. See among others the in Woolman, S and Bishop, M (eds), *Constitutional Law of South Africa*, Cape Town: Juta, 1996; Klare, K, in *SAJHR*, pp. 147 –188; Van der Walt, A and Botha H, 1998. Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*, in 1998 *SAPR/PL*, pp. 17 – 41; Froneman, JC, The Constitutional invasion of the common law. Can the judges be controlled? In *Focus on the Bill of Rights*, VerLoren van Themaat Centre, UNISA, Pretoria, 1996, pp. 6 – 27, Botha, C, *Maatskaplike geregtigheid, die animering van fundamentele grondwetlike waardes en regterlike aktivisme: 'n Nuwe paradigma vir grondwetuitleg*, in *Suprema Lex*, pp. 57 – 7. The list goes on.

⁶⁷⁹See Cockrell, A., *Rainbow Jurisprudence*, pp. 1 – 38.

⁶⁸⁰See *S v De Wee* 1999 NR 122 (HC).

judgments on due process⁶⁷⁹ also acknowledged the different framing of the South African and Namibian Constitutions, it did not prevent them from giving the Namibian Constitution a broad interpretation including some of the elements specifically mentioned in the later Constitution.

However, in this case the Supreme Court ignored the influence of the Namibian Constitution on the drafting of the South African Constitution and the fact that the South African drafters had the opportunity to draft their Constitution with the Namibian product already in operation.

The Court interpreted in a legalistic manner when it concluded from the wording of the interpretive clause of the South African Constitution that South African Courts have no option but to apply broad, substantive, valued-based interpretation that takes the spirit of the Constitution as a hermeneutical key. Since the Namibian Constitution has no such clause, he concluded that a literalist interpretation fits the Namibian Constitutional hermeneutic.

However, the judge again does not take the role of the Namibian courts in the pre-constitutional era of South Africa into consideration. From the literature (see above) it is clear that the South African academics and the courts valued the Namibian Constitutional jurisprudence extremely high. Consequently, rather than suggesting that the South African Constitution came with a new hermeneutic, it is closer to the truth that the South African interpretive clause was among other things, framed by the jurisprudence of Namibian Constitutional development.

Once the Court established the Namibian Constitution demands a literal or positivist approach to interpretation, the wording of Article 10 (2) does not pose a problem. The word *sex* as a non-discriminatory category refers to gender only – male and female. To back up this interpretation, the Court looked at the norms and the values of the Namibian people and concluded that lesbian relationships and a permanent same-sex relationship are not *per se* protected by law and in Article 10 (2) the word excludes sexual orientation.

The test for the values of the Namibian nation is the hate speech of the President and the Minister of Home Affairs against homosexuals. The Court concluded that since no one in Parliament has repudiated them, this must be the opinion of Parliament. The conclusion needs no comment, taking in consideration

the fragile democracy in Namibia and the almost absence of public debate on any issue of principle by the government and especially the governing party.

Since South Africa cannot help the Namibian courts with the interpretation of the issue, the judge turned to Zimbabwe – where co-incidentally, the president is an outspoken enemy of all homosexuals. The case that the judge chose is the now infamous *S v Banana*,⁶⁸⁰ where the first president of the Republic of Zimbabwe was charged with sodomising several inferiors.

The Supreme Court of Zimbabwe had to decide if sodomy as a common law crime was unconstitutional. If one bear in mind that the facts of the case pointed to rape rather than a long-term sexual relationship between consenting adults, and also that Zimbabwe did not have a law to use in cases of male rape, the emotional issues behind the Banana case become clear.

While the Supreme Court had to make a judgment on the consensual life-long relationship between two lesbians, sodomy is a male exclusive gender crime. In both Zimbabwe and Namibia, sexual acts between lesbian women were never criminal offences. The Court dealt with the discrepancy in one sentence:

*The reason may have been that the lesbian relationship and the sexual act performed in such relationship never became as clearly defined and notorious as in the case of the homosexual relationship between men.*⁶⁸¹

However, in a minority judgment in the Zimbabwean case, supported by appeal judge Ahmed Ebrahim, Chief Justice Anthony Gubbay would have struck the offence of consensual sodomy from Zimbabwe's statute book. In his judgment, the discriminatory element of criminalizing male sexual conduct and not female sexual conduct is untenable. The Namibian Supreme Court did not consider the minority judgment.

The Supreme Court virtually destroyed judicial review by refuse to act pro-actively and by stating that in terms of Article 81 later legislation can reverse all decisions of the Supreme Court. Without going into detail here, the judge seems to prioritize Art 81, which is a general article dealing with *stare decisis* in the Namibian law above Article 25, dealing with the enforcement of fundamental rights and freedoms, thus making Parliament a higher court of review.

⁶⁸⁰2000(1) ZLR 607(S).

⁶⁸¹*The Chairperson of the Immigration Selection Board and Erna Elizabeth Frank and Another*, 2001 NR 107 (SC).

The Court's reliance on Article 81 is somewhat flawed. If the legislature replaces a constitutionally correct judgment with unconstitutional legislation, an aggrieved person can approach the High Court in terms of Article 25 and request redress.

The Frank case is important and a blow for transformative constitutionalism. It addresses minority rights in a country where homosexuals are not only a minority, but they are also a rejected and despised group. While Article 10 (2), the non-discriminatory clause, lists several non-discriminatory categories, it is clearly not a closed list. The Supreme Court followed a narrow approach which can be criticised for several reasons, mainly because of the unequal treatment of persons based on their sexual orientation. The *Müller* (see the next sub-chapter) test referred to by Cassidy, does not fit the Frank case. Unlike the *Müller case*, there is no other remedy available for homosexual couples who are in a permanent relationship. The results are more serious than a denial to change a surname. The family will be separated and Ms Frank will have to return to Germany.⁶⁸²

One can also make out a good argument for a broader interpretation of the word "sex" as a non-discriminatory category. The Labour Act of 1992⁶⁸³ referred specifically in several sections to sexual orientation as a non-discriminatory category. If the word "sex" excludes sexual orientation in Article 10 of the Constitution, it seems strange that Parliament explicitly included the phrase "*sexual orientation*" in the Labour Act. Since the Labour Act was promulgated on 8 April 1992, taking in consideration the time a bill takes from the drafting to the eventual signing by the President, it is likely that the bill was drafted within the first year of independence.

The most logic conclusion one can draw is that the first government, with its majority in Parliament, was in favour of making an independent Namibian labour environment a place where people of all sexual orientations are tolerated and not discriminated against. If Article 10 (2) of the Constitution explicitly opted for the protection of gender discrimination and the exclusion of protection of discrimination against homosexuals, the specific protection in the labour market does not make sense.

A better explanation would be that both the Constitution and the Labour Act came from the same ideological source sensitive to protect sexual orientation. The

⁶⁸²In this case, Ms Frank eventually received permanent residence after the case.

⁶⁸³Act 6 of 1992.

homophobic statements of the President and other prominent members of the ruling party only started in the second half of the 1990's. This theory is further strengthened by the fact that in the new Labour Act Of 2007⁶⁸⁴ all references to sexual orientation are removed. While the homophobic utterances of prominent members of Parliament and Cabinet can never be an indication of the norms and values of the Namibian people, the historical development of the protection of sexual orientation in Namibia makes any interpretation of the word "sex" as an exclusive word meaning only male or female, highly unlikely, if not impossible.

Unfortunately, until the Supreme Court gets another opportunity to consider the meaning of the word "sex", all courts in the country will have to abide by the Supreme Court judgment in terms of the *stare decisis* rule and the constitutionalism thereof in Article 81 of the Constitution

2.6.8.2.4 The Limits of the Law

Any discussion of the Frank case will be incomplete without a reference to Hinz's (Allot) theory of the limits of law. As noted above in chapter 2⁶⁸⁵, Hinz did not take kind of judicial activism. He approves of the South African Constitutional Court's refusal to immediately translate the constitutional approval of same sex relationships "into an amendment of the South African law that governs marriages", and its decision to to refer the case back to the legislator to change the law.⁶⁸⁶

Hinz does not refer to the High Court judgment, but one can assume that he would not be comfortable with Justice Levy's activism. Neither is he at peace with the Supreme Court's reliance on values as an interpretive tool. While the Court quotes the reliance of the *Ex Parte Corporal Punishment Case on values* "...as expressed in their national institutions... as well as the consensus of values or 'emerging consensus of values' in the civilised international community",⁶⁸⁷ it did not follow that route. Instead, the Supreme Court simply took cognisance of the President and a Minister's repeated rejection of homosexual relationships in Parliament, while no member of the ruling party objected.⁶⁸⁸

⁶⁸⁴Act 11 of 2007.

⁶⁸⁵Chapter 2.3, pp 32 – 33.

⁶⁸⁶Hinz, Justice: Beyond the limits of Law and the Namibian Constitution, in Bösl, Horn and Du Pisani, p. 150.

⁶⁸⁷*Ex Parte Attorney-General: In re: Corporal Punishment by Organs of the State* 1991 NR, p. 178.

⁶⁸⁸Hinz, Justice: Beyond the limits of Law and the Namibian Constitution, in Bösl, Horn and Du Pisani, pp. 158 ff.

Thus, while the High Court judgment giving Frank permanent residence was overturned by the Supreme Court, Hinz points out that justice was eventually served when Frank obtained a permanent residence permit after applying in accordance with the requirements of the law. That, he asserts, underlines the ineffectiveness of the Supreme Court judgment.⁶⁸⁹

Hinz criticises value judgments of the South African and Namibian courts for its simplistic attempt of using values as an alternative to the positivist interpretation of the courts in applying the oppressive apartheid laws: “*For the courts to opt for values does not mean there is an automatism between public opinion and the court decision.*”⁶⁹⁰ In other words, there are limits to the transformative power of judicial activism. He acknowledges that “*post-apartheid, post-colonial, postmodern jurisprudence has to acknowledge values*” and that dealing with it is inevitable in law. But he warns that jurisprudence cannot solve all legal problems, or as he put it:

*...jurisprudence has to acknowledge the strong message of **The limits of law** that urges us to test the societal environment in terms of the extent to which the far-reaching employment of controversial values by the judiciary would be conducive to an intended decision, as these intended decisions would otherwise run the risk of becoming ineffective.* (emphasis Hinz).⁶⁹¹

Hinz refers to the approach of the South African Constitutional Court, more specific the judgment of Justice Sachs in the Fourie case.⁶⁹² While the Court acknowledged the constitutional rights of same sex partners, Justice Sachs was not prepared to change the South African Marriage Act⁶⁹³ to allow same sex marriages with an activist judgment in line with the Constitution without giving the general public the opportunity to discuss the issue.⁶⁹⁴ This approach Hinz asserts, creates an adequate framework for value assessments and shows respect for the limits of law.

Hinz has a point. Values judgments or a post-modern approach such as transformative constitutionalism can easily transform the judiciary in a legislator.

⁶⁸⁹ *ibid*, p. 160.

⁶⁹⁰ *ibid*, p. 159.

⁶⁹¹ *ibid*, p. 160

⁶⁹² *Minister of Home Affairs and Another v Fourie and Others; Lesbian and gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR355 (CC) at p415.

⁶⁹³ Act 25 of 1961.

⁶⁹⁴ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*, p. 406.

However, acknowledging the limits of law in constitutional cases can also be seen as a compromise that satisfies no one. The fact that Elizabeth Frank eventually received permanent residence did not change the fate of Namibian homosexuals in general. The Supreme Court's erroneous interpretation of article 10 of the Constitution remained intact. While Frank did not approach the Court for permission to marry her partner, the legal issue in both the High and Supreme Courts was not limited to Frank's residence permit. The constitutional question was the applicability of article 10 to permanent same sex relationships and the meaning of the non-discriminatory category "sex" in the said article.

It may be helpful to allow the public to participate in the constitutional debate. But one should not confuse constitutionalism with majoritarianism. The Makwanyane case⁶⁹⁵ in the South African Constitutional Court explains the principle. The judges acknowledged that the majority of South Africans were in favour of the death penalty. Yet the Court decided unanimously that the Constitution demands the abolition of the death penalty.

At the time of writing of this thesis, no attempt has been made by either the government or the Namibian judiciary to reconsider the issue of the protection of same sex relationships. One can never predicted what could have been the result had the Supreme Court followed the High Court. However, even if it did not change the attitude of the ruling party or the majority of the Namibian nation, it would have given legal protection to same sex relationships.

While the acknowledgement of or respect for the limits of law may be helpful in some cases, and may caution against an over-enthusiastic bench, it does not make the need to interpret a post-modern constitution in a transformative manner.

6.9 Minority Rights

The apartheid history of Namibia undoubtedly played an important role in the fact that the Constitution does not protect minority rights as such. However, the issue is all but clear in international law. One school of thought does not see minority rights as rights at all. It prefers to see it as a general principle embedded in all protected rights.

⁶⁹⁵*S v Makwanyane* 1995 (7) BCLR 793 (CC).

The Namibian Constitution seems to fall in this category too. The Supreme Court has described the Constitution as an irrevocable... *constitutional commitment to equality and non-discrimination and (the) eradication of racial discrimination and apartheid and its consequences*.⁶⁹⁶

However, one of the legacies of apartheid was the splitting of people into groups and sub-groups under the pretension of protecting minorities. In Namibia, this obsession with groups leads to many absurdities. While the country surrounded by two deserts hardly provides enough for its sparsely populated communities, the Odendaal Commission came up with a plan to split the country up in several ethnic states. To give expression to this ideology, in daily life not only whites and blacks were separated, but also the different ethnic black groups.⁶⁹⁷

Katatura, the black township developed when the people were removed from Ou Lokasie (Old Location), a township surrounded by so-called white suburbs in 1959, was from the outset divided in different ethnic areas: Wambo Location, Herero Location, etc. Even the development for the upper class in Katatura, is a reminder of the ethnic divisions of the apartheid era. The name, Wanaheda, is an acronym of the first letters of the different ethnic groups: **W**ambo, **N**ama, **H**erero and **D**amara. (emphasis mine)

Consequently, a specific section protecting the different rights of ethnic or social groups, were just not on the table. For the Namibian mindset in 1990, the reaction against apartheid required a restructuring of society based on the rights of the individual rather than on groups. Instead, the Constitution opted for a general protection of rights, as we have seen above. In a newspaper article on affirmative action, Kosie Pretorius, a former Nationalist Party leader,⁶⁹⁸ and the only proponent of minority rights in the Constituent Assembly, pointed to the difficulties the Constituent Assembly had with the concept of group rights.⁶⁹⁹

⁶⁹⁶ *S v Van Wyk* 1993 NR (SC) at p. 452.

⁶⁹⁷ The different white language or ethnic groups (Afrikaans, German, English and Portuguese) were not sub-divided. That demonstrated the hypocrisy of the system. However, South Africa established second tier Governments for the black ethnic groups (separate governments for the Basters and coloureds), but only one second tier government for all whites.

⁶⁹⁸ Pretorius represented Action Christian National, a coalition between the National Party and the Deutsche Aktion, in the Constituent Assembly. The Deutsche Aktion withdrew from the coalition and in the second and third Parliaments Pretorius was the sole representative of Monitor Action Group, the successors of the Nationalist Party in Namibia.

⁶⁹⁹ 2004. Parliamentary Potholes, weekly column in the *Windhoek Observer*, 10 January 2004, pp. 12 and 13.

The sub-committee of the Constituent Assembly that dealt with the issue of affirmative action strongly felt that only individual rights and not group rights should be protected. It went as far as stating that affirmative action advantages should not be available to blacks who, despite the system of apartheid, were not socially and economically disadvantaged.⁷⁰⁰ Consequently, even the wording of Article 23(2) was changes from

Nothing contained in Article 10 shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of a class of persons or groups within Namibia who have been socially, economically or educationally
To: *Nothing contained in Article shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally(emphasis mine)*

The issue of group rights came on the agenda of the Supreme Court in an indirect way first In the *Müller case*.⁷⁰¹ Müller and his wife Ms Engelhardt claimed that the Aliens Act of 1937 is unconstitutional since it unfairly discriminates against men allowing wives to take on their husband's surname after marriage, while denying the same rights to men. Müller approached the High Court, but lost the case. He then appealed to the Supreme Court.

While the issue has very little to do with groups, unless married men can in some way or another be seen as a identifiable group, in determining if the Aliens Act discriminates unfairly against men, the Court developed a test with a strong emphasis on groups.

There can be no doubt that the Act clearly differentiates between men and women, which is an enumerated ground stated in Article 10 (2) of the Constitution. To place the differentiation in context, the Court stated that discrimination could not be approached in the Namibian context from a neutral position.

Following the South African Constitutional Court, the Supreme Court stated that the words *discriminate against* in Art. 10 (2) of the Constitution refer to the pejorative meaning of *discrimination* and not its benign meaning.⁷⁰²

⁷⁰⁰Ibid. The minutes of the sub-committees of the Constituent Assembly were never released by the government and are consequently not available to the public, hence the use of secondary sources.

⁷⁰¹*Müller v President of The Republic of Namibia* (SA 2/98) [1999] NASC 2; 200 (6) BCLR 655 (NMS).

⁷⁰²Ibid, p. 665.

The enumerated list of categories in the anti-discrimination article 10 (2), the judge concluded must be seen in the light of the Namibian past. All these categories were in the past singled out for discrimination. Reading Article 10 with Article 23,⁷⁰³ it is clear that the purpose of Art. 10 “is not only to prevent further discrimination on these grounds but also to eliminate discrimination, which occurred in the past”.⁷⁰⁴

The Court struggled with the old problem that the former oppressor could also use the provisions and protections of the Constitution against those people who opposed oppression. Ramose echoes the frustration of many when he said the benefits of a constitutional dispensation serves only the colonial conqueror.⁷⁰⁵

The Court however pointed out that the Namibian Constitution differs from Article 9(3) of the South African Constitution. It does not create a resumption of unfairness in cases of discrimination like Article 9(3), and the enumerated categories are a closed list in the Namibian Constitution and an explicit open list in the South African Constitution.

The Court developed certain guidelines to determine unfairness in terms of Art. 10 (2). In this process, the Court used Article 23 as a hermeneutical key to get to the intended meaning of the word *discrimination*.

The Court emphasized that the different criteria should not be evaluated in isolation. The corporate effect of all the factors needs to be evaluated.

The factors are:

1. The disadvantaged **group** (emphasis mine JNH);
2. The nature of the power causing the discriminations;
3. The interests affected;

⁷⁰³Preamble

(1) *The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.*

(2) *Nothing contained in Article 10 shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.*

(3) *In the enactment of legislation and the application of any policies and practices contemplated by Paragraph (2), it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enable to play a full, equal and effective role in the political, social, economic and cultural life of the nation.*

⁷⁰⁴Müller, pp. 666 and 667.

⁷⁰⁵See: Ramose. 2003, p. 5.

4. The impact of the discrimination on the victim;
5. The complainant's position in society;
6. Whether the complainant suffers from a pattern of disadvantage;
7. The purpose of the discrimination;
8. The extent of the complainant's prejudice; and
9. Whether the discrimination has led to an impairment of his/her dignity.

In applying the test to the case, the Court concluded that this is not a matter of unfair discrimination for the following reasons:

- Müller, being a white male immigrant from Germany after independence, cannot claim that he has been part of a disadvantaged group in the previous dispensation;
- One cannot conclude that the act impairs the dignity of males as a group or as individuals;
- Names and surnames play an important role in the ordering of society. Consequently, the process and records must guarantee that proper identity is maintained;
- The provision that wives may take on their husband's surname is based on a tradition of longstanding in Namibia; and
- A husband is not without remedy. He can change his surname using the general procedure open to all Namibians.

The appeal was dismissed.

While the *Müller case* dealt with a very personal matter of an individual without deep roots in any identifiable group in Namibia, the Court opted to make groups an important key in interpreting Art. 10(2), which like Article 23, do not use the word *group*. If one reads the minutes of the sub-committee of the Constituent Assembly that dealt with Art. 23, it seems as if the omission of the word *group* was an explicit act to get away from an era obsessed with groups.

There are two ways to look at the transformative value of the *Müller case*. One would be to see it as a traditional formalistic approach. From this perspective there is not much positive to be said about the judgment. The Court missed the fact that this is not a matter of discrimination against men *per se*, but in essence legislation intending to maintain women in a subordinate position. She will always, be the one to sacrifice her surname. The Court opted to ignore this historical

subordinate position of women in society, which is ongoing and should be corrected by positive transformative constitutionalism.

One can however, analyse the judgment from a different angle. Although groups were not the main issue in the case, the Supreme Court judgment moved the case away from a mere gender issue of inequality between men and women. While the Court does not use the term “group rights”, it nevertheless meticulously looked at the position of Müller in relation to the advantage or disadvantage of his group in the colonial era.

Given the abuse of group rights in the colonial era, and specifically in the time of the so-called Transitional Government of National Unity, emphasis on groups may end in a situation where national reconciliation is sacrificed for a new appreciation of race and ethnicity. Recent developments in Namibia have shown that ethnic divides are alive and well.⁷⁰⁶ The Affirmative Action Act has also taken the groups route in defining their categories as *previously disadvantaged groups*.

The specific application of groups in the *Müller case* can be questioned and the evolutionary interpretation of Article 10 to include groups may turn back the constitutional clock rather than transforming society.

As for Mr Müller, he took the case to the Human Rights Committee, the complaint organ of the International Covenant on Civil and Political Rights, where the advisory opinion went in his favour.⁷⁰⁷ Mr Müller added his wife Ms Engelhard when they approach the Human Rights Committee for relief, and made it an issue of discrimination against both women and men. The Namibian government did not change the Aliens Act because of the opinion and Mr Müller went to Germany to have his surname changed to Engelhard.

6.10 The Independence of the Judiciary: The Magistracy

Several magistrates’ conferences discussed the position of magistrates since independence as part of the independent judiciary. However, the issue got serious

⁷⁰⁶The multi-cultural opposition party the Democratic Turnhalle Alliance, fragmented when two of its former ethnic member parties, the Republican Party for whites, and NUDO, a Herero party, came out of their hibernation and registered with the Independent Electoral Commission. The centenary commemoration of the German/Herero war and the subsequent genocide resulted in a new wave of nationalism. The Herero paramount chief, Chief Riruako, was at the time pursuing litigation in the United States of America against German companies who benefited from colonial exploitation despite the Government’s opposition.

⁷⁰⁷Advisory Opinion No. 919/2000. Session 74, *Michael Andreas Müller and Imke Engelhard v. Namibia*.

attention when the magistrate of Gobabis asked the High Court to review his transfer to Oshakati. Not satisfied with the judgment, he later appealed to the Supreme Court.

The Supreme Court ruled that in the light of the constitutional independence of the judiciary, magistrates could not be public servants.⁷⁰⁸ Referring to the South African constitutional Court case *Van Rooyen and Others v The State*⁷⁰⁹ the Court stated that it does not mean that they should be appointed in the same manner as judges. The Namibian Constitution makes a clear difference as well. The President upon recommendation of the Judicial Service Commission appoints judges, their salaries may not be reduced and the circumstances in which they may be removed from office are prescribed.

The Constitution does not render the same protection to magistrates. There is not even an indication that an independent commission must appoint them.⁷¹⁰ However, that does not mean that their independence is unimportant. Yet, the hierarchical differences between magistrates and judges must be considered. Magistrates have a lesser jurisdiction,⁷¹¹ they do not have constitutional review powers, i.e. they cannot strike down unconstitutional laws, they are courts of first instance,⁷¹² aggrieved persons can take all the judgments of the magistrate's courts on appeal and the High Court automatically review longer sentences of district courts.

The Court made it nevertheless clear that the independence of magistrates is part of the constitutional dispensation. It affirmed that Article 78,⁷¹³ of the Constitution, dealing with judicial independence, includes all the courts in Namibia.⁷¹⁴

⁷⁰⁸*Mostert v Minister of Justice*, 2003 NR 11 (SC).

⁷⁰⁹2002 (5) SA 246 (CC); 2002 (8) BCLR 810.

⁷¹⁰Art. 83, dealing with lower courts, reads as follows:

(1) *Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.*

(2) *Lower Courts shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.*

⁷¹¹The jurisdiction of regional court magistrates have increased tremendously after independence. A regional court magistrate can trial any crime but high treason, including murder and rape. She/he can bestow a sentence of twenty years per charge.

⁷¹²The Community Courts Act gave district courts appeal powers over the community court judgments.

⁷¹³Sections 2 and 3 reads 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.*

Since the legislator did not comply with the expectation of Article 78 to pass legislation regulating an independent magistracy, the Permanent Secretary of the Ministry of Justice just took over the pre-independent role of the South African directors and the laws regulating the Public Service. Consequently, magistrates in Namibia were public servants and operated under the Public Service Act 13 of 1995. The authority of the Permanent Secretary to transfer magistrates (the issue of the Mostert case), came from section 23 (2) of the Act.

Before independence, Act 32 of 1944 regulated both South African and Namibian magistrate's courts. The Act dealt with magistrates as part of the public service. The magistrate was not only to be the presiding officer in the magistrate's court, she/he was also the head of the office. They had to handle leave of the clerks and prosecutors, the daily administration of all aspects of the office, such as liquor licenses, tax and VAT collections, issuing of birth certificates, and all other functions assigned to the office.

The main cause of disagreement of the appellant, Magistrate Mostert, was the power of the Minister of Justice to appoint magistrates. Act 1 of 1999 amended Act 32, but the amendment was not aimed at bringing the magisterial profession in line with the Constitution. On the contrary, the Minister not only remained as the appointing officer of magistrates, she/he also received the power to appoint any other competent staff member in the Public Service or a competent retired staff member to act in the place of an absent or incapacitated magistrate.⁷¹⁵

The main objective of the amendment was to deal with the legality of regional court magistrates. After independence, the Appointments Advisory Board, a South African body dealing with the appointment of regional court magistrates, seized to deal with Namibian appointments. The Minister just took over the Board's functions. The amendment gave legality to this practice. In effect, the Minister gained total control over the appointment of magistrates.

The Supreme Court concluded that the amendment did not give effect to Article 83 (1) of the Constitution.⁷¹⁶ The Chief Justice then made the following comment regarding the two Acts:

⁷¹⁴2003 NR p. 31.

⁷¹⁵Subsection 3.

⁷¹⁶*Mostert v Minister of Justice*, 2003, (SC), p. 33.

*It seems to me futile to leave intact the provisions of Act 32 of 1944 which are in conflict with the Constitution. To do so would be to give legal impetus to provisions which are not constitutional. In my opinion it is necessary to finally cut the string whereby magistrates are regarded as civil servants, and that will only be possible once new legislation completely removes them from the provisions of the Public Service Act.*⁷¹⁷

Consequently, the Supreme Court declared sections 9 (as amended) and 10 of the Magistrates' Courts Act 32 of 1944 unconstitutional. It gave government six months to correct the legislation. Further the Court declared that section 23(2) (a) of Act 13 of 1995 is not applicable to magistrates and “that consequently the order of the Permanent Secretary to transfer the appellant, was ultra vires”.⁷¹⁸

As a result, Parliament passed the Magistrates Court Act, 3 of 2003. The long title of the Act reads as follows:

To provide for the establishment, objects, functions and constitution of a Magistrates Commission; to provide for the establishment of a magistracy outside the Public Service; to further regulate the appointment, qualifications, remuneration and other conditions of service of, and retirement and vacation of office by, magistrates; to provide that certain conditions of service of magistrates may be prescribed by regulation; and to provide for matters in connection therewith.

The objectives of the Supreme Court are clear. It identified two problems in the *status quo*: the fact that Minister of Justice, a political appointee, has the exclusive power to appoint both district and regional magistrates, and the fact that magistrates are still seen as public servants despite the clear stipulations of the Constitution. The judgment nowhere referred to the Minister as a political appointee, although the separation of power remains the most important aspect of judicial independence. The Supreme Court solved the conflict between the Attorney General and the Prosecutor-General with a clear judgment that the Prosecutor-General as a quasi-judicial office must be independent of the Attorney General, a political appointee.⁷¹⁹

⁷¹⁷Ibid, p. 35.

⁷¹⁸Ibid, p. 39

⁷¹⁹See *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*, 1998 NR 282 (SC) (1)

If the independence of the Prosecutor-General from the Attorney General is crucial for the independent functioning of the prosecutorial authority, cutting the umbilical cord of the magistrates from the Minister of Justice must be even more crucial.

During the fourth government of Namibia under the new presidency of Hifikipunya Pohamba, the same person held the Offices of Minister of Justice and the Attorney General. It is ironic if the Minister cum Attorney General is kept at arm length from the Prosecutor-General, but allowed to play a major role in the execution of the magistracy in Namibia.

Yet, the objectives set by the Act in section 3 still give the Minister the central stage:

- a) to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, magistrates take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and correctly;*
- b) to ensure that no influencing or victimization of magistrates takes place;*
- c) to promote the continuous judicial education of magistrates and to make recommendations to the Minister in regard thereto;*
- d) to ensure that properly qualified and competent persons are appointed as magistrates; and*
- e) to advise the Minister regarding any matter which, in the opinion of the Commission, is of the interest for the independence of the magistracy and the efficiency of the administration of justice in the lower courts.*

While sub articles (a) and (b) emphasize the independence of the magistrates, the two issues dealt with in the Supreme Court, the role of the Minister in terms of the old Magistrates Court Act, and the role of the Permanent Secretary in terms of the Public Service Act, is not even mentioned. On the contrary, subsections (c) and (e) give the impression that the Minister is still the major role player. The only role in the objectives given to the Magistrates Commission is to advise the Minister of its opinion on matters of the interest for the independence of the magistracy.

If it were the intention of the legislator to acclaim the independence of the magistracy, one would have expected a central position for the Commission in the Act. While the judgment did not give specific guidelines, as to how the legislator should meet the demands of Art. 83 of the Constitution, the reference to *Van Rooyen*

and Others v The State, possibly inspired the legislator or Cabinet to look south for guidelines. In South Africa, a Magistrates Commission replaced the Minister.

The Namibian Act describes the role of the Magistrates Commission in appointing magistrates as follows-⁷²⁰

The Commission must:

f) *make recommendations to the Minister with regard to –*

...

i) *the suitability of candidates for appointment as magistrates;*

The appointment of magistrates is still in the hands of the Minister of Justice who may appoint magistrates at the recommendation of the Magistrates Commission. If it had not been for the permissible *may* in the text, the fact that the Minister acts on the recommendation of the Commission would have created an acceptable check on the power of the Minister. *Recommendation* is a much stronger word than *consultation*.

Consultation places a burden on the official to obtain an opinion from the consultative body. After consultation, the official is free to make her/his own choice, if it does not contradict the common law, principles of natural law and the Constitution.

The Namibian practice has created a precedent that will make it difficult for an official not to follow the recommendation of a body prescribed by law to recommend.⁷²¹ It is not clear why the legislator used the permissible *may* rather than

⁷²⁰The full text of section 4(1) reads as follows:

(1) *The Commission must –*

a) *prepare estimates of the expenditure of the Commission and the magistracy for inclusion in the annual or additional budget of the Ministry of Justice;*

b) *compile, after consultation with the Judges' and Magistrates' Association of Namibia, a code of conduct to be compiled with by magistrates;*

c) *receive and investigate, in the prescribed manner but subject to subsection (4), complaints from members of the public on alleged improper conduct of magistrates or alleged maladministration of justice in the lower courts;*

d) *receive and investigate, in the prescribed manner, complaints and grievances of magistrates;*

e) *carry out or cause to be carried out disciplinary investigations into alleged misconduct of magistrates;*

f) *make recommendations to the Minister with regard to –*

i) *the suitability of candidates for appointment as magistrates;*

ii) *the minimum standard of qualification required for the purposes of section 14;*

iii) *the conditions of service of magistrates, including their remuneration and retirement benefits;*

iv) *the dismissal and retirement of magistrates; and*

v) *any matter referred to in section 3(e); and*

g) *perform any other function entrusted to the Commission by or under this Act or any other law.*

⁷²¹See sub-chapter 5.11, p. 13 above.

a clear instructive sentence: *The Minister **shall** on the recommendation of the Commission..... appointment.... magistrates....on the permanent establishment.*
(bold JNH)

The word *may* can never mean that the Minister does not have to appoint magistrates to vacant posts if she does not feel like it. It clearly cannot mean that the Minister may leave the appointment to someone else, or to the Magistrates Commission, since those options are not provided for. Alternatively, does it mean that the Minister can also appoint without any recommendation, but he may also request the Commission to recommend? Such an interpretation would fly against the Supreme Court judgment.

Even if the wording of the Act cannot be interpreted to allow the Minister unrestricted powers to appoint, it remains suspicious that the legislator used the permissive sense without any specific objective. If nothing else, it points to a stubborn challenge to the Constitution and constitutionalism by government.⁷²²

The Act did not go unchallenged. Magistrate Mostert went back to the High Court.⁷²³ Mostert challenged the independence of the Magistrates Commission and the role of the Minister in the new Act.

The High Court concluded that although the Minister plays a role in the appointment of the Commission, it could not be said that the members are therefore bound to follow the directives of the Minister. There are several checks built into the Act that will make the appointments credible and will make it extremely difficult for the Minister to manipulate any process.⁷²⁴

The Commission consists of one judge designated by the Judge-President, the chief lower courts, one person designated by the Attorney General, one person designated by the Judicial Service Commission, one magistrate appointed by the Minister from a list of three magistrates nominated by the Judges' and Magistrates' Association of Namibia, a staff member of the Ministry of Justice designated by the Minister and one teacher of law appointed by the Minister from a list of two teachers of law nominated by the Vice-Chancellor of the University of Namibia.⁷²⁵

⁷²²In two post 2004 judgments the High Court limited the power of the Minister in its interpretation of the Act. That, however, is a subject of further research.

⁷²³*Walter Mostert and Another v Magistrates Commission and Another*, unreported case of the High Court of Namibia, Case No.: (P) I 1857/2004.

⁷²⁴See the elaborate answer of the Court to each of the criticisms against the members of the Commission, pp. 20ff.

⁷²⁵Section 5(1).

Although the Minister appoints three persons, he/she is limited in his/her choices of the magistrate and the law teacher. The Public Service Commission is an independent constitutional organ and they have the power to designate a member. In the same manner, one cannot question the independence of a High Court judge. Consequently, at least four of the seven members are independent. On these points, I agree with the judgment.

The applicant is also wrong in stating that six of the seven members of the Commission are public servants. The Court pointed out that nothing stipulates that the Public Service Commission designated member must be a public servant⁷²⁶ and the UNUM law teacher is also not a public servant.⁷²⁷ It seems strange that the Minister should get three nominations from the Judges' and Magistrates' Association. The section looks suspicious. However, it is highly unlikely that the Association will nominate anyone to the Minister that will not represent the Association's own strong principled position on the independence of the judiciary.

The designated members of the Minister⁷²⁸ and the Attorney General are public servants, as is the Chief Lower Courts.⁷²⁹ Since one person in the Pohamba cabinet occupied the positions of Minister of Justice/Attorney General, the Minister/Attorney General directly oversees the employment of three of the seven Commission members.

The Court erred in stating that the appointment of a politician is of no significance to the independence of the office. This is the position of the South African Constitutional Court, but not the position of the Namibian Supreme Court.⁷³⁰

The Constitutional Court made the same point as the Namibian High Court: The Ex Parte Prosecutor-General/Attorney-General saw important significance for the independence of the Office of the Prosecutor-General in the fact that she/he is,

⁷²⁶Walter Mostert and Another v Magistrates Commission and Another, p. 24.

⁷²⁷Both members of the Faculty of Law, who have been appointed by the Minister since the Act was promulgated, were practicing legal practitioners.

⁷²⁸The Court stated that the representative of the Ministry of Justice only needs to be a suitable person and not necessary a public servant. This assertion seems to be wrong if one considers the wording of the Act: *one staff member of the Ministry of Justice designated by the Minister.*

⁷²⁹See *Kobi Alexander v the Minister of Justice and Others*, 2009 (2) NR 712 (HC). The Court ruled that the Chief Lower Courts could not sit on this extradition case since he is a public servant. In terms of the Extradition Act the Minister and not the Magistrates Commission must do the appointment of a magistrate to hear the extradition application.

⁷³⁰See: Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

unlike the Attorney General appointed at the recommendation of the Judicial Service Commission.⁷³¹

The fact that the Minister of Justice/Attorney General appoints two public servants from his/her own fold of employees, does not reflect well on the independence of the Commission, especially if a third member is a staff member of the Ministry of Justice.

The Court stated that even if the Commission is not independent, it does not reflect negatively on the independence of magistrates.

I see nothing in the Constitution which suggests that magistrates should be appointed by an independent body. That would in any event be requiring standards more rigorous than those in place for the appointment of Judges and would go against the spirit of the Supreme Court judgment. I do not therefore see on what basis the fact that the Minister is the appointing authority for Magistrates can, without more, be objectionable if Judges are appointed by the President who wields ultimate executive power in the Republic.⁷³²

However, the appointment of judges by the President at the recommendation of the Judicial Service Commission is not comparable to the Minister who *may* appoint magistrates at the recommendation of the Magistrates Commission and the Minister who, appoints two members of the Magistrates Commission and plays a role in the appointment of four others.

The Supreme Court obviously had a problem with the huge role the Minister and her/his senior public servant, the Permanent Secretary, played under the old dispensation. Yet, the Magistrates Act did not limit the powers of the Minister. Neither did it bring real independence to the magistrates or gave substantive power to the Magistrates Commission.

The Act gives the magistrates in office at the time of the promulgation of the Act tenure of office, which meant that the newly appointed Commission did not have the opportunity to make a fresh start with a magistrates approved and selected by them.

⁷³¹See Horn, N. 2008. A Comparison between the NDPP of South Africa and the Prosecutor-General of Namibia, in Horn, N and Bösl, A (eds.). 2008. *The Independence of the Judiciary in Namibia*, Windhoek: Gamsberg Publishers. See also Maughan, K and Webb, B. 2007. The desperate bid to shield Selebi. *Mail & Guardian*. 5 October 2007. Accessed on 13 November 2009.

⁷³²*Walter Mostert and Another v Magistrates Commission and Another*, p. 23.

The High Court quoted several South African and Canadian cases and the earlier *Mostert* case and then made the following comment:

*Judicial independence can be achieved in a variety of ways; the most rigorous and elaborate conditions of judicial independence need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.*⁷³³

One cannot argue with this position. The Constitution does not set the same requirements of appointment for the Superior Courts and the Magistrate Courts. However, both the Constitution and the Supreme Court in the first *Mostert* case and the *Ex Parte Attorney-General/Prosecutor-General* case laid down some benchmarks for independence. The Magistrates Commission Act did not meet these benchmarks.

The applicants did not appeal to the Supreme Court. Magistrate Mostert resigned and his counsel, Adv E. du Toit, SC, passed away. Despite the positive judgment of Justice Strydom, the Magistrates Act and subsequent High Court case are opportunities lost. The magistrates were still not fully independent in 2004 and the authority of the Minister of Justice remained intact. For many magistrates the new Act meant less power and more frustration.⁷³⁴ Since so many aspects of the running of the magistrates courts are still in the hands of the Minister, magistrates may still look to the Permanent Secretary and the Minister to solve their problems rather than the Magistrates Commission.

6.11 The Right to Legal Representation:

The Relationship between the Human Rights Covenants and the Constitution

The high treason case against the so-called Caprivi secessionists had a very important legal off shoots. The case ended in the Supreme Court when the

⁷³³See *Valente v The Queen* 1986 24 DLR (4th) 161 (SCC); *The Queen in Right of Canada v Beauregard* 1986 30 DLR (4th) 481; *Lange v Smuts NO and Others* 1998 (3) SA 785 at p 813 ff (CC).

⁷³⁴Since the magistrate is no longer a public servant, she/he has no authority over the administrative staff. Since it is the duty of the clerk of the court to have records typed and sent appeals and reviews to the High Court, the best a magistrate can do if the clerk does not comply, is to report him/her to a superior at the Ministry.

government appealed against a High Court judgment,⁷³⁵ (hereafter the *Mwilima case*) dealt with the right to free legal representation.

The respondents (applicants in the *court a quo*), 128 of them, were all accused of high treason after an uprising and eventual attack on several targets in Katima Mulilo in the Caprivi. They were all refused legal aid and launched an application in the High Court (the *court a quo* in this case). The *court a quo* ordered the second appellant, the Director of Legal Aid to appoint legal counsel for the respondents. The government appealed against this decision.

The legal question focussed on the enforceability of Art 95(h) of the Constitution. Unlike first generation or civil and political rights, social, economic and cultural rights are not entrenched in the Bill of Rights (chapter 3). They are part of Article 95 under the Principles of State Policy (chapter 11).

The government argued that Article 95(h) - the right to free legal representation, - unlike the basic right to legal representation in Article 12(e), are limited to defined cases and resources of the State.⁷³⁶ The respondents did not agree with the issue of limited responsibility, but argued that in this particular case the facts and legal issues are such that the accused will not get a fair trial unless they get legal representation. Since the State refuses to or is unable to provide legal representation in terms of Article 95(h), the Court should make a ruling in terms of Article 12(e) – the right to legal representation to ensure a fair trial.

An unfortunate amendment to the Legal Aid Act, 29 of 1990, was the subtext of this case. Initially Section 8(2) gave a High Court bench the authority to issue a legal aid certificate to an unrepresented accused if there is sufficient reason why the accused should be granted legal aid. The certificate compelled the Director of Legal Aid to grant legal aid to the accused.

The government wanted to limit the rights of the courts to make decisions that could place a financial burden on the State. “Government felt that certificates were issued indiscriminately by the judges without due regard to available funds with the result that during successive years the funds allocated for legal aid were

⁷³⁵*Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

⁷³⁶Art. 95 (h) reads as follows:

The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

.....(h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.

exceeded'.⁷³⁷ Parliament amended the Act and removed the mentioned sections of the Act.

The applicants in the court *a quo* concentrated on the amendments and requested the High Court to declare them unconstitutional. The High Court found it unnecessary to entertain the constitutionality or not of the amendments. The effect was that the granting of legal aid in terms of the Act was taken from the High Court and placed solely in the hands the bureaucratic structures of the Ministry of Justice.

The government attorney, who represented the appellant in the Supreme Court, argued that since a Court in terms of Article 101 cannot legally enforce principles of state policy, the courts have no jurisdiction whatsoever to determine if and under what circumstances legal aid should be awarded. Any instruction by the Court to the State to grant legal representation to an accused would be inappropriate and an intrusion "on the exclusive domain of Parliament to decide how and in what way funds should be allocated to its various ministries".⁷³⁸

The majority judgment, written by Justice Strydom, agreed that that art 95(h) expresses only the intention of government to facilitate equality and justice by providing statutory legal aid to those who qualify. The implementing legislation that gives effect to Article 95(h) is the Legal Aid Act. With the amendment, the judges can no longer intervene where the Legal Aid Board or the Director have turned down an application for legal aid. The Court called this form of legal aid statutory legal aid.⁷³⁹

However, this is not the last word on the responsibility of the Court. It may be that the Court is of the opinion that a accused will under certain circumstances not receive a fair trial in terms of Articles 10(1) and 12, especially sub-article 1(e), if he/she is not represented. Then it is the duty of the Court to ensure that steps are taken to guarantee a fair trial. Article 12, being part of the enshrined Bill of Rights, is not part of the principles of state policy and not subjected to budget constraints or availability of resources.

How can the court obtain the authority to instruct the government to grant legal aid if it can no longer issue legal aid certificates and prevented by Article 101 to compel government to provide legal aid? The Court began its argument by pointing out that the categories of fair trial elements mentioned in Article 12 are not closed. In

⁷³⁷Commentary of the Chief Justice in *Mwilima* case, p. 250.

⁷³⁸Ibid, p. 255.

⁷³⁹Ibid,

*State v Scholtz*⁷⁴⁰ where the Court looked at the principle of equality before the law in Article 10(1) of the Constitution and concluded that state disclosure is a principle of a fair trial, although state disclosure is not one of the fair trial categories of Article 12.

Consequently, Article 10(1) is also a test to determine if a trial is fair in terms of Article 12. There can be instances where two suspects have equally strong defences. Yet one may not get a fair trial because he/she does not qualify for legal representation in terms of the provisions of the Legal Aid Act or because of a lack of state resources. The limitations of Article 95(h) and the Legal Aid Act still stand in the way of a fair trial for the accused. The Chief Justice found the answer in Article 144 of the Constitution:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Since Namibia ratified both International Covenant on Civil and Political Rights (ICCPR) and its optional protocols, it forms part of Namibian law in terms of Article 144 of the Constitution. Although the Court did not go into the general rules of direct application, it found that the ICCPR is indeed part of Namibian law and the courts must accede to it. Section 14(3) of ICCPR is a combination of Articles 12(1)(e) and 95(h), without the limitations of Article 95, providing legal aid "... in cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". Consequently, as a party to ICCPR, Namibia is bound to apply section 14(3) in its municipal courts.

The two judges who wrote separate judgments agreed with the principle that the State is bound under the specific situation to grant legal aid to the accused. Judge O'Linn suggested that the idea of two forms of legal aid is confusing. All legal aid, he held, is grounded in the Legal Aid Act. Nevertheless, in terms of the provisions of ICCPR and taking Article 95(h) in consideration as a principle of the state policy in effecting justice, the Court can instruct the State to provide legal aid, irrespective of the fact that a specific budget is depleted.

⁷⁴⁰1998 NR 207 (SC).

The Court made it clear that legal aid will never be automatic. The Court will always have to satisfy itself that it is indeed in the interest of justice to grant legal aid in a specific case, and that the refusal of legal aid will make a fair trial impossible.

The judgment was a clear message to the legislator. The protection granted by the Constitution and especially the Bill of Rights (chapter 3), cannot be annulated by innovative legislation. Justice O'Linn made the following comment:

*If the intention of the amendment was to exclude the function of the Court, it was an exercise in futility, because as shown in this decision, the Court retains the power in accordance with articles 5 and 25 of the Namibian Constitution to decide whether or not legal aid must be supplied by the Government (the executive) and/or the Director of Legal Aid to ensure a fair trial as contemplated by articles 12 and 10 of the Namibian Constitution and section 14(3) (d) of the aforesaid convention on political and human rights which is part of the law of Namibia.*⁷⁴¹

The direct application of the Section 14 of the ICCPR was an innovative and exciting development in constitutional jurisprudence in Namibia, albeit somewhat naïve. The constant reference to *The Covenant* gives the reader the impression that the Court is not aware of the other Covenant – The Covenant on Social, Economic and Cultural Rights, (ICSECR) which was ratified by Namibia on 28 November 1994, the same day that it ratified ICCPR.

Nevertheless, the judgment opened the door for litigation based on a violation of social and economic rights. If the Constituent Assembly included Article 101 to make sure that government is not burdened with litigation laying claims on economic and social benefits envisaged in Article 95, the *Mwilima* case came as a wakeup call.

Nakuta reminded us that Namibian litigation has done little to improve the socio-economic fate of the vast number of poor people and to narrow the gap between the rich and the poor.⁷⁴² He reminded his readers that the Vienna Convention declared that all human rights are universal, indivisible, interdependent and interrelated.⁷⁴³

However, in Namibia, civil and political rights have a vast advantage over social and economic rights, mainly because of the exclusion of social and economic

⁷⁴¹Ibid, p. 279.

⁷⁴²Nakuta, J. 2008. The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-Governmental Organisations, in Horn, N. and Bösl, A. 2008. *Human Rights and the Rule of Law in Namibia*. Windhoek: MacMillan Namibia, pp. 89 ff.

⁷⁴³Quoted in ibid, p. 91.

rights from the Bill of Rights and the limitation to litigate placed on it by Article 101. Nakuta argued correctly that the drafters of the Constitution “bought into the idea that social and economic rights were not true rights”.⁷⁴⁴ As a consolation prize, some social and economic rights were listed in Chapter 11 as Principles of State Policy. Instead of second-generation rights being human rights entitlements and tools of empowerment, the poor are left at the mercy of government policies and programmes.⁷⁴⁵

Without referring to the use of the ICCPR in the *Mwilima* case, but with reference to two other Namibian cases,⁷⁴⁶ Nakuta concluded that aggrieved persons could litigate for economic and social rights relying on Article 144 of the Constitution. He also proposed an indirect application of civil and political rights to litigate for second-generation rights.⁷⁴⁷ Several civil and political rights have social and economic consequences. If the right to dignity (Article 8 of the Constitution), is taken seriously, social and economic issues cannot be ignored. How can a person have dignity if he/she is forced by poverty to live on the streets, have no prospect to earn a decent living or the possibility to take care of his/her children?

Nakuta quoted an Indian case – India has the same limitation clause and inferior position of economic rights in its constitution – to prove his point-⁷⁴⁸

*(t)he right to life includes the right to live with human dignity and with all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing, shelter.....*⁷⁴⁹

The *Mwilima* case opened the door for more innovative jurisprudence. One question remains: Is it a valid interpretive model used by the judges or is it what the government attorney called “*inappropriate and an intrusion on the exclusive domain of Parliament*”, and to add Judge O’Linn’s comment, a “*wrongful and unlawful intrusion*” ?⁷⁵⁰

⁷⁴⁴Ibid, p. 95.

⁷⁴⁵See *ibid*, p. 95, as well as the work quoted by Nakuta: Asbjørn, E and Allan, R. 2001. *Economic and Social Rights and Cultural Rights: A universal Challenge*. Dordrecht: Martinus Nijhoff, p. 3.

⁷⁴⁶*Kauesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (NM), also reported as 1994 NR 102 (HC). See also *Muller and Engelhard v Namibia*, CCPR/c/74/D919/2000.

⁷⁴⁷Nakuta, pp. 98 ff.

⁷⁴⁸*Ibid*, p. 99.

⁷⁴⁹*Mullin v The Administrator*, 1981. 2 SCR 516 at 529, quoted in *ibid*.

⁷⁵⁰If the intrusion is not illegal and wrongful, the judge suggested, the Court is left with “nothing more and nothing less than a function and duty placed on it by the Namibian Constitution itself” to see that accused persons’ constitutional rights are not violated. See *Mwilima* (SC), p. 275.

The *Mwilima* case addressed an area of the society in dire need of transformation: the social inequalities of the Namibian nation. While it dealt with a basic civil right, it has an economic agenda – free legal representation. The Supreme Court, in an excellent exercise of legal activism linked free legal representation with the right to a fair trial guaranteed in both Article 12 of the Constitution and the International Covenant on Political and Civil Rights.

In this case, the gap between Art 95 social and economic rights and the civil and political rights of chapter 3 have dramatically been narrowed. One would have expected a floodgate opening up of aggrieved citizens claiming their social and economic rights from the right to health to the general right to a decent living. None of it happened. *Mwilima* remains a once off successful attempt to unlock the economic rights of Article 95. Yet, the effect of the judgment is important. Two aspects of the judgment hold the key for future litigation by aggrieved citizens who are being deprived of their social and economic rights:

- The Namibian courts will, in following the *Mwilima* case, treat Article 95 as a corpus of enforceable rights that can be enforced and not merely as a meaningless statement of state policy; and
- While Article 101 limits litigation prospects for aggrieved citizens, it does not exclude all remedies. The *Mwilima* judgment opened the door to scrutinize the Constitution for other remedies. The litigant may find some possibilities in Article 144 and the ratified covenants and other treaties. The litigant may link a violation of an Article 95 right with a comparable right in Chapter 3. The right to health can be linked to the right to life (Article 6), or the right to a decent living to the right to education. The list goes on.

The South African experience – where economic and social rights form part of the Bill of Rights - unfortunately does not give social and economic litigants hope for real societal transformative constitutionalism. The availability of resources played an important role in both the acclaimed *Grootboom* case⁷⁵¹ and the *Soobramoney* case.⁷⁵² The Constitutional Court recognised Ms. Grootboom's right to housing. Yet, despite the countless number of articles written about the case and the conferences

⁷⁵¹*Government of the Republic Of South Africa And Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁷⁵²*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), also reported as 1997 (12) BCLR 1696 (CC).

around the world to discuss this ground-breaking development, Ms Grootboom died homeless and penniless.⁷⁵³

At the time of the judgment Judge Richard Goldstone, who was not on the bench, referred to the *Grootboom judgment* as "the first building block in creating a jurisprudence of socio-economic rights".⁷⁵⁴ At the time of her death her advocate, Ismael Jamie, said to the Mail and Guardian - "The fact that she died homeless shows how the legal system and civil society failed her".⁷⁵⁵

Soobramoney's fate was worst. He suffered from chronic renal failure. His life could be prolonged if he by an on-going dialysis treatment. The hospital denied his application for treatment since its limited resources only gave the treatment to people eligible for a kidney transplant. Soobramoney approached the Constitutional Court, linking his right to treatment with his right to life. The Constitutional Court refused to intervene, since "the right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees". Soobramoney died of kidney failure.⁷⁵⁶

The South African Constitutional Court took cognisance of the limited resources, restricted the application of their judgment in the Grootboom case, and refused Soobramoney relief.

The Namibian Supreme Court opted to prioritise the rights of the suspects and not the financial burden the judgment placed on the State. Unfortunately, while the judgment opened the door for societal transformation, it did not change society. The dramatic possibilities for future socio-economic adjudication went unnoticed in the legal fraternity. The Court rejected an interpretation seeing Article 101 as an absolute rule to prevent the enforcement of chapter 11 socio-economic rights. For some reason the legal fraternity never saw it as an invitation to start with an aggressive adjudication to enforce socio-economic rights listed in Article 95.

Something needs to be said about the foundation of the judgment. The obvious positivist approach would be to accept Article 101 as absolute. The Court opted to go beyond Article 101 and interpreted the prohibition in the light of two other

⁷⁵³Joubert, P. 2008. Grootboom dies homeless and penniless. *Mail and Guardian Online*, 8 August 2008, published at <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>, accessed on 28 April 2011.

⁷⁵⁴Ibid.

⁷⁵⁵Ibid.

⁷⁵⁶BCLR 1996 (CC), par. 19.

constitutional principles: the right to a fair trial envisaged in Article 3 and the monist approach to international law in Article 144.

Cockrell and Roux's submission that positivism does not exclude transformative constitutionalism has merit. While the Court did not work with an "original intent" approach, it worked with the text. Even if the intention of the Constituent Assembly was to prevent expensive enforcement of socio-economic rights, they did not close all the possible constitutional avenues allowing remedies to enforce Chapter 11 rights to aggrieved citizens. The Court only investigated two of those avenues and found that the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by Namibia and part of Namibian law, and Article 12 of the Constitution, also provide for legal representation to ensure a fair trial.

There was no purposive interpretation, no broad CLS approach and no judicial activism. All it took to come up with an extremely valuable transformative interpretation was a mere acknowledgment that Article 101 is not the only word on the enforcement socio-economic rights.

The old majoritarian argument also applies here. It was well articulated by the Government Attorney. The Constitution makes the granting of legal aid dependent upon resources and the kind of cases, and the Constitution further stated that the Courts cannot enforce Chapter 11 rights (or Principles of State Policy).

How is it then possible that a Court can intrude on this exclusive domain of Parliament and force government to allocate money to suspects in a case where State functionaries denied them legal aid? Is the Court not making law here? In addition, how can the Court rely on a human rights instrument if Article 144 clearly states that Namibian statutory law and the Constitution take precedence over principles of international law?⁷⁵⁷

The Government Attorney gave more weight to her position by stating that the government believes in equality before the law. Therefore, it cannot deplete its legal aid budget on just one case. This seems to be a fair point.

The decision of the Prosecutor-General to prosecute all 128 accused for high treason does not make legal sense. Since high treason has to do with the attitude of the accused, his/her intention to overthrow the government, even the apartheid

⁷⁵⁷*Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.* (Emphasis mine JNH).

government seldom succeeded in convicting high numbers of accused in one case.⁷⁵⁸ Taken into account that many of these accused were linked to the crime only indirectly by applying the so-called common purpose doctrine,⁷⁵⁹ the *modus operandi* of the Prosecutor-General is questionable. While the Prosecutor-General cannot be blamed for using the traditional test of a *prima facie* case, the external pressure did not make things easier.⁷⁶⁰

Although the Prosecutor-General could have made the process less complicated, it still does not solve the conflict between the government and the Supreme Court. The *Mwilima* case is the textbook example of transformative constitutionalism. The easy way out for the interpreter would be the “clear wording of the text”, in this case Article 101 of the Constitution. What can be clearer than that?

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforced by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

However, the words “*shall not of and by themselves be legally enforced*” opened the door for a progressive application of Chapter 11. Consequently, once the Court established that free legal aid could not be enforced by law in all cases, it is not the end of the enquiry. The process of transformative adjudication will start when the interpreter is convinced that the text does not tell the whole story. In this case, the justice behind Article 95(h) can hardly be reconciled with the harsh *No!* in Article 101.

⁷⁵⁸The well-known *R v Adams and others*, 1959 (1) SA 646 (SCC); 1959 (3) SA 753 (AD) is a case in point. The South African Government spent several years and huge resources to prosecute the leaders of the movements resisting the apartheid Government and its policies. Yet, none of the accused was convicted.

⁷⁵⁹The doctrine, valid and acknowledge by most common law jurisdictions, is applied primarily when an obvious conspirator cannot be linked directly to a crime. The textbook example is the driver of the runaway car in robbery cases. While he/she is not present when the pistol is pulled, or the money taken, his/her actions showed that he/she had common purpose with the main perpetrators. In the apartheid era, the doctrine was often used against people who joined a looting mob or were part of a protest march where some protesters committed crimes. See Dubach, A. 1990. *Upington. A story of trials and reconciliation*. Cape Town: David Philip Publishers for a description of how the State used the doctrine in one of the last cases where Anton Lubowski was involved. The Supreme Court of Appeal in South Africa eventually rejected the doctrine in this case.

⁷⁶⁰This is not to say that the Prosecutor-General made a political decision. Since the Prosecutor-General does not have to give reasons for his/her decisions, the public will never know why he prosecuted as he did. The Prosecutor-General at the time was not known as one who tried to please politicians (see the *Ex Parte Attorney-General/Prosecutor-General* case above). It is nevertheless possible that all the pressure and emotional appeals did not make it easy for the Office of the PG.

This conviction may be politically motivated, but as Klare pointed out, it is no more political than the opposition to legal aid by the government attorney. Her reliance on the clear meaning of Article 101 does not address the issue and would have led to gross injustice for the 128 accused. However, the debate on where the conviction came from not to be satisfied with the obvious answer of Article 101, is unimportant. More important is the fact that the No! in Article 101 is not the last word.

By turning to Articles 12 and 144 of the Constitution, the Court did not opt for a political interpretation, but a result that fits the spirit and objective of Chapter 11 and more particular Article 95(h). The issue may have been controversial, but the judgment, while answering a political *cum* legal ethical question, is not political.

The *Mwilima*⁷⁶¹ case could have been one of the most dramatic examples of transformative constitutionalism at work. Unfortunately, the superior courts did not enforce any other socio-economic right in following *Mwilima*, partly because the legal fraternity did not attempt to bring new cases to the courts.

While the characters of the judges on the Bench can be overemphasised, it is important in this case to take note of the fact that two judges wrote judgments, Chief Justice Strydom and acting Supreme Court Justice O'Linn, formed the Bench of the overturned *Kauesa High Court judgment*. I have pointed out that O'Linn was known for his insistence of adhering to the text. In this instance, however he, together with the then Chief Justice came up with ground-breaking transformative constitutionalism.

⁷⁶¹ *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

CHAPTER 7

7. Analysis

The Interpretive Models of the Superior Courts of Namibia

As we have noted, there was no dominant interpretive model applied by the Namibian superior courts between 1990 and 2004. The numerous examples where the High and Supreme Court came to different conclusion can often be traced back to the interpretive models (*Kauesa, Frank, Hanekom*, etc).

In terms of Article 81 and the *stare decesis* rule a Supreme Court judgment becomes the authoritative word on the issue at stake and gets legal status. Such judgments become law and must be followed by all Namibian courts, even if the overturned High Court judgment is legally more sound (*Frank case*).

There are also some contradictory judgments of superior courts with the same status where the Supreme Court overturned none of them (*Shilunga/Sikunga*), or cases where, a judgment of the High Court was controversial or questionable, but not appealed (Smith) In addition, there were Supreme Court cases which were seriously contested in the legal fraternity, but nevertheless became law since it was brought before the Supreme Court by the AG in terms of the Constitution to get legal clarity. (The two *Ex parte Attorney General cases*).

Although judgments of the Supreme Court can be overturned by legislation or later judgments of the Supreme Court, this process will be difficult and will only succeed if the earlier judgment was clearly unconstitutional. An attempt by the legislator to overturn constitutionally sound judgments by using Article 81 to pass laws contradicting the Supreme Court judgment, will fail. A superior court asked to give judgment on the constitutionality will have to declare the new legislation unconstitutional.

In the absence of any legislation challenging the constitutional judgments of the Supreme Court, these judgments have become part of Namibian law in terms of Article 81.

In this concluding chapter I will first look at a transformative model of adjudication and interpretation. I will then look at the legal issues and some cases discussed in chapters 5 and 6, and to what extent did they transform the Namibian legal system after independence.

7.1 The Development of a Constitutional Model:

Freedom and Constraint, Objectivity or Value-based Subjectivity

The post-apartheid constitutional democracies in South Africa and Namibia ended the rule-based interpretation of statutes as the only hermeneutical model applied by the courts. South African and Namibian courts were no longer satisfied with the old standard textbook approach to the interpretation of statutes by authors such as Steyn.⁷⁶² Interpretation was no longer an uncomplicated set of rules to assist in understanding the literal meaning of the text.

While substantive reasoning did not enter the South African (and Namibian scene) only at Namibian independence in 1990, Cockrell correctly states that the nature of pre-1994 legal reasoning in South Africa was predominantly formalistic.⁷⁶³ Referring to the article of Atiyah and Summers⁷⁶⁴ who emphasise the formalistic approach of English law, and the more substantive content of the American courts, South Africa, Cockrell assumes, are even more formalistic than England.

The *Makwanyane case*⁷⁶⁵ illustrates the movement away from formalism in South Africa. Popular opinion was undoubtedly in favour of the death penalty. Yet, the Bench was unanimous in its position that it is unconstitutional.⁷⁶⁶ Kriegler attempts to explain why public opinion was forbidden domain. The method used in legal interpretation is in essence legal and not philosophical or moral, he states. However, the Courts do not operate without a moral foundation or in an ethical vacuum. The public expect courts to make value-based judgments, but the framework and outcome of the judgment ought to be legal.⁷⁶⁷

Kriegler seems to have the same problem that Mahomed, struggled with in the *Ex Parte: Corporal Punishment case*. While Kriegler acknowledges the necessity of substantive reasoning in determining values, he immediately retreats to the safer grounds of formal law, at least in theory, if not in practical terms. "Legal" seems to be

⁷⁶²Steyn, L. 1974. *Die Uitleg van Wette*, fourth edition. Cape Town: Juta and Co.

⁷⁶³Cockrell, *Rainbow Jurisprudence*, p. 7.

⁷⁶⁴Atiyah, P and Summers, R. 1987. *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, Oxford: Clarendon Press, p. 437.

⁷⁶⁵*S v Makwanyane* 1995 (7) BCLR 793 (CC).

⁷⁶⁶Public opinion played a major role in the argument against the abolition of capital punishment in the *Makwanyane case*, and also in *S v Williams* 1995 (7) BCLR 861 (CC).

⁷⁶⁷*Ibid*, p. 747.

a synonym for formal law”.⁷⁶⁸

Several South African and Namibian judges constantly follow the example of Kriegler and retreat to formal law. After a long tradition of a literalist approach to law, there is a strong belief that the Bench can always act objective. Closely tied to this is the myth that pure, indisputable legal rules of process and a formal interpretation of the text will lead to the truth. The white community accepted the objectivity of judges as a given until the 1990's. Thereafter the new public opinion turned against white judges coming from the pre-1990 dispensation. They carried the stigma of their appointment by the colonial government in Namibia and the apartheid government in South Africa and their assistance to maintain the unjust legal system and laws. After Namibian independence objectivity of the Bench was often disputed by society.

Cockrell deals with the issue of objectivity in an enlightened manner.⁷⁶⁹ Several Constitutional judges referred to the pitfall or temptation of subjectivity in the death penalty issue. The Court created a dichotomy between objective and subjective arguments, the latter being of a lower class. Nevertheless, even if some judges are subjective, how will any critic determine the level of subjectivity?

Cockrell suggests a different approach. Arguments on objectivity of values are second-order claims, judgments about the content of values are first-order. First-order claims deals with the normative aspect of values.

*Claims about the objectivity of values are second-order ('meta ethical') claims about the status of those values, about where and how they fit into the world. These may be contrasted with first-order claims which are judgments about the content of values by persons adopting a practical, normative stand. In other words, second-order issues are issues about morality, and first-order issues are issues within morality.*⁷⁷⁰

Whether one uses objective or subjective arguments to reach a normative position is irrelevant. A critical observer is not interested in questions such as the personal views of the judge on moral issues, but rather the logic and rationality of the

⁷⁶⁸See his comment in par. 205:

“Nevertheless, the starting point, the framework and the outcome of the exercise must be legal. The foundation of our state and all its organs, the rules which govern their interaction and the entrenchment of the rights of its people are to be found in an Act of Parliament, albeit a unique one. That Act entrusts the enforcement of its provisions to courts of law. The "court of final instance over all matters relating to the interpretation, protection and enforcement" of those provisions is this Court, appointment to which is reserved for lawyers. The incumbents are judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.”

⁷⁶⁹Cockrell, A.1996: Rainbow Jurisprudence, 12 SAJHR, p. 1 ff.

⁷⁷⁰Ibid, p. 17.

argument. Therefore, substantive argument does not have to be rated less valuable or less authoritative than formal legal arguments.

While public opinion may be helpful and needed to determine the values and aspirations of society, constitutionalism among other things, protects the society against dangerous and illogical public opinion. Consequently, the Court does not have to fall back on formal law in justifying decisions that go against public opinion or state policy. The requirements for a good judgment are clear logical arguments that can and should include political, economic and philosophical argument.

As indicated the basic problem with Mahomed's judgment in the *Corporal Punishment case* lies on this level. While he maintained that the judgment interprets the values of the Namibian people, there are no indications how he came to that conclusion. Had he consulted widely with some of the role players, he might have found that interest groups in government and society do not see corporal punishment for juveniles as degrading and contrary to Article 8.⁷⁷¹ While he possibly referred to the norms and values embedded in the Constitution, he never made it clear, except for footnote in a later case. In the footnote the Chief Justice merely stated that he did not have to enquire about the norms and values of the Namibian people since those norms are already in the Constitution.⁷⁷² However, the Namibian legal fraternity never understood the footnote. It remains nothing more than a very short postscript to a complicated issue.

However, the mere fact that pockets of society did not agree with the judgment, does not mean that the Court is wrong. In the *Corporal Punishment case* and the *Makwanyane case* in South Africa, there are good reasons not to follow popular opinion. If we take the historical approach of Berker into account, the mere fact that the colonial government used corporal punishment in the traditional areas against its political enemies, is good enough reason not to allow the community courts to use it in a democratic, constitutional country.

The second question deals with the perception of law. The South African Constitutional Court bench often uses *ex cathedra language*. In other words, they confirm the outdated perception that somehow the text of the constitution can be

⁷⁷¹These include evangelical Christians and traditional authorities. See also Berker's statement in his concurring judgment. "...there is less agreement with regard to the desirability or otherwise of the imposition of corporal punishment judicially or quasi-judicially ordered to be meted out to juveniles, that is on young persons under the age of 21 years...", p. 364.

⁷⁷²*S v Tcoeb* 1993 (1) SACR 274 (NMS).

interpreted and dissected by the Court in such a way that the pure meaning becomes clear.⁷⁷³ Botha notes that the perception has an extremely broad interpretation:

Sometimes, they seem to underscore the Court's understanding that it is its task to inquire into the constitutionality (and not the political wisdom) of a particular law or policy. However, sometimes the Court seems to go further to imply that the political beliefs of its members played no part in their decision-making; implying that their decision was based on purely 'legal' grounds. It thus postulates the existence of a strict division between law and politics, and assumes that the law is sufficiently determinate to dispose of cases without the need for judges to have recourse to 'extra-legal' considerations.⁷⁷⁴

Botha correctly sees this as a problem of freedom and constraint. A theory of adjudication that ignores the vast volumes of hermeneutical research since World War II and its radical effect in almost all the branches of the social sciences⁷⁷⁵ is out of step with the post-modernist world of the 21st century. Yet, it does create a sense of security.⁷⁷⁶ Hard core positivism, on the other hand is not only a continuation of the legal philosophy of pre-independent Namibia and pre-democratic South Africa it also maintains the myth of a single interpretation and application of the law, free of ideological or political influence.

Karl Klare observes that a strong element of legal conservatism marked the initial process of transformation in South Africa.

In this context, "conservatism" does not refer to political ideology. I mean rather cautious traditions of analysis common to South African lawyers of all political outlooks. Even the most optimistic proponents of progressive social change often display the same jurisprudential habits of mind as shown by their more pessimistic or political conservative colleagues.⁷⁷⁷

⁷⁷³See Botha, H. 2004: Freedom and Constraint in Constitutional Adjudication, 20 SAJHR, p. 249f.

⁷⁷⁴Ibid, p. 249.

⁷⁷⁵Cf. the influence of Heidegger and the existentialist school on theology, or the influence Derrida and Foucault and the deconstructionist approach on linguistics and hermeneutics. Or the influence of legal realists such as Lon Fuller and their social contract philosophy on the United States' legal philosophy of the 1930's, 40's and 50's.

⁷⁷⁶The legal fundamentalism of the Constitutional Court in South Africa, and to a great extent the Supreme Court in Namibia, runs parallel with the revival of religious and political fundamentalism in southern Africa. It seems as if societies in transition seek refuge in the clear, undisputed answers that fundamentalism offers.

⁷⁷⁷Klare, 1998. p.152.

Klare suggests that the hermeneutical key for constitutional interpretation can be found in the political framework and structure of the constitution. He further contends, in the same line of thinking as Judge Chaskalson that it is not a case of the post independent interpretation being political and the interpretation of the previous dispensation being pure legal interpretation. The apartheid interpretation was as political as any value-based interpretation can be after 1994.⁷⁷⁸

Klare, as we noted at the beginning of the thesis, opts for what he calls a post-liberal reading of the South African Constitution, “*committed to large-scale egalitarian social transformation*”.⁷⁷⁹ In other words, he opts for an *a priori egalitarian* point of departure. Since the South African and the Namibian constitutions, are in the first place the bridge to take South Africa and Namibia from apartheid to a just, inclusive society, one cannot interpret sub-divisions without constantly being reminded of the *basic values* and intention of the document as a whole.

Klare’s point is clear. One cannot speak of values as if it is eternal, non-changing universal principles that are somewhere out there for the judges to discover. This rigid, natural law approach does not have that much persuasive power in a post-modernist, pluralist society. When reading Klare and other scholars working with the South African constitution, it is important to understand that the Namibian society is more than a carbon copy of the South African society. Neither are the two constitutions identical, despite several similarities.

Klare further demonstrates that a *pure legal argument* does not exist. He uses the concepts *legal constraint* and *adjudication* to explain the conflict between aspects of law that a judge deals with and the extra-judicial material that comes into play to determine values.⁷⁸⁰ All legal texts maintain elements of constraint that binds the interpreter. However, even the constraints are not clear-cut legal principles, but matter of interpretation, “*not an innate, (i.e. interpreted property of the material themselves) that we can know objectively*”.⁷⁸¹

The adjudicators are also not subjective interpreters who come to the text in total objectivity. They work with the materials of previous adjudicators (an important aspect of the common law with its *stare decisis*-rule). They also bring their culture, history and personal values to the table.

⁷⁷⁸Ibid, p. 150f.

⁷⁷⁹Ibid.

⁷⁸⁰Ibid, p. 160ff.

⁷⁸¹Ibid, p. 160.

Consequently, the Appellate Division of the Supreme Court of South Africa could take a formalist approach to the constitutional issue posed by Chikane and Eins in upholding appeals against the value judgments of the South West African Supreme Court. Justice Rabie could make use of the language of the total onslaught, without even considering the substantive argument of the court *a quo*. The basic premise of this approach operates with a bias in favour of the *status quo*.

The issue of land in Namibia is another case in point. While the Constitution protects property rights, which includes land ownership,⁷⁸² the spirit of the Constitution is surely not against correcting the injustices of the past. While reconciliation is a major post-independence theme, it does not exclude other strong sentiments and objectives of the liberated people of Namibia. Transformation, affirmative action and liberation from colonial structures are equally important. The Constitution guarantees land ownership as it existed on 21 March 1990. However, that does not automatically close the door on any other rights that may exist on the land.

Two landmark decisions, one in the Supreme Court of Australia, and one in the International Court of Justice, may still require the legal fraternity and the Courts to rethink the absolute rights the farming community claims.⁷⁸³ An old legal myth that land was a *terra nullius* before European colonialism was successfully challenged in these cases. In the *Mabu case*, it had the effect of affirming the fact that communal land rights survived colonialism.⁷⁸⁴ A more pro-active approach of the Namibian superior courts will open the door to deal with the land issue in a manner that will both acknowledge the protection of private property rights in terms of Article 16 of the Constitution. At the same time it will extend the present protection of property rights to pre-colonial rights in following the *Mabu* and *Western Sahara cases*.

In reaction to the forced philosophy of legal interpretation that strips the judge from all freedom in its adjudication of the law, the American Legal Realists developed a scheme of interpretation that opted for substantive justice rather than formal law.⁷⁸⁵ Compare Fuller's vision on substantive argument -

⁷⁸²Article 16.

⁷⁸³*Mabo v Queensland* (1992) 175 CLR 1 and the *Western Sahara case*.

⁷⁸⁴I have written on the relevance of the cases to Namibia. See: Horn, N. 2005. Eddie Mabo and Namibia: Land Reform and Human Rights, Sao Paulo. *SUR, Human Rights Journal*, No 3.

⁷⁸⁵See Fuller, L. 1934. American Legal Realism, 82 *University of Pennsylvania Law Review*, p. 429. Fuller became critical of some aspects of legal realism in the 1940's. The idea of a judge becoming a practical politician did not appeal to him.

*The intellectual torture which our courts inflict on legal doctrine will be obviated when we have brought ourselves to the point where we are willing to accept as sufficient justification for a decision the "non-technical" considerations which really motivated it.*⁷⁸⁶

In his later years, Fuller has tried to find a balance between two usually exclusive positions. Boyd suggests that-

*Lon Fuller was capable of showing us the inherent instability of any attempt to reconcile two concepts that both deny and depend on each other. In this case, the concepts were formal and substantive justice.*⁷⁸⁷

Botha proposes a more post-modernist approach, yet one that will take both judicial freedom and constraint serious. Borrowed from Kennedy⁷⁸⁸ he explores means "to overcome *the traditional conception of legal rules as long, straight boundaries that predetermine the outcomes of cases - except in those few instances that are not yet covered by the rules and in which judges are free to make new law*".⁷⁸⁹

Botha emphasises the possibility and challenges of legal pluralism. Whenever humans interpret documents, there will always be more than one possibility. Kennedy insists that law is too contradictory and complicated for the judge to determine judgments without being influenced by her/his own ideological and political beliefs.

Kennedy paints a grim picture of legal clarity by looking at the freedom and constraints that burden judges. Legal arguments, he asserts, are based on what he calls stereotyped 'argument bites'. However, what makes law contradictory is the fact that every 'argumentbite' has a 'counterbite' that has the exact opposite meaning: The maxim *pacta sunt servanda* has a 'counterbite', *rebus sic stantibus*. Consequently, a judge can choose to either enforce a promise, or easily find that the circumstances changed and therefore law can confirm a broken promise.

Within this confusion, judges can make their pick of a rule to follow and conclude that in their understanding it is the best one. However, as Botha points out,

⁷⁸⁶Ibid, p. 435.

⁷⁸⁷Boyle, J. 1993. Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance, *78 Cornell Law Review*, pp. 371ff, at p. 379.

⁷⁸⁸Kennedy, D. 1997: *A Critique of Adjudication*, Cambridge MASS: Harvard Press, p. 10.

⁷⁸⁹Botha, 2004, p. 268.

*...they are not free to justify their decisions in just any terms, but are expected to engage in legal argument. They must draw on an existing range of bites and counter-bites, must reduce complex fact situations and personal beliefs to patterns that can be comprehended in terms of the binary structures of legal argument.*⁷⁹⁰

Botha also has something to say to scholars-

*...legal scholars work hard at identifying gaps and contradictions in existing legal doctrine, and putting forward proposals that would fill the gaps and iron out the contradictions. Mainstream legal scholarship thus strives to substitute straight, clear boundaries for crooked, vague and contorted ones, to fill clearings of freedom with saplings of constraint.*⁷⁹¹

Kennedy concludes that with all the possibilities open to the judge, law is best defined as contradictory rules. Consequently, the only reliable set point for the judge is his/her own ideological beliefs. However, the theory of law as a set of neutral rules, does not allow the judge to acknowledge his/her subjective ideological involvement in making decisions. Therefore, the judge is forced to cloth her judgment in “the language of legal necessity”.

However, Kennedy surprisingly does not conclude that judgments are a mixture of unrelated political driven choice. Constraint comes to the play. Botha explains -

*For Kennedy, constraint is ultimately illusory: it is the product of collective denial. Judges are caught up in the contradiction between their own experience of law as indeterminate and contradictory, and the need to present their decisions not as their own, but as compelled by the relevant legal materials. They are therefore not in a position to take responsibility for their choices. Moreover, legal argument has a superficial quality. The complexity of social experience is reduced to and reified in stereotypical arguments, which resemble sound bites rather than attempts at serious ethical debate.*⁷⁹²

Listening to Kennedy, “the development of a constitutional model” in an environment of legal pluralism is in many ways a contradiction in terms, if it aims at the development of a single authoritative hermeneutical key. Should we not just accept that there are multiple possibilities open to judges in each case and that the

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

⁷⁹² Ibid, p. 260.

judge is at liberty to choose one, provided he can cloak his judgment in one or other legal principle and either find an earlier judgment to rely on in terms of *stare decisis*, or a “legal” reason to deviate from it? If we also accept that the only real foundation for any judgment is the ideology of the judge, as Kennedy alleges, and the only constraint is social pressure and guilt, it makes no sense to develop a model for adjudication. Moreover, the interpreters, the academics and legal fraternity are left with evaluating judgments based on what we know of the judges.

Botha agrees with the basic tenets of Kennedy’s views on legal pluralism. He nevertheless does not see a contradiction in legal pluralism and, but develops a meaningful constitutional approach to interpretation in a post-apartheid society. For him legal constraint is much more than Kennedy’s “ultimate illusory”. It depends on several complex factors, conflicting values, policies, and the capacity of the judge “to rework the relevant legal materials”.

Botha sees the South African constitution as the key to find a post-apartheid interpretive hermeneutic. Like Klare, he finds determinism in the constitution itself. Breaking with the “*traditional conception of legal rules as long, straight boundaries that predetermine the outcomes of cases*” is a constitutional imperative for interpretation. Davis and Woolman likewise identify the South African constitution as a Creole-liberal constitution that determines a Creole-liberal model of interpretation, similar to Klare’s post-liberal approach. Neither of these interpreters leaves the door open for the adjudicators to make a case-tot-case decision on the model that she/he will use.

Botha points to the fact that the South African constitution introduced a culture of justification, including an expectation that judges will give substantive reasons for their judgments.

The constitution is a bridge from the old dispensation of oppression to one of inclusiveness. The pre-constitutional boundaries can no longer determine the rule for interpretation and the Courts should not be tied up by common law rules or judgments that have no relevance for the constitutional dispensation. Botha points to the fact that the constitution is a clean break with the past. There is no way that the concept of legal rules from the apartheid era with its solid boundaries should be forced into the present dispensation only to prevent transformative constitutionalism. One can argue that Botha’s assertion on the South African constitution clearly applies to the Namibian Constitution as well. Taking into account the close

relationship between the two countries before 1990 and the similarity between the struggle for independence in Namibia and democracy in South Africa, it came to no surprise that the two constitutions have so much in common.

Does principled transformative constitutionalism leave space for a conservative positivist model, or even a Dworkinian approach? Alternatively, is it part of a CLS definition of transformation, represented in this chapter by the opinions and philosophy of Duncan Kennedy? While Duncan Kennedy's critical understanding of adjudication and his aversion in traditional legal argumentation are attractive for critical thinkers (including myself), CLS is in essence a non-authoritarian philosophy. Klare, while committed to understanding the South African constitution as a post-liberal document, submits that a denial of the post-modern elements of the constitution does not exclude the possibility to subscribe to transformative constitutionalism.

Roux, as we have seen, shares the understanding that the South African constitution inherently calls for transformative constitutional interpretation. Yet, he dismisses Klare's view that a transformative model of interpretation operates best if one interprets the constitution as post-liberal, which Roux sees as a typical CLS model.

Botha points out that there is at least common ground between Kennedy and Hart. Both accept that there are cases where there might be more than one answer to a legal question. In Hart's understanding, the penumbra is small and those cases represent a minority. If one interprets the text in its context, there will generally be only one interpretation.

Even Chief Justice Pius Langa, a committed believer in transformative constitutionalism, contended that where the text is clear, the court should not look for alternative interpretive models. Kennedy expands the penumbra to include almost all legal questions. The binding factor is that both the soft positivist and the critical proponents of transformative constitutionalism accept that the constitution bodes for transformative interpretation and that whenever more than one possibility confronts the judge/interpreter, he/she should choose the transformative option.

Cockrell opens the door a little more when he accepts that values and norms are not necessarily obstacles for soft positivists. If we keep in mind that the values and norms that transformative constitutionalists emphasise are not the majority opinion (*Makwanyane*), but rather the norms and values of the constitution (*Ex Parte*

AG: Corporal Punishment by Organs of the State), the gap between critical scholars and soft positivists narrows even more.

One can make out an argument, as Roux does, that followers of Dworkin's reconstruction do not have a principled objection to transformative constitutionalism, as long as the transformative option fits the Dworkinian metaphoric Judge Hercules' expectation of the only reasonable conclusion of a legal problem.

This does not mean that every judge and interpreter will find transformative constitutionalism acceptable. The hard core positivists, personified in modern constitutional interpretation by United States Supreme Court Justice Scalia, and many others will refuse to look anywhere else than the legal text before them for interpretive answers. However, it seems to be broad enough to include both critical scholars and soft positivist in the South African debate.

As a broad guideline to understand Namibian transformative constitutionalism rather than the futile attempt to prescribe it as a model, makes sense. As we have noted, the acceptance of legal pluralism opens the door to harmonise models that look irreconcilable from the outside. The superior courts of Namibia have in their first fourteen years often failed to break loose from the formalistic shackles of the past. Examples of a fundamentalist model of interpretation abound. In several instances, the Court could not leave the static rules paradigm behind.

There are, however, also ample examples where the Courts moved beyond the formalism of the colonial times and interpreted the Constitution and the common law in such a manner that it not only brought justice to one litigant, but also set the ball rolling for a transformative constitutional interpretation that will influence society.

Both the judges and magistrates on the one hand and the professional interpreters (academics, the press, higher courts) on the other need to see the Constitution in its historical context: A document that not only brought the guidelines for future adjudication, but also had to stop the war and bring peace and reconciliation.

It brought a new way of looking at law where the ideas and values of the Constitution plays an important role in understanding the expectations of the people for a just society, not merely a society that are governed by rules and law. Where the interpreter has a choice of more than one interpretation, the transformative possibility needs to be the decided one rather than a mere reliance on rules, *stare decesis* and pre-independent case law.

Botha and Kennedy's arguments show that even if a specific Bench claims to rely only on law, in our pluralist world, 'law' seldom, if ever, presents the court with only one answer. Which does not mean that judges are free to deal with the text of statutory law as if they are writing on a blank page. One needs to discern between radical judicial activism and an hermeneutical option to interpret a post-modern document with an interpretive model suited for a post-modern view of adjudication. That is the point Woolman/Davis and Klare make. One cannot on the one hand accept that the Namibian Constitution presents itself as a total break with apartheid in toto, and yet remain with the formalistic interpretive approach of the conservative Roman Dutch ideologues. And transformative constitutionalism fits - to use a Dworkinian principle - the metaphor of Mureinik and further developed by De Vos of a jurisprudential bridge that will take the country from oppression to democracy.

Hinz quotes South African Constitutional Court Justice Albie Sachs stating that a judgment will not change the attitudes. If we accept that the law has limits to change society – the impossibility of the “bridge” to change attitudes – it does not mean that the law has no role to play in crossing the metaphorical bridge.

While we have no psychological or empirical research to indicate that law or legal interpretation can change society, a comparison between South Africa and Namibia in their attitude to the enforcement of minority rights to LGBT people points to a dramatic difference. In South Africa, where the Constitution guarantees sexual orientation, the degree of homophobia is much lower than Namibia, where senior politicians and government officials constantly use verbal offence language about and against LGBT people.

One can only speculate of what would have been the result if the transformative judgment in the Frank case was not overturned by the Supreme Court.

7.2 An Evaluation of a Positivist Challenge to Value Judgments

One judge stands out as a critic of seeing a constitution as a *sui generis* that requires a value-based and transformative hermeneutic: Judge O'Linn. He criticizes the judgment of *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* by stating that that the case for corporal punishment was never considered. The cultural values of Namibia, he argues, are generally in favour of corporal punishment both in school and for juvenile and violent offenders. The use of

corporal punishment in the traditional courts and the role of corporal punishment in the raising of children should have been considered, he argued.⁷⁹³

In *S v Van den Bergh*,⁷⁹⁴ he criticizes the interpretive approach of this case.

Furthermore, many Namibian fundamental rights provisions are not clearly defined and are expressed in 'wide general terms'.

Article 12(1) (d) expressly provides that a person is presumed innocent until proved guilty 'according to law'. In such cases the Canadian Bill of Rights provisions and jurisprudence as well as that of the USA may be more in point and more helpful than for example the provisions of the Canadian Charter and its interpretation by the Canadian Courts. The same applies to the role of the Court. An example of the Namibian Court in the role of law-maker, in the form of case law, appears from the decision of the Supreme Court of Namibia in Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State 1991 (3) SA 76 (NMS). In that decision the provisions of art 8 were interpreted, but the Court made a value judgment and laid down, in the words of Mahomed AJA as he was at the time, that the value judgment 'requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations, and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilized international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic.

Berker CJ had this to say:

Whilst it is extremely instructive to refer to, and analyze, decisions by other Courts such as the International Court of Human Rights or the Supreme Court of Zimbabwe or the United States of America on the question whether corporal punishment is impairing the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhumane or degrading treatment, the one major and basic consideration in arriving at a decision involves an enquiry the generally held norms, approaches, moral standards aspirations and a lot of other established beliefs of the people of Namibia. In other words the decision which the Court will have to make in the present case is based on a value judgment which cannot primarily be determined by legal

⁷⁹³See the comments of Justice O'Linn in *S v Tcoeib* 1993 (1) SACR 274 (NM) and *S v Vries* 1996 (2) SACR 638 (NM).

⁷⁹⁴1996 (1) SACR (NM) 19.

⁷⁹⁵*Ibid*, p. 57.

*rules and precedents, as helpful as they may be, but must take full cognizance of the social conditions, experiences and perceptions of the people of this country.*⁷⁹⁵

The court's criticism touches a sensitive nerve. While the international community praised the subjective interpretation as a valid and progressive constitutional jurisprudence, the Supreme Court does not indicate how it determined the values and norms of the people. And why should the values and norms of the international community be of such importance to determine the Namibian values?

Judge O'Linn was never convinced that the value judgments of the Supreme and High Courts were a necessary interpretive result of the constitutional era. He deplored the emotional language of the Acheson-case and the unsophisticated conclusions drawn concerning the values of the Namibian people.⁷⁹⁶ He even stated in public at a conference at the University of Namibia that the High Court was more reliable than the Supreme Court since its judges were either Namibians or permanent residents, while the Supreme Court under Chief Justice Mahomed were all foreign judges resident in other SADC states (South Africa, Zimbabwe and Zambia).

His first opportunity to comment on the *Corporal Punishment case* was *S v Tcoeib*.⁷⁹⁷ The accused brutally murdered two people and the judge considered a relevant sentence to replace the death penalty that was a mandatory sentence if no mitigating factors were present before independence. While there were no judgments on life imprisonment as yet, O'Linn possibly suspected that it will come under constitutional scrutiny and reacted -

*The provisions in our statute providing for life imprisonment have not been abolished and it is not for the Courts to abolish it. If the statutory provisions dealing with the function of the Executive to reprieve or to allow out on parole or probation lead to some anomalies, such laws should be urgently reviewed.*⁷⁹⁸

⁷⁹⁶O'Linn often used his judgments in the High and Supreme Court as a platform to react to the new trends in the Namibian Courts. See *S v Vries*, *S v Tcoeib*, the *Frank-case*, etc.

⁷⁹⁷1991 (2) SACR p. 627.

⁷⁹⁸*Ibid*, p. 633.

Shortly after the *Tcoeib* case Judge Levy equated life imprisonment with the death penalty.⁷⁹⁹ This decision was rejected by the Supreme Court. It was not practice in Namibia to make recommendations regarding parole, and legislation did not make provision for such action. O'Linn nevertheless *recommended to the executive that the accused is not released on parole or probation before the lapse of at least 18 years' imprisonment.*

When the accused applied for leave to appeal, O'Linn used the opportunity to comment extensively on the Corporal Punishment case.⁸⁰⁰ Before doing so, the judge expressed his belief in the death penalty in no unclear words. While condemning *peoples justice*, O'Linn sees public support for the re-introduction of the death penalty covering the whole spectre of society from all parties in Parliament to the man on the street.

Since the protection of life in Article 6 of the Constitution cannot be changed in terms of Article 24, it may result in people taking the law in their own hands if the people are not satisfied that the substituting sentence is an adequate alternative to the death penalty, hence the two life imprisonment sentences in the *Tcoeib*-case and the recommendation to the executive.⁸⁰¹

The only issue on the table was the constitutionality of life imprisonment. Hence, after finishing off Levy's rather over breathed equation of life imprisonment with a sentence of death and a short reference to the German case law, the judges declared life imprisonment constitutional, provided that the accused has a legal hope to be released at some future date. Since the Namibian legislation opens such a door through parole and probation regulations in the Prison's Act, life imprisonment is not unconstitutional.

One can hardly speak of the legal clash between O'Linn and Mahomed as an example of the late 20th century battle between positivism and post-modernism (a heated academic debate in South African constitutionalism), or even between positivism and Dworkinian liberalism, neither a Namibian version of the American division between the original intent theory and living or transformative constitutionalism. In Mahomed's early judgments, while claiming a value-based

⁷⁹⁹*S v Tjijo* 1991 NR 361 (HC). It is interesting to note that Justice Frank in his concurring judgment did not agree with Levy's dictum. He also made it clear that the issue was not raised by the parties. Consequently, it is only obiter, p. 369.

⁸⁰⁰*S v Tcoeib* 1993 (1) SACR 274 (NM).

⁸⁰¹*Ibid*, p. 281.

approach, arguments are still of the second-order, to use Cockrell's vocabulary.⁸⁰² And he clearly prefers formal law to substantive law when it comes to justification for a value-judgment.

But the differences do identify at least two hermeneutical positions. And these positions are not only of academic interest. The course of legal thought in Namibia is determined by the decisions of the Supreme Court.

Even O'Linn's comments on the death penalty must be seen in the light of his criticism of the principle of value judgments. It is possibly a tongue in the cheek challenge to the legal fraternity to think substantively about the contradictions that may develop between the norms and values of the Namibian people and the Namibian Constitution. Despite the Supreme Court's attempt to reconcile the two in the *Tcoeib* case, the South African *Makwanyane* case is a clear example that the two can stand in stark opposition against one another.

Both O'Linn⁸⁰³ and Monitor Action Group⁸⁰⁴ questioned the idea that the prohibition of the death penalty represents the norms and values of the Namibian people. Member of Parliament and member of the Constituent Assembly, Kosie Pretorius, asked if the Namibian Constituent Assembly was correct to prohibit the death penalty without making sure that abolition is indeed a Namibian value.⁸⁰⁵

In addition, if the *Makwanyane* case in South Africa is indeed an example of ignoring the norms and values of the people (as may also be the case of corporal punishment), the Supreme Court does not assist the Namibian people in how to know when to follow and when to resist the values of the people. In the *Tcoeib* case O'Linn asked another important question, with apparent no logical answer: Why did the Supreme Court not follow its own guidelines laid down in the *Corporal Punishment Case*? It never answered (or asked) if life imprisonment was in line with the norms and values of the Namibian people.

Again, playing devil's advocate, O'Linn tries to establish the consequence of the Supreme Court not following its own judgment: Is it possible that in this specific

⁸⁰²See Cockrell, in 12 *SAJHR*, p. 1.

⁸⁰³*The Sacred Trust of Civilization, Vol. 1*, pp.

⁸⁰⁴The Monitor Action Group (MAG) is the successor of Action Christian National [Afrikaans: Aksie Christen-Nasionaal (ACN)]. ACN was an alliance of the conservative Deutsche Action (German Action) and the old Nationalist Party. They won three seats in the Constituent Assembly. MAG won one seat in 1994, 1999 and 2004. In 2009 SWANU, the oldest liberation movement in Namibia got just over 200 votes more than MAG to get the last seat (no. 72) in the Namibian Parliament.

⁸⁰⁵Pretorius, K. 2004: *Parliamentary Potholes*, weekly column in the Windhoek Observer, 10 January 2004, pp. 12 and 13.

case the Supreme Court broke the *stare decisis* link with a previous case? Art. 81 of the Constitution makes it clear that the Supreme Court is not bound by its own decisions and that a Supreme Court judgment is only binding as long as it is not reversed by a later judgment or contradicted by an Act of Parliament. O'Linn, without stating it directly, seems to take the latter position: The *Ex parte Corporal Punishment case* does not have to be followed by subordinate courts after the *Tcoeib case*.

However, O'Linn sees a serious flaw in the *Corporal Punishment judgment*. When using comparative constitutional law, the Court only referred to constitutional democracies of the global south. Why are the developed countries of the West necessarily a better solidarity partner than newly independent African states? When O'Linn looks at another article in the Namibian Constitution, namely the non-discriminatory categories of Article 10, he specifically looked to Zimbabwe to assist the Supreme Court in its interpretation. One does not have to agree with O'Linn in everything to see that his judgments are often a reaction to what Cockrell calls *rainbow jurisprudence*.

It seems as if the Supreme Court actually referred to the norms and values embedded in the Constitution itself rather than the norms and values of the Namibian people. While the Supreme Court seemed to have determined the values of the Namibian people by looking at other countries with similar constitutions, it looked at countries with similar constitutional norms and values. Since they interpret their constitutions to be against corporal punishment, so should Namibia.

Since Berker suggested that corporal punishment for juveniles may be a future possibility, the door on all forms of corporal punishment is not closed. Consequently, if the government fails in its obligation to ensure that juveniles are kept separate from adults in prisons and holding cells – an on-going government failure – corporal punishment will always be seen by some observers as the better of two evils.

While one can criticise the *Corporal Punishment case* for its illogical structure, or for the fact that it did not go far enough, it was at least a new beginning. The harsh legalised assault of the courts and traditional authorities were stopped, as was the assault on learners in schools. Yet, this should not be seen as the end of the road. All forms of corporal discipline – spanking by parents, older siblings and child caretakers – fall within the definition of assault. From a legal perspective one does

not even need a Supreme Court judgment to address these assaults that happen on a daily basis in Namibian homes. But it will possibly need a High or Supreme Court judgment to convince the public that spanking is not a legitimate expression of one's freedom of religion or parent's rights to discipline.

The value judgments did not help to develop guidelines for constitutional interpretation or a transformative model. The Supreme Court created confusion by its vague language. The Court should have made it clear that the norms and values of the Constitution are those agreed upon at the Constituent Assembly and are embedded in the Constitution. However, O'Linn's alternative would have locked Namibia in the past without the possibility of further constitutional transformation.

The High Court per O'Linn did not do much better than the Supreme Court in its application of the values and principles of the people in the *Frank case*. He simply took judicial notice of the derogatory language used by prominent politicians against homosexuals. The fact that they were not criticized or contradicted by other politicians of the majority party in Parliament, indicated that the elected members of the Namibian people, and by implication the people are not in favour of assigning minority rights to LGBT people.

Both Kriegler in the *Makwanyane case* and Hinz⁸⁰⁶ (as we noted) finds value judgments based on the values of the people problematic. Kriegler comments that the mere fact that the majority of the South Africans are in favour of the death penalty cannot make it constitutionally acceptable if the process flies against the principles of the South African Constitution. Hinz criticises the weak foundation for considering values as a specific category for constitutional interpretation.

A clearer approach to value judgments was found in the *Kauesa* Supreme Court judgment.⁸⁰⁷ The Court worked with clear constitutional principles in determining if the police regulations were unconstitutional. The values that the Court applied can both be seen as transformative and valued-based constitutionalism. The transformation of society forms an integral part of the judgment. And the court directly linked transformation to values such as freedom of speech and non-racialism.

⁸⁰⁶S v *Makwanyane* 1995 (6) BCLR 665 (CC), Hinz, M. 2010. Justice: Beyond the limits of law and the Namibian Constitution, in Bösl, A, Horn, N and Du Pisani, A. 2010. *Constitutional Democracy in Namibia. A Critical Analysis After Two Decades*. Windhoek: Macmillan Education Namibia, pp. 149 - 167.

⁸⁰⁷*Kauesa v Minister of Home Affairs and Others*, 1996 (4) SA 965 (NMS).

It is unfortunate that the *Kauesa case* did not become the benchmark for further jurisprudential development. The way in which the court replaced older positivist interpretive models with a progressive evaluation of constitutional values, begs for a further development of transformative constitutionalism. Dumbutshena, J's choice for freedom of expression as a core value to be considered in the *Kauesa case* was ground breaking. The court refused to prioritise rights - it did not even make a distinction between freedoms and rights. Instead, it looked at the need of the moment for a new constitutional democracy.

Unfortunately the superior courts of Namibia did not develop the foundations of *Kauesa* any further. If the prioritisation of rights is contextual it would have helped the process if later judgments could have developed guidelines to discern the need of the moment.

When it comes to societal transformation the *Kauesa case* opened the door for an aggressive approach to public debates without fear of being trapped in a position where the State can stop certain categories of people to participate. It falls outside the scope of this study to determine if the case created a more tolerant Namibian society. The judgment of *Kauesa* at least made transformation of the public debate possible.

While O'Linn seeks guidance from the elected leaders and Mahomed from the international community, Dumbutshena took a more technical approach in the *Kauesa case*. He refused to see dignity as the *Gründnorm* of the Namibian Constitution or to find any prioritising of rights, but chose freedom of speech as the important freedom to protect in the specific period.

Norms and values of the Namibian people as a transformative principle did not create a foundation for jurisprudential development. Neither did it move away from the old formalistic approach to legal adjudication and interpretation. However, the possibilities of transformative constitutionalism found its way into Namibian constitutional jurisprudence in several High and Supreme Court judgment. Comparing them with the positivist approach, more specific the contribution of Justice O'Linn, the yet to be developed principles laid a foundation for transformative constitutionalism as an on-going interaction between legal jurisprudence and societal transformation.

7.3 Transformation and Socio-Economic Rights

The *Mwilima*⁸⁰⁸ case could have been one of the most dramatic examples of transformative constitutionalism at work. Unfortunately, the superior courts did not enforce any other socio-economic rights in following *Mwilima*, partly because the legal fraternity did not make any attempt to bring new cases to the courts.

In *Mwilima* the court worked with values strongly embedded in the Constitution. However, in terms of Article 101 economic rights cannot be enforced by the courts. The Supreme Court nevertheless considered the basic right to a fair trial, linked with the right to legal presentation to be so important that it applied international law to grant the applicants relief. This was done, as we have seen, by relying on Art 144 of the constitution. The values the Court relied on, are, however not the values of the Namibian people, but the values of the Constitution.

The *Mwilima* case addressed an area of the society in dire need of transformation: the social inequalities of the Namibian nation. While it dealt with a basic civil right, it has an economic agenda – *free* legal representation. The Supreme Court, in an excellent exercise of legal activism linked free legal representation with the right to a fair trial guaranteed in both Article 12 of the Constitution and the International Covenant on political and Civil Rights.

In this case the gap between socio-economic rights and civil-politico rights has been dramatically narrowed. One would have expected a floodgate opening up of aggrieved citizens claiming their socio-economic rights from the right to health to the general right to a decent living. None of it happened. *Mwilima* remains a once off successful attempt to unlock the economic rights of Article 95. Yet, the effect of the judgment is important. Two aspects of the judgment hold the key for future litigation by aggrieved citizens who are being deprived of their social and economic rights:

- The Namibian courts will, in following the *Mwilima* case, treat Article 95 as a corpus of enforceable rights that can be enforced and not merely as a meaningless statement of state policy; and
- While Article 101 limits litigation prospects for aggrieved citizens, it does not exclude all remedies. The *Mwilima* judgment opened the door to scrutinize the Constitution for other remedies. The litigant may find some possibilities in Article 144 and the ratified covenants and other treaties to

⁸⁰⁸ *Government of the Republic of Namibia and Others versus Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

override the limitations of Article 101. Or the litigant may link a violation of an Article 95 right with a comparable right in Chapter 3. The right to health can be linked to the right to life (Article 6), or the right to a decent living to the right to education. The list goes on.

However, even the South African experience – where socio-economic rights form part of the Bill of Rights - unfortunately does not give social and economic litigants hope for real societal transformative constitutionalism. The availability of resources played an important role in both the acclaimed *Grootboom case*⁸⁰⁹ and the *Soobramoney case*.⁸¹⁰ The Constitutional Court recognised Ms. Grootboom's right to housing. Yet, despite the countless number of articles written about the case and the conferences around the world to discuss this ground-breaking development, Ms Grootboom died homeless and penniless.⁸¹¹

At the time of the judgment Judge Richard Goldstone, who was not on the bench, referred to the *Grootboom judgment* as "the first building block in creating a jurisprudence of socio-economic rights".⁸¹² At the time of Grootboom's death her advocate, Ismael Jamie said to the Mail and Guardian "the fact that she died homeless shows how the legal system and civil society failed her".⁸¹³

Soobramoney's fate was worst. He suffered from chronic renal failure. His life could be prolonged if he by an on-going dialysis treatment. The hospital denied his application for treatment since its limited resources only gave the treatment to people eligible for a kidney transplant. Soobramoney approached the Constitutional Court, linking his right to treatment with his right to life. The Constitutional Court refused to intervene, since "the right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees". Soobramoney died of kidney failure.⁸¹⁴

⁸⁰⁹ *Government of the Republic Of South Africa And Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁸¹⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), also reported as 1997 (12) BCLR 1696 (CC).

⁸¹¹ Joubert, P. 2008. *Grootboom dies homeless and penniless*. Mail and Guardian Online, 8 August 2008, published at <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>, accessed on 28 April 2011.

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

⁸¹⁴ BCLR 1996 (CC), par. 19.

The South African Constitutional Court took cognisance of the limited resources and restricted the application of their judgment in the *Grootboom* case and refused Soobramoney relief.

The Namibian Supreme Court, however, refused to be intimidated by the financial burden its judgment in the *Mwilima* case has placed on the State. In this case the Namibian Court was willing to walk the second mile where constitutional principle is at stake. While the judgment in itself opened the door for societal transformation, it did not change society. The dramatic possibilities for future socio-economic adjudication went unnoticed in the legal fraternity. The Court rejected an interpretation seeing Article 101 as an absolute rule to prevent the enforcement of chapter 11 socio-economic rights.

Something needs to be said about the foundation of the judgment. The obvious positivist would be to accept Article 101 as absolute. As we have seen in chapter 6, the Court opted to go beyond Article 101 and interpreted the prohibition in the light of two other constitutional principles: the right to a fair trial envisaged in Article 3 and the monist approach to international law in Article 144.

Cockrell and Roux's submission that positivism does not exclude transformative constitutionalism has merit. While the Court did not work with an "original intent" approach, it took the text serious. Even if the intention of the Constituent Assembly was to prevent expensive enforcement of socio-economic rights, they did not close all the possible constitutional avenues allowing aggrieved citizens remedies to enforce Chapter 11 rights. The Court only investigated two of those avenues and found that the International Covenant on Civil and Political Rights (ICCPR), treaty ratified by Namibia and in terms of Article 144 forms part of Namibian law, and Article 12 of the Constitution, also provides for legal representation to ensure a fair trial.

There was no purposive interpretation, no broad CLS approach and only a limited reliance on judicial activism. All it took to come up with an extremely valuable transformative interpretation was a mere acknowledgment that Article 101 is not the only word on the enforcement socio-economic rights.

While the characters on the Bench can be overemphasised, it is important in this case to take note of the fact that two judges wrote judgments: Chief Justice Strydom and acting Supreme Court Justice O'Linn. They also formed the Bench of the overturned *Kauesa High Court judgment*. Turning to Roux and Cockrell again, there

is clear merit in their view that transformative constitutionalism is not only the domain of post-modernists, Creole liberals and critical legal theorists.

The future of transformative constitutionalism is still uncertain in Namibia. Yet, the foundation has been laid for future development, not only in socio-economic adjudication, but in all constitutional matters. The fact that a legal conservative such as former Chief Justice Pius Langa of South Africa embraced the principle within the framework of a positivist values such as respect for the clear wording of the text, as well as its application by a positivist such as Justice O'Linn, will make it possible for a broader future development, as Roux has acknowledged.

7.4 Transformative Constitutionalism and Judicial Review

Chapters 5 and 6 dealt with several cases where constitutional interpretations went against government. In some of these cases the superior courts invoked their judicial review powers to declare legislation unconstitutional (*Smith, Kauesa, Ex Parte Corporal Punishment*). In other cases such as *Mwilima and Ex Parte the Relationship between the AG and PG* the Supreme Court interpreted phrases in the Constitution in ways that government found offensive and against both the wording and intention of the Constituent Assembly, while in *Sikunda and Ngoma* the Minister involved accused the judiciary of interfering in the work of the executive.

The relationship between law and politics, the executive and judicial functions of government will always be issues of potential conflict. Namibia is no exception. Since the early American case of *Marbury v Madison*⁸¹⁵ judicial review has become one of the most important and effective methods to limit the powers of government by giving the courts the power to review both laws of parliament and administrative actions of the executive in the light of the constitution or constitutional principles.

Transformative constitutionalism and judicial activism, like judicial review, have been criticised as means to defeat the will of the people. In the *Frank* judgment the Supreme Court criticised the High Court judgment ordering Parliament to amend the *Aliens Act* to protect permanent homosexual partnerships. The Supreme Court also found the interpretation given to the word "sex" in the High Court to include "sexual orientation" to be contrary to the norms and values of the Namibian people.

⁸¹⁵1803: (5) US137

If the Namibian people have a need to amend the Act, it is the duty of Parliament to do so. In a letter to the High Court judges, the same judge, Justice O'Linn, criticised the Supreme Court for taking cognisance of the Constitutional reference of Affirmative Action, protected by Article 23 (2) of the Constitution at a time when no Affirmative Action legislation has been promulgated at the time.⁸¹⁶

In the same manner the *Ex Parte Attorney General: The Relationship between the AG and PG* case has been criticised for ignoring not only the semantic meaning of the phrase “final responsibility”, but also the clear intention of the drafters of the Constitution.⁸¹⁷

However, judicial review and transformative constitutionalism are seldom appreciated by the executive and legislator. The idea that judges can find the legislation of the elected representatives of the people - needed to fulfil their constitutional responsibility to their constituency – unconstitutional, or to attach a meaning, are perceived by politicians as an intrusion of the courts in the mandate of the legislature and the executive. Namibia is no exception.

Not every lawyer, or every human rights lawyer for that matter, is in favour of judicial review or obvious political judgments. Retired Constitutional Court of South Africa judge, Albie Sachs is a case in point. He initially believed that the Bill of Rights proposed for the South African constitution was aimed at entrenching the advantageous economic position of the white community. He also has a problem with judicial review *per se*. For him it was inconceivable that a post-apartheid democratic elected government could be limited and its action reviewed by middle-aged white men and ill-informed positivist judges.⁸¹⁸ His alternative was a committee of hand-picked men and women who understood the South African context and like the Public Service Commission.

Sachs' committee can be compared with a special constitutional court. He preferred non-judicial presiding officers of the committee.⁸¹⁹ There are two major flaws in Sachs' model-

⁸¹⁶See a discussion of the letter and the subsequent interaction with Chief Justice Mahomed and Acting Supreme Court Judge Dumbutshena in O'Linn, B, 2010. *The Sacred Trust of Civilization. Ideal and Reality. Volume II*. Windhoek: Polination Publishers, pp.106 – 123.

⁸¹⁷See Chapter 5, sub-chapter 5.8.3, pp. 146 ff. for a discussion of the judgment.

⁸¹⁸Sachs, A, 1990: Towards a Bill of Rights in a Democratic South Africa, *South African Journal for Human Rights*, 1990 (1), p. 2.

⁸¹⁹*Ibid*, p. 4.

- the committee will not be equipped to deal with complicated legal issues, and
- the committee will never be independent, a basic pre-requisite for judicial review.

American chief justice Marshall explained the necessity of judicial review as follows-

*The powers of the legislator are defined and limited: and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits .may at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the person on whom they are imposed and if Acts prohibited and Acts allowed are of equal obligation. It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two particular laws conflict with each other, the courts must decide on the operation of each.*⁸²⁰

Most common law jurisdictions in the English-speaking world with written constitutions entrusted the courts with review powers. Namibia follows that tradition.

As I have pointed out, transformative constitutionalism, because of its less rigid approach to the text, has often come under the same criticism of taking over the role of the legislator.

But even in the United States, the birth place of judicial review, powers of the courts have been a bone of contention. Since new legislation often deals with issues and circumstances that were not even envisaged when the constitution was written, lay people cannot understand the hermeneutical link between the constitution and the new legislation. One school of interpretation suggests that one should never move outside of a strict textual determined approach. Namibian cases, as we have seen, abound.

The USA *Roe v Wade*⁸²¹ is a textbook example of a constitutional decision dealing with an issue - abortion - that was not even discussed at the time of the writing of the constitution. The Supreme Court of the USA nevertheless found that

⁸²⁰ *Marbury v Madison*, p. 137.

⁸²¹ *Roe v Wade*, 410 US 113 (1973).

allowing a female the right to terminate her pregnancy is a constitutional right. In a critical review of the case Ely contends that it is a bad decision because it does not *trace its premises to the charter from which it derive (sic) its authority*.⁸²² In other words, one cannot derive a pro-choice right to abortion if that right is not protected in the Constitution.

The problem with Ely's criticism is obvious. Firstly, non-discriminatory clauses do not necessarily limit themselves to interests and issues that are textually determined. This is true of the non-discriminatory clause in the Namibian Constitution, but also of the so-called Due Process and Equal Protection Clauses⁸²³ in the United States constitution.

As we have already seen, Dworkin and other interpreters in North America refer to rights that are worthy of protection and derivable from the spirit and context of the constitution, but not specifically mentioned, as unenumerated fundamental rights.⁸²⁴ The term unenumerated right, is already a misnomer since it suggests that there are other rights listed in constitutions that are *enumerated*. Even when rights are indeed listed, it still needs to be interpreted.

We now return to the word sex in Article 10 of the Namibian Constitution. While the South African Constitution makes specific mention of *sexual orientation* as a category of non-discrimination,⁸²⁵ the Namibian Constitution only mentions sex. Before the *Frank* case some expected the Namibian courts to follow the South African Courts and read sexual orientation into the word sex.⁸²⁶

The expectation was neither far-fetched nor without precedent. Some years earlier prosecutors pointed out that the Namibian Constitution, unlike the South African Constitution, does not include the right to be warned of a right to legal

⁸²²Ely, J. 1973. The Wages of Crying Wolf: A Comment on Roe v Wade, in *Yale Law Journal*, 82, p. 920 at p. 947.

⁸²³The Fifth and Fourteenth Amendment. The terms are derived from the wording: *No person shall be deprived of life, liberty or property, without due process of law* (5th Amendment) and *...nor shall any State deprive any person of life, liberty or property, without due process of law* (14th Amendment).

⁸²⁴See for example Crump, D. 1996. How do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy, in *Harvard Journal of Law and Public Policy*, Vol. 19 No 3, p. 798, on p. 799ff.

⁸²⁵Section 9(3). The South African Constitution also includes gender next to sex as a category.

⁸²⁶In 2001, the Legal Assistance Centre wanted to distribute condoms in the men's section of the Windhoek Prison. The issue was taken up with the Prosecutor-General, who refused to give his blessing since sodomy is still a crime in Namibia. The attitude of the Legal Assistance Centre was one of necessity rather than legal correctness. They did however justify their approach by referring to the latest South African court cases. See: Legal Assistance Centre Aids Law Unit and University of Wyoming College of Law. 2008. *Struggle to Survive A Report on HIV/AIDS and Prisoners' Rights In Namibia*, Windhoek: Legal Assistance Centre.

representation. The Namibian High and Supreme Court concluded that although the right to be warned is not explicitly mentioned, there is no real difference between the two constitutions in this regard and the warning right should be read into the Namibian Constitution.⁸²⁷

Dworkin contends that there is no real difference between unenumerated and enumerated rights since both need to be interpreted.⁸²⁸ Crump, following Dworkin, calls it a difference of degree.⁸²⁹

The anti-review thinking is flawed on at least one point. Parliaments or other legislative bodies can never be *the people*. Once the population of the city-state is too big for them to assemble in the market square, democracy needs symbols to represent the people.

The second flaw flows from the first. If the legislator is not really the people, but only a representative symbol, there is not necessarily an anti-thesis between the judiciary and the legislator. Both are symbolic representatives of the people, one to express their will in making laws, the other in executing the laws.

The counter argument in Namibia will be that judges are not elected, and only indirectly appointed by the executive.⁸³⁰ In the United States the issue is partly resolved by the prerogative of a serving president to fill vacancies on the bench during his/her term of office, which will not solve the problem of the “old guard” on the bench who could have been appointed by a previous president from the other party.

While constitutions are the ultimate expression of a people and their aspirations, it is also necessary to have independent supervisors of the expressed values rather than politicians. Dworkin observes that democracy is not only majority rule, but majority rule subject to those conditions that make majority rule fair.⁸³¹

The limitation of government is usually attained by a separation of powers with strong developed checks and balances built into the system. While legal philosophers did not always make a clear differentiation between the rule of law and constitutionalism, the basic idea was always to create a system of law that can

⁸²⁷See *S v. De Wee*, 1999 NR 122 (HC); *S v Kapika* 1997 NR 285 (HC).

⁸²⁸Dworkin, R. 1992. Unenumerated rights: Whether and how Roe Should Be overruled, in *Chicago Law Review* No 59, p. 381, on p. 388.

⁸²⁹Crump, 1996, p. 800.

⁸³⁰See the arguments of SWAPO stalwarts like Moses Garoeb after the *Kleynhans judgment* and Minister Jerry Ekandjo during the Ngoma controversy above.

⁸³¹2006. *Justice in Robes*. Cambridge, MASS: Belknap Press of Harvard University Press, p. 147.

outlive the ideological or nationalist outbursts of illogical hate and hysteria, or as McIlwain put it:

*We must leave open the possibility of an appeal from the people drunk to the people sober, if individual and minority rights are to be protected in the periods of excitement and hysteria from which we unfortunately are not immune.*⁸³²

Writing shortly after World War II, McIlwain possibly had the destructive result of Nazism and Fascism in mind. A constitution which makes it difficult for a power drunk government to suspend the rule of law and to rule by decree, is no guarantee for a *Rechtsstaat*, but the process of change will at least be slowed down and give logical thinking an opportunity to bring reasonableness back to the system.

The Namibian Constitution gave the High and Supreme Court review powers over all legislation and actions of Parliament, any sub-ordinate legislative authority, the executive and agents of government,⁸³³ as well as any law in force immediate before the date of independence.⁸³⁴ This includes legislation intact at the time of independence, new legislation of Parliament, sub-ordinate regulations, customary law and even the common law.⁸³⁵

To understand the need for an independent interpreter of a constitution and a transformative court to take cognisance of the needs of a changing society, judicial review and transformative constitutionalism must be seen in the light of the court's responsibility towards the final guardians of the constitution: The People. Judicial review fits the basic principle of transformative constitutionalism. It limits the possibility of the executive ignoring constitutional principles or transformative judgments.

7.5 The Executive and the Judiciary

While there is no indication of major attempts from the executive to interfere in the operations of the judiciary, negative attitudes of government often reflected in the mass actions of the people, most of the time initiated by the ruling SWAPO Party. As

⁸³²1947. *Constitutionalism: Ancient and Modern*, New York: Ithaca, p. 145 ff.

⁸³³Article 25(1) (a).

⁸³⁴Article 26(1) (b).

⁸³⁵Article 66. However, common law and customary law that did not comply with the Constitution were not taken up in the Namibian legal system at independence.

noted, at the height of the time of reconciliation the release of Acheson did not result in any major reactions. But the light sentences of the accused in the *Kleynhans case* caused a major outcry against a judge who gained the respect of SWAPO in exile for his fearless defending of political prisoners. Comparing the two cases, one would expect serious protest against the release of Acheson by Judge Mahomed. It virtually brought the prosecution of the Lubowski murders to a still stand, and as we know now, to a more or less finality. The only concern came from another High Court judge, Judge Levy, during the inquest where he pointed out that a chance to serve the ends of justice was lost once Acheson was released.

The angry reaction against Judge O'Linn was probably the result of a concern that the white right may become a future problem. Although unorganised at the time of the *Kleynhans case*, they could have posed a security threat if left to organise. All adult males were trained soldiers under the conscription policies of the South African government and later the transitional government of South West Africa/Namibia. It is also significant that the government did not play a significant role in the protest (although the executive as leaders of the SWAPO Party was certainly sympathetic to the protests). It remained a party driven programme. While the secretary-general of the Party, Moses Garoeb, was also a Member of Parliament, he was acting in his capacity as a party official.

The silence of government in the *Corporal Punishment case* was predictable despite the fact the traditional communities – many of them ardent SWAPO supporters⁸³⁶ – were in favour of corporal punishment in the customary courts.

Yet, none of the traditional authorities commented on the banning of corporal punishment by the Supreme Court. The reason is possibly to be found in SWAPO's initial opposition to traditional authorities. There is a contradiction in this position since SWAPO in exile was also in favour of establishing customary law a legal system in an independent Namibia. The traditional authorities were slow to do anything that would harm their relationship with government. Since the government accepted the judgment, it would possibly have been futile to raise their concerns. It may also have strengthened a general belief that customary law is not compatible with constitutionalism and human rights.

⁸³⁶In terms of the Traditional Authorities Act, the recognition of traditional authorities lies with the Minister of Local Government and Housing. There have been regular complaints from unrecognized authorities that authorities where the leadership is known to be members or supporters of the ruling party were favoured for recognition.

It is also known that the traditional authorities and customary courts, in their general co-operation with the South African authorities used corporal punishment as a tool against the liberation movements.⁸³⁷ At the time of the *Corporal Punishment* case the activists and the political populists supported the government in its attempts to limit the powers of the traditional authorities. Bearing in mind the role corporal punishment played in colonial times, the silent acceptance by the people is understandable.

The several issues involving Minister Jerry Ekandjo need some further scrutiny. In the *Osire Star* saga the Chief Justice was quick to accept a so-called apology by the Minister. However, the Minister's reaction can hardly be seen as an apology. In the *Sikunda* case, the court found that the Minister was in contempt of a court order.

In both instances the government made statements respecting the authority of the judiciary and the rule of law. However, in none of these cases was the Minister disciplined or even strongly repudiated by the executive. The same goes for the actions of the late Moses Garoeb in the *Kleynhans* case.

The criticism of the Prime Minister in 2003, that the Bench was still lily white and Dr. Kavana's criticism of the criminal justice system were more direct criticism coming from the executive. The Prime Minister later explained that he did not refer to the judges, but to the legal fraternity. The use of the word "Bench" was only a wrong choice.⁸³⁸ In the same manner Dr. Kavana was concerned with the implementation and interpretation of the constitution.⁸³⁹

The High and Supreme Court did not follow a clear pro- or anti-government approach. One thing seems clear: The Namibian superior courts did not hesitate to go against the interest of the government and constitutional institutions. Despite some indirect pressure from government on the judiciary, the superior courts were often almost surprisingly critical of government and its institutions. A list of the most important cases analysed in this study indicates that government did not always get what it wanted.

⁸³⁷ *Wood and Others v Ondangwa Tribal Authority and Another*, 1975 (2) SA AD 294 (A).

⁸³⁸ De Bruyn, E. 2003. Leliewit Regbank is uit, sê Theo-Ben, in *Die Republikein*, 28 January 2003.

⁸³⁹ *Ibid.*

- In *Ex Parte Attorney-General: In re The Constitutional Relationship Between The Attorney-General and The Prosecutor-General*⁸⁴⁰ the Supreme Court explicitly ruled against a prosecutorial role for the Attorney General and for an independent Prosecutor-General;
- In *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State*.⁸⁴¹ the Supreme Court found corporal punishment by organs of the State unconstitutional despite the fact that it was generally practised in schools and by traditional authorities;
- In *State v Smith and Others*⁸⁴² sections of the Racial Discrimination Prohibition Act 26 of 1991 were declared unconstitutional;
- In *Kauesa v Minister of Home Affairs and Others*⁸⁴³ important section of the Police regulation were declared unconstitutional and the right of a junior officer to criticise the commanding structures of the Namibian Police were recognised;
- In *Frank and Another v the Immigration Selection Board*,⁸⁴⁴ the High Court ruled against a decision of the Immigration Selection Board refusing a lesbian women living in a permanent relationship with another women permanent residence, despite the fact that the Board denied that her sexual orientation played a role in their decision. The judgment was, however overturned by the Supreme Court.
- In four Sikunda cases the High and Supreme Court ruled against the Minister of Home Affairs detaining Sikunda.⁸⁴⁵
- In *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC) the Supreme Court granted the Caprivi secessionists State funded legal aid despite Article 101 of the Constitution stating that Article 95 rights (the category in which paid legal aid falls) are not enforceable in a court of law.

⁸⁴⁰1998 NR 282 (SC) (1).

⁸⁴¹1991(3) SA 76 (NM) 178 (SC).

⁸⁴²1996 NR 367 (HC).

⁸⁴³1996 (4) SA 965 (NMS).

⁸⁴⁴1999, NR 257 (HC).

⁸⁴⁵*Government of the Republic of Namibia v Sikunda* 2002 SA5/0 NASC 1; *Sikunda v Government of the Republic Of Namibia And Another*, unreported case of the High Court of Namibia, coram Justice Manyarara, judgment on 24 October 2000; *Sikunda v Government Of The Republic Of Namibia And Another*, (unreported case of the High Court of Namibia, coram per Justice Levy, judgment on 31 October 2000).

- In a long series of cases, the courts declared reverse onuses and presumptions against accused persons, infringements of the constitutional right of accused not to give evidence against themselves and to be presumed innocent until proven guilty.

The list goes on. It seems clear that during the first fourteen years of independence, the superior courts remained independent. While the government may have placed some external pressure on the courts, there is no evidence of any direct attempt by government to influence judgments or to appoint judges who will be sympathetic to government or party interests.

7.6 Judges and their Influence

Traditionally the public expect judges to be objective and not to allow personal opinions to influence their judgments. As we have noted above, this is an unattainable ideal. Since it is impossible to measure the influence of a judge's ideology, Cockrell suggested that the ideology or political conviction of the judge should play no role in the analysis of his/her judgment.⁸⁴⁶ The substantive value of the judgment is the important issue. Cockrell found the denial of South African Constitutional Court judges that their ideology and political convictions played no role in their rejection of the death penalty unnecessary.

The legal realists, on the other hand, give the judge the freedom of a legislator. Lon Fuller, who influenced Duncan Kennedy⁸⁴⁷ realised in the 1940's that law cannot function without formal rules, hence his eight prerequisites for a proper legal system. Fuller defined the rules in the negative as elements undermining the legal system:

- Failure to achieve rules at all, so that every issue must be decided on an ad hoc basis;
- Failure to publicize, or at least to make available to the affected party, the rules he is expected to observe;
- Abuse of retroactive legislation;

⁸⁴⁶See 7.2 above.

⁸⁴⁷James Boyle, 1993, sees Duncan Kennedy's article of 1976, Form and Substance in Private Law Adjudication, 89 *Harvard Law Review*, together with Kelman, M. 1987. *Charting the Development of Critical Legal Studies: A Guide to Critical Legal Studies*. Cambridge: Harvard University Press, following the initial insights of Fuller.

- Failure to make rules understandable;
- The enactment of contradictory rules;
- Rules that require conduct beyond the powers of the affected party;
- Introducing such frequent changes in the rules that the subject cannot orient his action by them; and
- Failure of congruence between the rules as announced and their actual administration.⁸⁴⁸

The Realists nevertheless emphasised the unrealistic expectation to uphold a pure doctrine of separation between the judge as an interpreter and the judge as legislator. Even the liberal positivist Herbert Hart accepted that in the penumbra there are situations where the judge may have more than one option.

The American Realists made the personality, social position, background and character of the judge important issues to take cognisance of in understanding judgments. The prejudice of a judge is hidden behind the doctrine of independence, neutrality and the formalism of the system. Frank, a Realist legal philosopher who became a judge, suggested that the awareness of the human component is important in understanding the legal process,⁸⁴⁹ but also for the self-awareness of the judge. If the judge conscientiously acknowledges his/her own sympathies and prejudices, he/she can neutralise its effect.

The important question for this study is to what extent the historical background and ethnicity of the judges played a role in the development of two schools of thought, represented by the legal clash between O'Linn and Mahomed.

How does the South African debate reflect on the hermeneutical differences between O'Linn and Mahomed/Dumbutshena, or between the High and the Supreme Courts? If one takes the South African debate seriously, it seems inappropriate to lower the Namibian debate to a clash between the old positivist school and a progressive value-conscience bench driven by transformative constitutionalism.

O'Linn cannot be described as a product of the apartheid system. Ideologically he was always under suspicion by the South African administration and even the transitional government during the colonial era. As a young lawyer, he refused to toe the white political line. His participation in white opposition politics was

⁸⁴⁸See Fuller, L. 1934. American Legal Realism, 82 *University of Pennsylvania Law Review*, p. 429 at p. 439.

⁸⁴⁹See his judgment in *In Re Linaham* 138 F. 2d p. 650 on p. 652.

not exactly revolutionary, but his views were in the best tradition of liberal opposition to apartheid. O'Linn was respected as an advocate and his objectivity acknowledged by friend and foe. He was willing to go to Lusaka and engage in a transparent manner with the SWAPO Party despite the fact that some members of the transitional government saw people like O'Linn as traitors and communists.⁸⁵⁰ Yet, when SWAPO cadres crossed the borders into Namibia on 1 April 1989, O'Linn as chairperson of Peace Plan 435 fearlessly criticised the liberation movement.⁸⁵¹

As chairperson of the commission monitoring violence during the run up to the Resolution 435 elections for a Constituent Assembly, he gained the respect of all the parties and the international community – despite initial complaints by the internal parties that he will be biased in favour of SWAPO.⁸⁵²

As a member of the Windhoek bar, he defended Plan fighters and SWAPO members simply because he believed in the rule of law. O'Linn brought that same commitment to the bench, doing *constitutional interpretation the old-fashioned way*, to use a phrase once used to describe the method of American judge Antonin Scalia.⁸⁵³ O'Linn disliked what Scalia calls a *Living Constitution* or judges that go beyond the written text to discover the meaning.

For the political analyst, his love/hate relationship with the SWAPO Party is difficult to understand. The defence advocate of guerrilla fighters, but also the judge who was seen to be soft on white right wing terrorists, the judge who had no understanding of the need of a black police officer to criticise the white leadership, but shared the politician's concern about crime. The list goes on.

However, understanding O'Linn's background and ideological or legal philosophical point of departure, makes his judgments more predictable. His commitment to the text of all legislation and a faith in the basic interpretive rules

⁸⁵⁰ Author Unknown. 1988. Not SWAPO policy to attack civilian targets - O'Linn told. *The Namibian* 1 – 7 April 1988, pp. 4 – 5.

⁸⁵¹ Angula, H. 1989. Letter on behalf of SWAPO in response to Brian O'Linn's criticism of the 1 April 1989 Crisis, quoted in *The Namibian*, 28 April 1989. Also by O'Linn, B. 2009. *The Sacred Trust of Civilisation. Ideal and Reality. Volume 1*, (Revised issue, first issue 2003). Windhoek: Gamsberg Macmillan Publishers, p. 324.

⁸⁵² US Department of State: Country Report on Human Rights Practices for 1989, February 1990 (available at [ecoi.net](http://www.ecoi.net)) http://www.ecoi.net/local_link/240768/350170_en.html. Last accessed on 9 April 2015.

⁸⁵³ Justice Antonin Scalia 2005. Paper read at the Woodrow Wilson International Center for Scholars in Washington, DC. March 14, 2005. Transcribed by Jeffrey King of www.threebadfingers.com. Published by Three Bad Fingers at http://www.cfif.org/htdocs/legal_issues/legal_updates/us_supreme_court/scalia-constitutional, last accessed on 10 January 2011.

leave little room for the idea of reading the Constitution as a *sui generis* or considering transformative constitutionalism as an interpretive option.

His positivist approach may bear strong resemblance to the conservative approach of a Scalia in the USA or the South African bench during the apartheid era so severely criticised by Dugard, Chaskalson and Dyzenhaus. However, O'Linn never used the criticised dictum of Hart that law and morality have nothing to do with one another. He does not fit the positivist "yes man" image portrayed by Radbruch (and criticised by Mertens as the legal problem of the Nazi period).

O'Linn's insistence of the text resembles Fagan's reliance on Raz's textual moral position rather than the morals of the external rules of constitutional interpretation.⁸⁵⁴ The Constitution as a legal text should not be dealt with mystical moral rules and clothed in poetic language. If the legal text is not ambiguous, it should be treated like any other legal text.

O'Linn's criticism of the *Corporal Punishment Judgment* has merit, as shown in Chapter 5. It resembles Cockrell's criticism of the "rainbow jurisprudence" in South Africa. His criticism of Mahomed was not so much the application of value judgments. O'Linn himself applied value judgments, while defenders of "soft positivism" such as Cockrell and even Roux are at pains to point out that positivism are not in principle against value judgments. Even Hart saw moral superiority as the basis for the law making process of judges in difficult cases where the legal problem lies in the so-called penumbra.

Consequently, criticism of the corporal punishment case does not attack moral judgments or the reliance on the values of the Namibian people. Neither is it based on a preference for positivism against transformative constitutionalism. As Roux pointed out, transformative constitutionalism is not necessarily the domain of critical legal studies, and both Dworkinism and positivism can operate comfortably with the principle. As I noted in analysing the constitutional judgments in chapters 5 and 6, the Namibian superior courts did not rely on CLS arguments in any significant way.

If we take Woolman and Davis seriously, the real divisive moment between O'Linn and the more progressive part of the bench (Mahomed, Dumbutshena and possibly Hannah), can be found in the understanding of the political foundation of the

⁸⁵⁴Fagan, A. 1995: In Defence of the Obvious: Ordinary Language and the Identification of Constitutional Rules, *SAJHR*, Vol. 11, pp. 545 ff.

Constitution. The conservative approach of O'Linn saw dignity as the foundation of all rights listed in the Constitution. For him the battle or struggle for independence was based on the acknowledgement of the dignity of all humans. Unlike the freedoms, dignity is unrestricted and not subjected to any other legislation or law. Fundamental freedoms on the other hand, are subjected to the other laws in Namibia. Therefore, O'Linn found it inconceivable that freedom of speech can override the dignity of individuals. To rely on affirmative action, which may be a constitutional principle, but is not even a constitutional right, to backup the priority of freedom of speech over the need to respect the dignity of individuals, as the Supreme Court did, spelled heresy to O'Linn. While O'Linn obviously operated within the clear and known parameters of a positivist approach, he is at the same time defending typical liberal values.

Mahomed worked with an even stronger anti-apartheid background. Only, he was more than a sympathetic observer. He experienced the oppression and prejudice in his life. Mahomed could not join the exclusive white Pretoria Bar after his studies, and when he joined the Johannesburg Bar, the Group Areas Act prevented him from occupying an office in the city. He nevertheless became the first black lawyer to receive Senior Counsel status from the President of South Africa. In the early 1990's he was involved in civil society activism for a democratic South Africa.

There are clear differences between the backgrounds of Mahomed and O'Linn:

- O'Linn started his career as a police officer,
- Mahomed struggled to enter the legal profession because of his colour;
- O'Linn was a respected member of the South West Africa Bar,
- Mahomed struggled to get entrance into the Johannesburg Bar, and had to work without an office.

There are also obvious similarities:

- Both were fierce defenders of the rule of law during the apartheid era;
- O'Linn played an active role in both liberal political opposition to apartheid and civil society's drive for Namibian independence as chair of the Namibian Peace Plan 435.
- Mahomed was chair of the Convention for a Democratic South Africa in the early 1990's.

The conflict between the judges, and the total different approaches, makes it difficult to determine a sociological or psychological reason for their judgments. If

O'Linn's "soft" judgment in the *Kleynhans case* can be ascribed to his history as a former police officer, how does one explain the judgment of Mahomed in the *Acheson case*? If O'Linn's judgment in the *Kauesa case* are attributed to his loyalty to the white police officers, or his respect for discipline, does it mean that one has to ignore his explicit preferential choice for dignity as the foundation of the Namibian Constitution?

Taking note of Klare, Botha and Kennedy's criticism of the presumptions underlying legal interpretation, it remains an almost impossible task to use race or political association as interpretive guides to understand the different approaches of the first fourteen years of Namibian jurisprudence.

Although Judge Levy was a South African coming from the old dispensation, he was more willing than his colleagues to move the boundaries of judicial activism and freedom away from the old formalistic approach of the South African Supreme Court of Appeal. His judgment on the High Court bench in the *Frank case* did not get the credit it deserved, mainly because the Supreme Court overruled it. As noted, the judges of the South West African Supreme Court during the 1980's, which included Judge Levy and the later judge president and Chief Justice, Judge Strydom, already broke ranks with a pro-government conservatism.

The fearless conduct of judges Hoff and Mainga in the *Sikunda case*, both black judges appointed after independence, but both judges who cut their teeth on the Bench as magistrates before independence, is worth noticing as an example of judicial independence.

One of the reasons for the demise of American Realism is the difficulty of categorising judges. The realist Fred Rodell, looking at behavioural tendencies, predicted the results of the now well-known *Baker v Carr*⁸⁵⁵ fairly accurate in an article after argument but before judgment.⁸⁵⁶ However, it becomes much more difficult to use race or social tendencies as predictable yardsticks or interpretive explanations.

In the case of *S v Mushwena and Others*⁸⁵⁷ the Court had to decide on the jurisdiction of the High Court to trail suspects involved in the failed *Coe d'état* attempted in the Caprivi in 1999. The Namibian Police brought all the suspects

⁸⁵⁵1962. 82 S. Ct. p. 691.

⁸⁵⁶Rodell, F. 1962. For Every Justice, Judicial Deference is a Sometime Thing, 1961 -1962 50 *Georgetown Law Journal*, p. 700ff.

⁸⁵⁷2004 NR 276 (SC).

(respondents in the Supreme Court) to Namibia from neighbouring countries by unlawful means and without following extradition procedures. Three judges of the full Bench of the Supreme Court, Judges Mtambanengwe, Chomba and Gibson ruled in favour of the State, while two judges, Strydom and O'Linn ruled in favour of the respondents, finding that the High Court did not have jurisdiction to try them.

The immediate use of racial categories can easily be interpreted as a victory for progressive judicial activism by black judges on the Bench, resisted by the white component operating with a typical pre-independent apartheid mind-set and its obsession with form rather than content.

The black judges are concerned with the territorial integrity of the new Republic, the need for criminal trials to end all violence in the Caprivi and to send out a clear message that secession attempts will not be tolerated. While extradition is the normal way to get fugitives from law back in Namibia to stand trial, the succession attempt created an abnormal situation asking for radical action.

If we categorise the bench as a difference of opinion based on nationality, our interpretation can come to a different conclusion. Then the Namibian judges are the fearless protectors and defenders of the rule of law, the rights of an accused and the necessity of all the role players in the criminal justice system to come to court with clean hands. The foreign judges are dependent on the goodwill of the government for their contracts and their position on the bench. The answer may even be legal and based on substantive differences between the two groups on two clearly discernible interpretive positions and following two streams in international law, while the interpretation of the facts possibly also played a role.

O'Linn and Strydom followed a reasonably late South African case⁸⁵⁸ and accepted that while no one was abducted, neither was anyone deported. The handing over of the suspects to the Namibian police were not spontaneous actions of Botswana and Zambia, but initiated by Major-General Martin Shali of the Namibian Defence Force with the full knowledge of the Namibian Police.⁸⁵⁹ In following the "clean hands" approach of the *Ebrahim case*, the judges concluded that the High Court was correct. It did not have the jurisdiction to try the respondents, except for

⁸⁵⁸ *S v Ebrahim* 1991 (2) SA 553 (A).

⁸⁵⁹ *S v Mushwena and Others*, pp.288 and 289.

Charles Sambona, who returned to Namibia voluntary and co-operated with the Namibian Police.⁸⁶⁰

Both Gibson and Mtambanengwe, while acknowledging the “clean hands” doctrine of the *Ebrahim case*, showed more interest in the “act of state” doctrine, traced back to a series of cases in the United Kingdom and the United States, going back to the late nineteenth century.⁸⁶¹ In terms of the rule the actions of a foreign state has no relevance to the arrest of a suspect on territory of the state who trials the suspect or the jurisdiction of the courts to do so.

At the heart of the difference between the two groups lies the role Namibia played in the delivering of the accused to the Namibian Police. Mtambanengwe/Gibson (and Chomba, who concurred without writing a judgment) concluded that Major-General Shali’s request to the Zambian authority could not be seen as a Namibian initiative that lead to the handing over by the Zambian or Botswana authorities. O’Linn/Strydom saw a direct link between Shali’s action and the events following that lead to the handing over of the suspects to the Namibian police.

There are no indications in the judgment itself that the judges were driven by anything but their own convictions. O’Linn and Strydom relied on South African law. Their experiences the previous dispensation may have influenced their more critical approach to government action in following the *Ebrahim case*. The fact that Mtambanengwe gave a similar judgment while on the Zimbabwean bench, undoubtedly also had an influence on his views.

However, to link the judgment with the nationality of the judges or their ethnicity seems to be a bridge too far, to use Pierre de Vos’ expression. When interpreting the interpreters, it is possibly better to judge them on the weakness or strength of their substantive arguments.

If one opts for transformative constitutionalism, the judgment of O’Linn and Strydom is the way to go. Not only does it fit the development in Namibia’s neighbour, but it also opts for a broad, purported interpretation of individual rights. Namibia was, like South Africa, plagued by autocratic state abductions and even killings of political opponents in neighbouring territories. The *Ebrahim case* addressed and overturned the non-democratic judgment that bound both countries

⁸⁶⁰ Ibid, pp. 290 and 395.

⁸⁶¹ *Underhill v Hernandez* 168 US 250 (1897) at 252.

during the apartheid era. Although the action of the Namibian Police and Defense Force cannot be compared to the rogue actions of the South African occupation era, a strong burden on the State to follow its own rules when freedom of citizens are concerned, seems to be the logical approach to break the bonds of the past and create new rules and structures for the future.

The difference between the majority and minority judgments is not only the case authorities they preferred to follow, but a choice between an burden on the Namibian State to follow its own stringent rules, even if its neighbours can assist Namibia without asking questions, and a blind acceptance of the actions of neighbouring states, even if they are suspect.

Von Doepp, an American social scientist, used a comparative model to determine if expat judges are more likely to make judgments that favour government.⁸⁶²

*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.*⁸⁶³

Von Doepp's methodology is questionable since he does not analyse the facts but rather compare trends only.⁸⁶⁴ He explains his methodology as follows:

*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.*⁸⁶⁵

Even if one does not agree with Von Doepp's methodology, his conclusion summarises the relationship between government and the judiciary accurate:

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.

⁸⁶²Von Doepp, P. 2009. Politics and judicial decision-making in Namibia: Separate or connected realms? in Horn, N and Bösl, A. *The Independence of the Judiciary in Namibia*, pp.177 – 205.

⁸⁶³Ibid, p. 192.

⁸⁶⁴Ibid, p. 178.

⁸⁶⁵Ibid. See also p. 185 for a detailed explanation of Von Doepp's methodology.

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.⁸⁶⁶

It will be an overstatement to allege that transformative constitutionalism was the main jurisprudential model of the first twelve years of independence. But one needs to take notice of the fact that both liberal and judges who preferred a positivist approach, contributed to the development of transformative constitutionalism, even if they may not have been familiar with the concept and never quoted Mureinik, Klare or the writings of Davis/Woolman. It is irrelevant to ask if they consciously applied transformative principles. The post-2002 judgment may give us a better understanding of the ongoing influence of positivism and the development of transformative constitutionalism.

7.7 Final Conclusions

After evaluating the important cases between 1990 and 2002, looked at the South African debate and placed it in a broader interpretive perspective, we can now come to some final conclusions:

While the term *transformative constitutionalism* was relatively unknown in southern Africa when Namibia became independent, the Courts clearly understood the principles. Both the Supreme and High Court presented judgments with clear transformative objectives. Yet, it will be wrong to call the superior courts after 1990 transformative courts. There were also judgments that did not move away from the formalism and conservatism of the colonial era.

There is little, if any, indication that an ideology of apartheid played any significant role in post-independent jurisprudence. The *Kleynhans* case stirred the emotions, possibly because of the timing of the planned *co d'état* shortly after independence. There is little in the judgment indicating any sympathy with the accused. This also applies to the *Lubowski* murder. The South African Defence Force was still powerful during the period before the constitutional negotiations started. In several cases, the Courts made decisive judgments against apartheid, its ideology and discrimination.

⁸⁶⁶ Ibid, p. 192.

The Courts regularly crossed the dividing line between politics and law in the first fourteen years. The mere fact that certain issues such as socio-economic rights were nested safely in Chapter 11 of the Constitution, with Article 101 limiting the jurisdiction of the Courts over such issues, did not prevent the Courts from taking socio-economic rights serious.

Yet, no single model of constitutional interpretation was developed. Roux, a follower of Hart and Dworkin, points out that transformative constitutionalism has a positive role to play in constitutional jurisprudence. It must however be understood as a mode of interpretation based on the values and principles of the Constitution. Roux challenged the idea that transformative interpretations are dependent upon a specific hermeneutic approach such as CLS or legal realism, or a specific understanding or reading of the constitution such as a post-liberal or Creole liberal reading.

It is not clear what the dividing line in the Namibian jurisprudence of the first fourteen years was. O'Linn's positivism and literal interpretation resulted in several good, transformative judgments such as the *Mushwena case*. Although it was one of two minority judgments, it was a good transformative interpretation, preventing the police and defence force to ignore extradition laws. In the *Mwilima case*, O'Linn (with Strydom), loyal to his literal model of interpretation, interpreted the text of the Constitution, albeit not with a fundamentalist hardness. It turned out to be possibly the best examples of transformative constitutionalism of the first fourteen years.

Yet, it would have been possible to predict the outcome of judgments merely based on the known ideology or legal philosophy of the judge on the Bench. The Frank judgment of O'Linn was a disappointment, not because of his positivist approach, but because of a too narrow interpretation of the word *sex* in Article 10(2). This approach, while a literal approach like the *Mushwena judgment*, misinterpreted not only the word *sex*, but also the spirit of Article 10(2). In the *Mushwena judgment*, the judge opted for a broad interpretation of Article 95(h). While it is by no means an activist judgment, it captured the spirit of chapter 11.

In some cases the transformative elements of the judgments was not immediately clear. For progressive lawyers the interpretation of the phrase *final responsibility* in Article 87(a) as referring only to administrative issues and excluded responsibility of prosecutorial decision was a disappointment. It excluded the then AG, Hartmut Ruppel from the opportunity to transform the Office of the PG into a

human rights and gender sensitive authority. The independence of the PG from political authority became clear only if the interpreter managed to differentiate between the possible influence of the two office bearers and the principle of independence.

But the judgment is not without transformative significance. It went beyond the mere wording *final responsibility* which seems to make the Prosecutor-General a subordinate of the Attorney-General. Acknowledging both the principle of separation of powers, and the historical abuse of the apartheid colonial government, the Supreme Court opted to look to the future. An independent Prosecutor-General, the Court concludes, will break with the subordinate prosecutorial policies of the old era and replace it with a democratic, independent constitutional Prosecutor-General.

As a rule, the Namibian superior courts still approach the law as sacrosanct principles. The idea that a Constitutional problem may have more than one “correct” answer, is seldom, if ever, mentioned by the Courts. Every judgment appears to be the only possible interpretation, hence O’Linn’s criticism of the Supreme Court judgments of *Kauesa* and the *Corporal Punishment cases*.

The Courts prefer formalistic arguments. Even the acclaimed value judgments such as the *Corporal Punishment* and the *Frank cases* are not based on substantive arguments. Consequently, the value judgments did not help much to develop guidelines for constitutional interpretation. O’Linn correctly criticized the judgment in the *Corporal Punishment case*. There is no indication how the values of the people are determined. Rather than determining the values of the people, the Court simply assumed that Namibia shares the values and norms of countries with similar constitutions.

Even Mahomed was confused on how he determined the values of the Namibian people. Judge O’Linn did not do much better in his application of the values and principles of the people in the *Frank case*. He simply took judicial notice of the derogatory language used by prominent politicians against homosexuals. The fact that they were not criticized or contradicted by other politicians in Parliament, was proof enough for O’Linn to accept that the norms and values of the Namibian people do not include the acceptance of same sex relationships.

A more acceptable approach to value judgments came from the *Kauesa Supreme Court judgment*. The Court worked with clear constitutional principles

when it determined if the police regulations was unconstitutional. This opened the door for a more reliable value model.

While the history of the Namibian people and the preamble is important to understand the past, this should ideally lead to a correction of the past, but also the transformation of the Namibian society. Both the *Smith* and the *Müller* cases is against the spirit of the Constitution, and of the preamble to conclude that previously advantaged are limited in their enjoyment and protection of constitutional rights. The Constitution should be interpreted in such a manner that a bridge (Mureinik) is crossed from oppression to democracy, freedom and equality for everyone.

In several cases, the court ignored international law and used comparative law as an interpretive tool:

- *Frank* (Zimbabwe and to a lesser extent South Africa);
- *Corporal Punishment case* (Australia and Canada).

In both these cases international law could have played a positive role in developing transformative constitutionalism.

Something needs to be said about the traditional jurisprudential models. Namibian judges can hardly be placed in a Dworkinian or Hartian model. During the early years, the debate between O'Linn and Mahomed showed some traits of a battle between positivism (O'Linn) and transformative constitutionalism (Mahomed). However, none of them were consistent or dogmatic in their different approaches. While the two judges obviously operated from different jurisprudential models, the differences often did not end in different results (*Tcoeib*, etc.).

A last question: *“To what extent did the political atmosphere influence the jurisprudential development?”*

The court clearly went through different stages. Initially both the High and Supreme Courts followed a liberal approach. The rights of individuals were protected, even when this caused serious outcries in the community (*Corporal Punishment case, Kleynhans and Kauesa*).

The Namibian High and Supreme Court established the new Republic as a *Rechtsstaat*, a jurisdiction where the rule of law is observed and where there is a clear separation of power between the judiciary and the other legs of government.

While the judgments did not always follow a consistent mode of interpretation, there is no evidence of any government interventions in the judgments of the superior courts.

The lack of cohesion between different judgments and the use of different hermeneutical keys to unlock the Namibian Constitution need to be taken seriously by the Namibian courts in the 21st century. The old perception of law and the role of the courts are no longer tenable or realistic.

It is also clear that the last word of positivism has not been spoken. Moderate positivists such as Fagan and Cockrell do not operate with an old-fashioned view of law. Cockrell's challenge to lift both the academic debate and the judgments of the superior courts to the level of substantive legal issues rather than structural law still holds.

The test for good or bad judgments should not be an ideological shibboleth for or against value-based or positivist judgments. Rather, transformative constitutionalism ought to be accepted as the best possible way. Namibian jurisprudence since independence has examples of good transformative judgments such as the *Kauesa case*, but also less convincing examples of value-based such as the Corporal Punishment case. Often different hermeneutical approaches nevertheless produce the same results, such as the *Tcoeib cases*.

South African scholars such as Roux, Cockrell and to a lesser extent Fagan, have pointed out that even closer to home positivism does not equal stagnant, outdated fundamentalism. Consequently, the soft positivism of Cockrell and Roux fall outside the domain of rigid, literalist interpretation.

If the Namibian bench is going to learn anything from the first fourteen years of constitutional development, the legal fraternity needs to take cognisance of the debates and developments in textual interpretation. A Namibian debate, almost non-existent in the first fourteen years since independence, will possibly concentrate on substantive arguments.

Finally, we can point to a few other developments during the first fourteen years of constitutional development.

- The Supreme Court of South West Africa was a worthy forerunner of the superior courts of an independent Namibia in the 1980's during the period when the Transitional Government of national Unity governed the country with the South African representative, the Administrator-General. While Proclamation R101 was not a constitution of the territory, the attached Bill of Rights gave the Supreme Court the opportunity to develop a human

rights jurisprudence even before independence. Unfortunately, the Transitional Government often challenged the judgments of the court based on Proclamation R101 in the Supreme Court of Appeal in Bloemfontein, South Africa, where fundamentalist judges regularly overturned the South West African decisions on clearly political grounds.

- Despite early criticism that the composition of the superior courts' benches are such that it will keep unelected middle aged men in power for a long time, the transformation of the bench soon created a fairly representative bench, taking into account the initial lack of available black Namibian judges. There is no indication, either in the appointments of the Judicial Service Commission or in the judgments of the courts that judges are appointed with political motives, or that judges are inclined to make favourable or unfavourable judgments in cases where the state is involved, based on the nationality, race or political alliance of the judges.
- Despite some law reform, the umbilical cord between the Minister of Justice and the magistrates are not cut yet. The independence of the magistrates improved with the implementation of a Magistrates Commission, but it did not take away all the powers of the Minister over the fate of magistrates.
- No clear discernible constitutional model of interpretation evolved in the Namibian superior courts in the period investigated. In some instances specific judges used a clearly definable model or a philosophical/jurisprudential method. In this regard one can refer to the positivist approach of Judge O'Linn, clearly demonstrated in the *Kauesa* case in the High Court and his severe criticism of Judge Mahomed's value judgment in the corporal punishment case. However, in the Frank case in the Supreme Court Judge O'Linn, while still faithful to the positivist approach, also relied on the values and norms of the Namibian people to justify his position.
- Positivism as an interpretive model has led to some good as well as questionable judgments. Nevertheless, it is an overstatement to say it always leads to undemocratic or conservative judgments. Despite severe criticism of South African scholars after apartheid, and to lesser extent German scholars after World War II, positivism cannot be blamed for the

powerlessness of the bench to protect human rights. It is more correct to say the apartheid judges abused positivism. South African liberal scholars such as Roux, Cockrell and Fagan have pointed out that all the basic elements of a transformative constitutionalism and even values of the people can be accommodated by positivism, Dworkinianism and legal liberalism. Cockrell's position that the quality of the judicial officer's substantive argument rather than the interpretive model she/he used should be the yardstick to evaluate the judgments.

- Where the courts relied on the values and norms of the Namibian people, it was not always clear how they determined the values and norms of the Namibian people. In the *Corporal Punishment case*, Judge Mahomed relied on the practises of other "civilised" countries with sections similar to Article 8 of the Namibian constitution to determine what the norms and values of the people are, possibly because Namibia shares their constitutional norms and values. Chief Justice Berker implicitly worked with an historical yardstick. The people reject corporal punishment by organs of the state because of its political abuse in the past.
- Judge O'Linn accepted the outbursts against homosexuals by the then President and a senior cabinet minister against homosexuals, as clear evidence that homosexual relationships are not condoned by Namibians. He added that neither members of the ruling party nor the opposition challenged them in Parliament. Consequently, homosexual relationships are not worthy of protection as a non-discriminatory category in terms of Article 10.
- The norms and values referred to in the *Corporal Punishment case* are the norms and values embedded in the Constitution rather than the norms and values of the Namibian people. Judge Mahomed said so much in a footnote in the *Tcoeib case*. In the early *Acheson case*, it also seemed to be the values of the Constitution itself that determined the treatment of Acheson by the High Court rather than the values of the people.
- Namibian judges preferred to solve constitutional issues by referring to formalistic law rather than substantive argument. Judge Mahomed presented no substantive argument on why corporal punishment should be considered cruel and inhumane, either as a value of the people or the

Constitution, but relied exclusively on the practices of other liberal democracies. Judge O'Linn's criticism is likewise a formalistic argument that Judge Mahomed and the Chief Justice did not follow the formal rules of the High Court in holding a specific enquiry as prescribed. His own application of values in the *Frank case* is likewise not based on a substantive argument or enquiry into the values of the people, but a conclusion based on populism political statements.

- Judge Dumbutshena's judgment in the *Kauesa case* in the Supreme Court presents a more successful approach to value based judgments. Accepting that values of societies change over time, he did not prioritise freedom of speech as a permanent priority in a clash between dignity and freedom of speech. He limited his judgment to the need of the time to give priority to freedom of speech to enable the Namibian people to enter into open and free debates after the colonial era with all its limitations on freedom of speech.
- In the *Kauesa case* in the Supreme Court rejected a prioritising of rights and a distinction between rights and freedoms.
- Both superior courts interpreted freedom of speech in a broad purposive manner.
- While the superior court judges acted generally with restraint, there are at least two occasions where the courts played a significant activist role. The first, the *Kauesa judgment* in the Supreme Court has been discussed above. In the *Mwilima case* the Supreme Court bench applied Article 144 and thus international law to enforce a socio-economic right (the right to free legal representation) despite the prohibition created by Article 101 on enforcing socio-economic rights in court.
- The *Mwilima case* opened the door for the enforcement of other socio-economic rights by linking it to either a right listed in Chapter 3 or a right protected by international law.
- The *Ex Parte Attorney-General/Prosecutor-General case* afforded the prosecutorial authority with the exclusive power to make decision on prosecutorial issues. The independence of the Prosecutor-General *vis-à-vis* the Attorney General, a political appointee, was confirmed and firmly established. Without stating that prosecution is part of the judicial function

of the State, the Supreme Court placed the Prosecutor-General in the company of judges. Prosecution in Namibia can be described as an independent constitutional function unrelated to the executive.

- Same sex relationships are not protected as a category of non-discrimination under Article 10. While homosexuals enjoy the general protection of their rights under the Constitution, the *Frank case* maintained that sodomy as a crime is constitutional and the non-discriminatory category described by the word “sex” in Article 10 means male and female.

The ultimate questions needs to be answered: To what extent did the Namibian superior courts contribute to develop a transformative jurisprudence during the first fourteen years of nationhood? In addition, which hermeneutical models did they apply in their development a transformative jurisprudence? My preference for a critical approach and my appreciation for the foundational work of the American Realists and the CLS movement played a role in my own interpretation.

The Supreme Court *Kauesa case* and the *Ex Parte AG: in re the Relationship AG/PG* were good examples of transformative constitutionalism. Both judgments had the future in mind. Although the bench never referred to a futuristic approach in their judgments, Judge Dumbutshena prepared the way where the previously disadvantaged will be able to speak for themselves and criticise the authorities. Judge Leon, in the *Ex Parte* case did not base his judgment on a preferential choice for Adv. Heyman. He looked back at the devastating effects of a prosecutorial authority being subservient to government and interpreted the Constitution in such a manner that it will not happen again.

The judgments were not mere situational ethical choices. However, I will not follow the Dworkin route to say that those judgments are the only possible interpretation of the Constitution for the specific legal problem. As I noted, Judge O'Linn's criticism of the *Kauesa case* has merit. On what legal grounds did the Supreme Court decide that freedom of expression is more important than dignity? If we consider the *Ex Parte PG/AG case*, we may well ask on what legal grounds the Court limited the meaning of the phrase *final responsibility* to refer only to administrative responsibility.

In both cases, one needs to move broader than the traditional text, even if the text is unambiguous. The judges in both cases would probably justify their choices

on a more extensive reading of the Constitution in context. Klare would refer to the ideology of the Constitution, as would Woolman/Davis. Whether one calls it a post-liberal or Creole liberal constitution, both Klare and Woolman/Davis concluded that the constitutional content demands a different reading of the text.

I agree with that position. If one add the insight of Mureinik and Chief Justice Berker and see the Constitution as a bridge from the old to the new, the judgments make legal as well as transformative sense. It is indeed unthinkable, as Judge Leon stated in the *Ex Parte AG/PG* case, that the Namibian people would want a repetition of the political manipulation of prosecutions of the colonial era. The constraints on freedom of expression during the colonial era obviously played an important role in the judgment of the *Kauesa* case in the Supreme Court. The message of the Court was clear: In future, the limitation of rights will not be lightly allowed. A liberal approach to free speech is important to overcome the oppressive colonial era with all its propaganda and limited opportunities for the public to participate in public debate.

However, the Office of the Attorney General may deconstruct the argument of the Supreme Court. They may argue that faster and sustainable transformation of the bench demanded the ruling party who opposed the oppression of the colonial era in control and not the prosecutors who prosecuted the people fighting for liberation. The real threat of a fair and just prosecutorial system is not the political appointee sanctioned by the Constituent Assembly to have the final responsibility, but prosecutors schooled in the apartheid courts, working hand in hand with the occupational forces from South Africa. O'Linn would want to know if the demand for an open society justifies the defamation of senior police officers without giving them an opportunity to answer to the serious allegations. He would maintain that the struggle for independence was primarily a battle to restore the dignity of all Namibians. Both these arguments have value. Even liberal or CLS adherents will admit that without an element of constraint, the law will become unpredictable. Since constraint is not measureable, interpreters will always argue on the limits of transformative constitutionalism.

The above examples can be multiplied. Think of the application of Article 144 in the *Mwilima* case. A positivist judge may ask if the Court considered the limitations of Article 144 - "Unless otherwise provided by this Constitution or Act of Parliament..." when it reverted to the Covenant of Civil and Political Rights. Every transformative judgment can be criticised from a positivist position. However, even

Roux and Cockrell agreed that transformative constitutionalism and value judgments are not alien to positivism.

I agree with Botha that the courts can fully accept legal pluralism without sacrificing legal clarity and predictability in the process. The South African/Namibian legal history provides several constraints that will prevent transformative benches from becoming a law unto itself. The values and determinism of the Constitution, and to quote Botha, conflicting values, policies, and the capacity of the judge “to rework the relevant legal materials” all place a burden on the courts to seek for the best possible solution of a legal problem. Botha added one more constraint: There must be an expectation from the public, and more specifically from the legal fraternity to insist that the judges will give substantive arguments for their judgments.

Lastly, it is important to understand that positivism is not the enemy of Namibian transformative jurisprudence. Some judgments came to the wrong conclusion mainly because the argumentation was not good enough, rather than the fact that the judge is inclined to positivism (*Frank, Supreme Court*), while judges with known positivist convictions, gave good transformative judgments (*Mushwena, Mwilima cases*). Cockrell is helpful when he insisted that judgment ought to be judged, not by the ideology of the presiding officer or the hermeneutical key he/she used, by the persuasiveness of his/her arguments.

The late chief justice Pius Langa said it all in his epoch-making lecture in Stellenbosch:

It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.⁸⁶⁷

⁸⁶⁷Prestigious Lecture delivered on 9 October 2006. Published as Langa, P. 2006. Transformative Constitutionalism. *17 Stellenbosch Law Review*, p. 351 on p.353.

BIBLIOGRAPHY

BOOKS AND ARTICLES

Ackermann, L. 2004. The Legal Nature of the South African Constitutional Revolution, in *New Zealand Law Review*, Vol. 4, 2004.

Afary, J and Anderson, K. 2005. *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism*. Chicago: University of Chicago Press.

Albertyn, C, Goldblatt, B and Roederer, C (eds). 2001. *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act*. Johannesburg: Wits University Press.

Allott, A. 1980. *The limits of law*. London: Butterworths.

Amoo, S and Haring, S. 2010. Intellectual Property under the Namibian Constitution, in Bösl, A, Horn, N and Du Pisani, A. *Constitutional Democracy in Namibia. A Critical Analysis After Two Decades*. Windhoek: Macmillan Education Namibia, p. 299.

Angula, H. 1989. Open letter written on behalf of SWAPO in response of Judge O'Linn's criticism of the 1 April 1989 Crisis, quoted in *The Namibian*, 28 April 1989.

Ankondah, B. 2003. Nujoma: No Fourth Term for me. London: *New Africa*, 17 November 2003 published on <http://www.swans.com/library/art9/ankomah9.html>, accessed on 30 November 2004.

Amupadhi, T. 2000. Too Much Emphasis on Rights 'Messing Us Up', in *The Namibian*, 18 October 2000.

Amupadhi, T. 2002. Iyambo Calls For Death Penalty. *The Namibian* 2 October 2002. Available on <http://www.namibian.com.na/2002/October/national/028A8E8951.html>, accessed on 4 December 2007.

Amupadhi, T. 2004. The Contender Who Came from Nowhere, in *The Namibian*, 28 May, 2004, published on http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=9344&no_cache=1, accessed on 20 March 2008.

Anonymous. 2002. Abraham Iyambo: Interview with *Republikein*. 6 September 2002.

Anonymous. 2003. Why He May Go For Fourth Term, in *The African*, Vol. 2, September/October 2003, Windhoek, Roots Travellers Productions CC.

Anonymous. 2002. *Behind the Mask. The Voice of Africa's LGBT's Community*, published on <http://www.mask.org.za/article.php?cat=&id=394>, last accessed on 4 July 2008.

Anonymous. 2008. (a). Scorpions didn't have clearance. *News 24. Com*. Available at

[http://www.news24.com/News24/ South Africa/ Politics/0,,2-7-12_2349491,00.html](http://www.news24.com/News24/South%20Africa/Politics/0,,2-7-12_2349491,00.html); last accessed 17 July 2008.

Anonymous. 2008b. Inquiry Told of Desperate Scramble to Prevent Selebi Arrest. *Legal Brief Today*, 2064, 9 May, 2008, available at <http://www.legalbrief.co.za/article.php?story=2008050908143157>, last accessed 17 July 2008.

Areios Pagos Decision 18/1871, quoted in Spilitotopoulos, E 1983. Judicial Review of Legislative Acts in Greece, in *Temple Law Quarterly*, Vol. 56, p. 472.

Asbjørn, E & Allan, R. 2001. *Economic and Social Rights and Cultural Rights: A universal Challenge*. Dordrecht: Martinus Nijhoff.

Atiyah, P and Summers, R. 1987. *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*. Oxford: Clarendon Press.

Author Unknown. 1988. Not SWAPO Policy to Attack Civilian Targets - O'Linn told. *The Namibian* 1 – 7 April 1988.

Author unknown. 1991. Attack of Moses Garoeb on the judiciary. *The Namibian*, 18 October 1991.

Author unknown. 1999. Namibia Drops Move to Legalise Abortion, *The Namibian*, 20 April 1999, published on the website Euthanasia.com, available at <http://www.euthanasia.com/nambia.html>, accessed on 10 February 2008.

Author unknown. 2000. Ekandjo Trashes the Law, in *The Namibian*, 28 July 2000.

Author unknown. 2002. Death Penalty in Parliament, in *The Namibian*, 28 October 2002.

Authors unknown. 2002. See articles on the conflict between the Prosecutor-General and the Attorney-General/Minister of Justice relating to the retirement of the Prosecutor-General, *The Namibian*:

- 15 January 2002. PG refuses to retire;
- 31 January 2002. The Minister of Justice and the Attorney General disputed his interpretation;
- 21 June 2002. AG announces agreement with PG;
- 31 July 2002. Law Society and Namibian Law Association block the amendments to the Legal Practitioner's Act; PG's contract is renewed until November 2002; and
- 3 December 2002. Bill passed and President appoints of Adv. John Walters as acting PG.

Balkan, J. 1994. Being Just with Deconstruction, 3 *Social and Legal Studies* p.393.

Barnard-Naude, A. 2009. Beyond the Brother: Radical Freedom, in Barnard-Naudé, J, Cornell, D, and Du Bois, F (eds). *Dignity, Freedom and the Post-Apartheid Legal*

Order. The Critical Jurisprudence of Laurie Ackermann, Cape Town: Juta and Co. Also published as *Acta Juridica*, 2008.

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.

Beale JH. A Treatise on the Conflict of Laws, *California Law Review* 1935 p.38.

Becker, H. 2006. New Things after Independence. Gender and Traditional Authorities in Postcolonial Namibia, *Journal of South African Studies*, Vol. 32 no. 1, March 2006, p.40.

Bösl, A, Horn, N and Du Pisani, A. 2010. *Constitutional Democracy in Namibia. A Critical Analysis after Two Decades*. Windhoek: Macmillan Education Namibia.

Botha, C, Maatskaplike geregtigheid, die animering van fundamentele grondwetlike waardes en regterlike aktivisme: 'n Nuwe paradigma vir grondwetuitleg, in *Suprema Lex*, p. 57.

Botha, H. 2004: Freedom and Constraint in Constitutional Adjudication, *20 SAJHR*, p. 249.

Boyle. J. 1993. Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance, *78 Cornell Law Review*, p. 371.

Brugger, W. 2002. The Treatment of Hate Speech in German Constitutional Law (Part I), *3 German Law Journal*, No. 12, 01 December 2002. Originally published in Bullinger and Starck (eds.), *Stocktaking in German Public Law*, Baden-Baden: NOMOS Verlag.

Bukurura, S: 2002: The Namibian Constitution and the Judiciary, in Hinz, M, Amoo, S and Van Wyk, D (eds). *The Constitution at Work. Ten Years of Namibian Nationhood*. Windhoek: UNAM Publishers, printed in Pretoria by Veloren van Themaat.

Butcher, T. 2002. Namibian Leader Warns EU of Economic War, London: *The Telegraph*, 4 Sept 2002, published on <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/namibia/1406250/Namibian-leader-warns-EU-of-economic-war.html>, accessed on 5 September 2005.

Carpenter, G. 1987. *Introduction to South African International Law*, Durban: Butterworths.

Carpenter, G. 1991: The Namibia Constitution – Ex Africa Aliquid Novi After All? In *African Yearbook of International Law* Vol. 15, 1989/90, p. 22.

Carpenter, G., 1996. Public opinion, the judiciary and legitimacy, *SAPR/PL Vol. 11*.

Cassidy, E. 2002. Article 10 of the Namibian Constitution: A look at the First Ten Years of the Interpretation of the Rights to Equality and Non-discrimination and Predictions of the Future, in Hinz, M, Amoo, S and Van Wyk, D. 2002. *The Constitution at work. Ten Years of Namibian Nationhood*. Windhoek: UNAM Publishers, printed in Pretoria by Veloren van Themaat, UNISA.

Central Committee of SWAPO. 1976. *Political Programme of the South West African Peoples Organisation*. Lusaka: Central Committee of SWAPO, Adopted 1 August 1976.

Chase, S and Governor S, submissions quoted in Finkelman, P (ed.). 1988. *Fugitive Slaves and American Courts*, New York: Garland Publishing Co.

Chaskalson, A. 1989. Law in a Changing Society, in *SAJHR*, 1989 (5), p. 293.

Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D & Woolman S (eds). 1996. *Constitutional Law of South Africa*. Cape Town: Juta Kenwyn Revision Service.

Chikane, F. 2008. *Communique of the Office of the President on the Pikoli saga*. Pretoria: Office of the President of South Africa.

Child Rights Information Network. 2009. *Corporal Punishment: Inter-American Court Confirms Obligation to Prohibit All Corporal Punishment*. Published on <http://www.crin.org/about/index.asp>, accessed on 1 September 2009.

Christodoulidis, E. 2009. Strategies of Rupture, in *Law and Critique, Volume 20, Number 1*.

Christie, G and Martin P. 1996. (first edition 1973). *Jurisprudence. Texts and Readings on the Philosophy of Law*. St. Paul, Minnesota: West Publications.

Clark, G. 1994. *The Advocate. The Suffolk University Law School Journal*, Vol. 24, No. 2, Spring 1994.

Cockrell, A. 1996. Rainbow Jurisprudence, 12 *SAJHR*, p. 1.

Committee of the International Convention on the Elimination of All Forms of Racial Discrimination. 1996. New York: *Summary Record of the 1169th meeting: Namibia, Venezuela. 06/11/96*.

Cornell, D. 2009. Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence, in Barnard-Naude, A, Cornell, D and Du Bois F, (eds.). *Dignity, Freedom and the Post-Apartheid Legal Order. The Critical Jurisprudence of Laurie Ackermann*, Cape Town: Juta & C. Ltd.

Corbett, M. 1998. Presentation to the Truth and Reconciliation Commission, 115 *SALJ* 18.

Crump, D. 1996. How do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy, in *Harvard Journal of Law and Public Policy*, Vol. 19, No. 3, p. 798.

Davis, D, Marcus, D and Klaaren, J. 1997. The Administration of Justice in *Annual Survey of South African Law 1997*. Johannesburg: Juta & Co, p. 786.

Davis, D. 1998. Democracy and Integrity: Making Sense of the Constitution, 14 *SAJHR*, p. 127.

Davis D. 2000. Duncan Kennedy's A Critique of Adjudication: A Challenge to the 'Business as Usual' Approach of South African Lawyers. 117 *SALJ*, p. 69.

Davis, D. 2009. Judge Ackermann and the Jurisprudence of Mourning, in Barnard-Naudé, A, Cornell, D and Du Bois, F. (eds.) *Dignity, Freedom and the Post-Apartheid Legal Order*. Cape Town: Juta and Co.

Department of Safety and Liaison. 2002. *Press Release by Northern Cape Department of Safety and Security*, 2 March 2002, published at http://www.northern-cape.gov.za/_input/prshow.asp?ID=108, accessed on 5 May 2007.

Derks, K. 2005. *Chronology of Namibian History. Data base of Namibian Biographies*. Available at <http://www.klausdierks.com/index.html>.

Derrida, J. 1967. *La Voix et le Phénomène*, Paris: Universitaires de France. See English version below.

Derrida J, 1973. *Speech and Phenomena and Other Essays on Husserl's Theory of Signs*; Evanston, IL: Northwest University Press, originally published in 1967 in French, see original publication above.

Derrida J, 1976. *Of Grammatology*. Baltimore: John Hopkins University Press, originally published in 1967 in French as *De la grammatologie*, Paris: Editions de Minuit.

Derrida J, 1979. *Spurs: Nietzsche's Styles/Eperons: Les Styles de Nietzsche*. Chicago: Chicago University Press.

Derrida J, 1980. *Writing and Difference*. Chicago: University of Chicago Press, originally published in 1979 in French as *L'écriture et la différence*. Paris: Éditions du Souil.

Derrida, J. 1972. *Positions*. Paris: Editions de Minuit. See translated version below.

Derrida, J. 1981 *Positions*. Chicago: University of Chicago Press, originally published in 1972 in French, see original publication above.

Derrida J, 1981. *Dissemination*, Chicago: University Of Chicago Press, originally published in 1972 in French as *La dissémination*, Paris: Éditions du Souil.

Derrida, J. 1988. Like the Sound of the Sea Deep Within a Shell: Paul de Man's War, 14 *Critical Inquiry* p. 590.

De Vos, P. 2001. A Bridge Too Far? History as Context in the Interpretation of the South African Constitution. *SAJHR Vol.17* 2001 (1), 2.

De Vos, P. 2012. NPA Problems Part Of Larger One Party Dominant Pathology, *Constitutionally Speaking*. Cape Town: Blog Of Pierre De Vos. C Available at <http://constitutionallyspeaking.co.za/>, accessed on 5 September 2012.

De Vos, P. 2013. *Constitutionally Speaking*. Blog of Pierre de Vos. Cape Town: Blog of Pierre de Vos. Available at <http://constitutionallyspeaking.co.za/>, accessed on 5 October 2013,

De Waal, J. and Currie, I. 2005. *Human Rights Handbook*. Cape Town: Juta and Co.

Doubell, L. 1998: *SWAPO's Struggle for Namibia, 1960 – 1991: War by Other Means*. Basel: P Schletwein Publishing.

Dugard, J. 1971. The Judicial Process, Positivism and Civil Liberties. in 88 *SALJ*, p. 181 .

Dugard, J, 1973. *The South West Africa/Namibia Dispute*. Berkeley: University of California Press.

Dugard, J. 1978. *Human Rights and the South African Legal Order*, Princeton: Princeton University Press.

Dugard, J. 1981. Some Realism About the Judicial Process and Positivism - A Reply. 98 *SALJ* 1981, p. 372.

Dugard, J. 1987. Omar: Support for Wack's Ideas on the Judicial Process? 3 *SAJHR*, p. 295.

Du Pisani, A. 1986. *Namibia: The Politics of Continuity and Change*. Johannesburg: Jonathan Ball.

Du Preez, M. 2003. *Pale Native*. Paarl: Zebra Press.

Durbach, A. 1990. *Upington. A Story of Trials and Reconciliation*. Cape Town: David Philip Publishers.

Duxbury, N. 2004. English Jurisprudence Between Austin and Hart. *Public Law and Legal Theory working Paper Series, Paper 9*. Charlottesville, VA: University of Virginia.

Dworkin, R. 1967: The Models of Rules. *University of Chicago Law Review*, Vol. 35.

Dworkin, R. 1975. Hard Cases, *Harvard Law Review*, Vol. 88, No. 6.

Dworkin, R. 1975. The Law of Slave-Catchers. New York: *New York Times Literary Supplement*, December 5, 1975.

Dworkin, R. 1977. Why Bakke has no case. *New York Review of Books*, November 10, 1977.

Dworkin, R. 1977. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.

Dworkin, R. 1977. *The Philosophy of Law. Oxford Readings in Philosophy*. New York: Oxford University Press.

Dworkin, R. 1985, *A Matter of Principle*. Cambridge, MA: Harvard University Press.

Dworkin, R. 1986. *Law's Empire*. Cambridge, MA: Harvard University Press.

Dworkin, R. 1992. Unenumerated Rights: Whether and How Roe Should Be Overruled, in *Chicago Law Review* No 59, p. 381.

Dworkin, R. 2006. *Justice in Robes*. Cambridge, Mass: Belknap Press of Harvard University Press.

Dyzenhaus, D. 1983. Positivism and Validity. *100 SALJ*, p. 454.

Dyzenhaus, D. 1998. *Truth, Reconciliation and the Apartheid Legal Order*. Cape Town: Juta and Co.

Ellman, S. 1992. *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency*. Oxford: Clarendon Press.

Ely, J. 1973. The Wages of Crying Wolf: A Comment on Roe v. Wade, in *Yale Law Journal*, 82, p. 920.

Erasmus, G. 2002. *The Impact of the Namibian Constitution After Ten Years*, in Hinz, M, Amoo, S and Van Wyk, D. (eds). *Ten Years of Namibian Nationhood*, University of Namibia Press. Printed by VerLoren van Themaat Centre, UNISA.

Fagan, A 1995: In Defence of the Obvious: Ordinary Language and the Identification of Constitutional Rules, *SAJHR*, Vol. 11, p. 545 ff.

Finkelman, P (ed.). 1988. *Fugitive Slaves and American Courts*. New York: Garland Publishing Co.

Forsyth, C and Schiller, J. 1981. The Judicial Process, Positivism and Civil Liberties. *98 SAJHR*, p.218.

Foucault, M.1961: *Folie et déraison. Histoire de la folie à l'âge classique*. Paris: Plon.

Foucault, M. 1967. *Madness and Civilization. A History of Insanity in an Age of Reason*. London: Tavistock, originally published in French. (see above).

Foucault, M. 1990: Iran: The Spirit of a World without Spirit, in Afary, J and Anderson, K. (eds). *Foucault and the Iranian Revolution: Gender and the seductions of Islamism*. Chicago: University of Chicago Press. Originally published in Brière, C and Blanchet P, *Iran, la révolution au nom de Dieu*. Paris: Editions du Seuil, 1979.

Friedrich C. 1946. *Constitutional Government and Democracy: Theories and Practice in Europe and America*. New York: Ithaca.

Frowein, J and Wolfrum, R. (eds). 2002. *Max Planck Yearbook of United Nations Law*. Alphen an den Rijn: Kluwer Law International.

Froneman, J. 1996. The Constitutional Invasion of the Common Law. Can the Judges be Controlled? in *Focus on the Bill of Rights*, Pretoria: VerLoren van Themaat Centre, UNISA.

Fuller, L 1934. American Legal Realism, 82 *U. Pa. L. Rev.*, p. 429.

Fuller, L. 1958. Positivism and Fidelity to Law: A Reply to Professor Hart, 71 *Harvard Law Review*, p. 630.

Fuller, L. 1964. *The Morality of Law*, revised edition, New Haven: Yale University Press.

Grundgesetz für die Bundesrepublik Deutschland. 1949.

Hansard (Republic of South Africa), 1950, cols. 7810 and 7827.

Harlech-Jones, B. 1997. *A New Thing? The Namibian Independence. Process, 1989-1990*. Windhoek: Ecumenical Institute for Namibia, University of Namibia.

Harris, J. 1980. *Legal Philosophy*. London: Butterworths.

Hart, H. 1961. *The Concept of Law*. *Clarendon Law Series*. Oxford: Clarendon Press.

Hart, H. 1963. *Law, Liberty and Morality*. Stanford, CA: Stanford University Press.

Harris, J. 1980. *Legal Philosophy*, London: Butterworths.

Heyman, H. 1992. Statement of the Prosecutor-General, quoted in *S v Heita and Another*, 1992 NR 403 (HC) on p. 414.

Hinz, M, Amoo, S and Van Wyk, D (eds). *The Constitution at work. Ten Years of Namibian Nationhood*. Windhoek: UNAM Publishers, printed by VerLoren van Themaat Centre, UNISA.

Hinz, M. (Assisted by Santos, J.). 2002. *Customary Law in Namibia. Development and Perspective*. 7thed. Windhoek: Centre for Applied Social Studies, University of Namibia.

Hinz, M (Assisted by Patemann, H). 2006. *The Shades of New Leaves. Governance in Transitional Authority: A Southern African Perspective*. New Brunswick: Transaction Publishers

Hinz, M. 2010. Sixty Years of Social Market Economy in Germany – Legal Sociological Observations, in *Namibia Law Journal, Volume 2*, no. 1.

Hinz, M. 2010. Justice: Beyond the Limits of Law and the Namibian Constitution, in Bösl, A, Horn, N and Du Pisani, A. 2010. *Constitutional Democracy in Namibia. A critical Analysis after Two decades*. Windhoek: Macmillan Education Namibia, pp. 149 -167.

Horn, N. 1998(1). *Interview with Prosecutor-General, Heyman, J*. Pretoria: June 1998.

Horn, N. 1998(2). *Interview with Prosecutor-General, Heyman, J*. Windhoek: August 1998.

Horn, N. 2003. *The Development in Constitutional Interpretation in Independent Namibia*. The Hague: Institute for Social Studies, unpublished guest lecture, January 2003.

Horn, N. 2004. Unpublished discussions with traditional leaders. Oshakati: Good governance and corruption workshops for traditional leaders and secretaries. Windhoek: Personal collection of author.

Horn, N. 2005. Eddie Mabo and Namibia: Land Reform and Human Rights, Sao Paulo, *SUR, Human Rights Journal*, No 3.

Horn, N. 2006. Criminal or Civil Procedure? The Possibility of a Plea of *Autrefois* in the Namibian Community Courts Act, in, Hinz, M (Assisted by Patemann, H). 2006. *The Shades of New Leaves. Governance in Transitional Authority: A Southern African Perspective*. New Brunswick: Transaction Publishers.

Horn, N and Schwikkard, P. 2007. *Commentary on the Criminal Procedure Act, Act 25 of 2004*. Windhoek: OrumbondePress.

Horn, N. 2008. A Comparison between the NDPP of South Africa and the Prosecutor-General of Namibia, in Horn, N and Bösl, A (eds). 2008. *The Independence of the Judiciary in Namibia*. Windhoek: Gamsberg Publishers.

Horn, N and Bösl, A (eds). 2008. *The Independence of the Judiciary in Namibia*, Windhoek: Gamsberg Publishers.

Horn, N. and Bösl, A. 2008. *Human Rights and the Rule of Law in Namibia*. Windhoek: MacMillan Namibia.

Horn, N. 2008. *Telephone interview with Pretorius, K*. Windhoek: 7 July 2008.

Horn, N. 2010. *Telephone Interview with Mudge, D.* Windhoek/Otjiwarongo: 30 January 2010.

Horn, N. 2010. Community Courts in Namibia: Life or Death for Customary Law? In Hinz, M, 2010. *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa*, Windhoek: Namibia Scientific Society.

Horn, N. 2012. Becoming Fred Rodell: Predicting the Result of the Second Supreme Court Appeal on the 2009 Election, in *Namibia Law Journal (NLJ) Vol. 4, No. 1*, p. 127.

International Association of Prosecutors. 1999. *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, approved by the Executive Committee Amsterdam, April 1999 and adopted by the Annual Conference of the International Association of Prosecutors, Beijing, October 1999. Available at <<http://www.iap.nl.com/>>, accessed on 5 May 2007.

International Bar Association. 2006. Africa Focus. *Legalbrief Africa*, issue 203, 23 October 2006.

International Convention on the Elimination of all Forms of Racial Discrimination. 2008. Consideration of Reports *Submitted by States Parties under Article 9 of the Convention. Eighth to twelfth State Reports of Namibia, due on 11 December 1997, 1999, 2001, 2003, and 2005. (CERD/C/SR.1878 and CERD/C/SR.1879)*, held on 29 and 30 July 2008. Geneva: United Nations Organisation.

International Court of Justice. 1950. The International Status of South-West Africa, reported in *1950 ICJ Reports*, p. 131.

Joubert, P. 2008. Grootboom dies homeless and penniless. *Mail and Guardian Online*, 8 August 2008, published at <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>, accessed on 28 April 2011.

Kateb, G. 1989 The Freedom of Worthless and Harmful Speech, in Yack, B. (ed). *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*. Chicago: University of Chicago Press.

Katjavivi, P. 1988. *A History of Resistance in Namibia*. London: Jams Curry and UNESCO.

Kelman, M. 1987. *Charting the Development of Critical Legal Studies: A Guide to Critical Legal Studies*. Cambridge: Harvard University Press.

Kennedy, D. 1970. How Law Schools Fail: A Polemic, in *Yale Review of Law and Social Action*. 1970 (1), p. 71.

Kennedy, D. 1976. Form and Substance in Private Law Adjudication. 89 *Harvard Law Review*, p. 1685.

- Kennedy, D. 1980. Towards An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850 – 1940, in *Research in Law and Sociology*, Volume 3, p. 3.
- Kennedy, D. 1995. American Constitutionalism as Civil Religion: Notes of an Atheist, 19 *Nova Law Review*, p. 909.
- Kennedy, D. 1996. Strategizing Strategic Behavior in Legal Interpretation, in *Utah Law Review*, p. 787.
- Kennedy, D. 1997. *A Critique of Adjudication (fin de siècle)*, Cambridge MASS: Harvard University Press.
- Keulder, C (ed.), 2000. *State, Society and Democracy in Namibia*. Windhoek: Gamsberg Publishers.
- Klare, K. 1998. Legal Culture and Transformative Constitutionalism, 14 *SAJHR*, p. 146.
- Klenner, H. 1977. *Human Rights: A Battle Cry for Social Change or a Challenge to Philosophy of Law?* Unpublished paper presented at the World Congress of Philosophy of Law and Social Philosophy. Sydney/Canberra: Aug 1977.
- Knemeyer, T 2002. Interview mit Sam Nujoma, *Die Welt*, 2 December 2002.
- Koskenniemi, M. 2002. Between Impunity and Show Trials, in Frowein, J & Wolfrum, R. (eds.). 2002. *Max Planck Yearbook of United Nations Law*. Alphen an den Rijn: Kluwer Law International.
- Kramer, M. Coming to Grips with the law. In Defence of Positive Legal Positivism. Cambridge: *Legal Theory*, Vol 5, issue 2, June 1999, p.171,
- Kroeze, I. 2004. Legal Positivism, in Roederer, C and Moellendorf, D. 2004. *Jurisprudence*, Cape Town: Juta and Co. Ltd.
- Kruger, J and Curren, B. 1991. *Interpreting a Bill of Rights*. Cape Town: Juta and Co.
- Langa, P. 2006. Prestigious Lecture delivered at Stellenbosch on 9 October 2006. Printed as Langa, P. 2006. Transformative Constitutionalism. 17 *Stellenbosch Law Review*, p. 351.
- Langton, R. 1990. Whose Right? Ronald Dworkin, Women and Pornographers, in *Philosophy and Public Affairs*, 19, no.4.
- Lawyers for Human Rights. 1997. *Human Rights Practice*. Pretoria: Associations of Law Societies of the RSA.
- Legal Aid Committee. 1985. *Essays in Law and Society*. Dar-es Salaam: Faculty of Law, University of Dar-Es-Salaam.

Lenta, P. 2001. Just Gaming? The Case for Postmodernism in South African Legal Theory, in 17(2) *SJHR*, p. 173.

Lister, G. 1999. Choice is the Better Option, Editorial in *The Namibian* 23 April 1999, published at <http://www.namibian.com.na/Netstories/Cols4-99/edit230499.html>, accessed on 10 February 2008.

Littleton, C. 1987. Reconstructing Sexual Equality, 75 *California Law Review*, p.1729 ff.

Lubowski M. and Van der Vyfer, M, undated. *Anton Lubowski. Paradox of a Man*. Strand: Queillerie Publishers.

Lush, D. 1995. Editors Appear Before Court on Racism Charges, *Action Alert Update*, 20 December 1995, published at <<https://listserv.heanet.ie/cgi-bin/wa?A2=ind9512&L=AFRIK-IT&P=4475>>, accessed on 3 July 2008, at 12h00.

Maletsky, C. 2002. Abortion Ruled Out, *The Namibian*, 28 November 2002, at <http://www.namibian.com.na/2002/November/national/029C6A15DC.html>, accessed on 10 February 2008.

Maletsky, C. 2005. Ongombo West to be Expropriated, *The Namibian* 22 July 2005.

Marcus, G and Spitz, D. 1999. Expression, in Woolman, S and Bishop, M (eds). *Constitutional Law of South Africa*. Cape Town: Juta and Co.

Marmor, A. 1992. *Interpretation and Legal Theory*. New York: Oxford University Press.

Maughan, K and Webb, B. 2007. The Desperate Bid to Shield Selebi. *Mail & Guardian*. 5 October 2007.

Maughan, K & Webb, B. 2008. Pikoli Slams 'Fabricated' Accusations'. *The Star*, 9 May 2008.

McIlwain, C. 1947. *Constitutionalism: Ancient and Modern*. New York: Ithaca.

Melber, H, Neocosmos, M, Suttner, R, and Taylor, I. (eds). 2002. *Political Culture in Democratic South Africa, Discussion Paper 19*. Uppsala: Nordiska Afrikainstitutet.

Menges, W. 2001. As Magistrate loses case, judiciary wins. *The Namibian*, 27 November 2001.

Menges, W. 2003. Lawyers take Government to court. *The Namibian*, 27 January 2003.

Menges, W. 2003. Admission of Prosecutor as a legal practitioner delayed, in *The Namibian*, 28 January 2003.

Menges, W. 2005. Magistrate to fight on with Constitutional Case. *The Namibian*, 5 August 2005.

Menges, W. 2005. 'Kill All Whites' call a Strategy, Says Suspect, in *The Namibian*, 10 October 2005, Windhoek.

Mertens, T. 2003. Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice, in *Law and Critique* 14, p. 277.

Metcalf, R. 2003: *Bail and the Namibian Constitution*, unpublished open lecture at the Faculty of Law, University of Namibia, August 2003.

Ministry of Justice, Namibia. 1999. *Ministry of Justice Annual Report, 1998/99*. Windhoek: Government Printers.

Mudge, D. 2010. The Art of Compromise: Constitution-making in Namibia, in Bösl, A, Horn, N and Du Pisani, A. *Constitutional Democracy in Namibia. A critical Analysis after Two decades*. Windhoek: Macmillan Education Namibia.

Mureinik, E. 1988. Dworkin and Apartheid, in Corder, H. (ed). *Essays on Law and Social Practice in South Africa*. Cape Town: Juta and Co.

Mureinik, E. 1994. A Bridge to Where? Introducing the Interim Bill of Rights, 10 *SAJHR*, p. 31.

Myjer, E, Hancock, B and Cowdery, N (eds). 1999. *IAP Human Rights Manual*. The Hague: International Association of Prosecutors.

Nakuta, J. 2008. The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-governmental Organisations, in Horn, N and Bösl, A. 2008. *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia.

Naldi, G. 1995. *Constitutional Rights in Namibia*. Cape Town: Juta and Co.

Namibia Peace Plan 435. 1987. *The Choice. Namibia Peace Plan 435 or society under siege*. Windhoek: Namibia Peace Plan Study and Contact Group.

National Society for Human Rights. 2000. *Press Release: Ekandjo Does It Again*. Windhoek: NSHR, October 2 2000.

Neocosmos, M. 2002. Democracy, Rights Discourse, National Healing and State Formation, in Melber, H et al (eds). *Political Culture in Democratic South Africa*. Uppsala: Nordiska Afrika Institutet.

Nyanchama M. 1996. *Editorial. New Year Internet Edition*. Windhoek: Misa Free Press, Media Institute of Southern Africa. Available at <https://groups.google.com/forum/#!topic/soc.culture.kenya/pXwB3CkAQsl>. Last accessed on 3 April 2015.

Ogletree, C (Jr). 1991. *Arizona v Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, in *105 Harvard Law Review*.

Oelsen, J. 2007. *The Antigone Dilemma: When The Paths of Law and Morality Diverge*. *Cardozo Law Review* Vol. 29:2, p. 690.

Okpaluba, C. 2003. *Constitutionality of Legislation Relating to the Distribution of Governmental Powers in Namibia: A comparative Approach*, in Hinz, Amoo and Van Wyk, *supra*, p. 297.

O'Linn, B. 2009. *The Sacred Trust of Civilization, Ideal and Reality. Vol.1*. Windhoek: Gamsberg/MacMillan.

O'Linn, B. 2010. *Namibia. The Sacred Trust of Civilisation. Ideal and Reality. Vol.2*. Windhoek: Pollination Publishers.

Oliver, M and Jeffery S. 2002. *Earth Summit*. London: *Guardian*, 4 September 2002, published on <http://www.guardian.co.uk/environment/2002/sep/04/theissuesexplained.greenpolitics>, accessed on 12 June 2009.

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

O' Regan, C. *From Form to Substance*, in Barnard-Naudé, J, Cornell and Du Bois, F. (eds). *Dignity, Freedom and the Post-Apartheid Legal Order. The Critical Jurisprudence of Laurie Ackermann*. Cape Town: Juta and Co. Also published as *Acta Juridica*, 2008, 1.

Parliamentary Monitoring Group. 1999. *Equality Hearings. Minutes of Joint Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill*. Cape Town: 22 November 1999, published on <http://www.pmg.org.za/minutes/19991121-equality-bill-hearings>, accessed on 3 July 2008.

Permanent Secretary of Justice. 2000. *Press release by Ministry of Justice of Namibia*. 12 September 2000, published by Afrol on <http://www.afrol.com/News/nam002freejudiciary.htm#up>, accessed on 12 June 2003.

Potgieter, P. 1991. *Human Rights in Namibia*, in *Theological Forum*, Vol. XIX, No. 1, March 1991, Grand Rapids: Reformed Ecumenical Council, published on <http://www.recweb.org/TF-March91potgieter.html>, accessed on 3 January 2010.

Pretorius, K. 2004. *Parliamentary Potholes*, weekly column in the *Windhoek Observer*, 10 January 2004.

Prollius, S. 1998. *The Independence of the Prosecutor-General*, Windhoek: Unpublished opinion, with which the Prosecutor-General concurred. Copy in possession of author.

Radbruch, G. 1946. Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristenzeitung* 1 (1946).

Radbruch, G. 1957. *Der Mensch im Recht*. Göttingen: Vandenhoeck und Ruprecht.

Ramose, M. 2003. *Philosophy and Africa's struggle for economic independence*, unpublished paper presented at the Annual Philosophy Day, 20 Nov. 2003, Windhoek. Organized by UNESCO and the Human Rights and Documentation Centre, University of Namibia.

Robson, R. 2007 Sexual Democracy, in 23 *SAJHR*, p. 409.

Rodell, F. 1962. For Every Justice, Judicial Deference is a Sometime Thing. 1961 - 1962 *50 Georgetown Law Journal*, p.700ff.

Roux, T. 2009. Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference? *Stellenbosch Law Review*, Vol. 20, No 2, p. 258.

Sachs, A, 1990: Towards a Bill of Rights in a Democratic South Africa. *South African Journal for Human Rights*, 1990 (1), p. 2.

Scalia, A. 2005. Constitutional Interpretation the Old Fashioned Way. Paper read at the Woodrow Wilson International Center for Scholars in Washington DC, March 14, 2005. Transcribed by Jeffrey King. Published by *Three Bad Fingers* at http://www.cfif.org/htdocs/legal_issues/legal_updates/us_supreme_court/scalia-constitutional, last accessed 10 January 2011.

Scheinin, M. 2003. *Non-Discrimination and Minority Issues*, unpublished lecture at the Linguistic and Minority Rights Course, Institute for Human Rights, Åbo Akademi, Turku (Åbo), Finland, 10 – 14 November 2003.

Schlag, P. 1997. Law as the Continuation of God by Other Means. *California Law Review* Vol. 85, p. 427.

Schultz, H. 1999. Teachers Lashed over Corporal Punishment, in Windhoek: *The Namibian*, 2 July 1999.

Schulz, S. 2002. Legal Interpretation and the Namibian Constitution (a paradigm shift: through reason towards justice), in: Hinz, M, Amoo, S and Van Wyk, D. (eds). *supra*, p. 297.

Schulz, S. 2010. In dubio pro libertate: The General Freedom Right and the Namibian Constitution, in Bösl, A, Horn, N and Du Pisani, A. (eds). *Constitutional*

Democracy in Namibia: A Critical Analysis After Two Decades. Windhoek: Macmillan Education Namibia, p. 10.

Serfontein, H 1977: *Namibia?* London: Collins.

Shikwedha, A. 1998. Pupils Protest of 'Mistreatment, in *The Namibian*, 17 March 1998.

Shivji, I. 1977. *The Concept of Human Rights in Africa*, London: Codesria Books.

Shivute, O. 2008. Kwanyama Chiefs Hit Back Against Insults, in *The Namibian*, 11 June 2008.

Sixth Form Law, 2000 – 2008. Hart-Devlin Debate. Published on the *Sixth Form Law blog*, published at http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm, accessed on 10 January 2012.

Smith, J. 1996. Pres. Nujoma Accused Homosexuals of Exploiting the Country's Democracy. *Windhoek Advertiser*, 6 December 1996.

Spilitotopoulos, E. 1983. Judicial Review of Legislative Acts in Greece. in *Temple Law Quarterly*, Vol. 56, p. 472.

Steyn, L. 1974. *Die Uitleg van Wette*, Cape Town: Juta and Co.

Steytler, N. 1991: The Judicialization of Namibian Politics. *9 South African Journal on Human Rights*, p. 477.

Strydom, J. 2002. Keynote Address, in Hinz, M, Amoo, S and Van Wyk, D, supra, p. 297.

Platzky, L and Walker, C for The Surplus People Project. 1985. *The Surplus People. Forced Removals in South Africa*. Johannesburg: Ravan Press.

The Oxford Large Print Thesaurus. 1997. New York: Oxford University Press.

Thechner, S. 2003. The Hate Speech Provisions of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly. *19 SAJHR*, p.349.

Thompson, E. 1975. *Whigs and Hunters: The Origin of the Black Act*. London: Allen Lane.

Tonchi V, Lindeke, W and Grotpeter, J. 2012. *Historical Dictionary of Namibia*. Lanham, Maryland: Scarecrow Press.

United Nations Organisation. 1982. *United Nations Security Council Report Concerning the Implementation of Resolutions 435 (1978) and 439 (1978)*, Document S14333, 19 January 1982.

United Nations Organisation. 1982. *Principles for a Constituent Assembly and for a Constitution of an independent Namibia*. New York: UN Security Council document (S/15287), accepted by the Security Council as part of Resolution 435 on 12 July 1982.

United Nations Organisation. 1990. New York: *Note by Secretary-General to Security Council*, 16 March 1990, (S/20967/Add.2).

US Department of State: *Country Report on Human Rights Practices for 1989*, February 1990, available at [ecoi.net](http://www.ecoi.net)
[http://www.ecoi.net/local link/240768/350170_en.html](http://www.ecoi.net/local_link/240768/350170_en.html) accessed on 9 April 2015.

Ustoff, W. 1992. *Culture*, Unpublished lecture at Selly Oak Central House, Selly Oak Colleges, Birmingham: University of Birmingham. Personal notes in possession of author.

Uuanivi, U. 2007. *Alternative to State dominated criminal prosecutions in Namibia*, unpublished LLM thesis, Windhoek: University of Namibia.

Van der Walt, A. 1993. Reflections on the Teaching of Property Law in Future, in *Stellenbosch Law Review*, 1993(4).

Van der Walt, A. 1995. Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law, *11 SAJHR* p. 169.

Van der Walt, A. 1998. Un-doing things with words: The colonization of the public sphere by private property discourse, in *Acta Juridica*, p. 235.

Van der Walt, AJ and Botha H. 1998. Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*, in 1998 *SAPR/PL*, p.17.

Van Wyk, A. 1999. *Dirk Mudge. Reënmaker van die Namib*. Pretoria: JL van Schaik.

Van Wyk, D. 1991. The Making of the Namibian Constitution: Lessons for Africa. *CILSA Vol. XXIV*, pp. 341.

Van Wyk, D, Wiechers, M, and Hill, R. 1990. Namibia: Constitutional and International Law Issues, in *South African Yearbook of International Law*, Vol. 15.1989/90.

Van Wyk, D, Dugard, J, De Villiers, B and Davis, D. (eds). 1994. *Rights and Constitutionalism. The New South African Legal Order*. Cape Town: Juta and Co.

Vergés, J. 1968. *De la Stratégie Judiciaire*. Paris: Minuit.

Vergés' statement on 1 July 1987. Reported in Chalandon, S and Nivelles, P. (eds). 1998. *Crimes contre l'humanité. Barbie, Touvier, Bousquet, Papon*, p. 138.

Translation: Christodoulidis, E. 2009. Strategies of Rupture, in *Law and Critique*, Volume 20, Number 1, p. 3.

Volf, M. 1996: *Exclusion and Embrace. A Theological Exploration of Identity, Otherness, and Reconciliation*. Nashville: Abingdon.

Von Doepp, P. 2009. Politics and Judicial Decision-Making in Namibia: Separate or Connected realms? In Horn, N and Bösl, A. *The Independence of the Judiciary in Namibia*, p. 177.

Wiechers, M. 1972. *South West Africa: The Background, Content and Significance of the Opinion of the World Court of June 1971*.

Wiechers, M. 1991: Namibia: The 1982 Constitutional Principles and their Legal Significance, in the *South African Yearbook of International Law, Vol15* (1998/90).

Weiland, H and Braham, M. 1992. *The Namibian Peace Process: Implications and Lessons for the Future*. Freiburg: Arnold Bergstraesser Institut.

Departmental Committee on Homosexual Offences and Prostitution. 1957. *Wolfenden Report*. London: Her Majesty's Stationery Office.

Woolman, S and Davis, D. 1996. The Last Laugh: Du Plessis V De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions, in *13 SAJHR* p. 361.

Yack, B. (ed). *Liberalism Without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*. Chicago: University of Chicago Press.

Yambao, C. 2000. Gay-bashing Minister condemned, *The Namibian*, 4 October 2000.

Ya Nangolo, P. 2008. *NSHR Newsletter*. Windhoek: National Society for Human Rights.

Zaaruka, B. 2012. *Institutional Dynamics and Impact on Capital Formation: Evidence from Namibia and Tanzania*. Johannesburg: Unpublished PhD thesis in Economics at the University of the Witwatersrand.

Zoethout, C, Van der Tang, G and Akkermans, P. (eds). 1993. *Control in Constitutional Law*. Dordrecht: Martinus Nijhoff Publishers.

Zoethout, C. 1993: Reflections on Constitutionalism in the Netherlands, in Zoethoet, C (et al), *Control in Constitutional Law*, p. 161, supra, p. 305.

NAMIBIAN AND SOUTH AFRICAN CASES

Ally v Dinath 1984(2) SA 451 (TPD).

Alexander v the Minister of Justice and Others, 2008. Unreported case of the High Court delivered on 2 July 2008, Coram: Justice Parker.

Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A.).

Cabinet for the Interim Government for the Territory of South West Africa v Bessinger and Others, 1989 (1) SA 618 (SWA).

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC).

The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Another, 2001 NR 107 (NS).

Chikane v Cabinet for the Territory of South West Africa 1990 (1) SA 349 A.

Cultura 2000 and another v Government of the Republic of Namibia and Others 1993 (2) SA 12 (NM.)

De Klerk v Du Plessis. 1996 (3) SA 850 (CC).

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC).

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC).

Ekanjo-Imalwa v The Law Society of Namibia & Another; The Law Society of Namibia & Another v The Attorney-General of the Republic of Namibia & Others 2003 NR 123 (HC).

Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State 1991(3) SA 76 NM 178 (SC).

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

Heads of Argument on Behalf of the Prosecutor-General. Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General. 1998 NR 282 (SC).

Heads of Argument on Behalf of the Prosecutor-General (p. 119 ff.).
Counsel quotes a Letter of the Prosecutor-General to the Judicial Service Commission on 27 March 1992, p. 119 ff.

Heads of Argument of the Counsel for the Prosecutor-General, Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General, 1998 NR 282 (SC) (1).

Ex Parte Cabinet for the Interim Government for the Territory of South West Africa: In Re Advisory Opinion in Terms of S 19(2) of Proc. R101 of 1985 (RSA) 1988 (2) SA 832 (SWA).

Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Fantasy Enterprises CC t/a Hustler the Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others, 1998 NR 96 (HC).

Ferreira v Levine NO and Others; Vryehoek and Others v Powell NO and Others 1996 (2) SA 621 (CC).

Frank v the Chairperson of the Immigration Selection Board, 1999, NR 257 (HC).

Gillingham v Attorney-General and Others, 1909 TS 572.

Government of the Republic of Namibia and Others v Cultura 2000.1994(1) SA 407 (NMSC).

Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial, 2002 NR 235 (SC).

Government of the Republic Of South Africa And Others v Grootboom and Others 2001 (1) SA 46 (CC).

Hanekom v the State SA 4(A)/2000, Unreported Supreme Court of Namibia Judgment, Heard on 2 April 2001 and delivered on 11 May 2001. Coram: Strydom, O.K.; O'Linn, A.J.A. and Manyarara, A.J.A.

Hendricks and Others v Attorney-General, Namibia and Others 2002 NR 353 (HC).

Harris v Minister of Interior 1952 (2) SA 428 A.

Isaacs v Isaacs 1949(1) SA 952(C)

Inquest into the death of the late ATE Lubowski, unreported judgment of Justice Levy, High Court of Namibia, delivered on 23 June 1994.

Second Inquest into the death of the late ATE Lubowski, unreported judgment delivered in February 1998. Coram: Justice N Hannah.

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.

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

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).

Kauesa v Minister of Home Affairs and Others 1995 (1) SA 51 (NM), also reported as 1994 NR 102 (HC).

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

Kaulinge v Minister of Health and Social Services 2006 (1) NR 377 (HC).

Koorzen v Prosecutor-General 1997 NR 188 (HC).

Mandela v Minister of Prisons. 1983 (1) SA 938 (A).

Minister of Defence, Namibia v Mwandingi 1992(2) SA 355 (NMS).

Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Project and Others v Minister of Home Affairs and Others 2006 (3) BCLR 355 (CC).

Minister of Interior v Lockhat 1960 (3) SA, 765 (AD).

Mostert v Minister of Justice NR 2003 11 SC.

Mostert and Another v Magistrates Commission and Another, unreported case of the High Court of Namibia, Case No.: (P) I 1857/2004.

Müller v Minister of Home Affairs and others, 2000 (6) BCLR655 (NMS).

Mwandingi v Minister of Defense, Namibia, 1991 (1) SA 851 NM.

Mwellie v Minister of Works, Transport and Communication, 1995(9) BCLR, 1118, (NMH).

Myburgh v Commercial Bank of Namibia 1999 NR 287 (HC), 1999 p. 287.

Myburgh v Commercial Bank of Namibia Unreported case of the Supreme Court of Namibia, Coram Strydom, C.J.; O'Linn, A.J.A. et Manyarara, A.J.A, CA, SA 2/00 of 2000, delivered on 8 December 2000.

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

National Coalition for Lesbian and Gay Equality v Minister of Justice 1999 (1) SA (CC) 6.

National Coalition for Lesbian and Gay Equality v Minister of Home Affairs 2000 (2) SA (CC) 1.

Ndlwana v Hofmeyr, NO 1937 (AD) 229.

New Modderfontein Gold Mining Company v Transvaal Provincial Administration 1919 (AD) 367.

Ngoma v the Minister of Home Affairs, Case No. A 206/2000 unreported case of the High Court of Namibia.

Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 (BG)

Principal Immigration Officer and Minister of Interior v Narayansamy 1916 TPD 274.

R v Adams and others, 1959 (1) SA 646 (SCC); 1959 (3) SA 753 (AD).

R v Blom 1939 (AD) 188.

R v Christians 1924 (AD) 101

R v Sachs, 1953 (1) SA 392.

R v Sader 1952 4 SA392 (A)

S v Acheson 1991 (2) SA 805 (NM).

S v Adams 1979 4 SA (T) 801, confirmed by the Supreme Court of Appeal in *S v Adams*, *S v Werner* 1981 1 SA i87 (A).

S v Angula en Andere 1986 (2) SA 540 (SWA).

S v Damaseb and Another 1991 NR 371 (HC).

S v De Bruyn 1999 NR 1 (HC).

S v De Wee 1999 NR 122 (HC).

S v Ebrahim 1991 (2) SA 553 (A).

S v Haikele and Others 1992 NR 54 (HC).

S v Hanekom SA 4(A)/2000, Supreme Court Judgment, Heard on 2 April 2001 and delivered on 11 May 2001

S v Haulondjamba 1993 NR 103 (HC).

S v Heydenrich 1998 NR 229 (HC).

S v Heita and others 1987 (1) SA 311 (SWA).

S v Heita and Another, 1992 NR 403 (HC) also reported as *S v Heita and Another* 1992 (3) SA785 NM.

S v Hepute, Unreported case of the High Court, delivered on 13 June 2001.

S v K, 2000(4) BCLR 405 NMS 426

S v. Kamajame and Others 1993 NR 193 (HC).

S v. Kandovazu 1998 (9) BCLR 1148 (NMS)

S v Katamba 1999 NR 348 (SC)

S v Kapika and Others 1997(1) NR 286 (HC).

S v Kleynhans 1991 NR 22 (HC).

S v Khoenmab 1991 NR 99 (HC).

S v Makwanyane and Another, 1994 (3) SA 868 (A).

S v Makwanyane 1995 (3) SA 391 (CC). Also published as 1995 (6) BCLR 665 CC.

S v Marwane 1982 (3) SA 717.

S v Melani and Others 1996 (1) SACR 335.

S v Mushwena and Others, 2004 NR 276 (SC).

S v Nassar 1995 (1) SACR 212 (NM)

S v Pineiro 1991 NR 424 (HC).

S v Rittmann unreported case of the Namibian Supreme Court, delivered by Chief Justice Strydom on 11 August 2000, Judges Dumbutshena, and . O'Linn concurring.

State v Scholtz 1998 NR 207 (SC).

S v Sheehama 2001 Nr 281 (HC).

S v. Shikunga and Another 1997 NR 156 (SC), 2000 (1) SA 616 (NMS).

S v Sipula 994 NR 41 (HC)

S v Smith 1996 (4) SA, 965 (NMS).

S v. Steyn 1954 (1) SA 324(A)

S v Tcoeib 1991 (2) SACR 627 (NM).

S v Tcoeib 1993 (1) SACR 274 (NMS).

S v Titus, 1991 NR 318 (HC).

S v Tjijo 1991 NR 361 (HC).

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).

S v Van den Bergh 1996 (1) SACR (NM) 19

S v Van Wyk 1991 (2) SA 805 NHC

S v Van Wyk 1992 (1) SACR 147 (NMSC).

S v Van Wyk 1993 NR (SC) at 452.

S v Vries 1996 (2) SACR 638 (NM).

S v Werner 1981 1 SA i87 (A).

S v Williams 1995 (7) BCLR 861 (CC).

S v Zuma & Others, 1995(2) SA 642 (CC)

Scholtz v S 1998 NR 207 (SC).

Selection Board v Erna Elizabeth Frank and Another 2001 NR 107 (NS).

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

Shikunga v. S, unreported case of the Supreme Court. Supreme Court case no. 6/95.

Sikunda V Government of the Republic Of Namibia and Another (1) 2001 NR 67 (HC);

Sikunda V Government of the Republic Of Namibia and Another (2) 2001 NR 86 (HC);

Government of the Republic of Namibia V Sikunda 2002 SA5/0 MASC. 1.

Sikunda V Government of the Republic Of Namibia And Another, unreported case of the High Court of Namibia, coram Justice Manyarara, judgment on 24 October 2000.

Sikunda V Government Of The Republic Of Namibia And Another (unreported case of the High Court of Namibia, coram per Justice Levy, judgment on 31 October 2000).

Silunga v the State, unreported case of the Supreme Court of Namibia, delivered on 8 December 2000.

Smit v Windhoek Observer and Others 1991 NR 327 (HC).

Soobramoney vs. Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC),. 1997 (12) BCLR 1696 (CC).

Stopforth v Minister of Justice and Others, Veenendaal v Minister of Justice and Others 2000 (1) SA 113 (SAC).

The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Another 2001 NR 107 (NSO. See also *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Another* 2001 NR 107 (SC)

The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa 1987 (1) SA 614 (SWA)

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

Thomas Namundjebo, and others v Commanding Officer of the Prison and others Unreported case of the full bench of the High Court, delivered on 10 August 1998

Tussentydse Regering vir Suidwes-Afrika v Katofa 1987 (1) SA 695 (A).

Van Rooyen and Others v The State 2002 (5) SA 246 (CC); 2002 (8) BCLR 810.

Wood and Others v Ondangwa Tribal Authority and Another, 1975 (2) SA (AD) 294 (A).

COMMONWEALTH CASES

Adeyinka Oyekan v. Musendiku Adele(1921) 2 AC 399.

Amodu Tijani v. Secretary, Southern Nigeria (1957) 1 WLR 876.

Andres Sachariah Shipanga v the Attorney General Supreme Court of Zambia, Zambia Law Reports 1976

Attorney-General v. Brown (1847) 1 Legge 312.

Connelly v DPP 1964: AC 1254.

Ex parte Derwent 1953 (1) QB 380, 1953 (1) All ER 390 (QB).

Mabo v Queensland (1992) 175 CLR 1.

Mullin v The Administrator. Union Territory of Delhi (1981), 2 S.C.R. 516. 2.

Petition of Trevor Adams and Others for Judicial Review of the Protection of Wild Mammals (Scotland), Act 2002 and the Protection of Wild Mammals (Scotland) Act 2002 (Commencement) Order 2002P557/02 coram Lord Smith, delivered on 2 July 2002.

R v A Wimbledon Justices; Ex parte Derwent 1953 (1) QB 380, 1953 (1) All ER 390 (QB).

R v Big M. Drug Mart Ltd. 1985 18 DLR.

R v Oakes 1986 (26) DLR 4 200.

The Queen in Right of Canada v Beaugard 1986 30 DLR (4th) 481

Valente v The Queen 1986 24 DLR (4th) 161 (SCC).

JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE

Advisory Opinion on the Western Sahara (1975) ICJR p. 39.

Legal Status of Eastern Greenland, P.C.I.J. Series A/B, No. 53.

EUROPEAN COURT OF HUMAN RIGHTS

Belgian linguistic cases: European Court of Human Rights. Application numbers 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64. Judgment of 23 July 1968.

HUMAN RIGHTS COMMITTEE ADVISORY OPINIONS (ICCPR CASES)

Ibrahima Gueye et al. v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989).

Joslin et al. v. New Zealand, Communication No. 902/1999, Views adopted 17 July 2002.

Jacob and Jantina Hendrika van Oord v. The Netherlands, decision on admissibility adopted 23 July 1997, UN Doc CCPR/C/60/D/658/1995 pp. 311–316.

Müller and Engelhard v Namibia, CCPR/c/74/D919/2000.

Nicholas Toonen v. Australia. 31 March 1994. (Communication No. 488/1992), UN Doc.A/49/40, Vol. II (1994), Annex IX, sect. EE (pp. 226-237).

Young v Australia, 2003 UN Doc CCPR/C/78/D/941/2000 (12 August 2003).

Schmidt-De Jong v Netherlands. Communication No 855/1999. 16 July 2001.

Love et al v Australia. CCPR/C/77/D/983/2001.

USA Cases

Baker v Carr. 1962. 82 S. Ct.691.

Chapman v California 386 US 18 (1967).

Gorham v Lockett. 6 B. 1845 Monroe 146.

In Re Linaham 138 F. 2d p. 650.

James B. Beam Distilling Co. v. Georgia, 1991501 U.S. 529.

Jones v Van der Sandt 46 US (5 How.) 1847 215, 12 L.Ed. 122.

Marbury v Madison 1803: (5) US137.

Mullin v The Administrator, 1981. 2SCR 516.

Roe v. Wade, 410 US 113 (1973).

Tut v the United States of America. 319 US 463.

Virginia State Board of Education v Barnette.1943. 319 US 624.

LEGISLATION

Abortion and Sterilization Act, Act 2 of 1975.

Abortion and Sterilization Bill, 1996.

Administrator-General Proclamation R101 of 1985. 1985.

Affirmative Action Employment Act, Act 29 of 1998.

Aliens Act, Act 1 of 1937.

Canadian Criminal Code.RSC.

Combatting of Rape Act, Act 8 of 2000.

Community Courts Act, Act 263 of 2003.

First Draft of the Community Courts Bill, 1994.

Constitution of the Republic of South Africa, 1996 .Act No. 108 of 1996.

Criminal and Magistrates' Courts Procedure Amendment Act, Act 39 of 1926.

Criminal Procedure Act, Act 51 of 1977.

Criminal Procedure and Evidence Act, enacted in Namibia by Proclamation 5 of 1918).

Declaration of Independence of the Thirteen Colonies, In Congress, 1776.

Defence Act, 1957, Act. 44 of 1957.

Extradition Act, Act 11 of 1996.

Fugitive Slave Act, 1793 (USA).

Fugitive Slave Act, 1850 (USA).

Group Areas Act, Act 41 Of 1950.

Grundgesetz für die Bundesrepublik Deutschland. 1949. Accepted the vom 23. Mai 1949 (BGBl. S. 1).

High Court Act, Act

Immorality Act, Act 23 of 1957.

Internal Security Act, Act 44 of 1950.

Labour Act, Act 6 of 1992.

(New) Labour Act, Act 11 of 2007.

Legal Aid Act, Act 29 of 1990.

Legal Practitioners Act, Act 15 of 1995.

Legal Practitioners Amendment Act, Act 10 of 2002.

Magistrates Court Act, Act 32 of 1944.

Magistrates Act, Act 3 of 2003.

National Prosecuting Authority Act, Act 32 of 1998 (South Africa).

Police Regulation 58(32), published under *Government Notice R203 in Government Gazette 791* dated 14 February 1964.

Proclamation AG 26 of 1978.

Proclamation AG R101 of 1985.

Proclamation AG 13 of 1989.

Proclamation 2 of 1995, in Government Gazette 1285, Notice 75 of 1996.

Racial Discrimination Prohibition Act, Act 26 of 1991.

Racial Discrimination Prohibition Amendment Act 26 of 1998.

Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 (RSA).

Protection of Fundamental Rights Act, Act 16 of 1988 (SWA/Namibia).

Public Service Act, No. 13 of 1995.

Residence of Certain Persons in South West Africa Regulation Act, Act 33 of 1985 (SWA/Namibia).

Strafgesetzbuch-StGB BGBI (Germany). Criminal Code version promulgated on 13 November 1998, Federal Law Gazette (Bundesgesetzblatt) 1, p. 3322.

Version information: The translation includes the amendment(s) to the Act by Article 3 of the Act of 2.10.2009. Federal Law Gazette I p. 3214.

Translation by Bohlander, M.

Sea Fisheries Act, Act 58 of 1973.

South West Africa Constitution Act, Act 39 of 1968 (SWA/Namibia).

Traditional Authorities Act, Act 25 of 2000, section 2(2).

Terrorism Act, Act 83 of 1967.

Addendum to *Interpreting the Interpreters: A critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence. 1990 – 2004*, by Johannes Nicolaas Horn. Submitted in accordance with the requirements for the degree Dr Iur at the University of Bremen.

First Supervisor: Prof Dr Manfred O Hinz, University of Bremen

Second Supervisor: Prof Dr Dr h.c. Gerd Winter, University of Bremen

Earlier Research and Published Work Included in the Thesis

The above mentioned thesis was written over a period of time. Having taught Public Law subjects, and specifically Human Rights Law and Constitutional Law at the University of Namibia since 2002, some of the material in the present thesis came from earlier articles and notes that I have collected over the years.

Herewith a list of publications that dealt with material used in the thesis:

1. A chapter I wrote in a book I co-edited in 2008 formed the foundation of Chapter 3 – The Time between the Times:
2008. The independence of the judiciary in pre-independent Namibia: Legal challenges under the pre-independence Bill of Rights (1985–1990), in Horn, N and Bösl, A, *The Independence of the Judiciary in Namibia*, Windhoek: Macmillan Education Namibia, p. 45.
2. I used chapter 4 of the thesis after the writing thereof in a chapter of a book I co-edited celebrating twenty years of constitutionalism in Namibia:
2010. The Forerunners of the Namibian Constitution, in Bösl, A, Horn N and Du Pisani, A, *Constitutional Democracy in Namibia: A critical Analysis After Two Decades*, Windhoek: Macmillan Education Namibia, p. 63.
3. I used earlier research done for my LLM dissertation as well as a chapter in the book on the independence of the judiciary I co-edited in 2008, referred to in point 1 above as the foundation for parts of point 5.8:
2000. *The unique constitutional position of the Prosecutor-General of Namibia and the effect of the independence of the office on the functioning of the prosecuting authority in relationship with the Ministry of*

Justice and the Attorney-General, LLM thesis, Pretoria: University of South Africa.

2008. The independence of the prosecutorial authority of South Africa and Namibia: A comparative study, in *The Independence of the Judiciary in Namibia*, supra point 2 above, p.113.

4. An article I wrote in the first edition of the Namibia Law Journal, of which I am the editor, in 2009, relied on material I collected for this thesis. Chapter 6.3 was in the making at the time and I strongly relied on the article in the present draft of my thesis.

2009. Freedom of expression and hate speech in Namibia. *Namibia Law Journal, Vol1, No 1*, p. 43.

5. Chapter 5.1 - 5.4 and more specifically chapter 5.6 includes part of an on-going research project on the adjudicative approach of the French defence lawyer, the late Jacques Vergés. Since it was a new field for me, I published an article on Vergés and the Namibian approach in the Lubowski case in the Student law journal of the University of Namibia, to test the application. I received generally positive feedback and included the theory in chapter 5.6 of the thesis.

2013. *S v Acheson and Kleynhans: The First Test for Constitutionalism in Namibia*, *University of Namibia Students Law Review Volume 1, No.1*, p. 63.