

## Rule of Law in Namibia

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*Since independence in 1990, Namibia has been transformed from apartheid rule to a State based on democracy, rule of law and justice for all. The Constitution of 1990, which was produced under the watchful eyes of the international community and won unanimous approval from the Constitutional Assembly, was appraised as a great achievement by providing modern standards as a firm basis for the latter transformation process. Today, it can be said that much has been achieved over the last 20 years, however many challenges still remain for the Constitution to be fully and meaningfully implemented and to prevent it from being downgraded to a mere facade.*

### I. Introduction

With independence in 1990 the Namibian people gave themselves a modern Constitution which provides the fundamentals of the rule of law in all of its aspects. In the drafting process all political parties showed a deep commitment to codify rule of law standards. Thus at independence and in the following few years, the document was highly respected and produced great expectations for the realisation of its transformational character compared to the previous illegitimate apartheid rule (see Wiechers 2010). But in the longer term it has become apparent that the implementation of the Constitution has been facing major challenges. One problem is that the political elite is tempted and often subordinates the upholding of rule of law requirements in favour of the pursuit of its own political goals (see Diescho 2009). Equally there is virtually no discussion of constitutional principles at civil society level (Amoo 2008: 37). Finally over 20 years after the adoption of the Consti-

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tution the process of transformation to meaningful implementation of the rule of law has not yet been completed.

## *II. Namibian Understanding of the Rule of Law*

### *1. Background: Previous Constitutional Developments*

Resolution 435 (1978) of the UN Security Council provided for a plan on the way ahead of the independence process and the *Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia* (document S/15287, annex, Section B of 12.7.1982) were formulated. All political parties that were part of the Constituent Assembly were committed to these principles which did not explicitly include the notion of rule of law, but they comprised the main aspects of it. Eventually they founded the basis for the later Constitution (see Hinz 1991/92).

### *2. Rule of Law in Namibia's Constitution*

In its first provision, the Constitution lays down fundamental principles: Art 1 (1) Namibian Constitution (NC) asserts that the State is founded inter alia upon the principle of the rule of law. Art. 1 (6) NC declares the Constitution the Supreme Law of the nation, thus stipulating the constitutional supremacy. The first Article also provides for the separation of powers: Sec. (3) sets the three branches of the State, the executive, the legislature and the judiciary. Additionally, the Constitution provides for a system of checks and balances. However there are some challenges to the independence of each branch which will be dealt with in the following sections. In the reasoning of the superior courts the upholding of the rule of law is used as a general argument.

Moreover, the Constitution requires a substantive notion of the rule of law. Chapter 3 contains a charter of fundamental human rights and freedoms. It is introduced by Art. 5 NC which requires that the given rights and freedoms are respected and upheld by all three branches of the State. Art. 25 NC, on enforcement, stipulates that all actions of the legislature and the executive need to be in conformity with the rights and freedoms of Chapter 3 and are otherwise invalid although that invalidity has to be declared by a court. Art. 25 (2) to (4) NC guarantee protection by the courts against any infringement. Limitations of the rights and freedoms are subject to different, strict levels of constraint under the general limitation clause under Art. 22 NC. The latter Article is complemented by Art. 131 NC which prohibits amendments of Chapter 3 which result in a decrease of the protection standard. Thus, the fundamental rights and freedoms are "at the very centre of

the Constitution's gravity" (Hinze 2009: 83). This strong emphasis on the rights based approach to the rule of law has to be seen against the backdrop of "the illegitimate but apparently legal regime" that was in power before independence (Wiechers 2010: 45 ff.).

*a. Government and the Executive Branch*

The executive consists of the President, who is elected by public vote, and the Cabinet which is appointed by the President (Art. 27 [2] NC). Chapters 5 and 6 deal with these two arms of the executive. The functions, powers and duties of the President are laid down in Art. 32 NC. These widespread powers, particularly when it comes to appointments (Art. 32 [3], [4] NC), are subject to one main limitation: Art. 32 (9) NC makes all decisions of the President subject to review, reversal or correction by the National Assembly if voted for by a two-thirds majority. Thus, in principle, a system of limitations on the office of the President is provided for in the Constitution. However, in reality the President holds the very central position in the State and the powers of the executive are predominant. This situation is possible because of the weakness of the legislative branch and is demonstrated by the public perception of the President as a symbolic figure (Diescho 2009: 107). This has to be seen in the context of the key role of the ruling party SAWPO (South West Africa People's Organization) which led the struggle for Namibia's independence (see below).

Furthermore, there are problems within the administration. The Constitution provides the necessary basis for the legality of public administration. Art. 18 NC requires procedural standards to be complied with by the administration when undertaking an administrative action and gives the citizen the constitutional right to challenge a decision before a competent court or tribunal. Art. 18 NC has been subject to several decisions of the superior courts (Coleman/Schimming-Chase 2010: 206). In addition Art. 5 and 25 (1) NC oblige the administration to adhere to fundamental rights and freedoms. However, the public sector is known for incompetence and inefficiency and there is a general perception that it is prone to nepotism, tribalism and corruption (Amoo/Skeffers 2008: 35).

*b. Special Institutions for the Control of the Executive: the Ombudsman\**

The office of the Ombudsman was created as an additional tool to hold the executive accountable and therefore stands inter alia for the promotion of the rule of law. Chapter 10 NC establishes the office of the Ombudsman. On this basis, the Ombudsman Act 7 of 1990 was passed. The Ombudsman is given a strong mandate in the Act, particularly to handle allegations of maladministration with influential powers for investigation. In practice, his

mandate is taken seriously (Ruppel-Schlichting 2008: 272, 288 f.) but there is criticism that the office lacks institutional autonomy, particularly when it comes to financial and personal equipment (Bukurara 2002: 57 ff.).

*c. The Legislature and the Relevance of Customary Law*

The legislative branch as outlined in Chapter 7 and 8 consists of the National Assembly and the National Council. Legislative power is primarily vested into the National Assembly, Art. 44 NC, whilst the National Council, representing the regions, merely has an advisory and opinion role. The passing of a law by the National Assembly is under the precondition of assent by the President. A dissent by him can be overruled by a two-thirds majority of the National Assembly, Art. 56 NC. The Constitution does not give the President legislative power in the form of decrees that can sideline the ordinary legislative process (Amoo/Skeffers 2008: 25). The constitutionally balanced system between the legislature and the executive faces one stark reality: Ministers are appointed from the 72 members of the National Assembly. Because there are 42 Cabinet Ministers, who remain members of the National Assembly, this means that the majority of deputies are part of the executive (Amoo/Skeffers 2008: 22, 25). Thus in fact, the National Assembly does not use its strong constitutional position and Parliament's control of the executive is undermined. This is attended by Parliament's own deliberate subordination under the executive because of the understanding that the country is in need of a strong executive because of the circumstances of transition (Bukurara 2002: 80). This is in line with the influential position of the SAW-PO party which gained 57 % of the votes at independence, subsequently increased, which has given them a two-thirds majority since 1994. In contrast, the opposition is scattered and rather weak.

In addition to the acts passed under the current constitutional setting, Art. 140 NC stipulates that all laws at the date of independence shall remain in force until repealed by Act of Parliament or declared unconstitutional by a Court. This solution was chosen in order to avoid a legal vacuum in the transition after Independence. Correspondingly, Art. 66 (1) NC stipulates the continuing validity of the common law in place as long as it does not conflict with the Constitution or statutory law.

To the same extent as the confirmation of the common law, Art. 66 (1) NC recognises customary law. The latter plays a significant role in Namibian society, particularly in rural areas. Furthermore, the Traditional Authorities Act 25 of 2000 permits the law-making power of traditional authorities. Thus with respect to customary law, Namibia opted for a model of regulated dualism (Hinz 2008: 63 ff.).

*d. Judiciary*

Chapter 9 deals with the administration of justice. The judiciary consists of the Supreme Court, the High Court (which both form the superior courts) and the lower courts (Art. 78 [1] NC). Art. 78 (2) and (3) NC emphasise the constitutional guarantee of independence of the judiciary. The superior courts are mandated with the interpretation, implementation and upholding of the Constitution, particularly the fundamental rights and freedoms guaranteed by it, Art. 79 (2), 80 (2) NC (see Coleman/Schimming-Chase 2010). According to Art. 32 (4) (a) together with Art. 82 (1) NC the President appoints superior court judges on the recommendation of the Judicial Service Commission. The removal of a judge works respectively, but only for limited reasons on which the Judicial Service Commission leads the investigation, Art. 84 NC. Apart from the permanent judges, there is the possibility of appointing acting judges (Art. 82 [2] and [3] NC), a tool which is continuously used (see Tjombe 2008). The purpose of their assignment in the Supreme Court is the filling of casual vacancies and their appointment on an ad hoc basis in cases dealing with fundamental rights and freedoms in order to furnish special expertise. In the High Court the broad function is to enable the Court to deal expeditiously with its work. The acting judges can be of other nationalities than Namibian. The rationale behind these provisions is the fact that Namibia is suffering from a lack of qualified lawyers.

The use of acting judges was subject to controversy regarding their independence, particularly with regard to the foreign nationals (see VonDoepp 2009). The situation was to be remedied by an amendment of Art. 82 (4) NC which introduced the requirement to employ them under a fixed term contract (Namibian Constitution Second Amendment Act 7 of 2010). Apart from the issue of acting judges, a real threat to the independence of the judiciary lies in the general appointment procedure itself and the fact that the judges are appointed and dismissed by the President. The Judicial Service Commission has a mere advisory function ("on recommendation"). Additionally, the appointment of members of the latter Commission is dominated by the President as well (see Art. 85 [1] NC). Despite these impediments it is commonly believed that the independence of the judiciary is widely observed (this results from a statistical evaluation in 2006: VonDoepp 2009; in contrast very critical on recent developments, Diescho 2009: 103, 108; highly critical generally: NSHR 2004).

Traditional courts are regarded as lower courts in terms of Art. 83 NC. The Community Courts Act 10 of 2003 provides for the recognition and establishment of such courts. It envisages a new uniform court structure which has not yet been fully implemented. Appeals against the traditional courts' decisions lie with the magistrates' courts and consequently with the formal court system (Hinz 2008, p. 66, 77 f.; see Hinz 2010, on the relevance of con-

stitutional requirements such as the rule of law and the independence of the judiciary in traditional courts).

*e. Substantive notion of the Rule of Law*

In the jurisprudence of the superior courts, the concept of proportionality is used, however so far only in singular cases. The most prominent is the *Kausea*-case (*Kausea v Minister of Home Affairs and Others* [1995] 3 LRC 528 [SC]), in which a regulation was held invalid because it did not pass the proportionality test with respect to the freedom of speech and expression and its possible limitation (Art. 21 [2] NC). Therein the Supreme Court referred to Canadian case law on its interpretation of proportionality (Koutnatzis 2011: 47). In another case decided by the High Court, proportionality was mentioned as a tool to control the exercise of discretion by the administrative authorities (*Immanuel v Minister of Home Affairs and Others* 2006 [2] NR 687 [HC], 702 A). Indeed it was not decisive in the latter case, though it was referred to as “the still-evolving doctrine of proportionality”.

*f. International obligations*

Article 144 NC declares the general rules of public international law and international agreements binding upon Namibia, part of Namibian law. Thus the strong commitment to human rights is emphasised by the fact that Namibia has ratified a large number of human rights treaties which are directly applicable into the Namibian legal system (Horn 2008).

*III. Conclusion*

Namibia has a strong rule of law basis in its Constitution. In practice, the separation of powers works reasonably well with respect to the judiciary. However, problems lie in the powers of government and in the functioning of the administration. As an overall appraisal of the status of the rule of law, more optimistic views still predominate which appreciate what could be achieved in the relatively short period of 20 years since the nation was founded and the fact that Namibia is doing relatively well in the regional context of Sub-Sahara or Southern Africa. Conversely, there are more sceptical views which point out the unity between state, government and ruling party and argue that the realisation of the rule of law remains a distant ideal for Namibia (Diescho 2009: 98 f., 107). Whichever interpretation is correct, it is obvious that there is still a long way to go to give the constitutional rule of law requirement its full meaning.

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