


# Democracy and the Namibian Constitution



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# Introduction

- ✦ After more than a century of colonial domination, and three decades of nationalistic liberation struggle, Namibia adopted a constitution, which at the time was hailed as one of the best in the world.

# What was unique about this constitution?

- Although it was written by the representatives elected by the Namibian people, benefited from insight and oversight from the international community?
- The final product was unanimously adopted by consensus, after eighty days of intense negotiations

# Importance of the Namibian Constitution

- ✦ The central pillar to the founding the Namibian statehood.
- ✦ The provision of Mechanism for the restraining the tensions in the Namibian body politics:
  - preventing arbitrary exercise of power, through among others the separation of state powers, independence of the judiciary, just administrative actions
- ✦ Formal source for the understanding and regulation of political processes
  - the basic rules on elections, the role of the legislature, powers of the head of state and government, the function of the executive, limitation to the terms of office of the president

# Democratic Governance

- ✦ The Greek historian Herodotus first used the word democracy in the fifth century BC; it combined the Greek words '*demos*' meaning the people and '*kratein*' meaning to rule.
- ✦ Abraham Lincoln through his Gettysburg address introduced the famous definition of democracy – "government of the people, by the people, for the people."
- ✦ An essential feature of democratic government is that it is supposed to be a government through discussion and by persuasion instead of by force.
- ✦ Defined from the perspective of international human rights law, granting a range of related rights including – rights protecting diverse and vigorous civil society and a free and vibrant press, rights defending the interest of minorities and rights requiring governments officials to be subjected to the rule of law

# Features of the Namibian Constitution

- ✦ Supremacy of the constitution, which confirms Namibia as a constitutional state (Rechtsstaat) by defining Namibia as a:
  - sovereign, secular, democratic state,
  - exercise of power subject to judicial review and on the basis of an entrenched, comprehensive and enforceable bill of fundamental human rights.

# Structure of Government

- ✦ Vertical separation of political power based on a typical three-tiered institutional pluralism:
  - The Executive (Chapters 5 & 6)
  - The Legislature (Chapter 7 & 8)
  - The Judiciary (Chapter 9)
- ✦ *Derives from the work of Montesquieu, a French political philosopher who advocated for a pluralistic political system - more than one source of authority, based on a multiplicity of institutions*
- ✦ *Hybrid form of government – which combines elements from both the presidential and parliamentary forms of government.*

# Presidential vs. Parliamentary Government

## ◆ Presidential System:

- the members of the executive branch are elected separately from those of the legislative branch;
- the president is both the head of state and government and has no formal relationship with the legislature, such as being a voting member;
- members of cabinet serve at the pleasure of the president and must carry out the policies of the executive and legislative branches;
- the president does not generally have the power to dismiss or give orders to judges

## ◆ Parliamentary System:

- a clear differentiation between the head of government and head of state,
- the executive branch is directly or indirectly dependent on the support of the legislative branch.
- there is no clear cut separation of powers between these two branches of the state.

# The Executive: Presidency

- ✦ Executive President who is both head of state and government,
- ✦ Article 27 - he/she *"shall in the exercise of his/her functions be obliged to act in consultation with the Cabinet"*

# The Executive: Cabinet

- ◆ Prime Minister – (Article 36) leader of government business in Parliament
  - Responsibility of coordinating the work of Cabinet
  - Advise/assist the President in the execution of the functions of government.
- ◆ Ministers are as members of cabinet serve at the pleasure of the president, and thus
  - Are individually accountable for the administration of their own ministries, and
  - Collectively for the administration of the work of Cabinet, both to the President and Parliament. (Article 41)

# The Legislature

- ✦ The **National Assembly** – the upper chamber – 72 members elected through direct and proportional system of voting.
- ✦ **National Council** –the house of review – total of 26 members (two representatives from each of the 13 Regional Councils)
- ✦ **Performance of Legislative oversight and control** roles –an integral part of the legislative process that cannot be separated from the law making process, in order to ensure that the government policies and programmes are implemented and administered efficiently and effectively, and in a manner consistent with legislative intent.

# The Judiciary

- ◆ Comprises of Supreme Courts, the High Courts and the lower Courts (Chapter 9).
- ◆ Primary functions:
  - Judicial interpretations - important source for the understanding of the meaning of the constitution, including how the constitutional process should impact on the political processes.
  - Upholding of the country's legal system,
  - Hearing and adjudicating civil disputes and criminal prosecutions.

# The justifiability of the supremacy of the constitution

- ◆ Issues that may seem political in nature could end up being of judicial jurisdiction.
- ◆ Tensions and difficult questions regarding the relationship between democratically elected government and an un-elected judiciary.
- ◆ Such as why should the majority, as expressed through democratic elections, be ruled upon by a small group of judges?
- ◆ Majority rule must not result in tyranny or absolutism that is characterised by the absence of acceptable and legitimate limitations on the exercise of state power.

# Horizontal Inter-governmental Relations

- ✦ The provision for Namibia as a unitary state. (preamble paragraph 5.4)
- ✦ Chapter 12 makes provision for the horizontal division of sovereignty, through the devolution of some central governmental functions to sub-national structures of government
  - ✦ Regional Councils
  - ✦ Local Authorities – municipalities and village councils

# Customary law & Traditional governance

- ✦ The recognition of customary law, provided that it is not in conflict with the constitution and legislation of the republic (article 66)
- ✦ The recognition of the structures for traditional governance, which originated from the pre-colonial era.

# Benchmarks for Good Governance

- ✦ Office of the Auditor General – (Article 127) – entrusted with the responsibility of auditing ministries' financial statements and records relating to budgeted funds.
- ✦ The Ombudsman (Chapter 10, articles 89 - 94) – assisting the members of the public against state action and/or inaction, through the application of less costly and time-consuming avenues for conflict resolution, compared to litigations through the courts.
- ✦ The Anti – Corruption Commission

# Electoral Democracy

- ◆ Democracy can also be defined from the perspective of the legal guarantees for the free expression of the will of all citizens to directly/indirectly take part in the conduct of public affairs through:
  - their freely chosen representatives,
  - to vote in genuine periodic and competitive elections that are:
    - ◆ freely held
    - ◆ transparently and accurately tabulated;
    - ◆ with universal and equal suffrage, and
    - ◆ secret ballots

# Political System

- ◆ Principles of electoral choice in a multiparty democratic system.
- ◆ Freedoms of thought; speech and expression including the press; association; assembly; article 21
- ◆ Electoral Systems
  - First Past the Post System - for Presidential and Regional Councils elections
    - ◆ Advantages – promote closer voter-representative relations that are conducive for a vibrant issue based political system
    - ◆ Disadvantages – distort proportionality by manufacturing electoral majorities
  - Party List Electoral System – for National Assembly (article 49) and Local Authorities elections
    - ◆ Advantages – allows for representation of smaller political interests, as well as marginalised groups such as women
    - ◆ Disadvantages – increase distance between elected representatives and voters, promote the entrenchment of a political system based on political parties

# Human Rights Provisions

- Human rights are universal, but have to be implemented locally within the context of a specific political system.
- Human rights provisions encompassed the following unique formula:
  - Chapter 3: inclusive of an entrenched Bill of Fundamental Human Rights and Freedoms
  - Chapter 11 – Outlined important Principle of State Powers, as mere guiding principles and therefore not legally enforceable.

# Rights to Liberty and Physical Security

- ✦ Right to Life – outlawing capital punishment – article 6
- ✦ Freedom from slavery or servitude – article 9
- ✦ Freedom from arbitrary arrest or imprisonment – article 11
- ✦ Freedom from torture and from cruel, inhuman or degrading treatment or punishment – article 8
- ✦ Equality and Freedom from Discrimination – article 18

# Obligations towards certain basic conditions and/or necessities for survival

- Liberty – article 7.
- Privacy and family life – articles 13, 14
- Fair Trial – article 12
- Children rights – article 15
- Property – article 6

# Entitlements to human dignity, creativity and intellectual and spiritual development.

- Education – article 20
- Freedoms of thought including academic freedoms; religion; speech and expression including the press; association; assembly; practice a profession.- article 21
- The right to participate in political/economic and/or cultural life the society you life in – article 17, 19

# Rights to Solidarity and Fairness in Social Living

- ✦ These pertain to collections of persons rather than to individuals. Such as the rights for an individual to claim on the attention and assistance in defense his/her substantive freedom include:
  - Article 95 under Principle of State Policy provides for:
    - ✦ gender, labor, senior citizens rights,
    - ✦ development in terms of fair access to public amenities, participation employment, a clean environment etc
    - ✦ Social protection, including adequate standard of living e.g.
      - health and well-being of the individual and his/her family.
      - physical and mental health
      - work under just and favorable conditions.
      - food, and housing.
  - Rights not explicitly state include the rights to peace, humanitarian assistance, as well as the rights of the indigenous people etc .

# Duty Bearers

- ◆ Deviation from the traditionalist view in terms of which only public institutions and officials are bound by human right obligations, by providing for the horizontal obligation of natural and legal persons towards human right.
  - **Respect** – requires the state as well as natural and legal persons to abstain from certain interferences
  - **Protect** – requires the nurturing of atmosphere conducive to the prevention of instances of human right violation by individuals, groups and private institutions.
  - **Fulfill** – requires the taking of positive action to realise the right enshrined in the constitution.

# Civil Society

- ✦ The engagement and/or involvement of citizens individually and/or collectively in the public spheres of the society
- ✦ Paragraph 5 (5) of the preamble - states that *"the Namibian state is founded on the principles of securing justice, liberty, equality and fraternity for all its citizens"*
- ✦ Article 95 (k) advocates for the adoption of policies for the encouragement of mass participation of the populace through their respective organizations, with the view of affording them opportunities to influence government policies and programmes.
- ✦ Vision 2030 and NDP II
- ✦ GRN – Civil Organisations Partnership Policy adopted in 2005