

**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**

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INDEX

CHAPTER	TITLE	PAGE
1	A BRIEF HISTORY OF THE INDEPENDENCE OF THE PROSECUTING AUTHORITY IN NAMIBIA	1
2	NAMIBIAN INDEPENDENCE AND THE NEW CONSTITUTION	
2.1	THE INFLUENCE OF THE NEW DISPENSATION ON THE COURTS' APPROACH OF CONSTITUTIONAL ISSUES	6
2.2	THE COURTS AND THE EXISTING LAWS	8
3	THE NEW DISPENSATION	9
4	THE HISTORICAL BACKGROUND OF THE NEW POSTS	11
5	THE APPOINTMENT OF THE PROSECUTOR-GENERAL	16
6	INDEPENDENCE: CHANGES AND CHALLENGES	17
7	THE INDEPENDENCE OF THE PROSECUTOR-GENERAL: THE CHALLENGE IN PRACTICE	21
7.1	Background to the Conflict	21
7.2	The Case of the Attorney-General	24
7.3	The Argument of the Prosecutor-General	27
8	THE JUDGMENT	32
9	THE ONGOING ISSUE OF INDEPENDENCE : ARE THE EMPLOYEES IN THE OFFICE OF THE PROSECUTOR-GENERAL PUBLIC SERVANTS?	38
10	A BRIEF COMPARISON BETWEEN SOUTH AFRICA AND NAMIBIA	48
11	CONCLUSION	50
12	EPILOGUE	51
	BIBLIOGRAPHY	54
	CASE AND STATUTE INDEX	59

1 A BRIEF HISTORY OF THE INDEPENDENCE OF THE PROSECUTING AUTHORITY IN NAMIBIA

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 on the greatest majority of South African acts were also made applicable to South West Africa. In 1919 South Africa established the High Court of South West Africa as the judicial authority for the territory, with the Appellate Division of the Supreme Court of South Africa as the final Court of Appeal. (Carpenter: 1991, p.23).

Prior to the formation of the Union of South Africa, the prosecution authority, at least in Transvaal, vested absolutely in the Attorney-General. (***Gillingham v Attorney-General and Others 1909 TS 572 on 573***).

With the formation of the Union of South Africa, section 139 of the South Africa 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 Attorney-General was independent and free from political oversight. The Administrator of South West Africa issued Proclamation 5 of 1918 to make the Criminal Procedure and Evidence Act of 1917 effective in the Protectorate of South West Africa, with minor special conditions.

The Administrator's Proclamation 20 of 1919 repealed Proclamation 5 of 1918, but confirmed the independence of the Attorney-General. Only the title was changed to Crown Prosecutor.

Thus, initially the prosecuting authorities both in South Africa and South West Africa had absolute autonomy and were free from political control. However, in 1926 the ways parted. The South African Criminal and Magistrates' Courts Procedure Amendment Act 39 of 1926 amended section 139 of the South Africa Act and sections 7(1) and (2) of the Criminal

Procedure and Evidence Act of 1917. Sections 1(3) and (4) placed the Attorney-Generals under the control and directions of the minister.

The 1926 Act was not made applicable in South West Africa and the Attorney-General of South West remained independent and free of political control. In 1935 Proclamation 30 of 1935 maintained the independence of the Prosecutor-General. The Criminal Procedure Ordinance, Ordinance 34 of 1963 repealed Proclamation 30 of 1935. Still, the South West African legislation did not follow the South African example of its time, but maintained the independence of the Attorney-General.

In South Africa the trend of political control was firmly established by the General Law Amendment Act, Act 46 of 1935. The prosecuting authority became part of the authority and power of the minister of justice. The minister had the legal right to take over the role of the Attorney-General and solicitor-generals at his own discretion. The 1935 formulation found its way into the Criminal Procedure Act of 1955, which repealed Act 31 of 1917.

The consequence of all these developments was that the authority and power of the Attorney-General in South West Africa was much wider than those of his counterparts in South Africa.

On 22 July 1977 the Attorney-General of the territory lost his autonomy when the new Criminal Procedure Act 51 of 1977 (CPA), was made applicable in South West Africa. Section 3(5) of the said Act made political control mandatory:

- (i) *The State President shall, subject to the laws relating to the public service, appoint in respect of the area of jurisdiction of each provincial division an Attorney-General, who, on behalf of the State and subject to the*

provisions of this Act -

- (a) shall have authority to prosecute, in the name of the Republic in criminal proceedings in any court in the area in respect of which he has been appointed, any person in respect of any offence in regard to which any court in the said area has jurisdiction; and*
 - (b) may perform all functions relating to the exercise of such authority.*
- (2) The authority conferred upon an Attorney-General under subsection (1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings within the area of jurisdiction of the Attorney-General concerned.*
- (3) The Minister may, subject to the laws relating to the public service, in respect of each area for which an Attorney-General has been appointed, appoint one or more deputy attorneys-general, who may, subject to the control and directions of the Attorney-General concerned, do anything which may lawfully be done by the Attorney-General.*
- (4) Whenever it becomes necessary that an acting Attorney-General be appointed, the Minister may appoint any competent officer in the public service to act as Attorney-General for the period for which such appointment may be necessary.*
- (5) An Attorney-General shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister,*

who may reverse any decision arrived at by an Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.

Thus, from 22 July 1977 the Attorney-General of South West Africa was in the same subservient position as his/her South African counterparts. Although the political and constitutional integrity of South West Africa was hardly respected by the consecutive South African governments, the South African 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 the fact that South West Africa had not been part of South Africa. As a Mandate C territory a South African minister could not control the Attorney-General. With the Criminal Procedure Act, Act 51 of 1977, South West Africa was stripped of this last bastion of judicial independence.

The timing of the implementation of political control over the South West African Attorney-General is not without significance. The South African-backed Turnhalle Conference of 1977 did not lead to an internationally accepted independence without Swapo. International pressure was mounting against South Africa and only a year later, in 1978, the United Nations accepted Resolution 435, providing for United Nations supervised elections which would lead to an independent Namibia.

Acting Supreme Court of Namibia Judge Leon made the following observation regarding the implementation of section 3 of Act 51 of 1977 in 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.

(Ex Parte Attorney-General in re The Constitutional Relationship Between The Attorney-General And The Prosecutor-General, p 36 f.)

In the same tone Henning, SC and Badenhorst, counsel for the Prosecutor-General, pointed out that the government who implemented section 3 of the CPA was not a *Rechtsstaat* and the political control over the prosecuting authority not a *Grundnorm* of a Constitutional dispensation. (1993: p.95)

In the period following the implementation of political authority and control from South Africa over the South West African Attorney-General, the Minister of Justice did not hesitate to use his authority when he deemed it necessary. It is clear from this Act and other Proclamations issued by the Administrator-General, and from South African laws made applicable in the Territory of South West Africa, that the control of the prosecuting mechanisms was of growing importance to the South African government.

When the power of the Minister of Justice over the Attorney-General was not adequate to manipulate prosecutions in the Territory, the South African authorities used other laws. A case in point is the well-known brutal murder of Swapo activist Immanuel Shifidi.

Shifidi was killed by five members of the South African Defence Force at a political rally in Windhoek. The Attorney-General for South West Africa instituted criminal proceedings. However, section 103 ter (4) of the Defence Act of 1957 provided the State President with the authority to issue a

certificate to stop any prosecution against defence force members for acts committed in the operational area. The State President, acting on the recommendation of the Minister of Defence, issued a certificate in terms of section 103 ter (4). The Administrator-General of South West Africa thereafter issued a certificate to halt the prosecution.

The son of the deceased applied for a court order declaring the Administrator-General's certificate invalid (***Shifidi v Administrator-General for South West Africa 1989 (4) SA 631 (SWA)***).

In the case of Shifidi no operational action of the Defence Force was involved and the killing took place on a football field in Windhoek. The court held that neither the Minister of Defence nor the State President, nor anyone else, had a 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 part of the operational area. Thus, the application was granted.

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

2. NAMIBIAN INDEPENDENCE AND THE NEW CONSTITUTION

2.1 THE INFLUENCE OF THE NEW DISPENSATION ON THE COURTS' APPROACH OF CONSTITUTIONAL ISSUES

The independence of Namibia on 21 March 1990 gave the country a Constitutional dispensation and a totally new approach towards the legal system. By opting for a Bill of Rights as an integral part of the Constitution of the Republic of Namibia, the Constituent Assembly opted for a legal system based on values and principles as opposed to the South African

system of parliamentary sovereignty.

From the outset the High and Supreme Courts of an independent Namibia adopted an approach to the interpretation of constitutional issues which was in line with the letter and spirit of the new constitutional order. [See ***Namibia National student's Organisation and Others v Speaker of the National Assembly for South West Africa 1990 (1) SA 617 SWA, Mwandingi versus Minister of Defence, Namibia 1991 (1) SA 851 (NM)***].

In ***Ex parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC)***, the Court was confronted with the question if corporal punishment by an organ of the State is in conflict with chapter 3 of the Constitution, more particularly art 8 thereof.

Unlike earlier cases [such as ***Cabinet for the Territory of South West Africa v Chikane 1990 (1) SA 349 (A)***], the Court did not begin with the facts of the case, but the context of the Constitution. The Constitution and its texts, the Court states, must be interpreted in the light of the aspirations and values of the new nation that the Constitution seeks to articulate. The Court made the following comment on the Constitution:

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. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

For this reason colonialism as well as "the practices and ideology of apartheid from which the majority of the people of Namibia have suffered for so long", is firmly rejected.

Kruger makes the following observation regarding this judgement:

*There can be no doubt that the approach followed by the Court may be described as the **sui generis approach** referred to in Fischer supra, and in particular as a **value-orientated approach**. (Emphasis mine, jnh) (ibid: p.113)*

The change in the Namibian society that came about by independence did not, as we have seen, stop with the implementation of a Constitution which has a Bill of Rights. The new dispensation was also marked by a new approach in the interpretation of human rights and other constitutional issues.

2.2 THE COURTS AND THE EXISTING LAWS

Before turning to the constitutional position of the prosecuting authority in the new Namibia, we need to look at the position of existing laws. Articles 140 (1) and (3) of the Namibian Constitution provides as follows:

Article 140 [The Law in Force at the Date of Independence]

(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

.....

(3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have

been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112, unless it is determined otherwise by an Act of Parliament.

The effect of this article was tested in the so-called **Cultura 2000 case (Government of the Republic of Namibia versus Cultura 2000, 1994(1) SA 407 NmSc)**. Before independence the then **representative authority for whites** sold the farm Regenstein to the organisation Cultura 2000. The representative authority also donated R4 million to Cultura 2000 and gave it a loan of R4 million carrying interest at 1%. Three weeks before independence the Administrator-General converted the loan into an outright donation.

In 1991 the Namibian legislator promulgated the **State Repudiation (Cultura 2000) Act**, to nullify the above actions of the old second tier government for whites. The High Court of Namibia declared the Act unconstitutional since it concluded that Art. 140 (3) only applies to acts and actions of the previous government that were not completed.

On appeal the Supreme Court found that nothing in Article 140 (1) or (3) prevents the Namibian government to repudiate any act or action of the previous government.

3 THE NEW DISPENSATION

The Namibian Constitution introduced a new dispensation where the prosecuting authority is placed in the hand of a new office, the

Prosecutor-General (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.*

However, it is not merely a change of name that was effected by the Constitution. The Constitution also makes provision for an Attorney-General (Articles 86 and 87). The Attorney-General follows the general pattern of Britain and Wales and several Commonwealth countries. The Attorney-General is a political appointment, exercises the final responsibility for the office of the prosecuting authority and is the principal legal adviser of the government. The Namibian Attorney-General is also responsible *for the protection and upholding of the Constitution* [Article 87 (3)]. But the Namibian Attorney-General is all but a carbon copy of his/her British counterpart, as the later conflicts between the Attorney-General and the Prosecutor-General clearly demonstrated.

There is also a difference between the appointment of the Prosecutor-General and the Attorney-General. The Attorney-General is *appointed by the President in accordance with the provisions of Article 32.* (Article 86). Article 32 (3) (1) provides for the appointment of

aa) the Prime Minister;

bb) Ministers and Deputy-Ministers;

cc) the Attorney-General;

dd) the Director-General of Planning; and

ee) any other person or persons who are required by any other provision of this Constitution or any other law to be appointed by the President.

Thus, although the Constitution nowhere states that the Attorney-General is part of the Cabinet, his/her appointment is provided for in the

same article as that of members of cabinet.

The Prosecutor-General, however is *appointed by the President on the recommendation of the Judicial Service Commission*. [Article 88 (1)].

Other offices appointed in the same way are:

- (a) judges [Article 82(1)], and
- (b) the Ombudsman [Article 90 (1)].

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

4 THE HISTORICAL BACKGROUND OF THE NEW POSTS

From the debates in the Constituent Assembly it is not clear where the idea of the new Attorney-General and Prosecutor-General came from, except that some of the Constitutional fathers had the British and other Commonwealth systems in mind. Thus Dr. N. Tjiriange, who later to become the Minister of Justice in the first cabinet of the Republic of Namibia, said the following about the relationship between the Prosecutor-General and Attorney-General in the Commonwealth:

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. (Constituent Assembly Minutes: 1990, p. 154)

In the same vein the late Dr. Fanuel Kozonguizi, who became the first ombudsman after independence, compares the Namibian Constitution on this point with the English system.

For example, in the British system they have an Attorney-General who is a political appointment but who has the functions of initiating prosecutions. Not only is there an Attorney-General, but you also have a Solicitor General under him who is also a political appointment and who is supposed to be his assistant. Then comes under them the Director of Public Prosecutions, who is in charge of the actual prosecution of people. He advises the Attorney-General, but the Attorney-General is the one who decides whether to prosecute or not and the Director of Prosecutions is the one who actually does the work. (Ibid: p. 155)

When we discuss the later conflict between the Prosecutor-General and the Attorney-General, it will be clear that Dr. Tjiriange completely over-simplified the Commonwealth systems. The truth is that most of the Commonwealth countries use the terms Attorney-General and Director of Public Prosecutions. Yet, there are several different models that varies from an independent Director of Public Prosecutions responsible for prosecutions, to a political appointed Attorney-General responsible for prosecutions, to a minister of justice taking the final decisions.

Likewise, the interpretation that Dr. Kozonguizi gave of the British system (possibly a reference to prosecuting in England and Wales) is not correct (see ***Ex parte Attorney-General in re The Constitutional Relationship Between The Attorney-General And The Prosecutor-General***, p. 30). Suffice it to say that the Constitutional Fathers and Mothers did not follow a specific model to base the new positions of Attorney-General and Prosecutor-General on. They took cognisance of the English system as well as the Commonwealth systems, without following anyone in detail.

The Constituent Assembly did, however, attempt to lay down certain important principles. Thus, Mr. Dirk Mudge, an elected member of the Democratic Turnhalle Alliance, commented during the debate that it would be unacceptable to give the responsibility to prosecute and defend appeals in criminal proceedings to a political appointee such as the Attorney-General. (Constituent Assembly Minutes: 1990, p. 153)

This position was supported by Dr. Tjiriange, as well as Mr. Vekuii Rukoro, who became Deputy-Minister of Justice in the first cabinet and Attorney-General in the second. (ibid: p.153) The only dissenting voice in the Constituent Assembly was Mr. Nahas Angula of Swapo, later Minister of Education in the first cabinet, who did not think that the fact that a person is a political appointee will affect his/her independence. Yet, he did not have a problem with a political Attorney-General and a Prosecutor-General, who *for sure must be a civil servant in the true tradition of that profession*. Mr. Angula did not propose an amendment and his opinion did not reflect further in the debates or in the drafts laid before the Constituent Assembly. (ibid: p153 f.)

The debates reflects little insight in the issues that would later arise, i.e. the relationship between the Attorney-General and the Prosecutor-General, and the question as to exactly what are the prerequisites for an independent Prosecutor-General.

The members of the Constituent Assembly were unanimous in their view that the prosecutor-general should be a civil servant. This view was undoubtedly influenced by the practice in England and Wales and other Commonwealth jurisdictions. (cf. The contributions of the members Tjiriange and Kozonguizi above).

The fact that civil servants are vulnerable, especially when they are to be subordinated to high ranking political officials, like an Attorney-General, did not enter the minds of the Constituent Assembly.

Members Tjiriange and Kozonguizi took it for granted that the Prosecutor-General will be subordinated to the Attorney-General or the Minister of Justice. For the Assembly the problem seems to have been where the Prosecutor-General will fit into the structure and under whose authority would he work, the Minister of Justice or the Attorney-General.

Dr. Tjiriange seems to have understood that if the Attorney-General does not take the final decisions, the Prosecutor-General cannot be subordinate to him.

Now that we have done that (taken the Prosecutor-General out under the final authority of the Attorney-General -jnh), the subordination has been removed, he (Prosecutor-General -jnh) is removed from the office of the Attorney-General. To whom is our new man subordinated? (ibid: p.157)

The discussions on the Attorney-General was suspended after Mr. Kozunguizi has suggested that the Prosecutor-General should be accountable to the Minister of Justice. After the lawyers in the House had discussed the matter with the legal advisers of the different parties, they returned with a new draft on the responsibilities of the Attorney-General, which began with the present Article 87(1):

The Attorney-General exercises the final responsibility for the office of the Prosecutor-General.

For the Constituent Assembly the problem was solved. The Prosecutor-General is independent, but accountable to the Attorney-General. Exactly what the final responsibility amounts to and how that responsibility was to be exercised, was never discussed.

Another aspect that the Constituent Assembly did not address, was the exact role of the Ministry of Justice vis-à-vis the Offices of the Attorney-General and Prosecutor-General. The Ministry is not mentioned in the Constitution at all. The Constitution also guarantees the independence of the judiciary. In this respect it does not distinguish between judges and magistrates.

The only reason for a Ministry of Justice was the South African structure that was in operation in Namibia at the time of independence. Had it not been for the South African model, the first government could not have created the Ministry by merely following the Constitution.

However, the Ministry took financial and administrative responsibility for the Office of the Prosecutor-General (despite Article 87(1)), the magistrates (who, one would expect, as part of the independent judiciary, should have fallen under the Chief Justice and should thus be appointed by the Judicial Service Commission with the same guarantees as judges), the legal drafters, the Law Commission (who would smoothly have fitted into the office of the Attorney-General as chief legal advisor of the government), the independent office of the Ombudsman, Legal Aid and the administrative staff of the courts. (Annual Report of the Permanent Secretary of Justice, 1997).

In 2000 the Legal Office SADCC, which will be seated in Windhoek, will also fall under the Ministry. The Ministry of Justice takes budgetary responsibility for all these components. In all other aspects the Attorney-General deals with the Office of the Prosecutor-General as part of his portfolio. (Annual Report of the Attorney-General 1997).

For the purpose of this study, the undefined relationships of the different components (Minister of Justice, Attorney-General and Prosecutor-General) are important. Almost ten years after independence there is still no complementary legislation to streamline the undefined

aspects of the Constitution.

In 1997 the Attorney-General drafted legislation to bring the Prosecutor-General, the legal drafters and the Law Commission under his administrative control. The legislation never went past Cabinet and reasons were not made known. It is probably safe to assume that the reasons were mainly political.

5 THE APPOINTMENT OF THE PROSECUTOR-GENERAL

The Prosecutor-General is appointed by the President upon recommendation of the Judicial Service Commission. The convention that the President follows the recommendation of the Judicial Service Commission, is settled Namibian practice.

In 1997, after the death of the first Ombudsman, the President appointed the then acting Ombudsman, Adv. E.K. 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 jurisdictions where the body that appoints the head of prosecutions can be manipulated by politicians, be it the executive or legislative powers, the Office may still be independent, but the office bearer can easily be compromised by his "masters" who gave him the post.

According to Article 85 of the Constitution the Judicial Service Commission, responsible for the appointment of the Prosecutor-General, shall consist of the Chief Justice, a judge appointed by the President, the Attorney-General and two representatives from the legal profession. The only political figure on the Judicial Service Commission is the Attorney-

General. Any political manoeuvring will be extremely difficult, especially since the representatives from the profession are nominated by two different organisations, the Law Society and the Lawyers Association of Namibia.

Thus, unlike South Africa, where the majority of the members of the Judicial Service Commission are appointed by Parliament, it will be extremely difficult to manipulate the Judicial Service Commission in Namibia. If the majority party in South Africa has an overwhelming majority, the chances are good that the appointments of the committee will have a political bias. This is highly unlikely in Namibia.

6 INDEPENDENCE: CHANGES AND CHALLENGES

For the Office of the Prosecutor-General independence on 21 March 1990 brought drastic changes. The last 'prosecutor' Attorney-General of the old dispensation and his most senior deputy left Namibia quietly for their motherland, South Africa.

The acting Prosecutor-General got on the wrong side of the new Constitutional era in **The State versus Acheson 1991(2) SA 805 NHC** shortly after independence. In this case the accused, Donald Acheson, was before court for killing Swapo activist and a prominent member of the party's election machinery, Adv. Anton Lubowski. The honourable Justice Mahomed, later to become the second chief justice of Namibia, was on the bench.

Politically tension was building up between the new state and its former sovereign power, South Africa. There was strong evidence that two members of the Civil Co-operation Bureau, a covert organisation of the South African Defence Force, Staal Burger and Chappie Maree, were at least accessories to the killing. It was almost impossible to get them extradited from South Africa (as was the case with the so-called Outjo

Three, a German citizen, Horst Klentz, and two right wing South Africans, Darryll Stopforth and Leonard Veenendal, who were suspected of killing two Namibians).

Yet the Court refused the State a further postponement . Even in politically sensitive cases where the former colonial power was involved, the Court still expected of the State to abide with the standards of the Bill of Rights.

The biggest challenge for the newly established Office of the Prosecutor-General came from the equally new office of the Attorney-General. Unlike the powerful South African Minister of Justice, the Attorney-General was not 1 800 km away, but only a few blocks away in a building next to Parliament.

It was from the outset clear that the then Attorney-General saw the office of the Prosecutor-General merely as an extension of his own. The Attorney-General relied on the controversial section 3(5) of the Criminal Procedure Act to vindicate his position, thus claiming extensive administrative and supervisory power over the Prosecutor-General

The effect of the latter sub-section (i.e. 3(5) of the Criminal Procedure Act-jnh) is unequivocally to bestow upon the then Minister ultimate control over the Attorney-General in respect of his prosecutorial functions. This was accordingly the position at the stage when independence was declared in Namibia. (Henning and Badenhorst: 1994, p.11)

Consequently, the Attorney-General concluded that 'final responsibility' *must inevitably carry with it associated commensurate power of intervention and direction.* (Soggott and Coetzee: 1993, p. 14) The extent of the Attorney-General's interpretation becomes clear from his

actions:

The Attorney-General and two of his senior staff members gave instructions to members of the office of the Prosecutor-General without his knowledge and without consulting him; the Attorney-General required members of the Office of the Prosecutor-General to perform tasks unconnected with the office (one senior member served on three commissions of inquiry on behalf of the Ministry of Home Affairs);

the Attorney-General appointed a member of the staff of the office of the Prosecutor-General as a special investigator without prior discussion with the Prosecutor-General (which the Prosecutor-General considered undesirable since it could lead to the prosecutor becoming a witness);

the Attorney-General sent up to five letters on one day to the Prosecutor-General;

the Prosecutor-General had to attend weekly meetings at the Attorney-General's office where the chairperson demanded explanations regarding pending prosecutions;

the Attorney-General instructed the Prosecutor-General to remand cases where all the witnesses were present at the Court (an instruction the Prosecutor-General refused to obey);

the Attorney-General dealt directly with enquiries and expected the Prosecutor-General to keep him informed rather than referring the enquiries directly to the Prosecutor-General;
and

the Attorney-General demanded access to police dockets (which the Prosecutor-General considered to be privileged - that was before the courts forced the Prosecutor-General to disclose the content of dockets);

and

the Attorney-General gave the Prosecutor-General instructions to withdraw a case. (Prosecutor-General's Letter: 27 March 1992 to the Secretary of the Judicial Service Commission, quoted in Henning and Badenhorst: 1994, p. 119 ff.)

From the above it is clear that despite the emphasis that the Constituent Assembly placed on the independence of the Prosecutor-General, in practice he was more subservient than any other time in Namibian legal history.

The new Attorney-General attempted to control almost every facet of the responsibilities and administration of the Prosecutor-General's office. He intervened and controlled in a way that no South African Minister of Justice with all his legal powers ever attempted. When the Prosecutor-General refused to take orders from the Attorney-General, the latter laid a charge of insubordination with the Judicial Service Commission. (Henning and Badenhorst: 1994, p. 119).

From this historical perspective it is clear that the conflict between the Attorney-General and the Prosecutor-General was not merely transitional problems, nor was it a conflict between dissenting ideological or political thinkers.¹ At stake was nothing less than the independence of the Prosecutor-General, which was an integral part of the new Constitutional dispensation in Namibia.

The office of the Prosecutor-General is an integral part of the practice of the administration of justice. This sphere of the

¹ The Attorney-General was one of a young generation German-speaking Namibians who were part of the internal wing of Swapo during the pre-independence era. The Prosecutor-General was a deputy-Attorney-General during the same period. Although he was not a member of the Broederbond or involved with the political powers, he was perceived to be part of the old order.

State is constitutionally separated and independent. Interference by the Executive - through the Attorney-General - into this domain would be unconstitutional in the legality sense but would furthermore constitute a serious violation of the content of fundamental underlying concepts such as Grundnorm, Rechtsstaat and constitutionalism. This would present a threat against the fundamental constitutional order, which cannot be tolerated and should be avoided. (Henning and Badenhorst: 1994, p. 132.)

7 THE INDEPENDENCE OF THE PROSECUTOR-GENERAL: THE CHALLENGE IN PRACTICE

7.1 Background to the Conflict

Constitutional watchers were generally impressed with the Namibian Constitution. Several of them commended the independence of the Prosecutor-General. Professor Gerhard Erasmus (1990, p. 308) pointed out that the Prosecutor-General is not only considerably more independent than the Attorney-General of the South African period, but he/she *is solely responsible for decisions concerning criminal proceedings. Neither the Attorney-General and even less the Minister of Justice can give instructions to the Prosecutor-General.*

Others have pointed to the fact that prerogatives do not exist in the Namibian Constitution. State functionaries (even the President) can only exercise those functions given to him/her by the Constitution. (Carpenter: 1991, p. 22, Erasmus: 1991 p. 96. See also Edwards: 1977, p. 6)

The fact that the independence of the Prosecutor-General in the Constitution received such a good Southern African and international press was a strong encouragement for the Prosecutor-General to stand his

ground.

The fact that the two positions vaguely conformed to the differentiation of the posts in England and Wales and the Commonwealth, without the specific boundaries of the two positions being spelled out, resulted in two conflicting interpretations by the Attorney-General and the Prosecutor-General.

The conflict was eventually settled by the Supreme Court. ***Lex Parte Attorney-General in re The Constitutional Relationship Between The Attorney-General And The Prosecutor-General, NSC, heard on 3.10.1994 and 6.12.1994, delivered on 13.07.1995. Original Copy of the Registrar used (Case No SA 7/93)***

In a drawn-out case of Racial Discrimination against the public broadcaster, the Namibian Broadcasting Corporation (NBC), (***The State versus Gorelick and others, Windhoek Magistrates Court, 1993***)¹ the conflict came to a point.

On 1 July 1993 the Attorney-General requested the police docket from the Prosecutor-General (Henning and Badenhorst: 1994, p.126). The Prosecutor-General refused since he regarded the docket as part of the prosecutor's brief and privileged (that was before the State was forced to disclose the police docket before a trial).

Later the Prosecutor-General changed his mind and on 20 August 1993 forwarded the docket to the Attorney-General. (ibid:p.126) On the same day the Attorney-General informed the Prosecutor-General that he had decided that prosecution should be withdrawn. He then instructed the Prosecutor-General to inform the Court and counsel for the defendant. (ibid: p. 127).

¹ The case was of great political interest. While the Act was introduced in Namibia against the background of a century of white colonial rule, in an ironic twist of circumstances in this first significant test of the Act, the complainant was a white police officer, complaining about what he perceived as racial hate speech by the national broadcaster.

The Prosecutor-General informed the Attorney-General on the same day that he did not regard himself bound by the instruction. (ibid: p. 128). The Prosecutor-General instructed the local prosecutor to request the Court to proceed with the matter, whereupon the Attorney-General requested for a postponement of the case pending a decision of the Supreme Court on the Constitutional relationship between the Prosecutor-General and the Attorney-General and the status of their offices. The matter came before a full Bench of the High Court (***Attorney-General of Namibia and the Prosecutor-General: Corelick and others, Case No C2/93.***) The High Court granted the postponement.

Thereupon the Attorney-General brought a petition to the Supreme Court in terms of section 15(1) of the Supreme Court Act of 1990 to determine the following questions:

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

- (i) to instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter;*
- (ii) to instruct the Prosecutor-General to take on or to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;*
- (iii) to require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important*

aspects of legal or prosecutorial policy.

7.2 The Case of the Attorney-General

The Attorney-General based his case on three points:

- 1 He maintained that **final responsibility** means that the *ultimate prosecuting discretion* or *ultimate superintendence* vests in the Attorney-General. (Soggott and Coetzee:: 1993, p. 2 ff.)

- 2 The Attorney-General also submitted that section 3(5) of the Criminal Procedure Act, Act 51 of 1977, was still Namibian law and that the Prosecutor-General must exercise his authority and perform his duties under the Act subject to the control and directions of the Attorney-General (as the previous Attorney-Generals since 1977 did under the control and direction of the Minister of Justice).

In his main Heads of Argument, the Attorney-General argued that section 3(5) of Act 51 of 1977 was still intact, provided that wherever the word *Attorney-General* appears, one should read *Prosecutor-General* (see article 141(2) of the Constitution) and where the word *Minister* appears, one should read *Attorney-General*. (Soggott & Coetzee: 194, p.10 - 11).

- 3 The Attorney-General submitted that article 87(a) accords with the situation in the United Kingdom and the Commonwealth, where the prosecuting authority is generally known as the Director of Public Prosecutions and operates under the authority and guidance of the Attorney-General. Thus, in Namibia the Prosecutor-General should also be submitted to the Attorney-General. The Attorney-General is in Namibia, like the Commonwealth countries, the final authority in

all criminal prosecutions and proceedings.

According to the Attorney-General, Article 140 (which provides for all laws in force immediately before independence to remain in force) and Article 141 (which replaces the Prosecutor-General with the Attorney-General in all existing legislation), do not enlarge the ambit of the duties and responsibilities of the Prosecutor-General vis-à-vis the Attorney-General of the colonial order. (Soggott & Coetzee: 1994, p. 11 f.)

It follows that *the Constitution leaves undisturbed that aspect of the relationship between the Prosecutor-General (formerly the Attorney-General) and a Minister or Official corresponding with the then Minister of Justice referred to in the Criminal Procedure Act.* (Soggott & Coetzee: 1994, p.12).

After analysing the words *final* and *responsibility* the Attorney-General concluded that given the dictionary meaning of the words, it is clear that the Constitution burdens the Attorney-General with ultimate responsibility for the Prosecutor-General's office. This burden, he argued, cannot be carried out without commensurate power of intervention and direction. (ibid: p.13f.)

The Attorney-General found support for his position in Article 41, which makes the Ministers of Cabinet responsible and accountable to the President and Parliament for their own ministries and collectively for the work of Cabinet. Since the Constitution does not make provision for any structural relationship between the Prosecutor-General and the Minister of Justice, or any other minister for that matter, the Attorney-General, as a political appointee, is the only Constitutional Office that can take final responsibility for the Prosecutor-General. (ibid: p. 15)

The Attorney-General described his function to uphold and protect the Constitution as a uniquely humanitarian and caring quality of the

Namibian Constitution. To fulfil this function, the Attorney-General must be in a *position to determine strategies ... and the implementation of such strategies in terms of prosecutorial action*. (ibid: p. 16).

The Attorney-General finally made a major point of the fact that the framers of the Constitution modelled the functions of the Attorney-General on the Westminster model. It seems as if the Attorney-General suggested that the English/Welsh model is followed in most Commonwealth jurisdictions where both the offices of Attorney-General and Director of Public Prosecutions are recognized by the constitution. (ibid: p. 16 ff.)

The Attorney-General did not conduct an in-depth study of either the English/Welsh model or the Commonwealth models as such. While he is correct in his historical approach of the relationship between the Attorney-General, a political appointee, and the Director of Public Prosecutions of England and Wales, a barrister or solicitor appointed by the Home Secretary, he did not go into recent developments in England.

Suffice it at this stage to say that although the Attorney-General of the United Kingdom does indeed have a duty of superintendence (which is a strong word), there has been a strong development of more independence for the Director or Public Prosecutions. (See the judgment of the Supreme Court on this point in (5) below.)

The arguments of the Attorney-General were all based on the practical issue of running the two crucial offices. The issue for him is to determine how the Attorney-General can exercise his *final responsibility* for the office of the Prosecutor-General. From this basic power-political platform he concluded that **final responsibility** also means **final control**.

Without questioning the *bona fides* or credibility of the then

Attorney-General,¹ it is clear his ideal was an Attorney-General that takes control of both the important prosecutorial decisions and the day to day administration of the Prosecutor-General's office. While the integrity of the Attorney-General cannot be questioned, his wisdom and insight in the issues at stake is something different. I will return to this issue later.

7.3 The Argument of the Prosecutor-General

While the argument of the Attorney-General was practical, based on the perceived international models that featured in the Namibian Constitution, the Prosecutor-General took a philosophical approach. The Prosecutor-General began with a closer look at **constitutionalism** and the *Grundnorm* of the Namibian law.

The Prosecutor-General defined constitutionalism to mean *that the government to be instituted shall be constrained by the constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes*. (Bold emphasis mine -jnh) (Henning & Badenhorst: 1994, p. 7).

The *Grundnorm* is the concept or norms and values behind the Constitution. Wiechers refers to it as the unalterable rules that *cannot be amended by any Constitutional revision or change...It is said that these fundamental laws ensure the foundations on which the Constitution rests and are therefore immutable*. (in Kahn E (ed): 1985, p. 389 ff., quoted in Henning and Badenhorst: 1994, p. 10).

1 The history of the Colonial misuse of prosecutorial authority undoubtedly inspired the Attorney-General to opt for a powerful political Attorney-General, grounded in the human rights tradition of the struggle against apartheid vis-a-vis an office who consisted predominantly of lawyers who served as prosecutors under the former administration with its poor human rights record. Although the language of the Attorney-General is mild (he or she should also be in a position to determine strategies for the upholding of the Constitution and sacrosanct human rights), the distrust in the Prosecutor-General's office is clear. The Attorney-General shared the general feeling of his time that only the Swapo government had the moral fibre and political will to implement a new dispensation of human rights vigorously.

The Prosecutor-General discussed the *Grundnorm* from the perspective of the so-called *Rechtsstaat*, representing *the notion of a state of justice*. In a *Rechtsstaat* certain fundamental principles are guaranteed, such as individual rights, equality before the law, the division of power of the state, the independence of the Courts, the legality of the administration, a democratic form of government, and judicial review. (Henning and Badenhorst: 1994, p. 16).

The argument of the Prosecutor-General goes beyond what is practical or what model will fit the transitional Namibian society best. The issue goes far beyond a power struggle between two offices. For the Prosecutor-General the issue at stake is the fundamental values and norms of the Namibian people upon which the legal system of the new nation ought to be built. Consequently, the question of constitutionality plays a vital part in its argument.

In discussing the functions of the modern state, the Prosecutor-General pointed out that the fundamental function of maintaining law and order is given to the Prosecutor-General in the Constitution. (Ibid: p. 25 f.)

The Prosecutor-General gave great prominence to the doctrine of the separation of powers as one of the *Grundnorme* of Namibian law. (Ibid: p. 34 ff.). As one of the so-called 1982 Constitutional Principles¹, it is entrenched in the Namibian Constitution. Wiechers (1990, p. 6f.) explains that the 1982 Principles constitute the conditions for Namibian statehood agreed upon by the international community and interested parties antecedent to the adoption of the Constitution. By introducing these principles in its Constitution, the Constituent Assembly created a curb. The effect of this curb is that the Namibian legislature cannot amend or

¹ See Wiechers: 1991 for a full discussion of the Principles and its history. The principles were proposed by the so-called Western Contact Group and later accepted by all parties as guidelines for a future Namibian Constitution.

abolish any of the 1982 principles.

In constitutional terms, it means that the 1982 principles go beyond and deeper than the Constitution itself: they constitute fundamental conditions upon which the existence and legal force of the Constitution itself is founded. (Ibid: p. 7, quoted in Henning and Badenhorst: 1994, p. 36).

Arguing from the premise that the doctrine of separation of powers is important to the position of the Prosecutor-General *vis-a-vis* the Attorney-General, the Prosecutor-General concluded that this independence is part of the 1982 principles that goes even deeper than the Constitution itself. (ibid: p.36)

From this foundation, the Prosecutor-General's argument moved to Art. 78(3) of the Constitution, stating that *no member of Cabinet of Legislature or any other person shall interfere with judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.* The Prosecutor-General quoted ***State versus Heita and Another 1992(3) SA 785 NmHC on 790B***, stating that the second leg of the article places a positive duty on the organs of the State to accord such assistance as the Courts may require. (ibid: p.44)

From ***Highstead Entertainment (Pty) Ltd. t/a 'The Club' versus Minister of Law and Order and Others 1994 (1) SA 387 (C)***, the Prosecutor-General quoted the principle that the discretion to decide whether to prosecute or not is one of the fundamental functions of the Prosecutor-General in executing his duty to prosecute. The Prosecutor-General concluded this section of his argument with a short sentence:

No political functionary can be allowed to interfere in this fundamental discretion. (ibid: p. 52)

After an extensive research on the relationship between the prosecuting authority and the Attorney-General in Commonwealth countries, the Prosecutor-General concluded correctly that the Commonwealth does not provide a single identity. Even legislation is not always helpful to understand the practices in different jurisdictions, since practical conventions often exist which present a completely different picture. Lastly, the Prosecutor-General points out that several of these jurisdictions lack a supreme law similar to a Constitution with an underlying *Grundnorm*, and are therefore doubtful examples for Namibia. (ibid: p. 76).

While the position of the Attorney-General that his supervision is necessary to ensure that human rights is respected and enforced, may have merit if one considers the past, the Prosecutor-General rejects it because it repeats the faults of the apartheid history the Attorney-General wished to change.

Henning and Badenhorst (1994: p. 133) pointed to the irony that the Attorney-General relied upon section 3(5) of Act 51 of 1977, a section that was introduced in Namibia *by a totalitarian regime which ruled by force and disregarded almost every accepted norm of constitutionalism*. Even in South Africa, section 3(5) was repealed by the Attorney-General Act, Act 92 of 1992.

The section, the Prosecutor-General argued, is not only a contradiction of the *Grundnorm* of Namibian law, but one of the worst practices of the old regime and it is expressly rejected by the Namibian Constitution, especially the Articles aimed at removing all vestiges of apartheid from society [Articles 23 (1) and 40(I)]. (ibid: p. 133).

But the position of the Attorney-General goes beyond being a

vestige of the old apartheid dispensation: Interference by the executive in the domain of the Prosecutor-General's independence is unconstitutional and, as was pointed out above, constitutes a violation of the content of fundamental underlying concepts such as Grundnorm, Rechtsstaat and constitutionalism. (Ibid: 132)

The Prosecutor-General concludes this section by stating that the Attorney-General fails to appreciate the true nature of his constitutional position. The fact that he relies on the worst practices of the South African regime, is a *sad reflection on his constitutional appreciation and his value judgement*. (Ibid: p. 133 f.).

Finally, the Prosecutor-General points out that final responsibility must be read with Art. 87 (c), obliging the Attorney-General to protect and uphold the Constitution, and Art. 87 (b), making the Attorney-General principal legal adviser of the President. Final responsibility can never be meant to strip the Prosecutor-General of his constitutional functions or powers. (Ibid: p. 134 ff.)

The Prosecutor-General adopted the stance that the real question that needs to be answered is: *Is the Prosecutor-General truly independent under the Constitution?* (p.3). The arguments of counsel for the Prosecutor-General were all attempts to point to the inherent philosophy and constitutional *Grundnorm* underlying the constitutional independence of the Prosecutor-General.

Against this approach stands the highly subjective (yet honest) ideal of the Attorney-General to transform society through specific and direct interventions in the prosecutorial process. The Attorney-General may have been correct in his view that only intervention by the Executive through him could serve the Constitution and especially the new values on human rights. Yet he makes the vital mistake to claim the same draconian powers of the old regime for the new government.

In doing so, the Attorney-General naively sanctified the new government. Constitutionalism and the principle of a *Rechtsstaat*, are, however based on a general mistrust in people. The corrupt world needs higher values, a *Grundnorm* that is not dependent upon good officials to maintain order and justice. The problem with the apartheid system was not that the officials who invented it were immoral people. The corruption lied in the *Grundnorm* (or absence thereof) in the basic values underlying the laws that were meant to ordain society.

Fortunately for the Namibian people and the future of constitutionality in Namibia, the Supreme Court based its decision on the philosophical question of a *Rechtsstaat* and a constitutional dispensation.

8 THE JUDGMENT

The Supreme Court per the Honourable Justice Leon only granted the third prayer of the Attorney-General, a point which was conceded by the counsel for the Prosecutor-General. The Court observed with reference to **Highstead Entertainment (Pty) Ltd t/a "The Club" versus Minister of Law and Order and Others 1994 (1) SA 387 (C) at 393 H - 394 H**, that one of the fundamental functions in the duty to prosecute is the discretion to proceed with a prosecution or to withdraw it. (p. 11).

After analysing the Constitutional provisions of the offices in question, the Court confirms the general notion that the Attorney-General is a political office with executive functions, while the Prosecutor-General is *quasi-judicial* and his appointment non-political.

Moving to the issue of Constitutionalism in general, the Court quoted several of the post-independent judgments of the Namibian High Court, **State versus Acheson, supra, Mwandingi versus Minister of Defence, supra, Government of Namibia versus Cultura 2000, 1994 (1) SA 407 and State versus Van Wyk 1992 (1) SACR 147** to underline the emphasis

the Court places on the broad interpretation of rights and the fact that the Court sees the Constitution as a radical break with apartheid and the old colonial order.

The by then standard practice of the Namibian Courts to deal with the Constitution was followed by the Court to weigh the other two contentions of the Attorney-General (i.e. that Section 3 of the CPA still applies to Namibia and that the words 'final responsibility' also implies final authority). The Court quotes ***The State versus Van Wyk 1992 (1) SACR 147 (NmSC)*** approvingly:

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

and also ***The State versus Acheson 1991 (2) SA 805 (NmHC)***

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

The Constitution is *a mirror reflecting the national soul* (**Acheson, supra, p. 813**), it must be interpreted *purposively to avoid the austerity of tabulated legalism* (**Mwandingi supra, p. 355**), it identifies a legal ethos against apartheid with greater vigour and intensity that any other Constitution in the world (**Cultura, supra, p.**

407 and **Van Wyk, supra p.173**) and many of the South African laws were inconsistent with both the ethos and the express provisions of the Constitution and therefore unacceptable to the new Namibia (**Cultura, supra, p. 561**).

In the light of the above and in the light of the fact that the Namibian constitution contains a declaration of Fundamental Human Rights that must be protected, the Court makes the following observation:

I do not believe that those rights and freedoms can be protected by allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted. Nor do I believe that that would be in accordance with the ideals and aspirations of the Namibian people or in any way represent an articulation of its values. (p. 14).

After this general discussion of constitutionalism and even before looking at the specific points of the argument of the Attorney-General, the Court made the following statement:

I shall revert to this topic again, but wish merely to record at this stage that the above-mentioned view strikes at the heart of the reliance which the Attorney-General places on sec. 3(5) of the South African Criminal Procedure Act No 51 of 1977.(p.15)

Coming to the Attorney-General's reliance on the English and Welsh jurisdiction, the Court shows that the final responsibility the Namibian Attorney-General exercises, is not synonymous with the superintendence of the British Attorney-General (pp. 12 and 18ff.)

The Court found that the reliance of the Attorney-General on the practices in the United Kingdom and the Commonwealth did not support his position. Counsel for the Prosecutor-General has clearly pointed out that there is no common system in the Commonwealth. (Henning & Badehorst: 1994, p. 56 ff.) In several cases the prosecuting authority, usually called the Director of Public Prosecutions, is independent of any political interference.

Although the English/Welsh system is indeed unique in the role that the political Attorney-General can play in theory, the Court points out that in practice it has followed a path of independency for the Director of Public Prosecutions. The English and Welsh courts have opted for a limitation of the powers of the Attorney-General over the years. The Court quotes several British authorities to point out that the Director of Public Prosecutions *is essentially an independent, non-political figure, (whose) decisions are his own and not those of the Attorney-General.* (ibid: p19 ff.) It concludes that it is unlikely that prayers (i) and (ii) of the Attorney-General would succeed even in the United Kingdom today. (p. 19).

The Court concludes that even if the Attorney-General is given statutory superintendence and direction over the office of the prosecuting authority, in practice he seldom if ever exercises any control over prosecutions. Thus, the Attorney-General cannot rely on his constitutional *final responsibility* to prove his point.

If the interpretation of the phrase **final responsibility** does not help the Attorney-General, the Court rightly concludes:

Unless section 3 (5) of the Criminal Procedure Act is applied,, the position of the Prosecutor-General is an a fortiori one in the sense that there is nothing in the Constitution which expressly places his office under the general superintendence or

direction of the Attorney-General. (ibid: p. 19).

The Attorney-General's reliance on the relationship between the Attorney-General and the prosecuting authority in Commonwealth countries is discussed in detail by the Court. (ibid: pp. 22 - 30). The Court concludes, there is no single pattern followed by all states. Further, the Namibian Constitution used a different, unique language to express the relationship. Therefore the Attorney-General's argument cannot stand.

While a constitutional observer like Prof. Edwards in his study of the relationship between the Attorney-General and Prosecutor-General in the Commonwealth, was not sure whether the Namibian Constitution gives the Attorney-General power to overrule the Prosecutor-General in the exercise of his powers, the Court points out that Prof. Gerhard Erasmus, one of the drafters of the Constitution, had no uncertainty. (ibid: p. 29).

He or she (Prosecutor-General-jnh) has a constitutionally prescribed post and is solely responsible for decisions concerning criminal prosecutions. Neither the Attorney-General and even less the Minister of Justice can give instructions to the Prosecutor-General. (Erasmus: 1990, 308)

While the Court clearly states that it does not suggest that the then Attorney-General acted in an oppressive matter, it warns against the dangers of a political prosecuting appointee. The Court approvingly quotes Justice Ayooly stating that in Africa the prosecutorial power has often been used as a weapon to foster political ends. That ultimately leads to the destruction of democracy. (ibid: p.31, quoting Ayoola 1991: p1032 ff).

The Court discussed the issue of a *Rechtsstaat*. The basic characteristic of the *Rechtsstaat* is that the state authority is bound by a

set of higher judicial norms (*Grundzätze*), while it protects rights within this normative structure of the Constitution. (ibid: p. 32 f.).

Namibia with its new constitution and its fundamental adherence to the Declaration of Human Rights complies with a modern *Rechtsstaat* where state authority is bound by a set of higher juridical norms (*Grundsätze*) (ibid: p. 32 f.) In the same way the South African apartheid regime was not a *Rechtsstaat*. (ibid).

The Court refers to the ***Cultura 2000*** case where it was pointed out that many of the South African laws enacted by the South African Government during its administration were inconsistent with the ethos and provisions of the Namibian Constitution. (ibid: p. 35 f.).

Therefore a mere reliance on Article 140 (1) - which keeps the laws in force immediately before independence intact in the new republic - is not enough. To be in force after independence, a law must also comply with the ethos and the provisions of the Namibian Constitution.

Section 3(5) of the Criminal Procedure Act does not pass this test. It is not a product of a *Rechtsstaat* and is not compatible with the *Grundsätze* relating to the separation of powers. (ibid: p. 37). On the contrary, it is part of oppressive laws made applicable to the territory of South West Africa by the apartheid regime for its own political aims.

The Court also concludes that if the third prayer of the Attorney-General is granted (namely 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), there need not be a conflict between an independent Prosecutor-General and an Attorney-General that has final responsibility. Final responsibility then means more than financial responsibility, and includes his duty to account to the President, the Executive and the Legislature. (ibid: p.38 f).

The Court concludes that the Attorney-general cannot instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter. Neither can the Attorney-General 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. Consequently, only the third prayer of the Attorney-General (the Attorney-general's right to require that the Prosecutor-General keeps him informed in respect of all sensitive prosecutions, was answered positively.

9 THE ONGOING ISSUE OF INDEPENDENCE : ARE THE EMPLOYEES IN THE OFFICE OF THE PROSECUTOR-GENERAL PUBLIC SERVANTS?

Although the decision of the Supreme Court on the independence of the Prosecutor-General removed the first uncertainty regarding the independence of the Prosecutor-General, it did not answer all the questions. Since the kind of independence that the Prosecutor-General enjoys, is in many ways unique in the world, there are not many authorities or examples to rely on. Several issues remain unanswered.

The Prosecutor-General does not have his own act in Namibia. Thus, the only sources of his functions at present are the Constitution, the Criminal Procedure Act, and recent case law.

It is generally accepted that the same rules that apply to Judges and the Ombudsman, are also applicable to the Prosecutor-General. The Prosecutor-General is appointed in the same manner as judges and the Ombudsman, and shares their salary scale and benefits. The Prosecutor-General 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, etc. of the Judges and the

Ombudsman, it is silent on the position of the Prosecutor-General. From the above it seems clear from both the Constitution and the judgement of the Court in **Ex Parte: Attorney-General and Prosecutor-General** that the Prosecutor-General is not a public servant. This is also in line with his independence.

However, even if the independence of the Prosecutor-General is clear, the same is not true of his staff. It is not clear whether Section 4 of the Criminal Procedure Act is still valid in Namibia. Although the Supreme Court only dealt with Section 3(5) of the Criminal Procedure Act, the present Prosecutor-General, Adv. J.L. Heyman, makes a case that the whole of sections 3 and 4 forms part of one corpus. (Prollius: 1998, p. 1)¹ Since section 3(5) was declared unconstitutional by the Supreme Court because its *Sitz im Leben* lies in the old parliamentary order, and does not form part of the *Grundsätze* of a *Rechtsstaat*, the same should apply to the rest of section 3 and all of section 4 of the Act.

The functions of the Prosecutor-General are described as follows in Article 88 (2) of the Constitution:

- 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*

1 1 The opinion of the Prosecutor-General is found in an unpublished opinion of a former staff member of the Office of the Prosecutor-General, Adv. S. Prollius, with which the Prosecutor-General concurs. (Personal interview with the Prosecutor-General, 4 November 1999).

Court;

e) to perform all such other functions as may be assigned to him or her in terms of any other law.

Section 4 of the Criminal Procedure Act reads as follows:

4. 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.*

The present Prosecutor-General, Adv. J.L. Heyman, SC, who is the first and only Namibian thus far to hold the position, holds 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 (Prollius: 1998, 1)

According to this interpretation, the ruling in **Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-**

General and the Prosecutor-General not only explicitly stated that the Constitution repealed section 3 of the Criminal Procedure Act, but one must also conclude that it implicitly included the rest of section 3 and section 4.

Prollius refers to the American decision *Corham versus Lockett*, quoted in *New Modderfontein Gold Mining Company versus Transvaal Provincial Administration 1919 AD 367 at 397*:

And if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supercedes 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 the principle to the issues at stake, the Prosecutor-General concludes 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. (Prollius: 1998, p.2)

Section 4(a) gives the Prosecutor-General authority to delegate **any person to conduct any prosecution**, while section 4(b) gives him/her authority to appoint any **officer of the State** as public prosecutor to any lower court **to institute and conduct** any state prosecution on his behalf.

The Prosecutor-General maintains that section 4 (a) refers to the High Court where the Prosecutor-General **institute** prosecutions in his/her own name. Those delegated to appear on his/her behalf only need to be

authorised to **conduct proceedings**. Since the Prosecutor-General 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 Namibian Constitution, which authorises the Prosecutor-General 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 Prosecutor-General 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 Prosecutor-General, has replaced section 4 (b) of the Criminal Procedure Act. Thus, Prollius (1998, p.3) makes 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.

Further, Prollius points out that if the Prosecutor-General 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) of the Public Service Act 13 of 1995 giving the Prime Minister the authority to appoint, promote, transfer or discharge public servants on the recommendation of the Public Service Commission, does not apply to public prosecutors. (Prollius: 1998, p.4).

Since section 3(3) of the Criminal Procedure Act gives the Minister of Justice (possibly the Attorney-General 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? (Prollius: 1998, p. 4)

Not every interested party agrees with the interpretation of the Prosecutor-General. If the Prosecutor-General is correct in his interpretation, the powers and functions that go with the duties of the Prosecutor-General, are all attributed to one person without any checks or balances.

The interpretation of the Prosecutor-General is usually challenged on two points:

1. The need for checks and balances;
2. The explicit use of the word "official" in the Constitution.

Dr. N. Tjiriange, who later became Minister of Justice, made the following comment on the Offices of the Prosecutor-General and Attorney-General 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. (Constituent Assembly Minutes: 1990, p. 153)

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 further regulate the functions and powers of the Office of the Prosecutor-General, it is not good enough to merely refer to a desirable situation.

Should the issue be raised in the Supreme Court, it might opt for a different interpretation than the Prosecutor-General, based on the values of the Constitution. We have already seen that the Supreme Court laid emphasis on the *Grundnorme* or core values entrenched in the Constitution, among them the separation of power is one. The whole philosophy of the separation of powers is based on the limitation of power.

If the Supreme Court is convinced that a more legalistic

interpretation is needed to limit the extensive powers of the Prosecutor-General, it might interpret the Constitution in such a way that the Prosecutor-General is totally independent, but that his staff are public servants in terms of sections 3(3) and 4 of the **Criminal Procedure Act** and that **Ex Parte Attorney General supra** should be understood strictly in the sense that it only refers to the Prosecutor-General and not his staff and that it only ruled that the Constitution repealed section 3(5) of the Criminal Procedure Act.

This interpretation is strengthened by the second point above. According to Article 88 (2) (d) the Prosecutor-General delegates *other officials, subject to his or her control, direction and 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 [Meaning of "Official"]

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, it has persuasive value. It is a logical conclusion that in the absence of any definition for **official** in Article 88, the word has the same meaning as elsewhere in Constitution.

The exclusion of judges and any other judicial officer from the meaning of 'official' gives credence to an interpretation that the Prosecutor-General, 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 Prosecutor-General.

If one argues, as the Prosecutor-General did, that Article 88 (2) of the Constitution has fully replaced section 4 of the Criminal Procedure Act, it is still possible to have a situation where the Prosecutor-General is bound to have a position where his staff is appointed according to the rules and norms of section 5 (1) of the Public Service Act 13 of 1995. This should then probably form part of the *final responsibility* of the Attorney-General.

However, until the Office of the Prosecutor-General 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.

Despite the practical shortcomings in the view that Article 88 of the Namibian Constitution has repealed sections 3 and 4 of the Criminal Procedure Act, it is the most acceptable interpretation. The spirit of the Namibian Constitution, as ably interpreted by the honourable Justice Leon in **Ex Parte Attorney-General in re The Constitutional Relationship**

Between The Attorney-General And The Prosecutor-General supra, is against political intervention in the prosecuting endeavours of the country.

The problems that might arise out of the uncontrolled and untested authority and power of the Prosecutor-General can be encountered by legislation. Such legislation can provide for a committee consisting of the Prosecutor-General and his/her senior deputies to handle appointments, transfers, promotion and other administrative issues, with the Prosecutor-General and all his deputies being a body of appeal. 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.

Presently in practice it is not even the Attorney-General, but the Minister of Justice or the Permanent Secretary for Justice, who performs this role.¹

Junior prosecutors are interviewed and recommended by the Prosecutor-General but appointed by the Permanent Secretary.

In the case of senior managerial staff, the Prosecutor-General usually sets up an interview team in accordance with the Public Service Act. Although the committee makes a recommendation, the appointment is made by the Public Service Commission and approved by the Office of the Prime Minister.

The Prosecutor-General is nevertheless left with the authority to delegate the official to prosecute. There is no indication in the Constitution or any other law, that anyone but the Prosecutor-General can

1 The Permanent Secretary for Justice is the administrative officer of both the Minister of Justice and the Office of the Attorney-General. In practice, however, he has limited contact with the Attorney-General. A case in point of their limited contact is the conflict between Namibia and Botswana over the ownership of the Kasikili islands in the Caprivi. The case went to the International Court of Justice. Yet although the Attorney-General is the chief legal adviser of government, and has the Namibian expert on borders on his staff, the Permanent Secretary handled the case without consultation with the Attorney-General.

delegate anyone to prosecute. Thus, if the Prosecutor-General refuses to delegate an appointee of the Ministry of Justice or the Public Service Commission, the Ministry will find itself with power that it cannot use.

The same argument applies to prosecutors, who are strictly speaking, employed by the Ministry of Justice (not the Attorney-General as one would expect). If such a prosecutor, working under the control, direction and authority of the Prosecutor-General, calls on his/her employer in a dispute with the Prosecutor-General, the employer remains powerless. If the employee complains against a transfer, and the Ministry intervenes, the station of the prosecutor may be stuck with an official with no delegation.

The way forward, it seems will only be smooth if the Office of the Prosecutor-General is regulated by the necessary legislation.

10 A BRIEF COMPARISON BETWEEN SOUTH AFRICA AND NAMIBIA

While Article 179 of the South African Constitution of 1996 creates an independent prosecuting authority, there are also severe shortcomings. The National Director of Public Prosecutions is an executive appointment *by the President as head of the national executive*. [Art. 179 (1) (b)] Thus, unlike Namibia, he is a political appointee.

According to Art. 179 (6) the *cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority*. Whether **final responsibility** will be interpreted to have the same restrictive meaning in South Africa as it has in Namibia since the historic case between the Attorney-General and the Prosecutor-General, remains to be seen. The Namibian interpretation will undoubtedly have convincing power in South Africa.

It does seem, however, as if the South African courts will be less inclined to follow the radical Namibian model. When the Constitutional

Court certified the South African Constitution, the Court rejected the complaint that the National Director of Prosecutions is appointed by the President. The Court, unlike the Namibian Supreme Court, did not see it as a threat to separation of powers, since the prosecuting authority is not part of the judiciary. ***Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) on p. 818***

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. (Ibid.: p. 818)

The Deputy National Directors and Directors (the former Attorney-Generals) of Prosecutions are also appointed by the President, albeit after consultation with the Minister and National Director. **(Section 11 (1) and 13 (1) of the National Prosecuting Authority Act, Act 32 of 1998).**

Consultation is a much weaker word than the Namibian *recommendation*. Further, the *consultation* is with the **Minister**, who is part of the executive, and the **National Director**, who is an executive appointee. Thus in terms of the reasoning of the Namibian Supreme Court, the Deputy Directors are also political rather than quasi-legal appointments.

However, the power of the National Director is much less than that of his/her Namibian counterpart and there are also more checks and balances built into the system. The traditional independence of the directors will make it difficult for the National Director to interfere with their decisions, although he/she has the constitutional power to do so [Art.

179 (5) (d)].

Further, the National Director is bound to a ten year non-renewable term [Section 12(1) of Act 32 of 1998]. The roles of the National Deputy Directors, Directors and Deputy-Directors are clearly spelled out in chapter 4 of the Act and special provision is made when the National Director is not available [Section 11 (2) (b) of Act 32 of 1998].

Thus, while the South African Constitution does not give its prosecuting authority the same independence as Namibia, the Namibian Attorney-General and the Law Reform Commission can address many of the present uncertainties and weaknesses of the Namibian prosecuting process by studying Act 32 of 1998.

11 CONCLUSION

The level of independence enjoyed by the Namibian Prosecutor-General is unique in Africa, and even in the world.

A glimpse into the organisation of prosecuting authorities in the Commonwealth, reveals extensive intervention by political appointees in criminal proceedings. (The Commonwealth Legal Advisory Service: 1992; Edwards: 1977).

The Commonwealth Legal Advisory Service (1992, p. 1) points out that even in England and Wales, where the Director of Public Prosecutions is independent in his day to day operations, he remains subject to the direction of the Attorney-General. The latter also has enormous quasi-judicial powers and a discretion to initiate, take over or terminate prosecutions. (Ibid.)

Edwards (1977: p. 202 ff.) comments that he was surprised to find out that the issue of *nolle prosequi certificates*, assigned to the Australian Attorney-General, was for many years controlled by Cabinet. He also learned that in New Zealand Cabinet discuss the initiation and extent of

criminal prosecutions.

Despite the shortcomings of the Namibian legislation, Article 88 of the Namibian Constitution gave the country a truly independent prosecuting authority that has the constitutional power and authority to withstand political pressure and intimidation.

The danger of uncontrolled and unchecked power in the hands of one person needs to be addressed in the near future with legislation ordering and organising the Office of the Prosecutor-General.

12 EPILOGUE

Constitutionalism is not only about interpretation or the ordering of society. It is also about power. Zimbabwe has changed its constitution fifteen times before it was decided to finally replace it to get rid of the unwanted Lancaster House clause requiring compensation for confiscated land.(UN Integrated Regional Information Network: Sept. 1999). The proposed new Constitution places the onus on the former colonial power to pay compensation to white farmers whose land is confiscated by government. (UN Integrated Regional Information Network: 2 Feb. 2000) The surprised victory of the No-vote in the Zimbabwean constitutional referendum will at least put the present new constitution on hold.

Nevertheless, the sentiments of the protagonists for a new constitution in Zimbabwe, are winning ground in Namibia. The Constitution expresses the will of the people and should be changed if it does not. It falls outside the objectives of this paper to discuss the validity of this point. Suffice it to say that after the overwhelming victory of Swapo in the presidential and general elections in November 1999, the pressure is already building up to change the Constitution again - it was changed in 1999 to give the present President a third term. (A. Du Pisani:2000)

The argument, often used in Zimbabwe, that those articles of the

Constitution that were introduced by the Western Contact Group must be seen as foreign interpolations, is also echoed on radio and television talk shows in Namibia. Thus, while constitutional authorities see the Constitutional Principles, including the independence of the Prosecutor-General, as a curb in the Constitution that cannot be amended, popular opinions in newspapers and on the radio chat shows express a different perception.

The extensive powers of the Prosecutor-General has also come under fire in the months running up to and directly after the general elections. The Lawyers Association of Namibia has complained about the fact that only white males attended the Annual Conference of the International Association of Prosecutors (L. Du Pisani: 1999), as well as the racial composition of newly appointed Deputy-Prosecutor-Generals.

In the absence of an act stipulating clear guidelines, the Prosecutor-General has relied on the Constitution to develop precedents that give him almost unchecked powers, not only in his prosecutorial duties, but also in staff and administrative matters.

When the third Parliament of Namibia is sworn in on 22 March 2000 and the third government takes power, one can expect that the office of the Prosecutor-General will be on their list of priorities.

The first Attorney-General, Mr. Harmut Ruppel, failed to get the Prosecutor-General under his political and administrative authority. The second Attorney-General, Adv. Verkuii Rukoro, entered Parliament as member of a small opposition party. He supported the philosophy of an independent Prosecutor-General and had a good relationship with his office. His name did not appear on the party list for the 1999 elections.

Indications are that the third Attorney-General will be a party loyalist. Only time will tell if he/she will take the road of Constitutional amendments or another act of Parliament to address the unsettled issues of *Ex Parte*

***Attorney-General: In re The Constitutional Relationship Between The
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CASES

TITLE	PAGE
Attorney-General of Namibia and the Prosecutor-General: Gorelick and others, Unreported case of the NHC, Case No C2/93	23
Cabinet for the Territory of South West Africa, v Chikane, 1990 (1) SA 349 A	7
Ex parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State, 1991 (3) SA 76 Nm SC	7
EX PARTE Attorney-General in re The Constitutional Relationship Between The Attorney-General And The Prosecutor- General, NSC, heard on 3.10.1994 and 6.12.1994, delivered on 13.07.1995. Original Copy of the Registrar used (Case No SA 7/93), published in 1995 (8) BCLR 1070 (Nms)	5, 12, 22 - 29, 32 - 43, 45, 52 & 53
Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)	49
Gillingham versus Attorney-General and Others, 1909 TS 572	1
Government of the Republic of Namibia versus Cultura 200, 1994 (1) SA 407 Nm Sc	9, 32, 33, 34 & 37
Highstead Entertainment (Pty) Ltd t/a "The Club" versus Minister of Law and Order and Others, 1994 (1) SA 387 (c) at 393 H - 394 H	29, 32
Mwandingi versus Minister of Defence, Namibia, 1991 (1) SA 851 NM	7, 32 & 33

TITLE	PAGE
Namibia National Student's Organisation and Others versus Speaker of the National Assembly for South West Africa, 1990 (1) SA 617 SWA	7
New Modderfontein Gold Mining Company versus Transvaal Provincial Administration 1919 AD 367	41
Shifidi versus Administrator-General for South West Africa , 1989 (4) SA 631 SWA	6
State versus Acheson , 1991 (2) SA 805 NmHC.	17, 32 & 33
State versus Gorelick and others , Windhoek Magistrates Court, 1993	22
State versus Heita and Another 1992(3) SA 785 NmHC,	29
State versus Van Wyk 1992 (1) SACR 147 NmSC	32, 33 & 34
 LEGISLATION	
SOUTH AFRICAN LEGISLATION	
South Africa Act, 1909	1
Criminal Procedure and Evidence Act of 1917	1
Criminal and Magistrates' Courts Procedure Amendment Act , Act 39 of 1926	1 & 2
General Law Amendment Act , Act 46 of 1935	2
Defence Act of 1957	5 & 6
Criminal Procedure Act , Act 51 of 1977	2, 24, 25, 30, 31 34, 35, 39 - 46.
Attorney-General Act , Act 92 of 1992	30
 SOUTH WEST AFRICAN LEGISLATION	
Administrator's Proclamation 5 of 1918	1

TITLE	PAGE
Administrator's Proclamation 20 of 1919	1
The Criminal Procedure and Evidence Proclamation, Proclamation 30 of 1935	1
Criminal Procedure Ordinance, Ordinance 34 of 1963	2
 NAMIBIAN LEGISLATION	
State Repudiation of Cultura 2000 Act, Act 32 of 1991	9
Public Service Act, Act 13 of 1995	43
 CONSTITUTIONS	
CONSTITUTION OF THE REPUBLIC OF NAMIBIA, 1990	9 - 11, 16, 22 - 31, 33,35, 36, 39, 40, 41, 43-50
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996	48 & 49