

Litigating Reparations

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2023-01-25T08:00:05

Throughout the world, indigenous populations are in a renewed push, demanding reparations from former colonial powers. On 19 January 2023, the Namibian lawyer Patrick Kauta filed an application to the Namibian High Court. In it, he challenges the lawfulness of the [Joint Declaration that the German and Namibian governments](#) initialed in summer 2021. This case has the potential to be a historic turning point in the process for reparations for the German state's crimes in its former colony. It could also contribute to establishing minimum legal standards for reparations processes worldwide.

The Joint Declaration and Its Negotiation from a Legal Perspective

In June 2021, the German and Namibian governments published the [result](#) of their negotiations on reparations for the colonial crimes committed by the German state in its former colony of South-Western Africa. Their negotiations lasted six years and it marked the first time a government of a former colonial power and one of a former colony had entered such negotiations. Unfortunately, they didn't seize this historic opportunity. First, despite the essential importance for both civil societies, they negotiated in strict secrecy. Second, they did not respect and fulfill the participation rights of the affected communities as recognized by customary international law and laid down for instance in the [United Nations Declaration on the Rights of Indigenous People](#). Third, continuing colonial patterns, the Joint Declaration speaks of [development aid rather than reparations](#). And fourth, they upheld an interpretation of the principle of intertemporality that is [deeply racist](#).

Debate in the Namibian National Assembly and the Parliamentary Resolution of 2006

In Namibia, the publication of the Joint Declaration sparked vehement protests from the affected communities, as well as from the general civilian population. These protests were probably [not expected](#) by either the SWAPO-led Namibian government or the German government to be this severe. In September 2021, Defense Minister Frans Kapofi tabled a motion in the National Assembly for debate of the Joint Declaration and sought a vote in favour of its ratification. Parliamentary approval is necessary in Namibia for several reasons, in part due to a resolution passed on the subject in October 2006. For ten weeks, members of Parliament debated the motion. In December 2021, the Speaker of the National Assembly noted the debates without taking a vote after the Namibian Executive promised further engagements with their German counterpart. On 30 August 2022, the German government [announced](#) that it would not negotiate any further, but that the funds were available and could only be released once the Joint Declaration had been signed. The latter puts the SWAPO-led government in a tight spot. On the one hand, it urgently needs the funds to maintain fiscal discipline. On the other hand, it risks losing popularity in view of the upcoming elections in Namibia. In November 2022,

a Namibian delegation traveled to Germany [to negotiate an addendum](#) to the Joint Declaration and to agree on the concrete terms of its implementation.

The Submission to the Namibian High Court in January 2023

On 19 January 2023, Namibian lawyer Patrick Kauta [filed an application](#) to the High Court to seek judicial review of the Speakers' decision to note the debate and of the Joint Declaration itself (Case-Number: HC-MD-CIV-MOT-REV-2023/00023). The respondents are the Speaker of the National Assembly, the National Assembly, the Namibian President, the Cabinet, and the Attorney General. Kauta acts on behalf of Member of Parliament Bernadus Swartbooi, the Ovaherero Traditional Authority (OTA), and eleven Nama Traditional Authorities. His founding affidavit is mainly based on constitutional Law, arguing for instance that the Namibian government didn't have the authority to agree to clause 20 of the Joint Declaration without prior legal review and approval by the Namibian parliament. This clause [stipulates](#) that no further demands based on colonial crimes will be made in the future. He further argues that the Speaker's decision to simply note the debate violated procedural laws and was ultra vires. He also argues the Joint Declaration is unlawful on substantive grounds. With regard to international law, he rightly points to the violation of participation rights by excluding OTA and the Nama Traditional Leaders Association (NTLA) from the negotiations. To establish the scope of the rights and to prove their violation, he quotes, among other sources, a [report](#) by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and a [letter](#) by the United Nations High Commissioner for Human Rights. It becomes very clear from his affidavits that the participation of those groups of Ovaherero and Nama, who were recently [listed](#) by the German government for the first time, was merely pretextual and cannot be a fulfillment of the Namibian government's obligations under international law.

The Racism of the Current Interpretation of the Principle of Intertemporality Unraveled Before a Court of a Former Colony?

One of Kauta's legal arguments, however, is particularly interesting for decolonial legal critique and the decolonization of international law. According to Article 63 (2) (i) of the [Namibian Constitution](#), the National Assembly has the duty to counter colonial patterns and legacies and to support those affected in this regard. According to Article 40 (I) of the [Constitution](#), members of the Cabinet have the same legal obligation. In the affidavit submitted to the High Court, Kauta [follows](#) the legal view that the current application and interpretation of the principle of intertemporality by the German and Namibian governments is a reproduction of the racist distinction between civilized and non-civilized nations and is thus itself racist. He rightly demands the Namibian National Assembly, Cabinet, Attorney General, and Namibian Executive to remain vigilant and to oppose such content in any agreement by all means. This means that, for the first time, the racism inscribed in international law could be unraveled before a court of a former colony. And it means that a legal obligation to actively contribute to a decolonization of law might be anchored in domestic constitutions with the Namibian constitution being exemplary.

The Court Case as a Gamechanger for the German-Namibian Reparations Process

With regard to the German-Namibian reparations process, this court case could be a gamechanger because it could prevent the Joint Declaration from being signed and executed. A newly elected Namibian government might refuse to sign it because of the opposition in Namibian society. This would mean that negotiations on reparations could start anew – but then in compliance with minimum legal standards under international law. This would include the adequate participation of affected communities, and the transparent participation of the domestic parliaments in accordance with Namibian and German constitutional law. The German government should decide to refrain from relying on the racist distinction between “civilized” and “uncivilized” nations and to enter into new negotiations with the affected communities on the basis of the [CARICOM Ten Points Action Plan](#). Only then might conversations be able to shift from tugs of war on amounts of money to dialogues on how to best achieve substantive equality, mitigate transgenerational social, economic and cultural exclusion, and – ultimately – how to reconcile. While the court case is pending, the German government [should refrain](#) from attempting to further execute the Joint Declaration.

Will Namibia Be Setting Standards for Reparations Processes Worldwide?

In private, German diplomats admit that their legal reasoning is tenuous, but that the floodgates must be prevented from being opened. The former colonial powers are nervous. Indigenous populations and Black citizens in Jamaica, Canada, [New Zealand](#), [the Caribbean](#), and [the United States](#) demand reparations for the crimes committed against them. They do so in political forums and by legal means. The court case in Namibia has the potential to significantly impact the floodgates by setting minimum legal standards worldwide in terms of participation rights of affected communities, a decolonial interpretation of the principle of intertemporality and participation of domestic parliaments. It is about time for the international community to actively deconstruct the colonial legacy of racism inscribed into today’s laws.

As an international legal consultant, the author was involved in the preparation of the court case by the law firm Dr. Weder, Kauta, Hoveka. The views expressed in this article are her own.

