

RONALD DWORKIN AND THE SUPREME COURT OF NAMIBIA

By

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Summary

Dworkin and the Supreme Court of Namibia

The Namibian Constitution grounds the legal system in values such as the rule of law, democracy, equality, respect for human dignity, freedom etc. My aim was to approach the Constitution as a transformative document. This is mainly because the Constitution aims to transform the Namibian society from one characterized by injustice and inequality for example, to a society where the principle of equality reigns supreme, and where the rule of law, respect for human dignity etc. are the distinguishing characteristics of the legal order. However, the study noted the Constitution's failure to entrench socio-economic rights as justiciable rights and the question was raised whether this necessarily undermines the Constitution's transformative goals. Overall, my aim was to consider to what extent the approach of Dworkin could address this failure. This study was undertaken out of two concerns; firstly, the Namibian Constitution can be termed a 'classical liberal' document which emphasizes civil and political rights at the expense of socio-economic rights; and secondly, the Supreme Court of Namibia's current approach to constitutional interpretation is inadequate to realize the transformative aims of the Constitution.

Whereas Namibia's Supreme Court has over the past 23twenty-three years underlined the need to construe the Constitution broadly, liberally, and purposively, it has failed to do so consistently, thus casting doubt on the objectivity of constitutional values. For example, the Court's decision in *S v Mushwena & Others* is one that hardly resonates with constitutional values of respect for the rule of law, respect for human dignity, and the right to fair trial. Nonetheless, I argued that Dworkin's approach of constructive interpretation and law

as integrity could address both the Constitution's failure to entrench socio-economic rights and also the Supreme Court's incoherent approach to constitutional interpretation. To this end, the study recommends a moral reading of the Namibian Constitution, one based on Dworkin's theory of constructive interpretation and law as integrity. This moral reading of the Constitution is not only to be limited to civil and political rights, but also to socio-economic rights implied in the principles of state policy.

Declaration of Originality

I, Kenneth Ferdie MUNDIA confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been acknowledged in the thesis.

Signed.....

Date.....

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In conclusion, I dedicate my thesis to my mother, Muvu MASHAPWA, and to the loving memory of my father, *Mundia Matemwa Josias MASHAPWA*, who died on the 24th of November 1997.

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Chapter 1

Introduction

The overriding objective of this study is to investigate the relevance of Dworkin's theory of 'constructive interpretation' and 'law as integrity' to Namibia's constitutional jurisprudence. I argue that there are elements in Dworkin's theory that can be adapted and applied to Namibia. These elements have the potential to enrich Namibia's constitutional jurisprudence in general and maybe even the specific issue of socio-economic transformation. I tentatively consider if a Dworkinian approach could contribute also to the aim of socio-economic transformation.

My hypothesis can be stated as follows:

1. The success of Namibia's constitutional practice and the realization of its transformative potential (socio-economic transformation included) calls for a constructive interpretation of the Constitution.
2. Dworkin's notion of constructive interpretation and law as integrity can assist the Supreme Court of Namibia to address the nation's aspirations as contained in the Constitution.

From the above hypothesis I have formulated the following research questions:

1. How should the Supreme Court of Namibia decide cases to ensure the progressive realization of the nation's aspirations as contained in the Constitution?
2. How can Dworkin's theory of constructive interpretation and law as integrity assist the Supreme Court of Namibia to address the transformative aims, including the socio-economic transformation?

1.1 Rationale

1.1.1 Background

The Namibian Constitution¹ grounds the legal system in values such as human dignity, equality, freedom and justice,² and founds the Republic of Namibia on 'principles of democracy, the rule of law and justice for all'.³ From the textual formulation of the preamble and substantive provisions dealing with these constitutional values and principles, it can be deduced that Namibia aspires to build a nation that is exemplified by respect for the rule of law, respect for human dignity, attainment of equality and justice for all. Accordingly, these values and principles are emblematic of the new constitutional dispensation. I argue that these aspirations have a transformative appeal to them. This is so because Namibia is a new nation emerging from a colonial past where these values and principles were once not espoused. In the preamble and subsequent Articles,⁴ the 'inherent

¹ *The Constitution of the Republic of Namibia* Act No 1 of 1990.

² The preamble to the Namibian Constitution.

³ Article 1(1) of the Constitution provides as follows:

The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.

⁴ *Article 8* of the Constitution deals with human dignity; *Article 10* deals with equality and freedom from discrimination.

dignity and the equal and inalienable rights of all members of the human family' are acknowledged as 'indispensable for freedom, justice and peace.'

It will be argued that if the transformative aims⁵ of the Constitution are to be realized, there is a need for a new narrative for post-colonial jurisprudence in Namibia. Pivotal to that narrative is the need for the Supreme Court, Namibia's highest court, to promote the rule of law, respect for human dignity, and the principle of equality. This will be possible if constitutionalism becomes the main guiding principle in constitutional interpretation. This then calls for the Supreme Court of Namibia to re-invigorate its interpretive strategies if not to seek new interpretive methodologies for the interpretation of the Namibian Constitution.

To this end, the primary aim of this thesis is to recommend a moral reading of the Namibian Constitution, one based on Dworkin's theory of constructive interpretation and law as integrity. This moral reading of the Constitution is not only to be limited to civil and political rights, but also to socio-economic rights implied in the principles of state policy. If faith is to be restored in law and legal practice as vehicles for the attainment of the Constitution's transformative aims, there is a need for a new narrative for post-colonial jurisprudence in Namibia. The fact that the Namibian Constitution does not entrench socio-economic rights should be noticed. I consider the question whether the Constitution's transformative aims are undermined by the lack of the entrenchment of socio-economic rights and those views that state that the enjoyment of civil and political rights can only be meaningful

⁵ I submit that the aims of the Constitution are very ambitious and may not be achieved through ordinary methods of interpretation.

where such rights are explicitly included in the Constitution.⁶ Following Dworkin's notion of integrity, socio-economic rights could be seen as part of transformation, in other words, a constructive interpretation of equality might include socio-economic aims and socio-economic transformation. I work from the starting point that the judiciary should guard against a propensity for bias, corruption, abuse of judicial process, and a selective appeal to constitutional values. This is because these characteristics are reminiscent of the judiciary during the apartheid era, but most importantly they are the very anti-thesis of transformation. Accordingly, there must be a radical and visible departure from the interpretive methodologies that characterised legal practice in the bygone era. If liberal legal thought is to be credible and remain a viable option for effecting the social transformation envisaged in liberal constitutions, there is a need for a new reading technique of the Constitution.

Without doubt, the integrity of the judiciary was severely compromised during colonial times as the majority of Namibians lost faith in the law's legitimacy as a vehicle for social change. This was mainly because law and legal practice, particularly with regard to the interpretation and application of security laws, were used to buttress apartheid. The advent of the Namibian Constitution at independence creates an opportunity to restore faith in the law. However, this is only possible if the judiciary interprets the Constitution in a manner that gives effect to its transformative potential. The new constitutional order requires that the values of human dignity, the principle of equality, freedom and the rule of law be actively promoted by the judiciary. It is suggested that these constitutional values are the very anti-thesis of apartheid principles.

⁶ For a detailed and diverse discussion of the rise and significance of socio-economic rights see B de Villiers 'Social and Economic Rights' in Van Wyk *et al* (eds) 1994 *Rights and Constitutionalism: the New South African Legal Order* p 599-628.

1.1.2 The Supreme Court of Namibia

Whereas the Supreme Court of Namibia has in the past 24 years underlined the need to interpret the Constitution ‘broadly, liberally, and purposively’ so as to avoid the austerity of ‘tabulated legalism’,⁷ it has failed to do so consistently. In *Ex parte: Attorney General: in re Corporal Punishment*,⁸ for example, in determining whether the imposition and infliction of corporal punishment by or on authority of any organ of state was in conflict with the provisions of Chapter 3 of the Constitution the Supreme Court considered the ‘contemporary norms, aspirations, expectations and sensitivities of the Namibian people’ as outlined in the Constitution. This appeal to the Constitution’s values and norms can be seen in decisions such *S v Tcoeib*,⁹ *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another*¹⁰ and *Government of the Republic of Namibia v Sikunda*. In the majority of its decisions since independence, the Supreme Court of Namibia has appealed to the values of the Constitution as a guide in constitutional interpretation.

However, in some Supreme Court decisions it is apparent that there is no willingness on the part of the Court to appeal to the same norms and values. My paradigm cases in this regard are *S v Mushwena & Others*,¹¹ *Chairperson of the Immigration Selection Board v Frank & Another*,¹² and *Muller v President of the Republic of Namibia and Another*.¹³ I argue that the principle of the rule of law, the right to a

⁷ *Minister of Defense v Mwandighi* 1993 NR 63 (SC); *Government of the Republic of Namibia v Cultura* 2000 1993 NR 328 (SC); *Namunjepo & Others v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC).

⁸ 1991 (3) SA 76 (NmSc).

⁹ 1993 (1) SA SACR 274 (Nm).

¹⁰ 1999 NR 271 (SC).

¹¹ 2004 NR 274 (SC).

¹² 2001 NR 107 (SC).

¹³ 1999 NR 190.

fair trial, respect for human dignity and equality before the law were violated in these cases.

A theory of the Namibian Constitution must begin with an appreciation of the point or purpose of constitutionalism and the centrality of the principles of democracy, the rule of law, respect for human dignity, equality, freedom, and liberty to constitutionalism. I make the argument, after Dworkin, that if the point of constitutionalism becomes the main guide in constitutional interpretation, there may be a progressive realization of the Constitution's transformative aims and that the Supreme Court may more reliably arrive at right answers in the process of adjudicating constitutional values and principles. It is these principles that should define the constitutional jurisprudence of Namibia. I want to suggest that one of the greatest challenges facing post-colonial Namibia is socio-economic inequalities. Admittedly, it is not the primary province of the courts to bring about socio-economic equality in Namibia as this is the domain of Parliament and the executive. That said, individual citizens have a right to be treated as equals before courts. There is no doubt that some of the values that now underpin Namibia's legal system were selectively applied during the apartheid era. I submit that the same approach of selective appeal to values is intolerable in post-colonial Namibia. This has the potential to frustrate the transformative aims of the Constitution, and may also call into question the Supreme Court's ability to interpret the Constitution. Accordingly, I make the argument that a coherent approach in the interpretation of constitutional values should characterize Namibia's post-colonial jurisprudence.

In the light of the above, I defend and advance Dworkin's notion of constructive interpretation and law as integrity as an approach for post-colonial jurisprudence in Namibia.

1.1.3 Why Dworkin?

Although Dworkin writes about the political and legal thought of western democratic legal systems, it must be accepted that the Namibian legal system is now a 'western democratic system'. At the outset, it must be pointed out that this study is underpinned by the assumption that there are elements in Dworkin's legal theory that can add value to Namibia's legal system. Dworkin has been an influential and important critic of legal positivism, a once and in many places still dominant legal theory. This is significant in that it provides a background to the new era of constitutionalism in countries like Namibia where there were bureaucratic type decisions where the 'letter' of the law was applied contrary to any decent interpretation that took the recipients of the force of the law into account in any humane way. It is doubtful that Hart conceived of his theory as licensing this. The real appeal of Dworkin for me was his capturing how characteristically good judges and lawyers did not decide cases in the way that legal positivism appeared to describe.

Second, Dworkin has been a powerful and imaginative defender of individual rights who has argued that rights ought to be the guiding principles of adjudication. With a liberal constitution which entrenches and protects human rights, the Namibian judiciary can learn more from Dworkin's extensive reflections on the subject of adjudication. Third, Dworkin has emphasized the interpretive nature of legal argumentation, and stands out as one of the key figures in the developing field of legal interpretation. Finally, there has not been a

study which relates Dworkin's legal theory to Namibia and which has examined the constitutional jurisprudence of the Namibian judiciary from a Dworkinian perspective. The thesis is intended to fill this gap.

Similarly, in order for there to be a progressive realization of the nation's aspirations as outlined in the Constitution, there is a need for the judiciary to accept their role in the process of transformation. This may require the Namibian judiciary to employ the constructive interpretation which Dworkin advocates.

1.2 Theoretical Approach and Methodology

This thesis is situated at the intersection of diverse approaches to constitutional interpretation and the divergent views on the role of the judiciary in the transformation process. Two approaches to constitutional interpretation have dominated academic literature. The first approach argues for the development of a set of fundamental principles which governments should respect in dealing with their citizens.¹⁴ In terms of this approach, fundamental principles of liberty, justice, and equality cannot be disregarded by government.¹⁵ Accordingly, it becomes a precondition of legitimate democracy that government treats individual citizens as equals and respect their fundamental liberties and dignity.¹⁶ Where these conditions are absent, in terms of this approach, there can be no genuine democracy

¹⁴ See D Davis, M Chaskalson & J De Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation', in Van Wyk *et al* (eds.) *Rights and Constitutionalism* p 122.

¹⁵ *Ibid.*

¹⁶ R Dworkin 1993 *Life's Dominion* p 123.

as the majority has no mandate to govern.¹⁷ It is to this approach that this study appeals.

The second approach considers the Bill of Rights as representative of the requirements for a democratic society as articulated by the politicians who drafted and endorsed its contents.¹⁸ In terms of this approach, constitutional provisions of the Bill of Rights can only be interpreted in a way that supports the outcome that would have been anticipated by the drafters.¹⁹ This is the original intent approach, whose familiar claim in constitutional law is that the original intent of the framers ought to control constitutional interpretation. The difficulties associated with this approach are highlighted in this thesis. It has been argued that one such difficulty with the approach is in its failure to fulfill its proclaimed objective, i.e. the eradication of judicial choice from the process of judicial decision-making.²⁰

It is submitted that in most jurisdictions²¹ the courts have tended to develop away from the original intent approach towards a purposive approach in terms of which courts attempts ‘to develop a theory regarding the nature of fundamental principles contained in a Bill of Rights within the context of a society proclaiming democratic aspirations.’²²

¹⁷ D Davis M Chaskalson & J De Waal *Rights and Constitutionalism* p 122, 123.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ For a detailed discussion on how other jurisdictions have dealt with the issue, see D Davis M Chaskalson & J De Waal ‘Democracy and Constitutionalism: The Role of Constitutional Interpretation’ in Van Wyk *et al* (eds.) *Rights and Constitutionalism* pp1-130.

²² *Ibid* p 123.

Namibia's Supreme Court has in the past two decades underlined the need to interpret the Constitution broadly, liberally, and purposively so as to avoid the 'austerity of tabulated legalism'.²³ But to what extent can the Namibian judiciary's approach to constitutional interpretation be said to have been creative and dynamic so as to ensure the progressive realization of the nation's aspirations as outlined in the Constitution?

Analyses of Dworkin's legal theory have been diverse, numerous, highly critical and dismissive in many respects.²⁴ Some analysts contend that Dworkin's critique of positivism can actually be accommodated by positivism itself.²⁵ Before I elaborate on his critics I provide a brief description of his notions of constructive interpretation and law as integrity.

Dworkin observes that works of art as well as social practices 'are concerned with purpose and cause...with the aim of imposing purpose on the object or practice, in order to make of it the best possible example of the form or genre to which it is taken to belong'.²⁶ He explains that it is this type of interpretation- argumentative or value guided which he has in mind as an approach and wishes to apply to law. Dworkin thinks that the only way we can understand a social

²³ *Minister of Defense v Mwandighi; Government of the Republic of Namibia v Cultura 2000; Namunjepo & Others v Commanding Officer, Windhoek Prison.*

²⁴ M Cohen 1983 *Ronald Dworkin and Contemporary Jurisprudence*; A Hunt (ed) 1992 *Reading Dworkin Critically*; S Honeyball & J Walter 1998 *Integrity, Community and Interpretation*; AC Hutchinson 1987 'Indiana Dworkin and Law's Empire' 96 *Yale Law Journal* 637.

²⁵ R Sartorius 1975 *Individual Conduct and Social Norms: A Utilitarian Account of Social Union and the Rule of Law*; J Coleman 1988 *Markets, Morals and the Law*.

²⁶ R Dworkin 1986 *Law's Empire* p 52.

practice like law is to approach it constructively, hence ‘constructive interpretation’.²⁷

Dworkin’s constructive interpretation therefore requires that purpose be imposed on the law that puts it in its best light possible and that makes it the best that it can be – just like the point or purpose of works of art are generally thought to be captured by various aesthetic values.²⁸ Dworkin argues that in order to understand law, one must also understand it in light of its point or purpose. Bix explains that constructive interpretation depends ‘upon being able to assign a distinctive value or purpose to the object of interpretation, whether that object is a work of art or a social practice.’²⁹ This may be a bit confusing and Bix may be getting things wrong here. It is not that one ‘assigns’ a value: it is that one only understands the practice *through* a value. This is significant in that one wants to avoid any idea that there is law there as it were which a value is ‘assigned’ or ‘imposed’ on (although Dworkin does use ‘impose’ on occasions). Value or purpose then, serves as criterion for the determination of whether ‘one’s interpretation of the object is better or worse than the alternative.’

To make law the best it can be, Dworkin provides two criteria, that of “fit” and “moral value” or “justification”. By fit is meant that the interpretation that the interpreter adopts must fit aspects of the local legal culture and explain them accordingly, otherwise it will not be interpretation but invention.³⁰ If, however, the requirements of fit permit more than one interpretation, then competition proceeds on the

²⁷ *Ibid.*

²⁸ C Roederer & D Moellendorf (eds) 2004 *Jurisprudence* p 229.

²⁹ B Bix 2004 *Jurisprudence: Theory and Context* p 90.

³⁰ Dworkin discusses the requirement of ‘fit’ in Chapter 6 of *Law’s Empire* p 176-224.

second dimension of moral value. Here, a morally superior interpretation is preferred.³¹

Dworkin terms his theory of legal interpretation “law as integrity”. This is premised on his conviction that the purpose of law is to protect individual rights. In *Law’s Empire*,³² integrity is both a principle of the legislature and the judiciary. As a legislative principle integrity requires ‘law makers to try to make the total set of laws morally coherent’.³³ And as an adjudicative principle integrity ‘instructs judges to identify legal rights and duties, as far as possible, on the assumption that they were created by a single author- the community personified- expressing a coherent conception of justice and fairness.’³⁴ For Dworkin, judicial decisions should be made in such a way as to make law more coherent, and only the interpretations that make law more like the product of a unified vision should be preferred. Integrity for Dworkin, is consistency in principle, which should be embraced as a political value. Integrity, therefore,

Requires government to speak with one voice, to act in a principled and coherent manner towards all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some.³⁵

According to Dworkin, when a judge is committed to law as integrity, he will seek out a principle that ‘both fits and justifies some complex part of legal practice that...provides an attractive way to see in the structure of that practice, the consistency of principle integrity requires.’³⁶ The essence of Dworkin’s theory of law as integrity, it is

³¹ *Ibid.*

³² 1986.

³³ Dworkin *Law’s Empire* p 176.

³⁴ *Ibid* p 225.

³⁵ *Ibid* p 165.

³⁶ *Ibid* p 228.

argued, is to ensure that every citizen is treated fairly and justly with the same standards. In doing so, the individual citizen's rights to be treated with equal concern will be affirmed and secured. For Dworkin therefore, arguments of principle justify decisions aimed at protecting individual rights.

Dworkin's interpretative theory of law as integrity has been dismissed in many circles as being theoretically too ambitious and irrelevant for purposes of practical adjudication.³⁷ Against this background, the overriding objective of this thesis is to relate Dworkin's interpretive theory of law as integrity to Namibia by assessing its practical utility to Namibia's legal system and to investigate whether elements in Dworkin's theory of law as integrity can add value to Namibia's constitutional jurisprudence.

Dworkin's theory of law as integrity is offered in what is held to be his most comprehensive work: *Law's Empire*. In terms of this theory, a judge should not merely be conventionalist nor merely instrumentalist.³⁸ In Dworkin's view, legal practice should be understood as an unfolding narrative in terms of which judges add a new chapter each time they make a decision.³⁹ In so doing, Dworkin contends, a judge must take into consideration all the principles at play in the case and weigh them in terms of their value in the past and their value in future.⁴⁰

³⁷ C Sunstein 1999 *One Case at a Time: Judicial Minimalism on the Supreme Court*; I Currie 1999 'Judicious Avoidance' 15 *SAJHR* 138; D Davis 1995 'Integrity and Ideology: Towards a Critical Theory of the Judicial Function' 112 *SALJ* 104; A Hunt (ed) *Reading Dworkin Critically*.

³⁸ See Chapter 4 & 5 of *Law's Empire*.

³⁹ Dworkin *Law's Empire* p 226.

⁴⁰ *Ibid* p 228.

Regarding precedent, Dworkin argues that the decision of the judge should justify that precedent with the present decision.⁴¹ In other words, precedent should be interpreted in such a way as to uphold the principles underpinning the precedent so as to make the present outcome worthy.⁴² In the discernment of applicable principles, a judge should be conscious of his community's history⁴³ and morality.⁴⁴ In Dworkin's view, the content of the moral value of principles does not emanate from government. Instead, the 'origin of ... legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time'.⁴⁵ And in the development of this narrative of political morality, judges should be aware of its evolutionary quality.

I have referred to the views of those who argue questions regarding the extent to which Dworkin moves away from the very positivism that he himself rejects above. Another set of analyses sees Dworkin's project as pursuing the interests of individuals ahead of community interests,⁴⁶ whereas others consider it the worst of both worlds when compared to natural law and positive law theories.⁴⁷ Some analysts have focused more on Hercules, arguing that Dworkin's fictitious judge neither fits nor brings value to practical adjudication and that Dworkin overstates the role of moral theory in law.⁴⁸

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid* p 227.

⁴⁴ *Ibid* p 126.

⁴⁵ *Ibid* p 40.

⁴⁶ Hutchinson 1987 'Indiana Dworkin and Law's Empire'; D Davis 2001 'Has any Author been Subjected to a 'Ruderer' Review? Or Cry the Beloved Academic Halls of Learning' 118 *SALJ* 250.

⁴⁷ K Kress 1999 'Coherence' in Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* 521; J Mackie 1983 'The Third Theory of Law' in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* p 161.

⁴⁸ Sunstein *One Case at a Time*; Currie 1999 *SAJHR* 138; M Wells 1998 'Is Disparity a Problem?' 22 *Georgia Law Review* 1733; R Posner 1998 'The Problematics of Moral and Legal Theory' 111 *Harvard Law Review* 1637.

Some other criticisms leveled against Dworkin include the following: that Dworkin disregards all the sociological or ideological analysis of the judicial function;⁴⁹ that Dworkin's theory allows judges too much freedom and encourages judicial activism;⁵⁰ that Dworkin fails in his analysis of the interpretive community to provide an analysis of the political and social circumstances where it would be beneficial to think of law as an expression of community values.⁵¹

Finally, there is a growing body of academic literature that offers a critical appraisal of Dworkin's theory of law as integrity, particularly as he has continued to refine his theory in his latest works, and to which this thesis is intended to contribute.⁵² More literature on Dworkinian scholarship is reviewed in this regard. It is submitted that a lot of criticisms of Dworkin's legal theory is bad and fails to grasp his arguments. For example, how does Dworkin ignore the 'ideological' when he affirms the ideology of democracy?

The merits and demerits of the above analyses and critiques will be critically examined in this study. The significance of this analysis is to determine whether the criticisms leveled against Dworkin's legal

⁴⁹ JM Balkin 1993 'Ideological Drift and the Struggle over Meaning' 25 *Connecticut Law Review* 869; A Hunt (ed) *Reading Dworkin Critically*; MDA Freeman 2001 *Lloyd's Introduction to Jurisprudence*; R Cotterrell 2003 *The Politics of Jurisprudence*.

⁵⁰ SC Brubaker 1984 'Reconsidering Dworkin's Case for Judicial Activism' 46 *Journal of Politics* 503; Van Blerk *Jurisprudence: An Introduction*; RA Posner 1990 *The Problems of Jurisprudence* p 22; R Cotterrell 1987 'Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy' 12 *Law and Social Inquiry* 509.

⁵¹ Cotterrell *The Politics of Jurisprudence*.

⁵² E Mureinik 'Dworkin and Apartheid' in H Corder (ed) 1988 *Essays on Law and Social Practice in South Africa* p 181; Honeyball & Walter *Integrity, Community and Interpretation*; D Johnson, S Pete & M du Plessis 2001 *Jurisprudence: A South African Perspective*; S Quest 1997 *Ronald Dworkin*, 2009 'How to Criticise Ronald Dworkin's Theory of Law' 69 *Analysis* pp 1-13; Roederer & Moellendorf *Jurisprudence*; D Cornell & N Friedman 2010 'The Significance of Dworkin's Non-positivist Jurisprudence for Law in the Post-colony' 4 *Malawi Law Journal* 1; JB Hall 1994 'Taking 'Rechts' Seriously': Ronald Dworkin and the Federal Constitutional Court of Germany', 9 *Germany Law Journal* p 771.

theory are valid and strong enough to render his theory inapplicable and inadaptable to the Namibian legal landscape. The crux of my research design lies in the analysis of Dworkin's legal theory of law as integrity and the constitutional jurisprudence of Namibia's Supreme Court in light of Dworkin's legal theory. The thesis is divided into two phases. The first phase consists of an exposition and critical analyses of the constitutional jurisprudence of the Supreme Court of Namibia. The second phase consists of an exposition and critical analysis of Dworkin's legal theory followed by a critical analysis of Dworkin's interpretative methodology. A discussion flowing from both phases concludes the thesis.

My methodological tools during both phases include: an examination and analysis of Dworkin's primary works, review of critical analyses of Dworkin scholarship; and review and analyses of Supreme Court constitutional judgments in light of Dworkin's theory. Using these methods, I seek to provide an answer to the central research question, namely, whether Dworkin's interpretative theory of law is a model to be aspired to by the Supreme Court of Namibia in its efforts to forge an appropriate model to constitutional interpretation?

The thesis is underpinned by the assumption that the judiciary can play a leading and pivotal role in society's transformative goals as outlined in the Namibian Constitution. The obligation to transform is imposed by the Constitution on all organs of state.⁵³ Hence, as interpreters of the Constitution, the judiciary has the responsibility to contribute toward the constitution's transformative goals. Furthermore, there are some elements in Ronald Dworkin's interpretive theory of law as integrity that can add value to Namibia's

⁵³ *Article 5 of the Constitution.*

constitutional jurisprudence. This is so on account that the new constitutional dispensation adopted at independence grounds the legal system in values such as dignity, equality, and freedom, and requires that all laws be interpreted and developed in accordance with these values.

1.3 Delineations and Limitations of Study

In undertaking a study on Dworkin of the scope envisaged in this thesis, it must be acknowledged at the outset that there is an inherent limitation. This is mainly because Dworkin writes about the political and legal thought of western democratic legal systems, particularly the United States and that there is a danger always associated with attempting to import such philosophies wholesale to legal systems other than the American legal system. I am inclined to state here that Dworkin's theory is of universal application because it applies morality (which is universal) to all legal systems. Dworkin thinks that non-democratic systems are not properly called legal systems (they can be, our language is rich enough to accommodate that. This thesis investigates the significance of Dworkin's constructive interpretation and law as integrity to Namibia.

In dissecting Dworkin's theory the study is limited to an examination of Dworkin's interpretive theory as outlined in *Law's Empire*,⁵⁴ *Taking Rights Seriously*,⁵⁵ and *Justice for Hedgehogs*.⁵⁶ Furthermore, the discussion and analysis of Namibia's constitutional jurisprudence is limited to the Supreme Court of Appeal, particularly in relation to human dignity, equality, the right to a fair trial, and the rule of law.

⁵⁴ Dworkin *Law's Empire*.

⁵⁵ Dworkin 1977 *Taking Rights Seriously*.

⁵⁶ Dworkin 2011 *Justice for Hedgehogs*.

1.4 Overview of Chapters

To achieve the study's stated objectives and to answer the research questions posed, the chapters are organized as follows:

In Chapter 2 I provide an overview of the Supreme Court's constitutional jurisprudence, with particular focus on human dignity and equality. I raise two issues that have the potential to stifle transformation as envisaged in the Constitution. Firstly, whereas the Supreme Court has over the past twenty-three years underlined the need to interpret the Constitution 'broadly, liberally and purposively',⁵⁷ it has failed to do so consistently.⁵⁸ On this evidence, there appears to be a selective appeal to constitutional values in the Court's current approach to constitutional interpretation. By appealing selectively to constitutional values, the Supreme Court fails to guarantee respect for human dignity as required by *Article 8* of the Constitution,⁵⁹ and also fails to guarantee equality before the law.⁶⁰ I raise the argument that the lack of a principled and coherent approach to constitutional interpretation undermines the Constitution's transformative aims. I therefore submit that the Supreme Court's current approach does not engender faith in the Constitution nor in our judges' ability to live up to the judicial oath to uphold the Constitution.

⁵⁷ *Minister of Defense v Mwandighi; Government of the Republic of Namibia v Cultura 2000; Namunjepo & Others v Commanding Officer, Windhoek Prison.*

⁵⁸ *Muller v the President of the Republic of Namibia; Chairperson of the Immigration Selection Board v Frank & Another; S v Mushwena & Others.*

⁵⁹ Article 8(2)(a) provides as follows:

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

⁶⁰ Article 10 of the Constitution provides as follows:

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

In order for faith to be restored in law and legal practice as tools in our quest to attain change, it is incumbent upon the judiciary to defend and promote the values underpinning the Constitution robustly.

Secondly, it is noted that the Namibian Constitution does not entrench justiciable socio-economic rights. It is conceded that civil and political rights alone may be inadequate to effect transformation, and that socio-economic rights may be an imperative if the aims of the Constitution are to be realized. However, I make the argument that a constructive interpretation of the Constitution could see notions of respect for human dignity and equality for example, as requiring an improvement in socio-economic conditions of individual citizens. This is mainly because Dworkin's constructive interpretation is not limited by what is posited as law in the Constitution. In this regard, I offer *Government of the Republic of Namibia and Others v Mwilima and Others*⁶¹ as an example of how the Supreme Court of Namibia may go about interpreting the Constitution.

In Chapter 3 I provide a synopsis of Dworkin's theory of constructive interpretation and law as integrity. Dworkin's earlier views in *Hard Cases* are briefly discussed only to provide a background to his later views. Nonetheless, the focal point of this chapter is Dworkin's theory of constructive interpretation and law as integrity.

Dworkin's legal theory has been criticized from several quarters. At the outset, I do not attempt to address all the criticisms of Dworkin in Chapter 4. The first criticism that I address is a recalcitrant one really, and pertains to the utility of law as integrity in legal systems

⁶¹ 2002 NR 235.

where ‘iniquity’ is entrenched. Often the question is, what is the point of making racism or Nazism ‘the best it can be?’ Christodoulidis has argued, for example, that law as integrity is an inappropriate approach in South Africa. He advances the reason that because of law of integrity’s fidelity to entrenched principles and the doctrinal past, it would mean committing South Africa to apartheid principles. He just misses Dworkin’s point about internal skepticism; Dworkin is crystal clear about this in *Law’s Empire*: accepting ‘fit’ does not mean all of it (what else would substance be there for?). The point to be remembered by Christodoulidis and other like-minded critics is that a ‘total legal revolution’⁶² occurred in South Africa. As a consequence of this revolution, promoting law as integrity is now more understandable to more lawyers in South Africa. Law as integrity should be understood to be committing South Africa to its new constitutional values such human dignity, equality, freedom etc. and as expressed in judicial decisions, what may be referred to as the early ‘chapters’ of law’s development since the revolution.

A second criticism regards Dworkin’s community of integrity. It is no exaggeration that Dworkin has written extensively that the community is the basis of law. Some critics have charged that Dworkin’s community is unreal because it is not reflective of social structures in liberal communities. I raise the argument that it is incorrect to accuse Dworkin of being hypocritical as Scott Veitch⁶³ does, as his theory is not limited by description of social realities. This idea that Dworkin is a bad sociologist is so misguided but it is very common. It misses the point that Dworkin’s community of integrity is

⁶² This phrase is associated with Cornell & Friedman in their seminal articles ‘The Significance of Dworkin’s Non-Positivist Jurisprudence for Law in the Post-Colony’ (2010) 4 *Malawi Law Journal* 1; and ‘In Defence of the Constitutional Court: Human Rights and the South African Common Law’ (2011) Vol. 5, *Malawi Law Journal* 1.

⁶³ S Veitch 2004 ‘Dworkin and the Power of Ideas’ *Acta Juridica* 2004.

an aspirational ideal rooted in values of dignity, equality etc. For example, it would be incorrect to accuse the Namibian Constitution or South African Constitution of being hypocritical when it uses the phrase ‘Whereas, we the people of Namibia’⁶⁴ in its preamble’, or ‘We, the people of South Africa’.⁶⁵ These are aspirational ideals to build the respective communities as united in their diversity, but not an attempt to mask socio-economic inequalities.

Some other criticisms that I address include the charge that Dworkin’s legal theory gives judges too much freedom to shape judicial decisions according to their personal moral views; and the Critical Legal Studies’ criticism. I make the argument that, to a greater extent, Dworkin’s theory of constructive interpretation and law as integrity addresses these concerns. CLS doctrines charge that legal rules are indeterminate and that the ‘doctrinal sources of law are so porous and malleable’ as to make it impossible for them to dictate one uniquely correct answer, but that they are subject to manipulation so as to legitimate whatever decision a judge wishes to make.⁶⁶ CLS argue that for every legal rule there is a counter-legal rule, and that for every principle there is an equally valid counter-principle. CLS reject as exaggerations and extravagant, claims that law have an objective content and that it is neutral in its operation.⁶⁷ For CLS, the portrayal of law by the liberal tradition as rational, coherent, necessary and just, is designed to mask inherent contradictions in law. CLS thus maintain that ‘law is arbitrary, contingent, unnecessary and profoundly unjust’.⁶⁸ Unger,⁶⁹ for example, argues that there is no need to presume coherence in the law when it is clearly ‘the outcome of

⁶⁴ Preamble to the Namibian Constitution.

⁶⁵ Preamble to the South African Constitution.

⁶⁶ Roederer & Moellendorf *Jurisprudence* p 251.

⁶⁷ H McCoubrey & MD White 1993 *Textbook on Jurisprudence* p 227.

⁶⁸ *Ibid.*

⁶⁹ R Unger 1983 ‘The Critical Legal Studies Movement’ 96 *Harvard Law Review* 565.

contingent power struggles or of practical pressures lacking in rightful authority’.

In Chapter 5 I critically discuss and analyze Namibia’s constitutional jurisprudence in light of Dworkin’s notion of law as integrity and constructive interpretation. Since the point of a practice is the main chart and compass of Dworkin’s constructive interpretation, I commence the chapter by a discussion of the point of constitutional practice. I claim here that if the purpose of having a written constitution becomes the main guide in constitutional interpretation, the Supreme Court may always make the right decisions that may lead to a progressive realization of the nation’s aspiration set out in the Constitution.

The second point I make is that there are some connections between Dworkin’s constructive interpretation and some Supreme Court decisions. The argument for connections is in relation to some Supreme Court decisions in which constitutional values are underlined. However, what is profoundly significant is that the Supreme Court has lacked consistency in its appeal to constitutional values. For example, I make the argument that the Supreme Court decision in *S v Mushwena & Others*⁷⁰ is a backward step to the ‘dark ages’ of apartheid and is inimical to the constitutional values of human dignity, the rule of law, the right to a fair trial, and equality before the law. First of all, it is against the aims of constitutionalism as a practice in Namibia. Secondly, it goes against the foundation already laid in the early judicial pronouncements in the development of Namibia’s constitutional jurisprudence. Thirdly, it calls into question the Court’s ability and willingness to give effect to its

⁷⁰ 2004 NR 274 (SC).

transformative potential. Finally, I suggest that the Court's current approach necessitates a constructive interpretation of the Constitution so as to realize its transformative potential.

There is a need for a new narrative for post-colonial jurisprudence for Namibia. If Namibia is indeed committed to constitutional principles with the aim of 'securing to all our citizens justice, liberty, equality and fraternity',⁷¹ the Supreme Court needs a novel interpretive methodology. It is here where I argue that Dworkin's constructive interpretation and law as integrity could assist the Court in its development of a new narrative for post-colonial jurisprudence. Jurisprudence in the post-colonial Namibia should be understood as founded on constitutional values of human dignity, equality, freedom, the rule of law etc. become the guiding *grundnorm* for constitutional interpretation.

Chapter 6 consists of a conclusion flowing from the preceding analyses of Dworkin's legal theory and Namibia's constitutional jurisprudence in light of Dworkin's work. Here I endorse Dworkin's theory of constructive interpretation and law as integrity as models for Namibia's Supreme Court

⁷¹ Preamble to the Namibian Constitution.

Chapter Two

The Constitutional Jurisprudence of the Supreme Court of Namibia

2.1 Introduction

In this Chapter I explore the constitutional jurisprudence of the Supreme Court of Namibia. To this end, the broad research questions that I address are: i) How should the Supreme Court of Namibia decide cases to ensure the realization of the transformative goals and aspirations contained in the Constitution? ii) How can Dworkin's approach help address the lack of socio-economic rights in the Namibian Constitution?

From the textual formulation of the preamble to the Namibian Constitution an argument can be made that social transformation ought to be at the heart of Namibia's new legal order. This much is discernible from the commitment in the preamble and some substantive constitutional provisions to recognise 'the inherent dignity and [...] the equal and inalienable rights of all members of the human family' as 'indispensable for freedom, justice and peace'. This is against the backdrop of the past where 'colonialism, racism and apartheid' played a pivotal role in denying the majority of black Namibians fundamental rights and freedoms, and thus accounting for acute inequalities, intolerable disparities in wealth distribution and many other social and economic ills.¹ To this end then, with the

¹ I do not suggest here that the socio-economic imbalances and inequalities that now exist in Namibia are all to be blamed on apartheid. Whereas the principles of apartheid may have contributed immensely to inequalities in society, disparities in wealth distribution was here long before the advent of colonialism.

adoption of the Constitution as the supreme law of the Republic at independence, there is a constitutional promise to confer on ‘all members of the human family’ within the borders of the Republic of Namibia fundamental rights and freedoms with a view to transform the Namibian society as one founded on the principles of equality for all and respect for human dignity.

The other question I ponder in this chapter, also directly linked to the main research questions above is whether Dworkin’s approach can assist in addressing the lack of socio-economic rights in the Namibian Constitution? Whereas the judicial enforcement and protection of civil and political rights is important for transformation, their judicial enforcement alone is lamentably insufficient to effect the substantive social transformation that the country requires. What is pivotal rather is a constructive interpretation of civil and political rights that could address also socio-economic transformation. The Namibian Constitution is a classical liberal² constitution, with an emphasis on civil and political rights. That being the case, it is doubtful whether social transformation can be attained under the current Constitution. However, through a Dworkinian approach of constructive interpretation and law as integrity Namibia’s civil and political rights could be interpreted so as to include socio-economic transformation. If social transformation is an underlying principle of the Namibian Constitution, law as integrity would mean that rights such as equality, dignity, life and their underlying values should be interpreted so as to give effect to socio-economic transformation as well. It must be conceded that Dworkin’s approach is of course a liberal one, mainly focused on the rights of the individual in the first

² The term ‘liberal’ is used in two different ways in this thesis; firstly as a ‘philosophical construct’ in my reference to the Namibian Constitution as a ‘classical liberal constitution’; and secondly, liberal in a sense of a flexible mode of construing texts like the constitution.

place. My tentative attempt to consider if law as integrity could be pushed to include socio-economic transformation stands in the guise of constructive interpretation – a constructive interpretation and application of Dworkinian theory itself

In addressing the above questions, this chapter is organized as follows: section 2.2 I briefly discuss the political situation in Namibia. In 2.3 I briefly discuss the concept of constitutionalism. In section 2.4 I provide an overview of human rights protection in the Namibian Constitution. In section 2.5 I discuss the constitutional jurisprudence of the Supreme Court of Appeal pertaining to human dignity, equality and freedom of expression. In section 2.6 I discuss how the exclusion of socio-economic rights can undermine transformation and how a Dworkinian approach of constructive interpretation and law as integrity could be interpreted to include socio-economic transformation. Section 2.6 concludes the chapter.

The object of this chapter is to provide a general overview of the constitutional jurisprudence of the Supreme Court of Namibia since independence. The rationale of this overview is two-fold. Firstly, the aim is to determine how the Supreme Court of Namibia has interpreted some civil and political rights since independence. Secondly, I intend to determine whether the Court's approach promotes the foundational values undergirding the new constitutional order and to bring about the desired transformation as declared in the Constitution, including socio-economic transformation.

However, a discussion and analysis of each and every case by the Supreme Court of Namibia since independence is beyond the scope of

this work. The selection of the constitutional values of dignity and equality and the right to a fair trial for analysis is underpinned by the view that these particular values and rights were some of the most suppressed and violated in pre-independent Namibia. Accordingly, the fundamental question is whether the judiciary has done any better in the interpretation and promotion of these foundational values and rights in a way that can be said to clearly mark a break with the past.

2.2 The Current Political Situation in Namibia

On the 21st of March 1990, Namibia gained her independence. Prior to Namibia's independence, Namibia was not a constitutional democracy but rather followed a system of parliamentary sovereignty. The advent of the new legal order marked the end of parliamentary sovereignty and constitutional supremacy was ushered in. Remarking on the impact of constitutionalism in South Africa, with which in this aspect Namibia can be compared, Du Plessis acknowledges and asserts that

Constitutionalism has meant exchanging an old paradigm premised on the sovereignty of parliament for a new paradigm premised on the supremacy of the Constitution.³

It is accepted that the advent of the constitutional dispensation has wrought changes of untold magnitude in both the political and legal spheres. However, it is with changes in the legal arena that this work is concerned. In discussing the constitutional jurisprudence of Namibia, it is of utmost importance to provide a context to such a discussion. The hallmark of pre-independent Namibia was that it was characterized by widespread human rights abuses. Colonialism, racism and apartheid provided impetus and fertile ground for such abuses. Accordingly, it comes as no surprise that at the attainment of

³ L Du Plessis 2002 *Re-Interpretation of Statutes* p vii.

statehood, the drafters of the Constitution were determined to put an end to human rights abuses and to entrench a culture of respect for the rule of law and the protection for human rights. Whereas some have sought to underscore that the entrenchment of human rights in Namibia did not commence on the 21st of March 1990,⁴ Namibia's real constitutional jurisprudence commenced after the attainment of statehood in 1990. The impact of this transition is well captured in the preamble⁵ to the Namibian Constitution which sets the tone of the new legal order, articulating the vision and foundational values of the Namibian community.

Notwithstanding the ideals and principles encapsulated in the preamble to the Constitution and some substantive provisions, it is acknowledged that Namibia is a young nation with an emerging democracy even after 24 years of independence. Regard being had to the long and brutal nights of apartheid and colonialism, it is conceded that most of the values and principles now entrenched in the

⁴ See, for example, SK Amoo 'The constitutional Jurisprudential Development in Namibia since 1985' in Bosl *et al* (eds) 2010 *Human Rights and the Rule of Law in Namibia* p 39; N Horn 'The Independence of the Judiciary in Pre-independent Namibia: Legal Challenges under the Pre-independence Bill of Rights (1985-1990) in Bosl & Horn (eds) 2008 *The Independence of the Judiciary in Namibia* p 45.

⁵ The preamble to the Namibian Constitution provides:
Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights includes the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed, or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have so long been denied to the people of Namibia by colonialism, racism and apartheid...;

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic

Constitution are merely aspirational and not deeply embedded in the moral fabric of the Namibian society. The authors Keulder, Nord and Emminghaus puts it as follows:

For us, Namibia is still in the process of consolidating its democracy and a possible reversion to non-democratic methods of rule cannot be excluded. In line with the dominant thinking on political culture, we believe that the future of democracy lies not only in the hands of the ruling elites, but also in the hands of ordinary citizens... After only nine years of independence and democracy, and after many decades of racist and authoritarian rule, one would expect that democratic values might not be all that well entrenched. One would be likely to find some remnants of non-democratic values installed during colonial rule to coexist with the more democratic values installed after Independence. This feature, we argue, is typical of “societies-in-transition” or “democracies-in-the-making”.⁶

What this entails is an acknowledgement that the adoption of the Constitution does not translate into an automatic adoption of its values by society. Emerging as it were from the brutal reality of colonialism and a racist past, most of the values now espoused in the Constitution are merely aspirational and not that deeply embedded in the Namibian society. Perhaps this could explain the judiciary’s struggle in adjudicating hard cases such as presented in *S v Mushwena*.⁷ Accordingly, though notions of democracy, the rule of law, respect for human dignity, equality before the law and justice for all are foundational to the Namibia state, all these still need to be fostered so that a political culture rooted in these values is developed. Totemeyer, writing on the link between democracy and elections, puts it as follows:

The electoral process is at the heart of democratic capacity building and involves the whole society. *In the case of Namibia, with its suppressive colonial past, the building and proper*

⁶ Keulder *et al* 1997 “Namibia’s Emerging Political Culture” in Keulder (ed) 2010 *State, Society and Democracy* p 238 & 239.

⁷ The case of *S v Mushwena* is discussed in more detail in a later section of this chapter.

functioning of institutions has taken root, but needs constant attention (emphasis supplied).⁸

In the light of the above, it is conceded that there is a wide gulf between Namibia as a developing state and some western countries like the United States of America where the ideals now entrenched in the Constitution are deeply embedded. Admittedly, it is this factor which may have the potential to limit the application of Dworkinian scholarship to Namibia.⁹ However, the fact that Namibia's democratic culture and institutions is only 24 years old should not be used as an excuse for failure to promote the foundational ideals now entrenched in the Constitution. Furthermore, though Dworkin writes about the political and legal thought of western democratic legal systems, it must be accepted that the Namibian legal system is now a 'western democratic system'. I am inclined to state here that Dworkin's theory is of universal application because it applies morality (which is universal) to all legal systems.

2.3 The Concept of Constitutionalism

The essence of constitutionalism is that state power ought to be prescribed and restricted by law so as to protect the interests of society.¹⁰ Thus, the idea of constitutionalism that permeates the Namibian Constitution is that the constitution must structure and limit the power of the state. Accordingly, the constitution has to ensure that 'the state has enough power to govern, but in the same

⁸ G Totemeyer 2010 "Namibia's Constitution, Democracy and the Electoral Process" in Bosl *et al* (eds) 2010 *Constitutional Democracy in Namibia* p 289.

⁹ I discuss possible limitations of Dworkinian scholarship to Namibia in chapter 5 of this thesis.

¹⁰ I Currie and J De Waal 2001 *The New Constitutional and Administrative Law* p 10.

vein state power must be limited by the constitution to ensure that it does not violate the law or the human rights of its citizens'.¹¹

In relation to constitutions, written or unwritten, by constitutionalism is meant conformity with the broad philosophical values within a state. According to Barnett, constitutionalism implies something more important than the idea of 'legality' which requires official conduct to be in accordance with pre-fixed legal rules.

According to the *Oxford Companion to the Supreme Court of the United States*,¹² the doctrine of constitutionalism addresses the problem of 'how to establish government with sufficient power to realize a community's shared purposes, yet so structured and controlled that oppression will be prevented'. Diescho submits that,

The constitution is meant to guide and protect those who govern as well as those who are governed in a manner that is fair to all, consistent, predictable and non-discriminatory.¹³

It has been acknowledged that constitutionalism is both a prescriptive and a normative concept. It is prescriptive in that it dictates how state power should be exercised, instead of explaining how it is exercised.¹⁴ It is also normative in the sense that it sets out values or standards which should be upheld in the governing process.¹⁵ Currie & De Waal conclude that 'as a theory of government, constitutionalism shares

¹¹ *Ibid.*

¹² *The Oxford Companion to the Supreme Court of the United States* (1990) p 192.

¹³ J Diescho 1994 *The Namibian Constitution in Perspective* p 49.

¹⁴ Currie & De Waal *The New Constitutional and Administrative Law* p 11.

¹⁵ *Ibid.*

with democratic theory a central respect for human worth and dignity'.¹⁶

Backed by the court's review powers, the Constitution in the American context 'takes on the nature of higher law'.¹⁷ This means that constitutional provisions prevail over all 'legal or political actions of government which are inconsistent with it: they become null and void on the basis that there was no legal authority for them'.¹⁸ No wonder then that in modern constitutionalism, the notion of the constitution as higher and fundamental law is common place. In the context of Namibia, *Article 1(6)* of the Constitution states that 'This Constitution shall be the supreme law of Namibia'. According to Devenish, 'the supremacy of the constitution means that all authority must be exercised by virtue of and in accordance with all provisions of the constitution'.¹⁹ The supremacy of the constitution therefore obliges government bodies and agencies to act in conformity with the constitution, failing which their actions could be declared invalid by the courts. Rautenbach and Malherbe submit,

The purpose of the constitution as a key element of a legal system, and as a reflection of the will of the people, is to provide the norm to which government actions should conform.²⁰

In light of the above, my concern in this chapter is to ask how the Supreme Court of Namibia has interpreted the Constitution, particularly the foundational values of human dignity, equality and freedom. Before I examine the Court's dignity, equality and freedom

¹⁶ *Ibid* p 10.

¹⁷ *Ibid* p 21.

¹⁸ *Ibid*.

¹⁹ GE Devenish 1998 *A Commentary on the South African Constitution* p 36.

²⁰ IM Rautenbach & EFJ Malherbe 2004 *Constitutional Law* (4th ed) p 24.

jurisprudence, I will briefly outline human rights protection in the Namibian Constitution.

2.4 Human Rights Protection in the Namibian Constitution

The Namibian Bill of Rights is a product of international conventions on human rights because all its provisions for human rights protection emanated from these instruments.²¹ In total, there are fifteen articles devoted to the protection of fundamental rights in the Namibian Constitution. These are contained in Articles 5 to 20. *Article 21(1)* enumerates (10) fundamental freedoms. *Article 5* of the Constitution enjoins the executive, the legislature and the Judiciary, together with all organs of state to respect and uphold the fundamental rights and freedoms enshrined in the Constitution. Article 6 acknowledges the sanctity of life and accordingly outlaws the death penalty as a competent sentence in Namibia. The protection of liberty is guaranteed under *Article 7* of the Constitution.

Respect for human dignity is guaranteed under *Article 8* in terms of which torture, cruel or inhuman or degrading treatment or punishments are prohibited. Slavery and forced labour are prohibited under *Article 9*. The right to equality and freedom from discrimination is recognised under *Article 10*. *Article 11* prohibits arbitrary arrests or detention. Every individual's right to a fair trial is recognised in *Article 12*. The right of every Namibian to privacy is acknowledged under *Article 13*; whereas the right to found a family is guaranteed in *Article 14* of the Constitution. *Article 15* recognises children's rights

²¹ Some of the International Instruments on which Namibia relied on for its Bill of Rights include the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966); the African Charter on Human and Peoples' Rights.

under the Constitution. The right of every person to own property in Namibia is guaranteed under *Article 16*. The right of all citizens to participate in the country's political activities is protected under *Article 17*. Administrative justice is secured under *Article 18*. The last fundamental rights protected under the Constitution are the right to culture in *Article 19*, and the right to education in terms of *Article 20*. The fundamental freedoms to which all persons shall be entitled are enumerated in *Article 21*²² of the Constitution.

It is important to note that whereas *Article 22* provides for the limitation of fundamental rights and freedoms, no derogation is permitted for a number of provisions such as the protection of life,²³ and freedom from torture or cruel, inhuman treatment or punishment.²⁴

²² Article 21 provides that all persons shall have the right to:

- (a) Freedom of speech and expression, which shall include freedom of the press and other media;
- (b) Freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;
- (c) Freedom to practice any religion and to manifest such practice;
- (d) Assemble peaceably and without arms;
- (e) Freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;
- (f) Withhold their labour without being exposed to criminal penalties;
- (g) Move freely throughout Namibia;
- (h) Reside and settle in any part of Namibia;
- (i) Leave and return to Namibia; and
- (j) Practice any profession, or carry on any occupation, trade or business.

²³ *Article 6*.

²⁴ *Article 8*.

2.5 The constitutional jurisprudence of the Supreme Court

2.5.1 Human Dignity in Namibia

The concept of human dignity is not only replete in many national constitutions as well as several international human rights instruments, but it is claimed that it is also the basis of all human rights that should serve as a guide to their interpretation.²⁵ In Namibian constitutional law, human dignity is both a constitutional right and also a foundational value. The preamble to the Namibian Constitution acknowledges and recognises human dignity as a foundational value of the Namibian society; and *Article 8* of the Constitution declares human dignity as a constitutional right. The preamble to the Namibian Constitution establishes human dignity as a foundational norm or value; and *Article 8* of the Constitution proclaims human dignity as a constitutional right. It provides as follows:

(1) The dignity of all persons shall be inviolable

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

(b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

From the above constitutional provisions it is clear that human dignity is accorded a privileged status in the Constitution, along with other foundational values. That human dignity is a fundamental constitutional norm in Namibia is evident from the way in which it is entrenched. It is noticeable that human dignity as a constitutional right is 'inviolable' and is accordingly not subject to the limitation

²⁵ *Ibid* p 171.

clause.²⁶ It is clear that the drafters of the Constitution sought to elevate human dignity as a foundational norm and constitutional right in direct response to the horrors of the apartheid era, through which the dignity of most Namibians was systematically violated. In the pages that follow I explore the dignity jurisprudence of Namibia.

With the adoption of the Constitution as the supreme law of the Republic,²⁷ the Constitution now calls upon the executive, the legislature and the judiciary to respect and uphold the fundamental rights and freedoms entrenched in it.²⁸ *Article 78* of the Constitution establishes the Supreme Court and the High Court, and both these courts are given the task and the authority to interpret, implement and uphold the ideals of the Constitution, together with all fundamental rights and freedoms guaranteed by it.²⁹ In exploring Namibia's constitutional jurisprudence, the focus is on the Supreme Court and how it has discharged this constitutional mandate. Accordingly, I aim to establish whether the approaches adopted by the Supreme Court in its interpretation of the Constitution are those that can be said to guarantee the protection and promotion of fundamental human rights and freedoms.

²⁶ *Article 22* is the limitation clause and provides that, *Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:*

- (a) *Be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;*
- (b) *Specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.*

²⁷ *Article 1(6)* provides that 'this Constitution shall be the supreme law of the Republic of Namibia'.

²⁸ *Article 5* of the Constitution.

²⁹ *Article 79(2)* and *Article 80(2)*.

Before I explore the constitutional jurisprudence of Namibia's Supreme Court, it should be noted that the Namibian Constitution³⁰ does not have an interpretation clause unlike its South African counterpart. There is no constitutional provision on how to interpret the Constitution. However, over the past two decades the Namibian courts have on occasion taken heed of Mahomed AJ's *dictum* in *S v Acheson*³¹ where the learned judge stated the following:

The spirit and tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.³²

Notwithstanding some questionable decisions, it can safely be asserted that Namibia's Supreme Court has generally performed well in as far as the enforcement and protection of fundamental rights and freedoms is concerned.³³ There is an array of cases to support this thesis. However, an exhaustive review of all Supreme Court constitutional decisions since independence is beyond the scope of this work. Selected cases only go to show how the Court has made a radical departure from the injustices of the past era to one where there is respect for the rule of law and the protection of fundamental rights and freedoms. It is submitted that most of the matters that have come before Namibia's Supreme Court have not necessarily been 'hard cases'. When the Court has on occasion had to deal with a supposedly hard case, it has tended to renege from its mandate of enforcing and protecting human rights.

Since the dawn of independence there have been several landmark judgments where *Article 8* of the Constitution was invoked and

³⁰ Act No. 1 of 1990.

³¹ 1991 NR 1.

³² At 10A-B.

³³ G Coleman & E Schimming-Chase 2010 'Constitutional Jurisprudence in Namibia since Independence' in Bosl, Horn & Du Pisan (eds) *Constitutional Democracy in Namibia* p 214.

interpreted. The first occasion was when the Supreme Court considered the constitutionality of corporal punishment by state organs in *Ex parte: Attorney General: in re Corporal Punishment by Organs of State*.³⁴ In issue was the determination of whether the imposition and infliction of corporal punishment by or on authority of any organ of state as contemplated in certain pieces of legislation was in conflict with any of the provisions of Chapter 3 of the Constitution. Several factors had a bearing in the Court's interpretation of human dignity as entrenched in *Article 8* of the Constitution. Firstly, the foremost consideration which appears to have weighed heavily on the Court's approach were the 'contemporary norms, aspirations, expectations and sensitivities of the Namibian people' as outlined in the Constitution. In terms of these new norms and values, practices³⁵ which were not in tandem with the articulated aspirations and values of the Namibian community stood to be repudiated. Mahomed A.J.A. (as he then was) put it thus:

For this reason colonialism as well as 'the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long' are firmly repudiated.³⁶

Another consideration was the place of human dignity in international and comparative constitutional law. For example, the Court noted some similarities between *Article 8(2)(b)* of the Constitution and *Article 3* of the European Convention for the Protection of Human Rights and Freedoms;³⁷ *Article 1(1)* of the German Constitution;³⁸

³⁴ 1991 (3) SA 76 (NmSc).

³⁵ One such practice noted by the court was colonialism and the 'practice of apartheid from which the majority of the people of Namibia have suffered for so long'.

³⁶ At 179F-G.

³⁷ At 189F-G.

³⁸ At 189J-190A.

Article 7 of the Constitution of Botswana;³⁹ and *Article 15(1)* of the Zimbabwean Constitution.⁴⁰ In this way, the Court noted the emerging international consensus against corporal punishment.⁴¹ Regard being had to the above, the Supreme Court had little difficulty in finding that corporal punishment on adults as well as children by organs of state was degrading or inhuman and was unconstitutional. In arriving at this decision, it is clear that the Supreme Court did not only rely on Namibia's contemporary norms, moral standards and aspirations, but also considered foreign case law and international human rights instruments.

That human dignity is the most important of all human rights in Namibian constitutional law is evident from the formulation of *Article 8(1)* of the Constitution where it is provided that 'the dignity of all persons shall be inviolable' and *Article 8(2) (a)* where it is stated that,

In any judicial proceedings before any organ of the state, and during the enforcement of a penalty, respect for the human dignity shall be guaranteed.⁴²

The above constitutional provisions lend credence to the view that human dignity is the touchstone of Namibia's constitutional order. To underline human dignity as a supreme value the Supreme Court in *Ex parte: Attorney General: in re Corporal Punishment* stated that 'no derogation from the rights entrenched by *Article 8* is permissible' and that 'the state's obligation was absolute and unqualified', notwithstanding the provisions of *Article 22* of the Constitution. Accordingly, the court reasoned, all that was required to infringe

³⁹ At 190D-E.

⁴⁰ At 190G-H.

⁴¹ At 189E-I

⁴² *Article 8(2)(a)*.

Article 8 was the finding that a particular statutory provision or conduct authorized by organs of state fell within one or other of the seven permutations of *Article 8(2) (b)*.⁴³ What is also noteworthy is the Court's approach to *Article 8(2) (b)*. According to Mahomed AJA,⁴⁴ (as he then was), the words 'to torture or to cruel, inhuman or degrading treatment or punishment' should be read disjunctively and therefore the section should be read as intended to protect individuals from seven different conditions namely: torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment, and degrading punishment.⁴⁵

Regardless of the above, it is generally acknowledged that human dignity is a contested concept and that there is no consensus as regards its 'scope and meaning, its philosophical foundations, and its capacity to guide the interpretation of human rights and to constrain judicial decision making'.⁴⁶ This is also evident in Namibia's constitutional jurisprudence as courts have been contradictory in their interpretation of *Article 8*. As shall be shown in the subsequent chapter, there have been instances where the Namibian judiciary have not sung in unison on whether *Article 8* is absolute or subject to limitations. Notwithstanding the contradiction, the approach in *Ex Parte: Attorney General: in re Corporal Punishment* was followed in many other subsequent cases.

⁴³ At 188B-C.

⁴⁴ Justice Mahomed had been the dominant figure of Namibia's developing constitutional jurisprudence, both from his years as a judge in the High Court to his tenure as Chief Justice.

⁴⁵ At 187G-H.

⁴⁶ See H Botha 2009 'Human Dignity in Comparative Perspective' 20 *Stellenbosch Law Review* p 171.

Human dignity was again in issue in *S v Tcoelib*.⁴⁷ The issue in *Tcoelib* related to the constitutionality of life imprisonment. On appeal the Supreme Court tested various statutory provisions permitting life imprisonment in the light of *Article 8(1)* and *8(2) (b)*. Chief Justice Mahomed concluded that in Namibia, if life imprisonment meant the incarceration of a prisoner for the rest his natural life, then that would reduce a prisoner to an object without any continuing obligation to respect his dignity.⁴⁸ Accordingly, the Supreme Court ruled, such a sentence would be unconstitutional.⁴⁹

After reviewing the relevant statute, however, Mahomed CJ concluded that sufficient provision is made for the release of the prisoner and that a sentence of life imprisonment was accordingly not *per se* unconstitutional. The Court concluded that a sentence of life imprisonment would be unconstitutional ‘if the circumstances of that case justify the conclusion that it is so grossly disproportionate to the severity of the crime committed that it constitutes cruel, inhuman or degrading punishment in the circumstances or impermissibly invades the dignity of the accused’.⁵⁰

Notwithstanding the Supreme Court’s finding in *Tcoelib*, it is not unusual in recent years for Namibian courts to mete out very lengthy sentences that can hardly be said to be proportionate to the crimes committed. Recently, however, the High Court ruled that the *Stock Theft Amendment Act of 2004* was unconstitutional on account that it prescribed disproportionate prison terms.

⁴⁷ 1993(1) SACR 274 (Nm); 1999 NR 24.

⁴⁸ At 33E-F.

⁴⁹ Par. 399A-B.

⁵⁰ At 37F-G.

There have been several cases where Namibian courts considered human dignity as a foundational value and a guide to the interpretation of other human rights in the Constitution. In *S v Sipula*⁵¹ the High Court accepted that *Ex parte: Attorney-General: In re: Corporal Punishment* also outlawed corporal punishment imposed and executed by a customary court (Khuta). In *S v Vries*⁵² the full bench of the High Court of Namibia considered the constitutionality of the minimum sentence imposed by the then *section 14(1) (b)* of the *Stock Theft Act*.⁵³ Frank J concluded that *Article 8(2) (b)* of the Constitution was absolute. The judge held that the determination of whether a particular statutory provision violated *Article 8*

is a value judgment that could vary from time to time but which is one not arbitrarily arrived at but which must be judicially arrived at by way of an attempt to give content to the value judgment by referral to norms which may or may not coincide with norms of any particular judge.⁵⁴

The court then concluded that mandatory sentences were not necessarily unconstitutional.⁵⁵ The judge stated that for the determination of whether a mandatory sentence was unconstitutional, one had to establish if the sentence was excessively disproportionate to the severity of the crime.⁵⁶ In arriving at this decision the Court reviewed American and Canadian case law where courts in those jurisdictions declared unconstitutional sentences disproportionate to the crimes committed.⁵⁷ It was then stated that the ‘disproportionate’ test was the same test that was originally used in the determination whether a sentence was shocking in the sense that it was one no

⁵¹ Unreported judgment by O’Linn J.

⁵² 1996 (3) SACR 638 (Nm).

⁵³ *Act No. 12 of 1990*.

⁵⁴ At 641B-C.

⁵⁵ At 646C.

⁵⁶ At 642C-J.

⁵⁷ At 642C-J.

reasonable man would have imposed.⁵⁸ However, whereas O'Linn J arrived at the same conclusion as the majority decision, he nonetheless stated that *Article 8(2) (b)* was not absolute. He reasoned that it was imperative to first of all ascertain the content of the fundamental right violated.

In *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another*,⁵⁹ the Supreme Court ruled that the practice of chaining trial awaiting prisoners was contrary to *Article 8(2) (b)*.⁶⁰ The Court noted that to chain a person 'was a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited'.⁶¹ The Court further noted that the practice of chaining prisoners was also a stark reminder of the dark days of slave trade when many Africans were sold into slavery in chains.⁶² The Supreme Court then decided that it was at least degrading treatment to put chains on prisoners and was thus against *Article 8(2) (b)* of the Constitution.⁶³ Accordingly, the effect of this ruling was that prison authorities could no longer chain prisoners in the free Namibia.

⁵⁸ At 643H-I.

⁵⁹ 1999 NR 271 (SC).

⁶⁰ The background to this matter was that the appellant (Thomas Namunjepo) and four other awaiting trial prisoners were placed in leg irons by prison authorities. The reason why these prisoners were chained was because one of them was allegedly intending to escape from prison and the others had on previous occasion escaped from custody. They were chained for approximately six months. These chains were however removed by the prison warders after the applicants applied to the High Court on account that the practice of placing them in leg irons were in conflict with the provisions of Article 8 of the Constitution. However, the High Court ruled in favour of the prison authorities. It was then that the appellants appealed to the Supreme Court for a determination on the constitutionality of chaining trial awaiting prisoners in the light of Article 8 of the Constitution.

⁶¹ At 286B-C.

⁶² At 286C-D.

⁶³ At 286G-H.

2.5.2 Human Dignity as a Guide to Interpretation

The above discussion demonstrated that human dignity is at the apex of the human rights discourse. It is unsurprising therefore that it should be a key consideration in the interpretation of other human rights. Not only is human dignity to guide the interpretation of other human rights, it is also to be a key consideration in judicial proceedings when sentences or penalties are meted out. This, admittedly, is the import of *Article 8(2) (a)* of the Constitution.⁶⁴ However, it is one thing for the Constitution to guarantee respect for human dignity in judicial proceedings as envisioned in *Article 8(2)(a)* and it is quite another for the judiciary to actually observe this constitutional imperative. I elaborate on this below.

In South Africa,⁶⁵ the Constitutional Court has described human dignity as the ‘cornerstone of human rights’⁶⁶ and as ‘a value that informs the interpretation of many, possibly all, other rights’.⁶⁷ To this end, some of the rights that have been interpreted in light of human dignity in South Africa are equality,⁶⁸ the guarantee against inhuman or degrading punishment,⁶⁹ personal freedom,⁷⁰ privacy,⁷¹ freedom of

⁶⁴ *Article 8(2) (a)* provides that ‘in any judicial proceedings before any organ of state, and during the enforcement of a penalty, respect for human dignity shall be guaranteed’.

⁶⁵ It should be pointed out these are foreign cases (South African) and not Namibian cases.

⁶⁶ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC) par 36.

⁶⁷ *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) par 35.

⁶⁸ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); 1997 6 BCLR 759 (CC) paras 31-33; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); 1997 6 BCLR 708 (CC) para 41; *Harksen v Lane NO* 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) paras 46, 50, 51, 53, 91, 92.

⁶⁹ *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC); *S v Williams* 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC); *S v Dodo* 2001 3 SA 382 (CC), 2001 5 BCLR 423 (CC) par 35.

⁷⁰ *Ferreira v Levin NO and Vryenhoek v Powell NO* 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC) par 49.

⁷¹ *Bernstein v Bester NO* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) paras 65-67; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA

religion,⁷² freedom of expression,⁷³ the right to vote,⁷⁴ freedom of occupation,⁷⁵ property,⁷⁶ socio-economic rights such as access to adequate housing and social security,⁷⁷ cultural life,⁷⁸ the right to a fair trial,⁷⁹ and the presumption of innocence.⁸⁰

There is no doubt that just as in South Africa, human dignity is the pivot of Namibia's constitutional jurisprudence in general, and the human rights discourse in particular. There are a myriad of cases,⁸¹ though not as impressive as in South Africa, where human dignity seems to have been a key consideration in the decisions of the Namibian Courts. Several of these cases are considered in the sections

6 (CC), 1998 12 BCLR 1517 paras 30, 120; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2000 10 BCLR 1079 (CC) para 18; *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC) para 89.

⁷² *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC) para 36; *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), 2002 3 BCLR 231 (CC) paras 48-51; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (cc), 2006 3 BCLR 355 (CC) par 89.

⁷³ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC), 1999 6 BCLR 615 (CC) paras 7, 8; *Khumalo v Holomisa* 2002 5 SA 401 (CC), 2002 8 BCLR 771 (CC) par 21; *South African Broadcasting Corporation v National Director of Public Prosecutions* 2007 2 BCLR 167 (CC) par 120; *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC) par 45.

⁷⁴ *August v Electoral Commission* 1999 3 SA 1 (CC); 1999 4 BCLR 363 (CC) par 17.

⁷⁵ *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA); 2004 2 BCLR 120 (SCA) paras 27, 32.

⁷⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) par 15.

⁷⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) paras 23, 4, 83; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) paras 41, 44.

⁷⁸ *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC) paras 53, 62-66, 150, 155-157, 177.

⁷⁹ *Jaipal v S* 2005 4 SA 581 (CC), 2005 5 BCLR 423 (CC) par 26.

⁸⁰ *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC), 2000 5 BCLR 491 (CC) par 40.

⁸¹ See for example *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others; Djama v Government Republic of Namibia & Others* 1992 NR 37 (HC); *Government Republic of Namibia v Sikunda* 2002 NR 203 (SC); *Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 (HC).

below where the relationship between dignity and other human rights is addressed.

Notwithstanding the above, the question is, to what extent can the Namibian judiciary be said to be ‘taking rights seriously’, in light of the manner in which some cases have been decided since independence? On the strength of the above evidence and for the most part, the Namibian judiciary has performed generally well in respect of a liberal interpretation of the Constitution. However, there are a number of cases where the judiciary has been conservative as regards the development of the dignity jurisprudence. Being a supreme value and a foundational principle, and also being the source of all other human rights, human dignity ought to be invoked as a guide in the interpretation of human rights and also in the determination of all human rights violations. The quest to transform the Namibian society should be informed by the recognition that all persons are bearers of human dignity. When it is accepted that all persons are bearers of human dignity, their right to ‘equal concern and respect’ may be guaranteed.

It is widely accepted that human dignity precludes treating individuals merely as objects or as the means to an end. This is usually referred to as the ‘object formulation’. Thus Dworkin defines human dignity as supposing that ‘there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community ... [S]uch treatment is profoundly unjust’.⁸² Conversely, there are ways of treating a human being that are consistent with the recognition that he is a bearer of human dignity worthy of equal concern and respect. I want to suggest here that this

⁸² Dworkin *Rights* p 198.

is the whole point of constitutionalism, both in its attempts to prescribe and limit the power of government and also in its promotion and protection of fundamental human rights and freedoms.

From above, human dignity ‘is a sanctified value unto itself’⁸³ which demands that all humans be treated as ends, not means.⁸⁴ This notion of human dignity seems to have permeated criminal law in the new dispensation of constitutionalism. For example, in *S v Makwanyane* it was held that a sentence of death placed an offender in a position that the court regarded as ‘beyond the pale of humanity’. It was held that the death penalty, once imposed, removes any possibility for rehabilitation and self-improvement, ‘instrumentalises the offender for the objectives of State policy’, and that it ‘dehumanizes the person and objectifies him or her as a tool for crime control’. This view was further underlined in *S v Dodo* where it was held that imposing a disproportionate sentence on an offender amounts to treating him or her as a means to an end. In the court’s view, this would be

[t]o ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.⁸⁵

Elsewhere, it has been held that an accused person should, as far as possible, ‘be viewed by the court not as a criminal, a dangerous character, or a threat, but as a person whose guilt must be proved beyond reasonable doubt’.⁸⁶

⁸³ Dworkin *Life’s Dominion* p 236.

⁸⁴ *Ibid.*

⁸⁵ 2001 (3) SA 382 (CC); 2001 5 BCLR 423 (CC).

⁸⁶ *S v Phiri* 2005 2 SACR 476 (T) para 15. In this case the court set aside proceedings in the lower court because the accused had pleaded while in leg irons.

It is submitted that the above idea of treating individuals as ends and not as means to an end has also found application in Namibia. For example, in *S v Tcoeib* the Supreme Court held that a sentence of life imprisonment would be unconstitutional if it amounted to ‘an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a ‘thing’ instead of a person without any continuing duty to respect his dignity’. Yet, it is not uncommon to observe that on several occasions accused persons are objectified by the courts as tools for crime control. This is particularly true in the cases where convicted criminals are sentenced to very lengthy prison terms in the hope of deterring them and others from committing similar crimes. Thus, it would appear as though human dignity is at times lost through the commission of crime in Namibia. Whereas some rights may be forfeited at the commission of crime, it has been emphasized that dignity vests in every person and cannot be lost through crime or undignified conduct.⁸⁷

2.5.3 Equality Jurisprudence in Namibia

One characteristic feature of most modern national constitutions and international human rights instruments is that they contain express provisions about the right to equality. The idea of including an equality clause in these documents is premised on guaranteeing the protection of individuals and groups against unfair discrimination. To this end, the right to equality is now a common fixture in both national constitutions and international human rights instruments.

⁸⁷ *S v Makwanyane* 1995 3 SA (CC), 1995 6 BCLR 665 (CC) paras 137 (dignity vests in ‘every person, including criminals convicted of vile crimes’), 142-143; *August v Electoral Commission* 1999 3 SA 1 (CC), 1999 4 BCLR 363 (CC) par 18 (prisoners are not stripped of their dignity); *Jordan v S* 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC) par 74 (despite finding that invasion of prostitutes’ dignity is a result of their own conduct, rather than of the impugned law, held that they must be treated with dignity by the police and their customers).

But what is the rationale of embedding the right to equality in national constitutions and international human rights instruments? In the context of Namibia, there can be no uncertainty regarding the entrenchment of the equality principle in the Constitution. This much is clearly outlined in the preamble to the Namibian Constitution. Regard being had to the importance and pre-eminence accorded the principle of equality in the Constitution, I now turn to the examination and analysis of how the Namibian courts have interpreted the foundational value and constitutional right of equality.

As acknowledged in the above section, the principle of equality has also been embedded in the Namibian Constitution and is at the heart of human rights discourse in Namibia. As with human dignity, equality is both a foundational value and also a constitutional right in the Namibian Constitution. That the principle of equality is central to Namibia's constitutional order and thus its main organizing principle can be gleaned from the preamble itself. In the first stanza of the preamble to the Namibian Constitution it is stated that, 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace'. The second stanza of the preamble expatiates more on the equality principle as follows: 'whereas the said rights includes the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or economic status'.

From the above clauses of the preamble, it is clear that the whole purpose of establishing a democratic government and entrenching a bill of rights is to ensure that individual rights are enjoyed by all on an equal footing. In my view, the principles of human dignity and

equality are at the center of Namibia's constitutional jurisprudence. With regards to the right to equality, the relevant constitutional provision is *Article 10*. It provides as follows:

- (1) All persons shall be equal before the law
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

It is submitted that there are some similarities between Namibia's equality clause and some equality clauses in other national constitutions and international human rights instruments. Before setting out to explore Namibia's equality jurisprudence, it is necessary to situate the historical context in which the Namibian equality clause arose. The context to Namibia's equality clause is provided in the preamble to the Constitution. It can be gleaned from the preamble that Namibia's resolve to commit to values of human dignity, equality etc. stems directly from the historical inequalities and injustices that characterised the apartheid era.

Regard being had to the policies of segregation and apartheid that accounted for systematic discrimination, the centrality and significance of the equality principle in the Namibian Constitution become clear. Writing about the legacy of apartheid and the developing equality jurisprudence in South Africa, Govender submits as follows:

Apartheid was technically about separateness, but it was fundamentally about inequality. The founding premise of the ideology was to preserve the total hegemony of the white South Africans. The liberation organisations opposing the apartheid regime sought to affirm that the country belonged to all that lived in it. Thus it is unsurprising that the commitment to equality is one of the founding values of the Constitution and an

indelible thread woven throughout the fabric of the Bill of Rights.⁸⁸

In Namibia, this commitment to the principle of equality is the reason why ‘racial discrimination and the practice and ideology of apartheid’ are repudiated by the Constitution.⁸⁹ But most importantly, the brutal realities of Namibia’s colonial history should also inform the reading of the Namibian constitution. A failure of Namibia’s colonial history to inform the interpretation of the Constitution could witness a repeat of that dark history. Accordingly, the significance of constitutional values of human dignity and equality is that they are regarded to be the very ‘antithesis of those features which defined apartheid’.⁹⁰

The commitment to the principle of equality is not only guaranteed in the Constitution, but also, the Namibian courts have in the past 24 years been called upon to interpret the provisions of *Article 10* of the Constitution. I will now deal with how courts have approached and interpreted the foundational value and constitutional right of equality.

In *S v Van Wyk*⁹¹ the court (per Ackerman AJA) made reference to several constitutional provisions, including *Article 10* and *Article 23*, related to equality and the ideology of apartheid and concluded that those provisions,

⁸⁸ K Govender 2009 ‘The Developing Equality Jurisprudence in South Africa’ 107 *Michigan Law Review* p 120.

⁸⁹ *Article 23(1)* of the Constitution provides:

The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

⁹⁰ See M Chaskalson *et al* (eds) 1999 *Constitutional Law of South Africa* chapter 14.

⁹¹ 1993 NR 426 (SC).

[D]emonstrate how deep and irrevocable the constitutional commitment is to, *inter alia*, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences.⁹²

In a concurring judgment Mahomed AJA (as he then was) noted that-

[T]hroughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread- an abiding “revulsion” of racism and apartheid. It articulates a vigorous consciousness of the suffering and wounds which racism has inflicted on the Namibian people “for so long” and a commitment to build a new nation “to cherish and to protect the gains of our long struggle” against the pathology of apartheid. I know of no other constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity.⁹³

Some of the cases in which the Namibian courts have pronounced themselves regarding the context of the equality principle in the Constitution include *Government Republic of Namibia & Another v Cultura* 2000;⁹⁴ *S v Vries NO & Others*;⁹⁵ and *Kauesa v Minister of Home Affairs*.⁹⁶ What is notable through these cases is that the commitment to the principle of equality and the repudiation of the apartheid policies is not only acknowledged and entrenched in the Constitution, but that the Namibian courts have also attempted to give effect to these constitutional provisions. Having discussed the historical context of the equality principle in the Namibian Constitution, I now turn to address the question of how the Namibian courts have interpreted *Article 10* of the Constitution.

⁹² At 452I.

⁹³ At 456G-H.

⁹⁴ 1993 NR 328 (SC) at 332 H-I as per Mahomed CJ.

⁹⁵ 1996 NR 367 (HC) at 371C-D as per Frank J.

⁹⁶ 1994 NR 102 (HC) at 143 as per O’Linn J.

2.5.4 Judicial Enforcement of Article 10(1) of the Constitution

Determining the contours and actual content of the equality principle has often proved difficult. In both the legal and political spheres the notion of equality has had potential to mean different things to different people. In *S v Vries* the court as per O'Linn J acknowledged the complex nature of the principle of equality. There it was expressed as follows:

Equality before the law remains a concept fraught with difficulty in interpretation as well as application. It is, as in most of the other fundamental rights, not precisely defined in the Constitution and the court must therefore define its content, and limitations.⁹⁷

Notwithstanding the complex task of defining equality, there has been a steady development of equality jurisprudence in Namibia since independence.⁹⁸ On several occasions the Namibian courts have been called upon to interpret *Article 10* of the Constitution. Below I analyse some cases that have dealt with the right to equality.

In *S v Scholtz*⁹⁹ the question was whether the non-disclosure of some witness statements to the defence was unconstitutional. In the case *Article 10* was relied upon to advance the principle of 'equality between the prosecution and the defence'. Accordingly, the equality clause was used to guide the interpretation of the right to a fair trial.¹⁰⁰ In *S v Ganab*¹⁰¹ the court held that it was unconstitutional to

⁹⁷ 1998 NR 316 (SC) at 276G-H (concurring judgment)

⁹⁸ For an illuminating overview of the equality jurisprudence in Namibia see D Hubbard 'The paradigm of equality in the Namibian Constitution: concept, contours and concerns' in Bosl, Horn, N & Du Pisani, A (eds) 2010 *Constitutional Democracy in Namibia* p 215.

⁹⁹ 1998 NR 207 (SC).

¹⁰⁰ See also *S v Nassar* 1994 NR 233 (HC) at 254-56, per Muller, where the court referred to foreign case law regarding the defence's right to access to information in the docket and relied on the equality principle.

¹⁰¹ 2001 NR 294 (HC) per Mtambanengwe J.

make it a convicted criminal's right to appeal conditional on a judge's certificate showing that there are reasonable grounds that warrants a review or appeal. The court thus concluded that the right to a fair trial was applicable until all channels available to an accused were exhausted, and that this included the right to appeal.

In *Namibia Insurance Association v Government of Namibia* the equality clause was invoked in respect of a temporary tax exemption granted exclusively to the Namibian National Reinsurance Corporation in terms of the *Namibian National Reinsurance Corporation Act*.¹⁰² It was held by the court that the exemption was not in violation of Article 10(1) of the Constitution. The court advanced two reasons for its finding.¹⁰³ Firstly, the Namibian National Reinsurance Corporation was a statutory body created to operate in the public interest and was accordingly *sui generis*. It was further explained by the court that the right to equality did not mean that 'everyone be treated the same, but simply that people in the same position should be treated the same'. Secondly, the challenged provisions were rationally connected to a defensible public interest, which was the development of a sound national insurance and reinsurance industry.

In *Detmold & Another v Minister of Health and Social Services*¹⁰⁴ Article 10(1) was used to examine the constitutionality of a provision in the *Children's Act*¹⁰⁵ in terms of which non-Namibians were prohibited from adopting Namibian children. The applicants in the matter were German citizens who were permanently resident in

¹⁰² Act No. 22 of 1998.

¹⁰³ At 18F-G, as per Teek JP.

¹⁰⁴ 2004 NR 174 (HC).

¹⁰⁵ No. 49 of 1960.

Namibia who wished to adopt a Namibian child already in their foster care but could not do so on account that *section 71(2)(f)* of the *Children's Act* prohibited the adoption of Namibian children by non-Namibians.

It was held that the provision in question was indeed in conflict with *Article 10(1)* of the Constitution which provides that 'All persons shall be equal before the law'. Accordingly, the court found that the impugned provision was unconstitutional because it impermissibly distinguished between foreign nationals and Namibians on the one hand, and on the other hand between children born of Namibian parents and given up for adoption, and children born of non-Namibian parents.¹⁰⁶ Furthermore, it was noted by the court that there was no rational connection to a legitimate government purpose that existed for the distinction between foreign nationals and Namibians, and between children born of Namibians and those born of non-Namibians when it came to adoption.¹⁰⁷

It is clear that in *Detmold's* case the equality principle was used to guide the interpretation of the adoption provision in the *Children's Act*. Since the impugned provision was found to be in conflict with a foundational value of equality, it was declared unconstitutional and invalid in its entirety. In several other cases *Article 10(1)* has been relied upon by the Namibian judiciary either to condemn or to justify certain practices.¹⁰⁸ And at several other times it has been referred to without being directly applied. The issue that needs to be addressed now is the relationship between equality and discrimination. How does

¹⁰⁶ See Hubbard *Constitutional Democracy* p 223, 224.

¹⁰⁷ At 182D-183B; *Ibid*.

¹⁰⁸ *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH).

this relationship contribute to a broader understanding of the equality principle?

2.5.5 Prohibition Against Discrimination

The relevant provision that prohibits discrimination is *Article 10(2)* of the Constitution. In terms of Article 10(2), ‘no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status’. There is fair discrimination and unfair discrimination. From the wording of *Article 10(2)*, it is unfair discrimination that is prohibited on the listed grounds.

In South Africa, discrimination has been held to be unfair by the Labour Court ‘if it is reprehensible in terms of society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what the object of discrimination is and the means used to achieve it’.¹⁰⁹ In *Prinsloo v Van der Linde and Another*,¹¹⁰ the South African Constitutional Court interpreted discrimination such that it incorporates a ‘pejorative meaning relating to the unequal treatment of people based on attributes or characteristics attaching to them’.¹¹¹

There have not been many cases in Namibia which involved the application of *Article 10(2)* of the Constitution. In the analysis of Namibia’s anti-discrimination law, I now focus on some Supreme Court decisions. *Muller v President of the Republic of Namibia & Another* is one of the earliest and most important decisions in as far as

¹⁰⁹ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BCLR 1438 (LC).

¹¹⁰ *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012.

¹¹¹ At 31.

the application of *Article 10(2)* of the Constitution is concerned. In *Muller* the Supreme Court laid down some guidelines and procedures in the application of *Article 10(2)*. At issue in the *Muller* case was that a man was desirous of adopting his wife's surname upon marriage. However, two things stood in his way. Firstly, the practice whereby women adopted the surnames of their husbands at marriage was said to be inapplicable to men. Secondly, and if he wanted to adopt his wife's surname, *section 9(1) ((2))* of the *Aliens Act* prescribed the requisite formal procedure for name-change. However, this formal procedure was not applicable to women who desired to adopt their husbands' surnames at marriage.

Admittedly, it was this differentiation that gave rise to Mr. Muller's application. His contention was that the different rules for name-change in respect of wives and husbands were an affront to *Article 10(2)* of the Constitution. Accordingly, the question for the determination of the Court revolved around the constitutionality of *section 9(1) (2)* of the *Aliens Act of 1937* which prescribed the procedure. More specifically, whether the different name-change rules for husbands and wives constituted a violation of *Article 10(2)* of the Constitution? In determining whether *Article 10(2)* was infringed, the Namibian Supreme Court did a comparative analysis of both the South African and Canadian approaches in the application of a test for differentiation on the enumerated grounds set out in *Article 10(2)*.¹¹² This was in contrast to the 'rational connection' test employed in *Mwellie* case.¹¹³ In the *Muller* case the court laid a four-stage approach in the application of *Article 10(2)*.¹¹⁴ The steps to be taken in regard to this sub-article are to determine-

¹¹² Hubbard *Constitutional Democracy* p 228.

¹¹³ *Ibid.*

¹¹⁴ At 200B-D.

- i) Whether there exists a differentiation between people or categories of people;
- ii) Whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
- iii) Whether such differentiation amounts to discrimination against people or categories of people; and
- iv) Once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of *Article 23* of the Constitution.

In defining the term discrimination it was acknowledged by the court that unfair or unjust treatment was inherent in the meaning of the word discriminate. The *Oxford Dictionary & Thesaurus of 2007* defines discrimination as ‘unfair treatment of different categories of people on the grounds of race, sex, or age; recognition of the difference between one thing and another; and good judgment or taste’.

The Court thus reasoned that in order to determine whether there was unfair discrimination, regard had to be had to the purpose of the particular discrimination; the effect of such discrimination on the victim and the previously disadvantaged members of society; and whether the particular discrimination had the effect of impairing the human dignity of the victim.¹¹⁵ With due consideration of Namibia’s discriminatory past, the Supreme Court justified the incorporation of unfairness on all grounds as enumerated in *Article 10(2)*, adding that correcting Namibia’s discriminatory past requires efforts of leveling ‘the playing field’.¹¹⁶ Otherwise failure to do this would perpetuate rather than eliminate inequalities.¹¹⁷ It was noted further that

¹¹⁵ At 203.

¹¹⁶ Hubbard *Constitutional Democracy* p 229.

¹¹⁷ *Ibid.*

whereas the affirmative action provisions¹¹⁸ covered a wide field, it was possible that this could still be insufficient to encompass all forms of past discrimination. Accordingly, the court left the door open as regards to distinctions on the enumerated grounds that could advance substantive equality and allow for positive measures in redressing past inequalities.¹¹⁹

After applying the four-stage approach to the facts before it, the Supreme Court held that the different rules for husbands and wives regarding surnames did not constitute unfair discrimination as envisaged in *Article 10(2)* of the Constitution.¹²⁰ In arriving at this decision, it appears that the following factors were a key consideration.¹²¹ Firstly, the appellant was a white male who had emigrated to Namibia after independence, and did not hail from the previously disadvantaged group. Secondly, the object of the formalities pertaining to name change was not to impair the dignity of men or to disadvantage them. Thirdly, the legislator had a clear interest as regards the regulation of surnames. Finally, the effect of the differentiation on the interests of the appellant was minimal as he could adopt his wife's surname by a procedure involving only minor inconvenience. Accordingly, the court concluded that Mr. Muller's right to equality was not violated.

In *Myburgh v Commercial Bank of Namibia*¹²² *Article 10(2)* of the Constitution was again at the centre of a fierce legal battle. At issue in this matter was the marital power of a husband over his wife where the marriage was in community of property. In terms of the marital

¹¹⁸ Article 23 of the Constitution provides as follows:

¹¹⁹ At 198B-F, 201C-H.

¹²⁰ At 198B-F; 201C-H.

¹²¹ At 203G-204F.

¹²² 2000 NR 255 (SC).

power doctrine, wives who were married in community of property could not sue or be sued on their own on account that they were regarded as perpetual minors with limited contractual capacity.¹²³ Following the test laid down in *Muller's* case, the court found that the sex differentiation was tantamount to unfair discrimination and was accordingly an infringement of *Article 10(2)* which proscribes discrimination on grounds of sex. It appears the key factors that were decisive in the finding of the court was that women were a previously disadvantaged group and that the differentiation in question was inspired by stereotyping that has always refused to accept the 'equal worth of women' and injured their dignity as individuals and as a group.¹²⁴

I submit that the Supreme Court's equality jurisprudence discussed above was undermined by its decision in *Chairperson of the Selection Board v Frank & Another*.¹²⁵ Admittedly, the Supreme Court's decision in *Frank's* case raises a legitimate question regarding the Court's commitment to the foundational value of equality. The Supreme Court was called upon to interpret *Article 10(2)* of the Constitution. The *Frank* case involved an application for permanent residence to the Immigration Selection Board by a foreign national who was in a lesbian relationship with a Namibian citizen. This application was declined by the Immigration Selection Board. Following the Immigration Selection Board's decision, and aggrieved that her constitutional right to equality was infringed, Ms. Frank approached the High Court for relief. The applicant's case was that had she been in a heterosexual relationship with a Namibian citizen she could have married and would have been granted a residence

¹²³ Marital power was abolished by the *Married Persons Equality Act* No 1 of 1996.

¹²⁴ At 265H-266J, per Strydom CH; Hubbard p 230.

¹²⁵ 2001 NR 107 (SC).

permit. She accordingly claimed that she was a victim of discrimination on the grounds of sex and that this was a flagrant violation of *Article 10* of the Constitution. She further claimed that several of her constitutional rights were infringed. Some of these rights were, inter alia, her right to family protected by *Article 14*; and her right to privacy in *Article 13(1)* of the Constitution.

The court *a quo* agreed with her and found that she was discriminated against on the grounds of sex. The court thus directed that she be granted a permanent residence permit. It was against this ruling that the appellants appealed the High Court decision. In overturning the High Court decision, the Supreme Court made several findings that may be considered problematic. First and foremost, as regards the respondent's claim that her right to family was infringed, the Court ruled that *Article 14* was inapplicable on account that 'family'-

envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race.¹²⁶

Secondly, in respect of her claim that she was discriminated against on grounds of sex, the court observed that 'sexual orientation' was not encompassed by the term sex in *Article 10(2)* of the Constitution. The court held as per Frank AJA that-

Whereas the word 'sex' can be defined as 'being male or female', or 'males or females as a group', 'sexual orientation' could encompass in theory 'any sexual attraction of anyone towards or anything'.¹²⁷

¹²⁶ At 146F-G.

¹²⁷ At 146G-H.

As regards *Article (10) (1)* the court made an interesting and controversial finding, concluding but without explaining why, that there was no ‘unfair’ discrimination because ‘equality before the law for each person does not mean equality before the law for each person’s sexual relationships’.¹²⁸ Interestingly, the court made another startling finding in determining whether the respondent’s right to dignity was impaired. The court observed that the state’s failure to accord the same treatment in respect of a permanent residence permit to ‘an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage’ when compared to ‘a recognised marital relationship’ only amounts to differentiation, but not discrimination.¹²⁹

Having regard to the fact that the Namibian Constitution makes the respect for human dignity and equality the cornerstone of the values it promotes and protects, the Supreme Court decision in the *Frank* case is problematic for several reasons. It also raises a legitimate question as to whether Namibia’s Supreme Court takes rights seriously. In considering whether the respondent was discriminated against on the grounds of sex, the Court found that the term sex in *Article 10(2)* precluded ‘sexual orientation’. The Court reasoned further that the right to family established in *Article 14* was inapplicable to the respondent. This was because the term family, in the Court’s view, could only be constituted by a heterosexual union between a man and a woman.

First of all, it is trite that gays and lesbians are a minority that have endured discrimination in the past, and continues to suffer from discriminatory practices to this day. Unfortunately, the Supreme

¹²⁸ At 155E-F.

¹²⁹ At 155I-156C.

Court ignored the fact that lesbians and gays have often been treated as less human on account of their different lifestyles when compared to those in heterosexual relationships. The status of gays and lesbians was well articulated in the South African case of *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*,¹³⁰ where the following was said, as per Ackermann J:

Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.

This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

It is unfortunate that the Supreme Court did not follow its equality jurisprudence laid out in previous decided cases as a guide in making its ruling. Accordingly, the Court failed to acknowledge the fact that gays and lesbians as a group and as individuals have been victims of discrimination for too long and that as a minority they require the protection of their constitutional rights by the courts. This failure made it impossible for the court to have accepted that the alleged

¹³⁰ 2000 (2) SA 1 (CC).

‘discrimination affected a previously disadvantaged group, which is also currently disadvantaged’.¹³¹

Secondly, it has also been held in previous cases¹³² that when construing constitutional provisions that a ‘broad, liberal and purposive’ approach should be preferred. Again, instead of following its jurisprudence in this regard, the Supreme Court employed a restrictive interpretation in its definition of the term family in *Article 14*, and thus excluded same sex relationships.¹³³ The same restrictive interpretation approach led the court to construe the term sex as precluding ‘sexual orientation’.¹³⁴

Thirdly, another problem with the approach in the *Frank* case is that the constitutional values underpinning Namibia’s legal order were not relied upon to inform the Court’s interpretation or approach. Rather than looking at Namibia’s foundational values such as respect for human dignity, equality etc., the Court provided a long list of what it considered reliable sources of information on values and thus a guide to interpretation. These sources are: Parliament, courts, tribal authorities, common law, statute law, tribal law, political parties, news media, trade unions, ‘established Namibian churches’, and other ‘relevant community-based’ organisations’. What is important is that all these sources comply with the Constitution.

¹³¹ Hubbard *Constitutional Democracy* p 239; *National Coalition* at par 42, as per Ackermann J.

¹³² *Minister of Defense v Mwandingi; Government of the Republic of Namibia v Cultura 2000; Namunjepo & Others v Commanding Officer, Windhoek Prison* etc.

¹³³ G Coleman and E Schimming-Chase 2010 ‘The Constitutional Jurisprudence in Namibia since Independence’ in Bosl, Horn & Du Pisan (eds) *Constitutional Democracy in Namibia* p 207 208.

¹³⁴ *Ibid.*

2.5.6 *S v Mushwena*: Implications for the rule of law and the Right to a Fair Trial

The right to a fair trial is dealt with under *Article 12* of the Constitution and covers a wide range of rights that are said to constitute a fair trial. These include the right to receive a fair and public hearing before an ‘independent, impartial and competent court’;¹³⁵ the right to be tried ‘within a reasonable time’;¹³⁶ the right to be presumed innocent until proven guilty according to law;¹³⁷ the right not to adduce self-incriminating evidence, and that ‘no Court shall admit in evidence against such person’s testimony which has been obtained from such persons in violation of *Article 8(2) (b)*’.¹³⁸ The Supreme Court decision in *Mushwena* appears to have serious implications for the rule of law and the right to a fair trial.¹³⁹

In *S v Mushwena*, the accused persons were charged with, among other offences, high treason, sedition, public violence, unauthorized possession of firearms and ammunitions, murder, and attempted murder. All these charges emanated from an incident that occurred at Katima Mulilo in the Zambezi Region whereby government institutions and installations were attacked by groups of men who attempted to secede Caprivi from Namibia. This event resulted in the deaths of several people and damage to properties. All accused persons alleged that they left Namibia and entered Botswana illegally, where they were granted political asylum and accommodated as refugees. They admitted that on various dates during 1999, most of them left those refugee camps. They were subsequently apprehended by the

¹³⁵ *Article 12(1) (a)*.

¹³⁶ *Article 12(1) (b)*.

¹³⁷ *Article 12(1) (c)*.

¹³⁸ *Article 12(1) (f)*.

¹³⁹ It is noted here that the Supreme Court decision in *S v Mushwena* has surprisingly received very little academic attention and scrutiny.

Zambian authorities in Zambia at various locations and times and handed over to the Namibian authorities.

At their first arraignment, they resisted the High Court's jurisdiction to try them, arguing that their apprehension in and abduction from Zambia and Botswana respectively, and their eventual deportation to Namibia and their arrest and detention there were in flagrant violation of international law, unlawful, and that they were not properly and lawfully before court to stand trial on charges brought against them. They argued further that the Namibian authorities had connived with their Zambian counterparts in the abductions.

The presiding judge, Hoff J declined jurisdiction to try accused persons for high treason for the reason that they had been brought from Botswana and Zambia without following the requisite extradition procedures and ordered their release. The Supreme Court overturned the High Court decision with a slim majority of three judges out of five.¹⁴⁰ Strydom ACJ and O'Linn AJA dismissed the appeal in respect of most of the accused persons, while the majority of the Court allowed the appeal.¹⁴¹

In upholding the appeal and writing the majority decision Mtambanengwe AJA, in what can be noted as one of the most impoverished judgments in reasoned exegesis in as far as Namibia's foundational principles and values are concerned, set aside the order of the court *a quo* and remitted the matter back to the High Court for the trial of the respondents to proceed. He relies on public interest as a

¹⁴⁰ Coleman & Schimming-Chase *Constitutional Democracy* p 208.

¹⁴¹ *Ibid.*

key consideration for his decision. In his only reference to human rights and without any actual balancing of the rights, he states:

[W]hen one considers the question of human rights, care must be taken to balance the rights of the accused against those of victims of their actions. We have in this case antecedent circumstances where people lost their lives and property was destroyed as a result of the incident at Katima Mulilo on 2 August 1999. The public interest that those responsible must be brought to justice is a very weighty counter in the balance.¹⁴²

In a host of cases reviewed above, the Supreme Court often invoked respect for human dignity as a guide to constitutional interpretation. Sadly, the Court abandoned its dignity jurisprudence and relied heavily on foreign case law as justification for its decision. In the affidavits for the respondents, there is sufficient evidence that *Article 8* of the Constitution was violated in their procurement as they were bundled over the border by security agents of the respective countries. *Namunjepo* affirmed the inviolability of *Article 8*. Furthermore, the Court ignored the exhortation of *Article 8(2) (a)* which provides that,

In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.¹⁴³

The Constitution prescribes that human dignity ought to be guaranteed in all judicial proceedings and even during the enforcement of penalties. Regrettably, whereas the Supreme Court has generally lived up to the challenge regarding the protection of human rights, it failed to do so in *Mushwena's* case. Unless the Supreme Court of Namibia can consistently guarantee human dignity as a foundational value and principle in all judicial decisions, the citizens' right to 'equal concern and respect' will ring as a hollow constitutional

¹⁴² At 419G-I.

¹⁴³ *Article 8(2)(a)*.

promise and will accordingly render the notion of equality before the law merely a political gimmick. In turn, this will further entrench the suspicion that not all are equal before the law despite constitutional guarantees to the contrary.

In Dworkin's view, the importance of judges and the courts is that they are particularly concerned, unlike other organs of state, 'with the safeguarding and enforcement of rights and with the interpretation of law in terms of principle'.¹⁴⁴ Whereas the concern to 'safeguard and enforce' the appellants' rights was apparent in the High Court, this concern was non-existent in the Supreme Court. In allowing the appeal, the Supreme Court relied heavily on bad foreign case law to justify its finding and thus exonerate the conduct of Namibia's security forces. As the minority decision demonstrates, there is plenty of foreign case law that would have confirmed the High Court ruling.

It is further submitted that the respondents' right to be treated equally before the law was flouted. By not applying the same standards that the Court previously invoked, the respondents' right to be treated equally before the law was ignored. This demonstrates the Court's inconsistent approach in the interpretation and application of constitutional values. *Mushwena* raises a legitimate question as to when a court of law may have regard to the values and norms underpinning the Constitution? Should courts pick and choose in which cases to be guided by the constitutional values? So much is often made by attacks on the Constitution by politicians. However, it is submitted that the most dangerous attack on the Constitution is when judges undermine the Constitution by not upholding its values consistently as per their judicial oath. In *S v Acheson* Mahomed AJA

¹⁴⁴ *Ibid.*

underlined the importance of constitutional values in judicial decision making. He stated thus,

The spirit and tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.¹⁴⁵

Importantly, Justice Mahomed went on to identify some constitutional values that were crucial in the exercise of his discretion. He said,

Crucial to that tenor and that spirit is its insistence upon the protection of liberty in *Article 7*, the respect for human dignity in *Article 8*, the right of an accused to be brought to trial within a reasonable time in *Article 12(1)(b)*, and the presumption of innocence in *Article 12(1)(d)*.¹⁴⁶

The *Mushwena* case also undermines the Court's commitment to the notion of the rule of law and runs counter to the judicial oath. As extensively demonstrated by O'Linn AJA in the minority judgment *Namibia, Zambia, and Botswana*¹⁴⁷ have extradition treaties in terms of which the respondents could have been requested. Notwithstanding the existence of these extradition treaties between the respective countries, no extradition procedures were followed and it is clear that the officials of the respective countries did not intend follow neither deportation nor extradition procedures. Notwithstanding the overwhelming evidence to the contrary, it is startling how Gibson AJA drew her conclusion in her supporting note of the majority decision. She concluded that

there was no act of lawlessness committed by either Zambia or Botswana with the knowledge or concurrence of Namibia such

¹⁴⁵ At 10A.

¹⁴⁶ At 10B.

¹⁴⁷ *Botswana Extradition Act*, No. 18 of 1990; *Namibia Extradition Act*, No. 11 of 1996; and *Zambia Extradition Act*, Chapter 94 of the laws of Zambia.

as to disentitle Namibia from assuming jurisdiction as a receiving state.¹⁴⁸

Chomba AJA's *dicta* in respect of breaches of international law and the respondents' human rights is more troubling. He chillingly contends:

I readily concede that there are many celebrated decided cases in many countries including South Africa and United Kingdom in which the plea of lack of jurisdiction by courts of trial has succeeded grounded on the principle that the accused's rendition to the country of trial was unlawful in as much as the laws of deportation or extradition had not been complied with by the surrendering countries. *However, in the situation which presents itself in the appeal before us, to use that rationale would not, in my considered opinion, meet the tenets of justice. In this day and age when the world has been and continues to be ravaged by terrorist activity it is otiose to apply that rationale (Emphasis added).*¹⁴⁹

More disconcerting is Judge Chomba's views regarding human rights protection. He opines:

Furthermore, I think that the human rights of fugitives from the law should not be considered by courts to be of prior concern over those of victims of terrorism whose security remains endangered as long as the fugitives remain at large.¹⁵⁰

The above *dicta* can hardly be consistent with the judicial oath in terms of which judges undertake to uphold the Constitution. The only reasonable conclusion that can be drawn is that this was a deliberate attempt by the security agents to circumvent the protection of the accused persons' rights. Sadly, the Supreme Court condoned their conduct. It is inconceivable and rather paradoxical for the Court to

¹⁴⁸ At 433B.

¹⁴⁹ At 268E-F.

¹⁵⁰ At 269G-H.

claim to be acting in accordance with the law whilst promoting lawlessness.

To conclude this part, some observations about *Mushwena* and the right to a fair trial will be in order. First of all, the flagrant disregard for the rule of law displayed in *Mushwena's* case raises a critical question about the prospects of fair trial in the ongoing *Caprivi* Treason case. Clearly the state was allowed to bend the law for its purposes and as a result the respondents' human rights were violated. From the above *dicta* by Mtambanengwe AJA and Chomba AJA, the right to be presumed innocent until proven guilty by a court of law was undermined. It is clear that both justices referred to respondents in the matter as 'terrorists'. Had this matter been prosecuted timeously and in the event of an appeal, it would have been expected for these two justices to have recused themselves having prejudged the respondents.

Another criticism relating to the *Caprivi* Treason trial that has received much media attention pertains to the delays associated with the trial.¹⁵¹ In terms of *Article 12(1) (b)* of the Constitution, 'A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released'. In *Malama-Kean v Magistrate for the District of Oshakati NO & Another*¹⁵² it was held that a delay of approximately 14 months could be regarded as unreasonable and that an accused was entitled to release from strict bail and conditions as well as from prosecution.¹⁵³ In the *Caprivi Treason* trial however, the accused persons are in

¹⁵¹ See for example http://www.irinnews.org/Report/45299/NAMIBIA_Caprivi_treason_trial_delay_unacceptable_says_Amnesty.

¹⁵² 2001 NR 268; 2002 NR 413 (SC).

¹⁵³ Coleman & Schimming-Chase *Constitutional Democracy* p 205.

custody since their arrest in 1999. Fourteen years after their arrest, accused persons are still in detention.¹⁵⁴ This raises real concerns about the fairness of the trial in terms of the Constitution.¹⁵⁵

2.6 Towards a Constructive Interpretation of Rights

In section 2.3.1 I enumerated the Fundamental Rights and Freedoms entrenched in the Namibian Constitution. In section 2.4 I highlighted how the Supreme Court of Namibia has interpreted these fundamental rights and freedoms. The question I ponder in this section is whether the exclusion of socio-economic rights undermines the transformative goals of the Constitution.

2.6.1 Social Justice

From the formulation of the preamble to the Namibian Constitution it can be deduced that social transformation is at the heart of Namibia's new legal order. The Constitution promises to build a society founded on respect for the rule of law, democracy, respect for human dignity and equality. Without doubt, the protection and promotion of civil and political rights is pivotal for post-colonial narrative in Namibia. Nonetheless, unless the lives of ordinary Namibians improve both socially and economically, the civil and political rights may be undermined. Accordingly, the constitutional promise of 'securing to all our citizens justice, liberty, equality and fraternity'¹⁵⁶ may remain a myth to most Namibians. This is so on account that whilst the

¹⁵⁴ It must be pointed out also that the conduct of the accused persons in this trial has been unhelpful. On several occasions the accused persons in this trial have refused to co-operate with the authorities, thus also creating delays in the trial.

¹⁵⁵ Forty-three of the accused men were acquitted on the 11th of February 2013. Judge Hoff cited lack of evidence in irinnews.org/Report/45299/NAMIBIA_Caprivi_treason_trial_delay_unacceptable_says_Amnesty_discharging_the_men.

¹⁵⁶ Preamble to the Namibian Constitution.

Namibian Constitution sings loudest on civil and political rights by their entrenchment, it does not entrench socio-economic rights. There are contradictory views on whether the Namibian Constitution entrenches socio-economic rights. It has been generally acknowledged that Namibia's fundamental rights and freedoms emanates from the 1948 Universal Declaration of Human Rights.¹⁵⁷ Carpenter submits that

The rights enumerated in the (Namibian Bill of Rights) are confined to the so-called first-generation or traditional human rights. The second and third generation rights do not feature in the Constitution, but only as principles of state policy (chapter 11) and not as judicially enforceable rights.¹⁵⁸

Interestingly, the above viewpoint has been somewhat contradicted by Naldi who claims that,

Chapter 3 of the (Namibian) Constitution is not solely concerned with civil and political rights but also seeks to protect certain economic, cultural and socio-economic rights, generally referred to as second generation rights in international law, albeit in a somewhat limited and modest fashion.¹⁵⁹

Notwithstanding Naldi's viewpoint expressed above, it is indisputable that the Namibian bill of rights pays little attention to socio-economic rights.¹⁶⁰ It is submitted that what may well be described as socio-economic rights in the Namibian Bill of Rights are the children's rights¹⁶¹ and the right to education.¹⁶² The right to property¹⁶³ may

¹⁵⁷ JC Mubangizi 2006 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' 2 *African Journal of Legal Studies* 1 p 8.

¹⁵⁸ G Carpenter 1991 'The Namibian Constitution-ex Africa Aliquid Novi After All?' in Van Wyk *et al* (eds) *Namibia: Constitutional and International Law Issues* p 32.

¹⁵⁹ GJ Naldi 1995 *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* p 96.

¹⁶⁰ Mubangizi *African Journal of Legal Studies* p 9.

¹⁶¹ *Article 15.*

¹⁶² *Article 20.*

also be included in this category. Other than that, the Namibian Constitution does not expressly provide for socio-economic rights. I agree with Fourie who contends that, ‘the authors of the Constitution chose to handle economic (and social) matters outside the rights context and specifically as policy goals’.¹⁶⁴

It is generally accepted that what would ordinarily be classified as socio-economic rights have been catalogued as policy goals in Chapter 11 of the Constitution under the rubric ‘Principles of State Policy’. In terms of *Article 95* of the Constitution particularly, the State is called upon to promote and maintain the welfare of the people actively through the adoption of, among others, policies aimed at:¹⁶⁵ ensuring that the health and strength of the workers are not abused; ensuring that citizens are not compelled by economic needs to enter vocations unsuited to their age and health; promoting the formation of trade unions so as to protect the rights and interests of workers; promoting sound labour relations; ensuring that citizens have a right to a fair and reasonable access to public facilities and services; and ensuring that senior citizens receive pension for their maintenance etc.¹⁶⁶

It has been rightly argued that the principles enumerated in Article 95 of the Constitution generally constitute what is often referred to in international human rights law as second and third-generation rights,¹⁶⁷ and that they are not constitutional rights in the context of

¹⁶³ *Article 16.*

¹⁶⁴ F Fourie 1990 ‘The Namibian Constitution and Economic Rights’ 6 *South African Journal on Human Rights* 363 p 365.

¹⁶⁵ Mubangizi *African Journal of Legal Studies* p 9.

¹⁶⁶ Principles of state policy are articulated in Article 95(a-1) of the Constitution.

¹⁶⁷ *Ibid.*

Namibia.¹⁶⁸ As the rubric suggests, these are ‘principles of state policy’ without any force of law. The Constitution makes it clear that

[T]he principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.¹⁶⁹

It is submitted that in as much as human rights are recognised as ‘universal, indivisible, and interdependent’,¹⁷⁰ it may take long for the Namibian society to be truly transformed because the Constitution does not entrench socio-economic rights. The African Charter on Human and Peoples’ Rights¹⁷¹ also acknowledges that the ‘satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights’.¹⁷² Given the fact that human rights are universal, indivisible and interdependent, what does this mean for Namibia which does not entrench socio-economic rights? Does this mean social transformation can never be attained in Namibia? I now consider how a Dworkinian approach of constructive interpretation of liberal rights could also include socio-economic transformation.

2.6.2 Constructive Interpretation of Liberal Rights

Notwithstanding the fact that the Namibian Constitution does not entrench socio-economic rights, the social and economic conditions of individual citizens can still improve. One way of achieving this is through government programs and schemes aimed at giving effect to

¹⁶⁸ *Ibid.*

¹⁶⁹ Article 101 of the Constitution.

¹⁷⁰ ‘Vienna Declaration and Programme of Action’ (12 July 1993) UN Doc. A/CONF.157/23 art 5.

¹⁷¹ The African Charter, also known as the Banjul Charter, was adopted on the 17th of June 1981 and entered into force 21 October 1986.

¹⁷² The preamble to the African Charter on Human and Peoples’ Rights (1986).

the principles of state policy articulated in Article 95 of the Constitution.¹⁷³ Notwithstanding all government efforts to improve the social and economic conditions of all Namibians, inequalities and the unequal distribution of wealth remains a characteristic feature of the Namibian society. Angula¹⁷⁴ recently conceded that the government had failed in its quest for the equitable distribution of wealth to all Namibians. He stated:

We have forgotten our historical mission as Swapo Party of fair and equitable distribution of wealth, which should have been the bed rock of our policies. This remains a challenge for the new crop of our politicians. Social transformation was a priority as we made out of apartheid for it to make meaning it had to be guided by social values which are equitable distribution of resources to all.¹⁷⁵

It is submitted that as long as these inequalities persist in society, transformative goals and constitutional rights as expressed in the Constitution will merely remain a political gimmick without any real significance on people's lives. It is conceded that the incorporation of justiciable socio-economic rights into the bill of rights does not necessarily mean that they would be justiciable and enforceable. For example, the Constitution provides, among other things, that

*[P]rimary education shall be compulsory and the state shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.*¹⁷⁶

¹⁷³ National Planning Development (NPD)1-4 and Vision 2030 for example, can be understood as geared towards improving the social and economic conditions of all Namibians.

¹⁷⁴ Nahas Angula is a former Prime Minister of Namibia, and is currently Namibia's Minister of Defence. His remarks were made in the *Confidante* Newspaper of 17-27 March 2013 (Independence Day Special Edition).

¹⁷⁵ These remarks were made in the *Confidante* Newspaper (In my possession) of 17-27 March 2013 (Independence Day Special Edition).

¹⁷⁶ *Article 20* of the Constitution.

Sadly, for 23 years after independence, this constitutional right was never enforced by government, and neither has the lack of enforcement resulted in a court challenge to compel government to comply with the provisions of *Article 20* of the Constitution.¹⁷⁷

Another approach through which socio-economic transformation may be realized in Namibia is through Dworkin's notion of constructive interpretation of liberal rights. I tentatively consider if Dworkin's approach of law as integrity could address the lack of the inclusion of socio-economic rights in the Namibian Constitution. Constructive interpretation, for his approach, entails adopting an interpretation of a practice that shows it in its best light.¹⁷⁸ In Dworkin's view, the purpose of a practice ought to be its main guide in the determination of what constitutes 'the best light'.¹⁷⁹ In the event that there are several competing interpretations of a practice, Dworkin's constructive interpretation calls for a morally superior interpretation to be preferred over any alternative interpretation. If anyone at all is asked what would be the best decision, the morally inferior, the morally better, the morally best, he must surely answer (with surprise at the question) the morally best! But how does this apply to the interpretation of liberal rights so as to include socio-economic rights?

When Dworkin's notion of constructive interpretation and law as integrity is transposed to the interpretation of civil and political rights, it could be understood to include socio-economic transformation as well. If it is accepted that human rights are 'universal, indivisible and interdependent', it should be accepted also that a constructive

¹⁷⁷ Cabinet has since directed the Ministry of Education to introduce universal free education in compliance with Article 20 of the Constitution with effect from January 2013. See *the Namibian Newspaper* of Wednesday 09 January 2013.

¹⁷⁸ Dworkin *Law's Empire* p 52.

¹⁷⁹ *Ibid.*

interpretation of civil and political rights includes socio-economic reforms. Though the Namibian Constitution does not entrench socio-economic rights, I want to suggest that the principles of state policy articulated in *Article 95* of the Constitution are aimed at giving effect to civil and political rights in the Constitution by improving the socio-economic conditions of all Namibians. If my interpretation of *Article 95* is correct, a meaningful enjoyment of the right to dignity, equality, life and other underlying constitutional values would not preclude socio-economic conditions. For example, *Article 98* of the Constitution recognises the importance of economic growth for the human dignity of the Namibian people. It provides as follows:

- (1) The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians.¹⁸⁰

The implications of a constructive interpretation of the Namibian Constitution is that courts must have regard to rights and moral values that may go far beyond what has been posited by the Constituent Assembly.

Furthermore, although the principles of state policy are not legally enforceable by virtue of *Article 101*, courts are nonetheless ‘entitled to have regard to the said principles in interpreting any laws based on them’.¹⁸¹ Clearly, this seems to me to be an invitation for constructive interpretation. Constructive interpretation would therefore recognise the universality, indivisibility and interdependence of human rights

¹⁸⁰ *Article 98(1)* of the Constitution.

¹⁸¹ *Article 101* of the Constitution provides as follows:

‘The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them’.

and that the right to dignity, equality before the law and life would be less meaningful amidst indigence, poor living and working conditions, unemployment, lack of access to health facilities etc. It is in this regard therefore that a constructive interpretation of the Namibian Bill of Rights would be construed to include socio-economic rights. Essentially, constructive interpretation calls on the judiciary to be activist through creative interpretation.

My paradigm case of how the Supreme Court of Namibia could go about constructively interpreting the Constitution is *Government of the Republic of Namibia & Others v Mwilima & Others*.¹⁸² I must admit though that there may not be too many opportunities for creative interpretation by the Supreme Court. However, when these opportunities come, the Namibian courts should be activist in their approach to give effect to civil and political rights.

In the *Mwilima* case the Supreme Court was called upon to decide whether government was constitutionally bound to provide legal aid to the respondents to ensure a fair trial as guaranteed in *Article 12(1) (e)* of the Constitution. The respondents in *Mwilima's* case matter were applicants in the court *a quo* and were trial awaiting prisoners on some 278 counts. The applicants had applied to the Directorate of Legal Aid for assistance. Their applications for legal aid were informed by the seriousness and the complexity of the charges they were facing. Both the acting Director of Legal Aid and Permanent Secretary in the Ministry of Justice deposed affidavits to the effect that the applications for legal aid could not be entertained 'due to a lack of both financial and human resources'.¹⁸³ In light of the stance of the respondents, the applicants approached the High Court of Namibia for

¹⁸² 2002 NR 235 (SC).

¹⁸³ At par. 9.

relief, seeking to compel the respondents to provide legal aid. In the court *a quo* the main thrust of the applicants' attack was directed at the *Legal Aid Amendment Act*.¹⁸⁴ The pertinent provisions are sections 4 and 5 which removed the discretion of the court to issue a certificate which, under certain circumstances, would oblige the Directorate of Legal Aid to grant legal aid to an accused.¹⁸⁵ The effect of the amendment was that the granting of legal aid was now the sole discretion of the Director of Legal Aid. The applicants further claimed that the Legal Aid Amendment Act threatened their constitutional right to a fair trial¹⁸⁶ and their right to equality before the law.¹⁸⁷ The applicants were successful in the court *a quo* and the Director of Legal Aid was directed to provide legal aid to the applicants in order 'to enable them to have legal representation for the defence of all the charges brought against them'.¹⁸⁸

Following the High Court judgment and order, Government¹⁸⁹ then launched an appeal in the Supreme Court in respect of the whole judgment and order. The applicants' main argument in the Supreme Court was that *Article 95(h)* of the Constitution limited government liability to grant legal aid to indigent accused persons, regard being had to the resources of the state. It was further contended on behalf of government that the court *a quo* erred in its finding that the issue was

¹⁸⁴ Act No 17 of 2000.

¹⁸⁵ I am inclined to believe that the *Legal Aid Amendment Act* of 2000 came about in anticipation of the Caprivi Treason trial.

¹⁸⁶ The relevant constitutional provision which the applicants claimed was Article 12(1)(e) which provides as follows:

'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice'.

¹⁸⁷ The right to equality before the law is protected by Article 10 of the Constitution.

¹⁸⁸ At 2A-B.

¹⁸⁹ Article 95(h) is one of the principles of state policy and aims at providing 'a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the state'.

‘not the resources available to the Ministry of Justice through the Department of Legal Aid, but the resources of the state which were at stake’.¹⁹⁰ Further to that, the government contended also that the effect of the order of the court a quo was that the judiciary now usurped the function of the legislature which has the exclusive preserve to allocate funds to different ministries. Accordingly, so the argument went, it was inappropriate for a court to make an order compelling government to provide legal aid.

It seems that the key consideration in the Supreme Court decision in the *Mwilima* case was the question whether the accused persons would receive a fair trial in the absence of legal aid being granted. While the Court acknowledged that the resources of the state were not limitless, and while acknowledging that any attempt by a court of law to compel government to increase legal aid amounts might be an encroachment on the domain of the legislature, the Supreme Court nonetheless dismissed the appeal.¹⁹¹

The Supreme Court underscored that the right to legal representation was a firmly entrenched principle in the Constitution. The Court noted two principles undergirding the right to legal representation. These were the principle that an accused person is entitled to a fair trial and the foundational principle of equality before the law protected under *Article 10* of the Constitution. In a rare move of ‘constructive interpretation’ of the equality principle (that it could be interpreted to include the socio-economic conditions of the Namibian people) the Court held, as per Strydom CJ,

¹⁹⁰ At 41A-C.

¹⁹¹ At 53C-D.

Equality pervades the political, social and economic life of the Republic of Namibia. A reading of the Constitution leaves one in no doubt as to what is intended to be achieved for the people of Namibia to live a full life based on equality and liberty. It is in this light that article 12 should be looked at and interpreted in a broad purposeful way.¹⁹²

In light of the above, the Court noted that while statutory legal aid was not a right per se and was made subject to the availability of resources, *Article 12* nonetheless guaranteed a fair trial to accused persons and it was unqualified.¹⁹³ Therefore, the Court held, where the trial of an indigent accused is rendered unfair because he cannot afford legal representation, there was an obligation on the government to make available such legal aid.¹⁹⁴ However, the obligation does not arise by virtue of *Article 95(h)* of the Constitution, but it arises because of the duty to uphold the fundamental rights and freedoms.¹⁹⁵

In light of the above, the Court ruled that it was imperative for the respondents to be legally represented. What should be noted here also is that the Supreme Court also referred to international agreements binding on Namibia, particularly the International Covenant on Civil and Political Rights (ICCPR).¹⁹⁶ Accordingly, it was incumbent on Namibia to give effect to the Convention as a State Party¹⁹⁷ since it now formed part of the law of Namibia.¹⁹⁸ Admittedly, international agreements that Namibia has ratified could also be employed to

¹⁹² At 60B-D.

¹⁹³ At 75D-E.

¹⁹⁴ *Ibid.*

¹⁹⁵ At 76; Article 5 of the Constitution imposes an obligation on the executive, the legislature and the judiciary to respect and uphold the fundamental rights and freedoms protected under chapter 3.

¹⁹⁶ ICCPR. The relevant provision referred to is Article 14(3) of the Covenant.

¹⁹⁷ The Namibian Parliament acceded to this Convention on 28 November 1994.

¹⁹⁸ This is in terms of Article 63(2)(e) and Article 144 of the Constitution.

constructively interpret the Constitution so as to give effect to its transformative goals.

2.7 South African Theoretical Debates

In South Africa, the concept of social transformation as occasioned by a ‘transformative constitution’ has been widely debated, both in judicial and academic circles.¹⁹⁹ It is generally accepted that the South African Constitution²⁰⁰ has a transformative aim. Accordingly, the South African courts²⁰¹ have long considered that this aim of transformation is entrenched in the Constitution. As regards the contours and content of this transformation, there are little disagreements about what social transformation should entail in South Africa. In *City of Johannesburg v Rand Properties (Pty) Ltd*²⁰² the court held, as per Jaybhay J:

Our Constitution encompasses a transformative provision. As such, the state cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights. The full transformative power of the rights in the Bill of Rights will only be realized when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant now finds itself in particular.²⁰³

¹⁹⁹ For an array of academic articles on transformative constitutionalism in South Africa, see T Roux 2009 ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?’ *20 Stellenbosch Law Review* p 1.

²⁰⁰ *The South African Constitution*, Act 108 of 1996.

²⁰¹ For example, *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 262, it was held, ‘What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting...future’; In *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) par 157, the Court held, ‘The Constitution is a document that seeks to transform the status quo ante into a new order’.

²⁰² 2006 6 BCLR 728 (W).

²⁰³ At par. 51, 52.

From the above *dictum*, it is apparent that social transformation in South Africa takes account of the social and economic conditions of the citizens, and seeks as its object the attainment of an equal society through the redistribution of resources. Accordingly, there is a commitment in the South African Constitution to eradicate patterns of inequality occasioned by the apartheid system. Albertyn & Goldblatt expressed what transformation for a South African society based on substantive equality should entail. They submitted that this will

require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships.²⁰⁴

The former Chief Justice Langa defines this social transformation as ‘a social and an economic revolution’.²⁰⁵ However, he hastens to add that this transformation should not only entail ‘the fulfillment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action and measures’. For South Africa, those concerned with social transformation acknowledge that apartheid left the majority of citizens in poverty and with acute disparities in wealth and resource distribution, and accordingly commits themselves to the establishment of a truly equal society through the redistribution of the nation’s resources. Because, as Chief Justice Chaskalson wrote, ‘[f]or as long as

²⁰⁴ C Albertyn & B Goldblatt 1998 ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ 14 *SAJHR* 248 p 249.

²⁰⁵ P Langa 2006 ‘Transformative Constitutionalism’ 17 *Stellenbosch Law Review* 351 352. This was a prestige lecture delivered at the University of Stellenbosch on the 9th of October 2006.

these conditions continue to exist that aspiration [that is, of substantive equality] will have a hollow ring'.²⁰⁶

Returning to the discussion on transformation in South Africa, there are not many disagreements about what social transformation should entail, though transformative constitutionalism is not limited to the socio-economic dynamics of the country. Notwithstanding the above submission and conclusion, it is in respect of how this transformation is to be attained that lively theoretical debates about transformative constitutionalism have ignited in South Africa. Being the transformative document that it is, what is the best reading for the construction of the Constitution to ensure the realization of its transformative goals?

Klare,²⁰⁷ in his seminal article, 'Legal Culture and Transformative Constitutionalism', proposes a novel and radical reading strategy of the South African's legal order in terms of which the Constitution's transformative goals can be realized. The basic assumption of Klare's argument is that adjudication is a vital medium through which justice can be attained in the new South Africa. In advancing what he considers to be the role of the judiciary, he seeks to dispel the distinction between law and politics, and contends that persistent liberal legal claims that law and politics are separate domains only serves to obscure the political nature of adjudication.

By transformative constitutionalism, Klare envisages a robust long-term project of constitutional law-making, interpretation and

²⁰⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 12 BCLR 1696 (CC) par. 8.

²⁰⁷ K Klare 1998 'Legal Culture and Transformative Constitutionalism' 14 *SAJHR* 146.

enforcement dedicated to transforming South Africa's political and social institutions and power relationships. This transformation entails 'large-scale social change through non-violent political process grounded in law'.²⁰⁸ He advocates a post-liberal reading as the correct or best interpretation of the South African Constitution to achieve social transformation.²⁰⁹ To this end, Klare challenges South African lawyers and judges to abandon the fiction about the law/politics divide and embrace transformative adjudication.²¹⁰

There are fundamental problems in Klare's argument. Some of the obstacles to Klare's transformative constitutionalism have been sufficiently addressed and in detail by Roux and will be discussed below. The most obvious objection to Klare is that judges in South Africa or anywhere in the world may not be amenable to assume jurisdiction to effect the kind of wide-ranging political and socio-economic reforms that Klare advocates. This is mainly because judges do not depart from their courtrooms to canvass for social and economic issues requiring reform. But the question which arises is why not? If judges have to uphold litigants' right to equality before the law, for example, why not their right to equality in say medicine or housing? The simple argument is that there are not many opportunities for the courts to do so. Whether it is labeled timidity or conservatism, it should be borne in mind that judges only deal with matters brought before them in courts. Nonetheless, when opportunities arise for courts to bring social justice to health, housing etc. courts should indeed bring about transformation that Klare has in mind. What I consider to be scandalous is when courts have an opportunity to bring about social transformation in the spheres of health, education, housing etc. but opt to shy away.

²⁰⁸ *Ibid* p 150.

²⁰⁹ *Ibid* p 152 156.

²¹⁰ *Ibid* p 166.

Cornell and Friedman²¹¹ have also offered a compelling and critical appraisal of Dworkin and the significance of his work for the new South Africa. The two authors write out of what they admit to be a grave concern for the ‘constitutional project’ in South Africa.²¹² They raise two threats to South Africa’s constitutionalism: firstly, the apparent promotion of the executive branch of government by the ruling party while attempting to diminish the role of the judiciary; secondly, the argument or claim in some academic circles that the Constitution does not impact on the private law sphere.²¹³

The main thrust of Cornell and Friedman’s argument is that Dworkin’s work should be understood as an ‘aspirational ideal of legality’.²¹⁴ And that this ideal of legality is firmly rooted in a political morality in which integrity equals faithfulness to Dworkin’s two principles of dignity. The two principles of dignity are what Dworkin has termed the ‘principle of intrinsic value’ and the ‘principle of authenticity’.²¹⁵ In a lengthy essay the authors trace the development of the central themes in Dworkin’s legal theory and conclude by demonstrating that Dworkin’s two principles of dignity are exemplified in the South African Constitution and that the South African Constitution is ‘exemplary of precisely the aspirational ideal of legality which Dworkin’ defends in his later works.²¹⁶

Roux has also added his voice that transformative constitutionalism in South Africa can be achieved employing Dworkin’s theory of constructive interpretation, contrary to Klare’s notion of

²¹¹ Cornell & Friedman *Malawi Law Journal* 1.

²¹² *Ibid* p 2.

²¹³ *Ibid*.

²¹⁴ *Ibid*.

²¹⁵ *Ibid*.

²¹⁶ *Ibid* p 83.

transformation. In a detailed and yet critical reply to Klare's 'Legal Culture and Transformative Constitutionalism', Roux disposes of Klare's contention that for there to be transformation in South Africa, judges, lawyers and legal academics must first of all abandon 'the liberal legalist distinction between law and politics' and embrace politics in adjudication.

Roux has no objection to the envisaged legal outcomes as pointed out by Klare, admitting that they are not in conflict with the 'political values' that the South African Constitution is committed to achieve. However, Roux questions why the South African legal fraternity must first of all reject the separation between law and politics as a condition for transformation.²¹⁷ In Roux's view, and rightly so, transformative constitutionalism is still possible in South Africa without necessarily collapsing the law and politics divide.²¹⁸ He maintains that Dworkin's interpretive methodology of putting the Constitution 'in its best light' can achieve transformative constitutionalism that Klare advocates while maintaining the distinction between law and politics.²¹⁹

It seems to me that the debate between Klare and Roux might turn on the meaning of 'politics'. Dworkin does not think that law and politics are the same, nor are they different: law is a sub-branch of politics, but very importantly is that he thinks that politics is a branch of morality; he thinks, again, that judges have a political role to play in a democracy. While acknowledging that 'transformative constitutionalism' calls for innovative and novel methodologies of legal analysis on the part of the judiciary, it is doubtful whether this calls

²¹⁷ Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution' p 267.

²¹⁸ *Ibid.*

²¹⁹ *Ibid* p 259.

for judges to actively legislate beyond what is provided for in the Constitution.

Despite dissenting voices to the contrary, the import of Dworkinian scholarship has long been acknowledged in neighboring South Africa. This is not to make an argument that because Dworkin has been useful in South Africa, his theory will also be suited and applicable to Namibia. However, there are similarities between the Namibian legal system and that of South Africa. Both legal systems are tainted with an oppressive apartheid legacy. And just as occurred in South Africa, a total revolution occurred in Namibia. Both legal systems are now underpinned by a new legal order in terms of which the promotion and protection of individual human rights is paramount. Furthermore, the two countries' 'constitutional projects' are designed to ensure the correction of past wrongs, the rule of law, the promotion and protection of human rights etc. Francois du Bois acknowledges that Dworkin's theory has found application in South Africa, particularly in some cases that have dealt with freedom of expression,²²⁰ affirmative action,²²¹ equal treatment,²²² end of life decisions,²²³ and abortion.²²⁴ In light of this, a bid for comparative analysis of how Dworkin has been employed in South Africa is not misplaced. It is of utmost importance to observe that not only has Dworkin's theory been used,

²²⁰ *Holomisa v Argus Newspaper Ltd* 1996 (2) SA 588 (W) at 608, 610; *Case v Minister of Safety and Security*, *Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC) paras 23, 26, 45.

²²¹ *Public Servants Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T) at 986-7.

²²² *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) paras 126, 128; *S v Kampher* 1997 (4) SA 460 (C) para 52; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 132.

²²³ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 55.

²²⁴ *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T) at 1124.

though sparingly, in South Africa, but Dworkin himself believed that South Africa is one jurisdiction where his legal theory could be used.²²⁵

Regard being had to some connections referred to pertaining to the relevance and suitability of a Dworkinian approach to South Africa, I submit that the same relevance is applicable to Namibia. The advent of a constitutional dispensation undoubtedly marked a clear break with the colonial past, thus providing an opportunity to the Namibian judiciary for a Dworkinian approach to constitutional interpretation. To this end, therefore, to strive for an interpretation of the constitution that shows the new constitutional dispensation in its 'best' light is not only desirable but also necessary. Notwithstanding some contextual limitations inherent in Dworkin's theory when applied to jurisdictions other than the Anglo-American, I argue that Dworkin's extensive reflections on the subject of adjudication can have a bearing on the Supreme Court of Namibia's efforts to forge a model of constitutional interpretation of civil and political rights as such, but beyond that, one that could also extend to socio-economic transformation.

²²⁵ Dworkin, speaking at the University of Cape town at the start of the conference on his work said the following:

South Africa has become, I think, the outstanding example of a successful interplay between constitutional law in general, really, and political morality. This is a theme that I have tried to emphasise in my writing and lectures for too many years now, and I find again and that I refer to South Africa as an example of a place where the constitution, you might think against the odds, was just assumed to be the nerve of the new majoritarian order. It is a country that not just continues to draw upon the best tradition of an understanding of law as part of political morality, but through the work of your Constitutional Court and other courts, increasingly provides material being studied carefully around the rest of the world.

11 & 12 February 2004, University of Cape Town.

2.8 Conclusion

In this chapter I provided an overview of the dignity and equality jurisprudence of the Supreme Court of Namibia. Generally, the Supreme Court has performed well in the interpretation of civil and political rights of the Constitution. However, the Supreme Court decisions in *S v Mushwena & Others* and *Immigration Selection Board v Frank*, for example, do not engender faith in the Court's ability to interpret the Constitution creatively. It is argued that *Mushwena* and *Frank* were wrongly decided because they undermined the purpose of the constitution.

The lack of inclusion of socio-economic rights in the Namibian Constitution was also noted. If it is accepted that the Namibian Constitution has a transformative aim, the import of socio-economic rights to the transformative goals of the constitution become more important. In other words, a meaningful enjoyment of civil and political rights may well depend on improved social and economic conditions of the people. In light of the fact socio-economic rights are important for a meaningful enjoyment of civil and political rights. I made the argument that Dworkin's approach could address the failure by the Namibian Constitution to include socio-economic rights. When the right to equality and human dignity are interpreted creatively, it will be seen that they do not preclude socio-economic transformation.

Chapter Three

Ronald Dworkin's Constructive Interpretation

3.1 Introduction

In the previous chapter I discussed the constitutional jurisprudence of Namibia's Supreme Court of Appeal and the problems experienced by that Court in its quest to realize the transformative potential of the Constitution. The present chapter provides a critical appraisal of Dworkin's interpretive methodology of constructive interpretation and law as integrity as a model for constitutional interpretation. To that end, the overall research question that I address in this chapter can be formulated as follows: How can Dworkin's theory of interpretation assist the Supreme Court in addressing the nation's aspirations as contained in the Constitution?

Dworkin's legal theory has been discounted and dismissed as being theoretically too ambitious and irrelevant for purposes of practical adjudication. Some have contended that Dworkin's legal theory as outlined in *Law's Empire* bears no resemblance to legal practice, let alone an accurate description of legal practice. In contemplating to relate Dworkin's legal theory to the South African Constitutional Court, Currie remarks that,

Herculeanism is both an unrealistic and inappropriate aspiration for the South African Constitutional Court. It is unrealistic to strive for an interpretation of the Constitution that is uncontentiously the "best" justification of the legal record in a society bitterly fractured on the meaning of the Constitution and the legitimacy of the legal system's past record.¹

¹ I Currie *SAJHR* p 146.

Assuming that the Namibian Constitution² is a transformative document in limited areas of civil and political rights, I argue in this chapter that Dworkin's interpretive methodology of 'constructive interpretation' and 'law as integrity' can assist the Supreme Court of Namibia in its interpretation of the Constitution. This is underpinned by the assumption that the Namibian Constitution is committed to effecting social transformation on the basis of human dignity and equality as announced in its preamble and substantive provisions. This is against the backdrop of the fact that at independence a new legal order was established with the adoption of the Constitution. My concern in this chapter pertains to the best interpretation of the Constitution that ensures the progressive realization of its transformative goals. While I acknowledge the difficulties associated with employing a Dworkinian approach to the old legal system under apartheid, the same cannot be said about the significance of Dworkin to post-apartheid Namibia. And it is the objective of this thesis to underline some elements in Dworkin's legal theory that can add value to Namibia's constitutional jurisprudence.

It is submitted that the advent of a constitutional dispensation undoubtedly provides the Namibian judiciary with an opportunity to consider Dworkin's 'constructive interpretation' and 'law as integrity' seriously as an approach to constitutional interpretation. To this end, therefore, to strive for an interpretation of the Constitution that is aimed at 'making the law as just as it can be' is not only desirable but a constitutional imperative if the Namibian society is to be truly transformed.

² *The Constitution of the Republic of Namibia Act No 1 of 1990.*

The most important claim ever made by Dworkin and which he has defended in most of his works is that law is an interpretive concept. This is illustrated in the nature of disagreements that judges and lawyers are always engaged in. In this chapter I provide a detailed synopsis of Dworkin's legal philosophy of law as integrity and its development. To understand Dworkin's legal theory of interpretation expounded in *Law's Empire* it is imperative to examine his earlier views in *Taking Rights Seriously*. This is based on the assumption that an examination of his earlier views deepens our understanding of his interpretive program as developed in *Law's Empire*.

3.2 Dworkin's Case against Legal Positivism

3.2.1 Theoretical Disagreements and the Nature of Legal Reasoning

Dworkin's legal theory is generally acknowledged to have been prompted by what he considered to be inadequacies of legal positivism, a then dominant legal theory of law, to account for the nature of legal reasoning and judicial decision-making.³ For most of his writings thus, Dworkin develops and argues for a legal theory which in essence is a refutation of legal positivism and which he accounts for the nature of legal reasoning and legal interpretation.

As Dworkin puts it, the real target of his discussion is legal positivism in general, and particularly as theorised by Hart.⁴ Hart's *The Concept of Law* is considered the best statement of legal positivism.⁵ Before delving into Dworkin's critique of legal positivism, it is necessary to

³ See D Lyons 1977 'Principles, Positivism and Legal Theory' 87 *Yale Law Journal* p 415, 416.

⁴ HLA Hart 1961 *The Concept of Law*.

⁵ See Dworkin *Rights* p ix; Dworkin *Law's Empire* p 34

outline Dworkin's understanding of the central tenets of legal positivism. Dworkin outlines the central claims of positivism as follows:

The law of a community is a special set of rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious rules...

The set of these valid rules is exhaustive of 'the law', so that if someone's case is not clearly covered by such a rule (because there is none that is appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by applying 'the law'. It must be decided by some official, like a judge, 'exercising his discretion', which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.

To say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule that require him to do or to forbear from doing something.⁶

Dworkin's main charge against positivism is that, as a theory of law, it is inadequate. This is because, as Dworkin correctly demonstrated, there is 'more to' law than just posited rules. In Dworkin's view, underlying every legal system are legal principles to which judges often resort when legal rules are ambiguous on a matter. Accordingly, legal positivism's focus on posited law or legal rules was too simplistic and inadequate to account for the existence of other standards constantly at play in legal systems. Whereas Dworkin concurred with Hart that there are 'Hard Cases' when legal rules would be

⁶ Dworkin *Rights* p 17.

insufficient to provide solutions, he nonetheless argued that law consisted also of principles⁷ and that these principles play a pivotal role in adjudication. He contends thus:

My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important role of these standards that are not rules.⁸

In addition to posited law, Dworkin argued that judges constantly revert to standards and justifications which legal positivists might regard as 'extra-legal'. In Dworkin's view, it was desirable and necessary for judges to have regard to moral principles in their quest to achieve justice and for the proper discharge of their duties. Accordingly, legal positivists' insistence that legal systems consisted entirely of posited law is an inadequate account of legal practice and 'legal reasoning' and also of the theoretical disagreements that judges have concerning the grounds of law.

The question that must be considered now for purposes of this study is whether a 'plain-fact' view of the Constitution is helpful in our quest to achieve the Constitution's transformative goals? In the context of Namibia, a 'plain-fact' view of the Constitution would mean only civil and political rights may be judicially enforceable because those are what the Constitution posits as rights. Accordingly, socio-economic rights which have not been entrenched in the Constitution would then be precluded. It appears that the Constitutional Assembly determined

⁷ *Ibid* p 22; M Martin 1987 *The Legal Philosophy of HLA Hart* p 67.

⁸ Dworkin *Rights* p 22.

that socio-economic rights will be precluded from the province of the Courts.⁹

In a later section I will tentatively consider if the exclusion of socio-economic rights undermines the transformative aims of the Constitution. Again, I make the argument that the transformative potential of the Constitution is undermined by the exclusion of socio-economic rights. In light of this, it is imperative then for the Supreme Court to consistently interpret the Constitution 'broadly, liberally and purposively'. In seeking to give effect to the transformative aims of the Constitution, this 'broad, liberal and purposive' interpretation of the Constitution should entail recognizing socio-economic rights as part of Namibia's human rights discourse even though they are not entrenched as rights.¹⁰

It is submitted that a 'plain fact' view of the law is still evident in some Supreme Court decisions. This is particularly evident in decisions like *Muller v President of the Republic of Namibia & Another* and *Chairperson of the Immigration Selection Board v Frank and Another*. In *Muller* the Supreme Court ruled that a man could not adopt his wife's surname because *section 9(1) ((2))* of the *Aliens Act* prescribed the requisite formal procedure for name-change. And that if he was desirous to adopt his wife's surname, he could achieve this by

⁹ This much can be gleaned from Article 101 of the Constitution where it is provided that,

The principles of state policy contained in this chapter shall not of themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

¹⁰ I will elaborate more on this when I make an argument for a constructive interpretation of liberal rights in a later section.

following what was prescribed in the statute. Accordingly, the Court dismissed Muller's claim of unfair discrimination.

A 'plain fact' view of the Constitution is also apparent *Chairperson of the Selection Board v Frank & Another*.¹¹ In the *Frank* case the Supreme Court was called upon to interpret *Article 10(2)* of the Constitution. The case involved an application for permanent residence to the Immigration Selection Board by a foreign national who was in a lesbian relationship with a Namibian citizen. This application was declined by the Immigration Selection Board. Following the Immigration Selection Board's decision, and aggrieved that her constitutional right to equality was infringed, Ms. Frank approached the High Court for relief. The applicant's case was that had she been in a heterosexual relationship with a Namibian citizen she could have married and would have been granted a residence permit. She accordingly claimed that she was a victim of discrimination on the grounds of sex and that this was a flagrant violation of *Article 10* of the Constitution. She further claimed that several of her constitutional rights were infringed. Some of these rights were, *inter alia*, her right to family protected by *Article 14*; and her right to privacy in *Article 13(1)* of the Constitution.

The court *a quo* agreed with her and found that she was discriminated against on the grounds of sex. The court thus directed that she be granted a permanent residence permit. It was against this ruling that the appellants appealed the High Court decision. In overturning the High Court decision, the Supreme Court made several findings that I find problematic. First and foremost, as regards the respondent's claim

¹¹ 2001 NR 107 (SC).

that her right to family was infringed, the Court ruled that *Article 14* was inapplicable on account that in the court's view, the term 'family'-

envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race.¹²

Secondly, in respect of her claim that she was discriminated against on grounds of sex, the court observed that 'sexual orientation' was not encompassed by the term sex in *Article 10(2)* of the Constitution. The court held as per Frank AJA that-

Whereas the word 'sex' can be defined as 'being male or female', or 'males or females as a group', 'sexual orientation' could encompass in theory 'any sexual attraction of anyone towards or anything'.¹³

As regards *Article (10) (1)* the court made an interesting and controversial finding, concluding but without explaining why, that there was no 'unfair' discrimination because 'equality before the law for each person does not mean equality before the law for each person's sexual relationships'.¹⁴ Interestingly, the court made another startling finding in determining whether the respondent's right to dignity was impaired. The court observed that the state's failure to accord the same treatment in respect of a permanent residence permit to 'an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage' when compared to 'a recognised marital relationship' only amounts to differentiation, but not discrimination.¹⁵ In the light of the above, it is inescapable that

¹² At 146F-G.

¹³ At 146G-H.

¹⁴ At 155E-F.

¹⁵ At 155I-156C.

the Supreme Court has employed a ‘plain-fact’ view of the law in some of its decisions.

3.2.2 The Case of *Riggs v Palmer*

To illustrate his argument about the role of principles in adjudication and also the nature of theoretical disagreements that judges are often seized with, Dworkin discusses *Riggs v Palmer*¹⁶ as his paradigm case. The facts appear as follows as recounted in *Law’s Empire*.¹⁷ Elmer Palmer murdered his grandfather by poisoning in New York in 1882. The motive for this murder case was that being the beneficiary he feared the possibility of an amendment to his grandfather’s existing will, having recently remarried. Fearing that his grandfather would change the existing will and leave him with nothing, he murdered his grandfather to expedite his inheritance. When his crime was discovered, he was convicted and sentenced to a jail term.

The deceased’s daughters then sued the administrator of the will, arguing that Palmer should be denied the inheritance and that the property should now go to them instead of Palmer. The governing law in respect of will, the New York statute of wills, was silent on whether someone named in the will could inherit according to its terms if he had murdered the testator. The case was dismissed in the trial court, and the daughters appealed to the New York State Court of Appeal. The issue for the determination of the court was whether, despite his crime and morally despicable conduct, Palmer was entitled to the inheritance in accordance with the clear provisions of the will?

¹⁶ 115 NY 506 (1889).

¹⁷ Dworkin discusses *Riggs v Palmer* in *Law’s Empire* p 15-20.

Palmer's lawyers argued that the New York Statute of wills was neither vague nor ambiguous regarding conditions of validity and should be decisive irrespective of the justices' personal moral convictions. They argued that if the court decided against Palmer, the court would be wrongly replacing its own sense of justice for a clear written law. Dworkin characterizes the court's dilemma as follows:

The judges of the highest court of New York all agreed that their decision must be in accordance with the law. None denied that if the statute of wills, properly interpreted, gave the inheritance to Elmer, they must order the administrator to give it to him. None said that in that case the law must be reformed in the interests of justice. They disagreed about the correct result in the case, but their disagreement or so it seems from reading the opinions they wrote was about what the law actually was, about what the statute required when properly read.¹⁸

Writing the minority judgment, Judge Gray argued for a literal theory of interpretation. The literal theory of interpretation assumes that 'statutory language as it stands, on the condition that it is clear and unambiguous, is a reliable expression of legislative intent'.¹⁹ He contended that if wills were not to be read this way, anarchy would result as testators could not be sure that their wills could be respected as written. Judge Gray maintained that, properly constructed, the real statute made no exceptions for murderers. He accordingly voted for Palmer.

Judge Earl, who wrote the majority decision distinguished between the literal sense of a statute and its 'real' meaning. He wrote,

It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under

¹⁸ See *Law's Empire* p 16.

¹⁹ Du Plessis *Re-Interpretation of Statutes* p 93.

no circumstances be controlled or modified, give this property to the murderer.²⁰

In Judge Earl's view, there was more to law than just posited legal rules in the form of principles in a legal system, and these principles were very much part of the law. Accordingly,

all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.²¹

Relying on the above principles, Judge Earl reasoned that it was not in the interest of justice for a murderer to inherit. The reasoning process employed by Judge Earl is applauded by Dworkin as exemplary and representative of the nature of legal reasoning. What is to be observed from the majority decision, as Dworkin puts it, is to recognize that 'a statute forms part of a larger intellectual system, the law as a whole; it should be constructed so as to make the larger system coherent in principle'. Thus, read as a whole, the statute of wills was to be constructed as to deny inheritance to someone who had committed murder to obtain it.²² The significance of *Palmer*, for Dworkin, was that it illustrated the nature of 'theoretical disagreements' that lawyers have, and that 'it was a dispute about what the law was, about what the real statute the legislators enacted really said'.²³ In a theoretical disagreement, lawyers and judges

[d]isagree about what the law really is ... even when they agree about what statutes have been enacted and what legal officials have said and thought in the past.²⁴

²⁰ 22 NE 189.

²¹ 22 NE 190.

²² Dworkin *Law's Empire* p 20.

²³ *Ibid.*

²⁴ *Ibid* p 5.

It is important to pause here and make some observations in respect of the above case study and why it poses a real problem for legal positivists. The challenge that Palmer's case poses to legal positivism is first and foremost its inability to provide an adequate description of the nature of law.²⁵ Dworkin's theory is not a 'descriptive' theory, although he acknowledges the dimension of descriptive 'fit'- which is really an early of saying that interpretive judgments are judgments about practices, e.g. linguistic, legal etc. The problem of legal positivism relates to what Dworkin terms its 'plain-fact' view of the law, in terms of which,

The law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If somebody of that sort has decided that workmen can recover compensation for injuries by fellow workmen, then that is the law. If it has decided the other way, then that is the law. So questions of law can always be answered by looking in the books where the records of institutional decisions are kept.²⁶

From the above characterization, it is apparent why legal positivism is inadequate to account for principles that underpin a particular legal system as judges are often called upon, as in *Palmer's* case, to search for underlying principles. Not only that, in the context of Namibia, a positivistic approach to constitutional interpretation is inadequate to realize the transformative aims of the Constitution. Thus, legal positivism cannot account for the existence of legal principles. Dworkin has no quarrel with the fact that rules form part of the law and that straightforward cases may be decided in accordance with those rules. But 'straightforward' means just that 'most people will accept that particular interpretation'. One of the problems with Gray's

²⁵ In the next chapter I will discuss the positivists' objection and reply to Dworkin's discussion of the *Palmer* case.

²⁶ Dworkin *Law's Empire* p 7.

judgment is that he talks- as so many people do- as though merely describing ‘literally’ what the words say is not just one more interpretation. These lawyers (mechanical lawyers) think somehow they can escape giving a justification of a particular interpretation by saying ‘that is simply what the law *is in fact*’. It is Dworkin’s view that there is *no such thing as what the law is in fact*. What he rejected, rather, was the notion that judges exercised discretion in cases where facts were not covered by existing rules.²⁷

According to positivism, legal rules are identified by the pedigree test. Dworkin, however, contends that principles are not identifiable by the pedigree test. And the reason he provides is in the nature of principles. He states:

They are controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle... We could not bolt all of these together into a single “rule”, even a complex one, and if we could the result would bear little relation to Hart’s picture of a rule of recognition.²⁸

According to Dworkin, and contrary to rules, principles do not emanate from ‘a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and public over time’.²⁹ Principles are an expression of the ‘deep-rooted and historical value of a legal system and the ‘political morality’ of the community’,³⁰ and judges are legally obliged to follow them when they apply.³¹ Principles, according to Dworkin, are therefore an integral part of the

²⁷ *Ibid.*

²⁸ Dworkin *Rights* p 40, 44.

²⁹ *Ibid* p 40.

³⁰ *Ibid.*

³¹ *Ibid.*

law and may justify, from time to time, departures from legal rules by judges.³²

Dworkin argued that judges do not rely on rules in cases such as *Palmer*. Rather, they rely on principles to arrive at the decision. He also denies that they use any discretion to override the ordinary legal rules, such as those with respect to legacies in *Palmer*. Instead courts in such cases interpret the rules in accordance with the ‘governing principles’³³ already extant in the legal system to arrive at the decision.

For Dworkin, principles are an integral part of the law. Therefore, what the *Palmer* case demonstrates is that judges do not only apply legal rules and then exercise their discretion in unclear cases, but that judges in ‘Hard Cases’ apply principles to decide hard cases.³⁴ However, unlike rules, legal principles are not accounted for by the pedigree test as valid principles of a legal system. Instead lawyers and judges apply principles based on the history of the law, judicial practice, and considerations of justice and morality.³⁵

To demonstrate the efficacy of Dworkin’s legal theory to Namibia’s constitutional jurisprudence as per this study’s hypothesis, I will argue in Chapter 5 for an outlook that regards constitutional values outlined in the Constitution as moral principles in the manner that Dworkin propagates. Furthermore, to demonstrate some connections between some Supreme Court decisions and Dworkin’s legal theory, I

³² Van Blerk *Jurisprudence: An Introduction* p 87.

³³ *Ibid.*

³⁴ J Penner, D Schiff & R Nobles (eds) 2005 *Jurisprudence and Legal Theory: Commentary and Materials* p 350.

³⁵ *Ibid.*

will attempt to show the use of the concept of ‘principle’ in those decided cases. I should hasten to state that this study will not only relate Dworkin’s legal theory to Namibia’s constitutional jurisprudence, but will also entail reading Dworkin constructively to suit his legal theory to the local setting.

3.2.3 Principled Adjudication and the Acknowledgement of Rights

Understanding Dworkin’s conception of principle is pivotal to understanding his theory of adjudication. On Dworkin’s view, there is a difference between arguments of principle on one hand, and arguments of policy on the other. An argument of principle is concerned with a person’s rights, whereas an argument on policy is concerned with community goals. In his *Taking Rights Seriously* Dworkin distinguishes between policies and principles.³⁶ He defines policy as ‘that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community’;³⁷ and principle as ‘a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality’.³⁸

Dworkin’s main argument is that judges have no discretion to decide hard cases by reference to policy considerations. Instead hard cases are decided by judges on the basis of principles. Dworkin raises two objections to the notion that judicial decision-making should be based on policy considerations. The first of these is that, for Dworkin, since judges are not elected in the way that legislators are, they cannot

³⁶ Dworkin *Rights* p 21, 22.

³⁷ *Ibid* p 22.

³⁸ *Ibid*.

make law.³⁹ Dworkin argues that ‘law should be made by elected and responsible officials’,⁴⁰ and not judges who are not accountable to the electorate.

Secondly, Dworkin contends that judicial decisions based on policy grounds have a retroactive effect and are unfair, whereas a decision based on principle entails that the judge is upholding existing rights and duties.⁴¹ For Dworkin, when judges have regard to policy considerations in their decision-making, they usurp the function of the legislature and ‘denie[s] the rights of the given party by trumping them with what they believe to be in the best interest of society. Individual rights ought to trump community rights, and not the other way round.

For Dworkin, government is the ultimate protector of individual rights. The implication of this is that if government is to protect individual rights, Namibia’s human rights discourse should not be limited to what is posited in the Constitution. Though Dworkin encourages legislative activity in the extension and realisation of such rights, he nonetheless underscores that the work of a policy-driven government should be separated from that of a principle-driven judiciary. For Dworkin, principles and individuated rights such as the general right to equal concern and respect, the right to freedom of speech or right to recover damages may be sacrificed to the collective welfare by the legislature but not by the judiciary.⁴²

³⁹ *Ibid* p 84.

⁴⁰ *Ibid*.

⁴¹ *Ibid*; R Dworkin 1985 *A Matter of Principle* p 18, 23.

⁴² Dworkin *Rights* pp 90-96.

In making the distinction between principles and policies, Dworkin makes the point that principles favour individual rights, whereas policies advance community goals. It is widely acknowledged that were this the extent of Dworkin's theory it would be very limited, on account that it would not protect rights against legislative interference. Dworkin's theory however, has a broader political import.

The reason is that Dworkin argues that rights cannot be overridden by government using utilitarian arguments of what is best for community.⁴³ On Dworkin's view, individual rights precede legislation and give it meaning.⁴⁴ Accordingly, legislation which infringes rights can only be justified when necessary to protect rights of others, or to prevent a calamity.⁴⁵ Dworkin argues that once it is accepted that rights and obligations are not dependent on the will of the majority, it will become clear that the judge's role is not that of the legislator who uses discretion in the interest of the community on grounds of policy.⁴⁶ Rather, the role of the judiciary is to identify and protect rights which already inhere in a legal system, irrespective of whether or not the goals are 'served and some political aim is disserved thereby'.⁴⁷

It merits emphasis that the theory which Dworkin postulates is more than the judicial protection of established rights. It has a broader dimension of entrenching some rights, be they against government or between individuals.⁴⁸ His theory is intended to give special place to rights as 'trumps' over the general utilitarian justifications in all cases

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid* p 191.

⁴⁶ Van Blerk *Jurisprudence* p 88.

⁴⁷ Dworkin *Rights* p 91.

⁴⁸ McCoubrey & White *Textbook on Jurisprudence* p 164.

during the legal process and not only during hard cases.⁴⁹ Judges, on Dworkin's view, are the protectors of rights. According to Dworkin then, the judicial function is aimed at

Trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.⁵⁰

3.3 The Political and Moral Background

3.3.1 Equality of Resources

The meaning of equality is contested both in the realm of politics, legal practice, religion, philosophy etc. Many dismiss the idea of equality as mythical and empty political rhetoric.⁵¹ I examine in greater detail some objections to the idea of equality in the next chapter. It suffices to state here that the common objection to the idea of equality has always been the question, how people with different attributes, ambitions, and talents can ever be equal? I make no attempt here to justify the conclusion that society is stratified into classes and groups. The rubric 'treating people as equals' presupposes that, by and large, people are not always treated as equals.

Before examining the concept of equality in Dworkin's political theory, it will be propitious to summarise some other general conceptions of equality briefly. In terms of the libertarian conception of equality, people have 'natural' rights over their property and that they are treated equally when government protects their possession and

⁴⁹ *Ibid.*

⁵⁰ Dworkin *Law's Empire* p 255.

⁵¹ P Weston 1982 'The Empty Idea of Equality' 95(3) *Harvard Law Review* p 542; L Alexander 1987 'Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law' 6 *Law and Philosophy* p 428, 429.

enjoyment of such property.⁵² Welfare-based conception of equality, on the other hand, deny the notion of a natural right in property and holds that it is incumbent on government to produce, distribute, and regulate property in order to get results required by some function of the welfare of individuals.⁵³ Another conception of equality insists that government target outcomes in the vocabulary not of welfare but of goods, opportunities and other resources.⁵⁴ The final category of the idea of equality is what Dworkin calls ‘equality of resources’. It is to this idea of equality that I now turn.

In terms of the conception of equality of resources, government is called upon to make an equal share of resources available to every citizen ‘to consume or invest as he wishes.’⁵⁵ In terms of this viewpoint, it is recognized that people’s wealth will differ as they make differing choices in respect of consumption and investment.⁵⁶ The basic assumption underpinning this view is that if people are given an opportunity to begin with the same wealth and other resources, equality is presumed even though some will grow richer than others.⁵⁷ Furthermore, equality of resources recognizes that differences in talent are essentially differences in resources, and it accordingly seeks to compensate the less talented beyond what they can get from the market.⁵⁸

There is no doubt that the notion of equality is the driving force behind Dworkin’s legal theory. And this much is evident in both his

⁵² Dworkin *Law’s Empire* p 297.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid* p 298.

early⁵⁹ and later work.⁶⁰ The gist of Dworkin's idea of equality is that government must treat its people as equals and with respect. Dworkin's view of equality is consistent with his views on human dignity discussed above. Because all human beings have dignity, government ought to treat them as equals. In Dworkin's view, people are treated as equals when there is equality of resources, which requires 'compensating for unequal inheritance of wealth and health and talent through redistribution.'⁶¹ Few will have a quarrel with the view that massive disparities in wealth characterize modern societies and that there is an unjustifiable distribution of state resources presided over by governments. In the context of Namibia, the gap between the rich and the poor is proverbial.

Some thinkers have underscored the incompatibility of the idea of equality and liberty- that treating people as equals diminishes their liberty. In Dworkin's view, equality cannot be divorced from liberty.⁶² The idea of treating people as equals entails that government should give as much resources to all its citizens or make available resources to citizens so that people choose what they want to do with those resources.

Persistent claims by some scholars that the idea of equality is incompatible with liberty only seek to perpetuate the current unjustifiable distribution of state resources in many countries. Sadly, this has the natural effect of endorsing the *status quo* in terms of which those who are at the bottom of the economic ladder in society tend to regard their lowly status as acceptable; while those who have

⁵⁹ Dworkin *Rights* p xiii; p 273, 274.

⁶⁰ Dworkin *Law's Empire*.

⁶¹ *Ibid* p 301.

⁶² Guest *Ronald Dworkin* p 182.

placed themselves at the apex of the social order endorse their positions as acceptable. The notion of equality of resources that Dworkin advocates recognises that there will still be differences in wealth. However, people ought to be placed on an equal footing in terms of resources before they can meaningfully exercise their choices. In Dworkin's view, and correctly so, equality and liberty are inseparable.⁶³ As Guest explicates,

The moral force of equality is to show what counts as an unjustifiable distribution of resources at the same time as countering leveling down. It must do this securing equality and being human in one bundle, so that any worthwhile, non-closure, sense of equality supports not only distributive but substantive reasons for reordering society.⁶⁴

Dworkin's concept of equality of resources entails treating all citizens as ends and not means, by enabling them to have real opportunities to live meaningful lives.⁶⁵ Dworkin's conception of equality is in tandem with his interpretation of utilitarianism. Generally, the essence of utilitarianism is defined by the *maxim* that it is incumbent on governments to maximize the average wealth of its citizens. In Dworkin's view however, the real appeal of utilitarianism lies in its rejection of the notion that certain persons are inherently more valuable than others. He says

Utilitarian arguments of policy, therefore, seem not to oppose but on the contrary to embody the fundamental right of equal concern and respect, because they treat the wishes of each member of the community on a par with the wishes of any others.⁶⁶

⁶³ *Ibid* p 183.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ Dworkin *Rights* p 275.

It is hard not to agree with Dworkin's equality of resources⁶⁷ argument in face of tendencies to grade some people as worthier than others. Admittedly, this tendency to regard some members of society as more worthy than the rest and thus entitled to have more in terms of resources, pauses a real threat to peace and stability in many developing constitutional democracies. On a more sombre note, it undermines the whole scheme of the new constitutional dispensation as it disregards the promotion and protection of human dignity and equality as foundational values. A question that must be asked is whether people can be said to have human dignity without the equality of resources? Put another way, what is the point of the human rights discourse amid indigence and massive disparities in wealth and access to state resources? I submit that the notion of equality before the law without equality of resources is empty political rhetoric and may undermine the aspirations contained in the Constitution.

To make his point that 'no person [is] to count more than one,' Dworkin makes a distinction between a person's personal and impersonal preferences or external preferences.⁶⁸ By a person's personal preferences, reference is to one's own life; and by impersonal or external preferences reference is to the way he thinks other people ought to live their lives.⁶⁹ Dworkin argues that satisfying impersonal preferences actually corrupts utilitarianism because it vitiates the idea that no person's preference is to be assessed in terms of its worth.⁷⁰ In Dworkin's view, double counting is at play where impersonal preferences are considered, and this negates the effect of

⁶⁷ For a detailed account of 'Equality of Resources', see R Dworkin 2000 *Sovereign Virtue* pp. 65-119, particularly chapters 1, 2, 7-9. In his latest publication, *Justice for Hedgehogs* (2011), Dworkin revisits his account of equality of resources as set out in *Sovereign Virtue*.

⁶⁸ Guest *Ronald Dworkin* p 187.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

that other person's preference as well as maintaining his own preference of how his own life should to be lived.⁷¹

In concluding this part, it is imperative to link Dworkin's idea of equality of resources with his theory of interpretation in general. Dworkin's theory of law as integrity calls on government to speak with one voice, and act in a principled and consistent manner towards all its citizens. Judges are therefore called upon to assume a scheme of rules that speaks equally and construct a set of principles that justifies all their decisions. The question is whether equality before the law is at all possible in the absence of equality of resources? It must be pointed out that there are limits to what the judiciary can do in bringing about transformation in society. The concept of treating people as equals in the sense that Dworkin propagates is the domain of the executive and legislature. Accordingly, the judiciary is limited in the task of promoting equality. If people who come before courts are already not equal in terms of resources, it is inconceivable as to how the judiciary can bring about equality.

3.4 Constructive interpretation and the point of law

3.4.1 The Idea of Interpretation

Before delving into Dworkin's constructive interpretation, it is necessary to have a brief discussion on the concept of interpretation. Interpretation is a concept that permeates almost all spheres of human life, and is an idea that is debated across diverse fields of human enquiry. Interpretation as a concept emanates from hermeneutics. By definition, hermeneutics is 'the science or art of

⁷¹ *Ibid.*

interpretation'. It is submitted that legal interpretation owes much of its characteristics to biblical hermeneutics.

Throughout the development of hermeneutics as a science of interpretation the question regarding the objectivity of interpretation has always been debated. The discernible issue in all facets of the problem of interpretation appears to revolve around the role of the author, the text and the interpreter in the determination of meaning. Some underscore the importance of the author. In terms of this school of thought, the retrieval of meaning as intended by the author is the main concern of the interpretation. Others put emphasis on the autonomy of the text; while others still acknowledge the role of the interpreter in the creation of meaning. Dworkin's constructive interpretation falls in the category of those who underscore the important role of the interpreter.

3.4.2 Constructive Interpretation and Judicial Responsibility

Before outlining his own theory of interpretation, Dworkin first of all attacks two approaches to interpretation. These are conventionalism and pragmatism. Dworkin terms his theory of legal interpretation 'law as integrity'. This is premised on his conviction that the purpose of law is to protect individual rights. In Dworkin's view, conventionalism (his term for legal positivism) regards legal practice as premised on statutory provisions, case law and 'as discoverable by fixed and certain rules of recognition'.⁷² Though Dworkin acknowledges that conventionalism guarantees predictability, he nonetheless considers it 'a caricature of legal positivism because it is exclusively backward-looking, and does not allow scope for interpretation based on current

⁷² Johnson *Jurisprudence: A South African Perspective* p 117.

principles and policies'.⁷³ Accordingly, Dworkin contends that conventionalism does not accurately describe actual legal practice.

As for pragmatism, Dworkin describes it as a theory of interpretation which permits judges to interpret the law in terms of what is best for the community as a whole.⁷⁴ Dworkin's main charge against pragmatism is that although it is forward-looking, it does not take rights seriously. In Dworkin's view, pragmatism regards individual rights as 'only servants of the best future: they are instruments we construct for that purpose and have no independent force or ground'.⁷⁵ After rejecting the two rival theories of interpretation, Dworkin outlines his own theory of law as integrity, situating it between the two theories.

Dworkin's constructive interpretation offers the Supreme Court of Namibia a potent tool with which to interpret the Constitution. In *Taking Rights Seriously* Dworkin introduced and underlined the concept of legal principle in adjudication whereby judges are to be guided by principles to determine the citizens' pre-existing rights. In *Law's Empire*, he discusses the concept of interpretation in general, before progressing to his interpretive approach to law which he terms 'law as integrity' and 'constructive interpretation'.⁷⁶ In this section I investigate Dworkin's constructive interpretation and how it bolsters his view that law is an interpretive concept.

Dworkin first distinguishes between three kinds of interpretation. The first of these is scientific interpretation in terms of which a scientist

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Dworkin *Law's Empire* p 160.

⁷⁶ Dworkin's views on interpretation are discussed in *Law's Empire* pp 53-65.

tries to understand what the data is telling him without much regard to purpose.⁷⁷ The second kind of interpretation which Dworkin describes is conversational interpretation. In conversational interpretation the interpreter assigns meaning in the light of what was intended.⁷⁸ Dworkin admits that this is the most popular kind of interpretation and that it poses a threat to his own interpretive methodology.⁷⁹ Usually this kind of interpretation is popular in statutory interpretation- the idea that statutes be construed in light of what was intended. Clearly, Dworkin's interpretive methodology is not aimed at retrieving the intentions of the legislature. Then finally there is artistic interpretation. In artistic interpretation a critic interprets works so as to defend a particular meaning.⁸⁰ Dworkin concedes that of the three kinds of interpretation, artistic interpretation is most akin to his interpretive methodology. He states,

The form of interpretation we are studying—the interpretation of a social practice—is like artistic interpretation in this way: both aim to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation. I shall capitalize on that similarity between artistic interpretation and the interpretation of a social practice; I shall call them both forms of “creative” interpretation to distinguish them from conversational and scientific interpretation.⁸¹

According to Dworkin, constructive interpretation⁸² is also the method that a judge committed to law as integrity employs.⁸³ He maintains,

⁷⁷ *Ibid* p 51.

⁷⁸ For a detailed account of Dworkin's views on interpretation and authorial intent in general, see *Ibid* pp 53-65.

⁷⁹ *Ibid* p 51.

⁸⁰ *Ibid* p 52.

⁸¹ *Ibid* p 50.

⁸² Much has been made of Dworkin's 'best' light approach by critics, and I will address this particular criticism in chapter 4 of this thesis. The common criticism being, what is the point of making the 'best' of something, for example, a wicked legal system like apartheid or the Nazi regime?

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make complex structure and record the best there can be.⁸⁴

Dworkin observes that works of art as well as social practices are 'essentially concerned with purpose and cause... with the aim of imposing purpose on the object or practice, in order to make of it the best possible example of the form or genre to which it is taken to belong',⁸⁵ he explains that it is this type of interpretation which is argumentative or value-guided that he has in mind as interpretive approach and wishes to apply to law. He calls it 'constructive interpretation'.⁸⁶

The general thesis of Dworkin's legal theory is that interpretation must always be understood as inescapably linked to a practice and that it is 'governed by or sensitive to one's sense of the purpose or point' of the particular practice. It is submitted therefore that the success of Dworkin's constructive interpretation depends on the acceptance and clear demonstration that law is indeed an interpretive concept. What then is constructive interpretation? According to Dworkin,

Constructive interpretation arises when people engage in a practice..., which they all regard as serving a purpose or a point but disagree as to what, exactly, the purpose or point is. In that event, participants will regard the extension or range of

⁸³ Freeman *Lloyd's Introduction to Jurisprudence* p 1394.

⁸⁴ Dworkin *Law's Empire* p 255.

⁸⁵ *Ibid* p 52.

⁸⁶ *Ibid*.

application of the concepts that make up the practice as sensitive to, determined by, the point.⁸⁷

In *Law's Empire* Dworkin explores the idea of interpretation in general.⁸⁸ From the above discussion he notes that there are different kinds of interpretations just as there are different kinds of enterprises or practices. However, he argues that what distinguishes interpretive practices from one another are the purposes that each practice is designed to serve though people might differ as to those purposes. Dworkin explains it as follows:

Interpretive practices will differ because they serve different kinds of points. We may disagree about what the point of law is but we agree that the point of law is different from the point of poetry.⁸⁹

From the above account of constructive interpretation, it becomes evident why disagreements over the best interpretation of a point or purpose of a practice are inevitable. This is mainly because the participants' viewpoints on the point or purpose of a practice will differ. Accordingly, a participant's interpretation of a practice will be determined by what he believes to be the point or purpose of the practice in question. Dworkin crucially argues that disagreements over the point of a practice by participants are not mere differences, but that participants believe that their interpretations and their opinions about the point or purpose of a practice are true.⁹⁰ Dworkin

⁸⁷ R Dworkin 1994 'Law, Philosophy and Interpretation' in Atria & MacCormick (eds) 2003 *Law and Legal Interpretation* p 10.

⁸⁸ Dworkin discusses interpretive concepts in *Law's Empire* pp 45-86.

⁸⁹ Dworkin in Atria & McCormack *Law and Legal Interpretation* p 10.

⁹⁰ *Ibid*; The relevance of this point pertains to questions about the objectivity of the interpreter. In real life it is not often that people provide proof or evidence about their beliefs and their convictions. Quite frankly, the point really is that people have a lot of views for which the truth is founded on reasons other than those scientific requirements of evidence and proof. This is one of the major theses of *Justice for Hedgehogs*. And yet questions about objectivity are always lurking in the background whenever people express their views to be not only correct but also true.

submits thus: '[W]e hold our views on these subjects as a matter of conviction, which means that we think they are true'.⁹¹

When Dworkin's account of constructive interpretation of social practices is transposed to law, the disagreements among lawyers and judges on the point or purpose of law come into clear focus, because they have different viewpoints about what that point or purpose of law is. As illustration, Dworkin proposes two points or purposes of law and applies these to his famous case studies of *Riggs v Palmer* and *Buick v McPherson*.

The first point of law which Dworkin puts forward is the generally held view that law exists to guarantee 'certainty and strict guidance in order that collective life can be more efficient, so that people can plan their lives knowing what rules the police or the state will enforce against them'.⁹² Dworkin says that a judge who subscribes to the above view as the point of law will be drawn to a more positivistic approach to law, in particular to the idea that 'law exists only in the form of explicit past decisions by political officials which can be read and known'.⁹³ Accordingly, on for example, the question of whether an heir who commits murder so as to expedite his inheritance is entitled to inherit, a judge who is disposed to positivism is likely to rule that the murderer should inherit because the statute regulating wills is unambiguous on the requirements of a valid will. Dworkin explains as follows:

A judge disposed to positivism, because he held the view that the purpose of law was to promote predictability, would therefore think the law allowed the murderer to inherit, though

⁹¹ *Ibid* p 10.

⁹² *Ibid*.

⁹³ *Ibid*.

he might also think that the law should be changed for the future, though by the parliament not by the judge.⁹⁴

Similarly, Dworkin argues, a judge who subscribes to the positivistic approach to law will decide the case of *Buick* on similar grounds in that he will not allow a lawsuit against a manufacturer on account that there is no precedent and that no law has been enacted by Parliament to change the status quo.⁹⁵

The second view that Dworkin puts forth as the point or purpose of law is actually his viewpoint that drives his interpretive program. In addition to the above positivistic view of the point of law, Dworkin describes the second viewpoint which holds that,

Law should also make government more coherent in principle; it should seek to help to preserve what we might call the integrity of the community's government, so that the community is governed by principles and not just by rules that might be incoherent in principle. And it insists that this later purpose is so important that it might well, in particular cases, be more important than predictability and certainty.⁹⁶

This formulation of Dworkin's view of the point or purpose of having law is the lifeblood of his interpretive program. When Dworkin's view of the point or purpose of law is understood, it becomes clear why his theory of law as integrity 'requires government to speak with one voice'. In Chapter 5 of this study I claim that Dworkin's view of the point of law is akin to the doctrine of constitutionalism that underpins the Namibian Constitution. From that premise, I argue that Namibia's Supreme Court will do well to take Dworkin's constructive

⁹⁴ *Ibid* p 11.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

interpretation seriously if the Constitution's transformative goals are to be realized.

I come back to the point or purpose of law as described above by Dworkin. In the *Palmer* case, a judge who espouses the second viewpoint of the point of law will find the conduct of murdering in order to inherit to be starkly incoherent with principles of law and morality, to an extent that the statute of wills should be understood as barring the murderer from inheriting.⁹⁷ Dworkin elaborates on the reasoning as follows:

Even though nothing in the statute explicitly says that a murderer may not inherit, when we read that statute against the background of the law as a whole, with the aim that law should be coherent in principle, then we are led for that reason to decide that the law, properly understood, does not allow a murderer to inherit.⁹⁸

Admittedly, this was the reasoning of the Appeal Court in its majority decision. Similarly, in the *Buick* case, Dworkin notes the same reasoning strategy by the Court, holding that a person who had suffered injuries in an accident was entitled to sue the manufacturer for the defect that caused the accident.⁹⁹

From the above account of constructive interpretation and reviewed cases, Dworkin underscores the inadequacies of legal positivism as a theory of law to account for the true nature of law and theoretical disagreements in law. In *Law's Empire* Dworkin gives an analogy of a chain novel to illustrate constructive interpretation and the nature of theoretical disagreement. He describes the project as follows:

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity... In our example, however, the novelists are expected to take their responsibilities more seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be.¹⁰⁰

Dworkin likens the writing of a chain novel to the development of law. The fundamental point Dworkin makes about the chain novel is that each time a judge has a matter before him, he is required to read all the law up to the present case before him 'as if it were the opening chapters of a novel and must understand that the decision he or she must reach in the new case must be one that continues the story in the most appropriate way'.¹⁰¹ As regards theoretical disagreements, Dworkin acknowledges that two different writers if given to write the same chapter would most likely write the story in different ways.¹⁰² Accordingly, it is inevitable that judges and lawyers will have different views about the best way to continue the development of the story of law. Dworkin explains that,

They will have different opinions in part, not entirely but in part, because which way makes the continuing legal story better will depend on one's own moral and political convictions.¹⁰³

The above account of constructive interpretation makes the viewpoint of judges about the point or purpose of law all the more important. This is the real significance of Dworkin's constructive interpretation to jurisdictions like Namibia. This point will be elaborated on in Chapter

¹⁰⁰ *Ibid* p 229.

¹⁰¹ *Ibid* p 6.

¹⁰² *Ibid* p 7.

¹⁰³ *Ibid*.

5 where I discuss the significance of Dworkin to Namibia. Suffice to state here that there is a need for judges to understand the purpose of the Constitution because that understanding shapes their interpretation of the Constitution. It is submitted that the real danger to transformation is judges who understand their mandate as serving the interests of the appointing authority or government. It is submitted that one particular factor may account for this: the manner in which judges are appointed and the heavy involvement of the executive in the composition of the Judicial Service Commission.¹⁰⁴

Following from the above, I wish to make some remarks on the responsibility of a judge in constructive interpretation in relation to the distinction that Dworkin makes between conversational and ‘artistic’ interpretation or ‘creative’ interpretation. With conversational interpretation the focus is on the recovery of legislative intent or purpose. The important aspect of this kind of interpretation as Dworkin describes it is that it presupposes a vital role for the author in the process of interpretation. With artistic interpretation however, the focus shifts to the interpreter in the interpretation process as the cause of meaning. With artistic interpretation thus, interaction is not necessarily between the author and the interpreter, but it is between the author’s work and the interpreter. Dworkin submits that ‘creative interpretation, on the constructive view, is a matter of interaction between purpose and object’.¹⁰⁵

¹⁰⁴ *Article 85 (1)* of the Namibian Constitution deals with the composition of the Judicial Service Commission, it states as follows:
‘There shall be a Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organization or organisations representing the interests of the legal profession in Namibia’.

¹⁰⁵ Dworkin *Law’s Empire* p 52.

Constructive interpretation underscores the responsibility of the interpreter in meaning creation. And this is the import of the term ‘impose’ in the definition of constructive interpretation. The interpreter is responsible for ‘imposing purpose on an object or practice in order to make of it the best possible of the form or genre to which it is taken to belong’.¹⁰⁶ The preeminence of the interpreter in constructive interpretation opens this kind of interpretation to queries regarding the objectivity of the interpreter. Doesn’t this give the interpreter of the work too much leeway on what should count as the best presentation of the art work?¹⁰⁷ Whereas the interpreter is paramount in creative interpretation, Dworkin cautions that this does not mean that the interpretation is unrestricted. He argues,

It does not follow, even from that rough account that an interpreter can make of a practice or work of art anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history or shape of a practice or object constrains the available interpretations of it, though the character of that constraint needs careful accounting.¹⁰⁸

Dworkin applies this constructive interpretation method to legal practice. The main distinctive feature of constructive interpretation is that it is ‘argumentative’ in nature.¹⁰⁹ Accordingly, the main object of interpreting a practice is making it the ‘best’ it can be or, put another way, ‘making the best’ of something.¹¹⁰ Making a practice the ‘the best’ it can be presupposes the ‘argumentative’ nature of the interpretation

¹⁰⁶ *Ibid.*

¹⁰⁷ In chapter 4 I will address the criticism of Dworkin’s legal theory that it gives judges too much freedom. Another criticism related to this regards the nature of constraints in interpretation. I will address, in particular, Stanley Fish’s critique of Dworkin on the nature of constraints in interpretation.

¹⁰⁸ Dworkin *Law’s Empire* p 52.

¹⁰⁹ *Ibid* p 13.

¹¹⁰ Guest *Ronald Dworkin* p 23.

process.¹¹¹ On Dworkin's view, placing a social practice in the best light presupposes that a practice does not just exist but that it has some 'point' or 'purpose', and it accordingly becomes the responsibility of the participants, who have adopted an 'interpretive attitude', to constantly review the rules of the social practice in the light of that 'point' or 'purpose'.¹¹²

As a social practice, when constructive interpretation is then transposed to law, the most crucial argument in Dworkin's legal theory become apparent, that law is an interpretive concept. Accordingly, law is deeply political and legal judgments are not devoid of political theory. By deeply is meant more and more abstract justifications because, following Hume as Dworkin and any other sensible person does, one can only derive oughts from oughts. Dworkin argues that it is only by comparing law to other disciplines, particularly literature, that the nature of legal interpretation can be comprehended. Social practices and works of art, Dworkin argues, are essentially concerned with purposes rather than causes.¹¹³ They are both linked under the rubric 'creative interpretation'. However, the purposes at play in creative interpretation- what Dworkin calls 'constructive interpretation', 'are not (fundamentally) those of some author but of the interpreter',¹¹⁴ whose aim is to impose purpose on the object or practice under interpretation so as to make it the best possible example of the genre to which it is taken to belong. Dworkin contends that lawyers and judges thus often disagree on the best interpretation of legal rules in the light of the point or purpose of the legal practice.

¹¹¹ Dworkin *Law's Empire* p 13.

¹¹² Guest *Ronald Dworkin* p 23.

¹¹³ Dworkin *Law's Empire* p 51.

¹¹⁴ *Ibid* p 52.

Dworkin conceives three stages of constructive interpretation, so as ‘to refine constructive interpretation into an instrument of fit for the study of law as a social practice’.¹¹⁵ The three stages are: the ‘pre-interpretive’ stage, the ‘interpretive’ stage and the ‘post interpretive’ stage or ‘reforming’ stage.¹¹⁶ At the pre-interpretive stage the participant identifies the rules and standards that tentatively constitute the practice. Its equivalent in literary interpretation is the stage where texts are identified.¹¹⁷ Dworkin admits that even at this stage interpretation may be necessary. At the interpretive stage the interpreter ‘settles on some general justification for the main elements of the practice identified at the pre-interpretive stage’.¹¹⁸

Finally, at the post interpretive or reforming stage the participant ‘adjusts his sense of what the practice really requires so as better to serve the justification he accepts at the interpretive stage’.¹¹⁹ Of all the stages of constructive interpretation the interpretive stage is pre-eminent. At the interpretive stage ‘the participant postulates the value of the practice’.¹²⁰ The participant’s proposal must satisfy or meet two requirements: it must ‘fit’ the data identified as constituting the practice at the pre-interpretive stage; and, in accordance with his convictions, the participant must choose a justification which he believes shows it in its best light.¹²¹

Dworkin argues that ‘law is an interpretive concept’¹²² like the practice of courtesy in his imaginary example. When constructive

¹¹⁵ *Ibid* p 65.

¹¹⁶ *Ibid* pp 65-68.

¹¹⁷ *Ibid* p 66.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ Freeman Lloyd’s *Introduction to Jurisprudence* p 1395.

¹²¹ *Ibid*.

¹²² Dworkin *Law’s Empire* p 87.

interpretation is applied to law, Dworkin observes that it would be best for lawyers or jurists, at the pre-interpretive stage, to have an initial agreement on the point of the law as a practice. In the same manner in which the practice of courtesy was understood to be a general token of respect at the pre-interpretive stage in his example, Dworkin argues that a better understanding of the law might be arrived at if a similar abstract description of the point law or legal practice could be agreed upon by most legal theorists.¹²³

Dworkin concludes that, by and large, discussions about law ‘assume that the most abstract and fundamental point of legal practice is to guide and constrain the power of government’.¹²⁴ It is submitted that this is the essential feature that characterizes most written constitutions. However, the real danger for constitutionalism particularly in developing democracies like Namibia is when judges fail to appreciate this point of the Constitution and decide cases in ways that do not reign in government. For Dworkin, the purpose of the law is to control the power of government. Dworkin submits as follows:

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.¹²⁵

When Dworkin’s ‘best light’ theory, the constructive interpretation’s three stages and his abstract central description of the point of law-are all put together, his criteria of a satisfactory theory of law becomes clear.¹²⁶ When a judge decides between two interpretations which are neutral regarding the requirement of fit, he does not depend on

¹²³ *Ibid* p 92 93.

¹²⁴ *Ibid* p 93.

¹²⁵ *Ibid*.

¹²⁶ Van Blerk *Jurisprudence* p 95.

discretion, or policy considerations. Instead he depends upon his finding a conception of law which best explains why law permits state coercion.¹²⁷ Thus, what the law requires in each case rests ultimately on a constructive interpretation of the legal practice.¹²⁸

What is the import, then, of the distinction which Dworkin makes with scientific interpretation and conversational interpretation? When contrasted to Dworkin's theory, neither scientific nor conversational interpretation 'requires proposing human interests or goals or principles'.¹²⁹ This is particularly pertinent in respect of scientific interpretation. Dworkin's view is that interpreting social practices is akin to 'artistic' interpretation. Dworkin says that artistic interpretation is 'creative' for the reason that 'a participant interpreting a social practice... proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify'.¹³⁰

3.4.3 Integrity and the Development of Law

Flowing from the above discussion of constructive interpretation, it is apparent that the judge is the central figure of Dworkin's interpretive methodology. Not only is a judge immersed in the interpretation of his legal practice, but he is equally committed to furthering its aims and purposes. It is for this reason that a judge, on Dworkin's characterization, is both a critic and an artist. Not only must he observe, but he must also perform.¹³¹ Dworkin anchors his theory of constructive interpretation in the chain novel metaphor discussed

¹²⁷ *Ibid.*

¹²⁸ Freeman *Lloyd's Introduction to Jurisprudence* p 1395.

¹²⁹ Guest *Ronald Dworkin* p 27.

¹³⁰ Dworkin *Law's Empire* p 52.

¹³¹ *Ibid* p 229.

above. From the analogy of a chain novel, Dworkin draws parallels on how a legal judgment ought to be constructed so as to have the integrity of law. It is submitted that Dworkin's law as integrity is the best hope for maintaining faith in the law and the juridical activity of legal interpretation amidst waning confidence in the law's ability to treat people with 'equal concern and respect'.

To ensure that law as a social practice has integrity, Dworkin proposes two requirements or dimensions of a legal judgment. One of the charges leveled against Dworkin by critics is the view that his legal theory gives judges too much freedom. It suffices to point out here that the chain novel metaphor that Dworkin employs to elaborate the dimension of 'fit' and 'moral value' goes a long way in addressing this particular criticism. Dworkin employs the example of an imaginary chain novel¹³² to further illustrate the dimension of 'fit' and 'value'.

What are the requirement of 'fit' and the requirement of 'moral value' or 'justification' for legal judgment? In terms of the requirement of fit, every new judgment ought to be a continuation of the already existing legal materials or chapters. Dworkin puts it this way:

[T]he interpretation [the novelist] takes up must nevertheless throughout the text; it must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor.¹³³

There are obvious challenges that the requirement of 'fit' may pose for practical adjudication. First, the requirement of fit presupposes a willingness on the part of the novelists to strive to make the novel 'the

¹³² *Ibid* pp 228-238.

¹³³ *Ibid* p 230.

best it can be'. However, in practical adjudication, judges may not feel a compulsion, moral or legal, for 'articulate consistency' in their judicial endeavors. Two factors may account for this. Firstly, judges may not feel legally obliged to follow precedent. Secondly, their conception of what constitutes 'the best' construction of the legal record may often be at variance with other judges in the 'chain'. Notwithstanding the above concerns, most of which are addressed by Dworkin, the real significance of the requirement of 'fit' in law as integrity is that it

[a]sks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.¹³⁴

The real challenge for constructive interpretation as described by Dworkin is in respect of legal systems where the promotion of justice, fairness and procedural due process is not necessarily a preoccupation of the legal system and its officials. This is particularly the case, for example, in countries where principles of democracy and the rule of law are not espoused. However, for legal systems that aspire to promote equality, justice, fairness, and due process, Dworkin's constructive interpretation can be a real model for constitutional interpretation.

But what happens in the event that various interpretations 'fit' the bulk of the text of institutional legal record? This question brings me to the second requirement of justification in a legal judgment. Dworkin describes the situation as follows:

¹³⁴ *Ibid* p 243.

He may find, not that no single interpretation fits the bulk of the text, but that more than one does. The second dimension of interpretation then requires him to judge which of these eligible readings makes the work in progress best, all things considered.¹³⁵

In terms of the second dimension, where there is a choice between different interpretations which both fit the bulk of the text, the novelists should prefer an interpretation which they believe makes the novel the best it can be.¹³⁶ Similarly, judges are enjoined to tell the best story and construct the best interpretation of previous works of contributors to legal doctrine. Judicial decisions should, therefore, not only fit but must also provide justification of already decided cases. Under the old dispensation in both Namibia and South Africa, it was this requirement in Dworkin's interpretive program that made his theory hard to contemplate. The proverbial question often is, what is the point of justifying an evil legal system or wrongly decided cases unsupported by political morality of the legal system?¹³⁷ Regarding wicked legal systems Dworkin assures us that,

I do not mean that every kind of activity we call interpretation aims to make the best of what it interprets—a 'scientific' interpretation of the Holocaust would not try to show Hitler's motives in the most attractive light, nor would someone trying to show the sexist effects of a comic strip strain to find a nonsexist reading—but only that this is so in the normal or paradigm cases of creative interpretation.¹³⁸

A judge must choose an interpretation 'which shows the community's structure of institutions and decisions- its public standards as a whole-

¹³⁵ *Ibid* p 231.

¹³⁶ *Ibid*.

¹³⁷ A detailed discussion and analysis of this objection to Dworkin's constructive interpretation is addressed in the next chapter. The standard objection to Dworkin's best light approach is that, 'Judges should not look at the law through 'rose-coloured' glasses, trying to see it in the best possible way, or present a legal system in its best light. They should rather do their best to present the law as it actually is'.

¹³⁸ Dworkin *Law's Empire* p 421.

in a better light from the standpoint of political morality'.¹³⁹ Two points are worth mentioning regarding the justification requirement. Firstly, Dworkin admits that the juridical activity of interpretation is contestable. Accordingly, there will always be possibilities for competing interpretations. For law as integrity however, the interpretation which is morally superior should be preferred over other alternative interpretations. It is submitted that this stage of a legal judgment requires judges to make a moral or value judgment.¹⁴⁰

Are judges at liberty to decide cases as they please according to their own subjective views?¹⁴¹ Dworkin rejects the notion that the writers in this enterprise are free to write whatever they like. Rather, he maintains that there are constraints placed on the respective novelists. The first constraint is that each new chapter must 'fit' the already existing material.¹⁴² However, Dworkin cautions that this does not mean that the new chapter must 'fit' exactly. The dimension of fit does not mean that 'his interpretation must fit every bit of the text',¹⁴³ rather it must fit the bulk of the text.

Dworkin has been criticised from diverse quarters. Raz has questioned the value of what he calls 'recipe-like theories' aimed at guiding judges

¹³⁹ *Ibid* p 256.

¹⁴⁰ It is submitted that even at the first stage of 'fit', judges may still be required to make a moral judgment. This is so because the process of determining whether a particular interpretation fits the bulk of the text may well involve moral reasoning.

¹⁴¹ The objection to Dworkin's theory that it gives judges too much freedom to decide according to their own subjective views of morality will be addressed in chapter 4.

¹⁴² In chapter 4 I will discuss the question of textual constraints in legal interpretation. The focus of the discussion will be on the debate between Ronald Dworkin and Stanley Fish. Stanley Fish has been one of Dworkin's fiercest critics. Fish's critique of Dworkin's chain novel metaphor is contained in 'Working on the Chain Gang: Interpretation in Law and Literature', in F Atria & DN MacCormick *Law and Legal Interpretation* 387-406.

¹⁴³ Dworkin *Law's Empire* p 230.

to the right decisions before them,¹⁴⁴ or legal theories that claim to provide criteria on how to distinguish good interpretations from bad ones.¹⁴⁵ Admittedly, Raz has been very down on Dworkin- he always was. There are indications though that he might be softening his approach now that he talks of his theory as ‘serviceable’ only as a moral conception of law. Clearly, this may be seen as giving his whole theory to the anti-positivist camp.

Fish¹⁴⁶ doubts the value of Dworkin’s ‘law as integrity’ because he believes that this is already a strategy that judges employ in legal interpretation, and to which they are already committed. Fish’s main attack on Dworkin centers on the nature of constraints in legal interpretation. To the question what constrains an interpreter in legal interpretation, Fish argues that it is the interpreter’s training, shared conventions etc. He says the interpreters

are already and always thinking within the norms, standards, criteria of evidence, purposes and goals of a shared enterprise; such that the meanings available to them have been preselected by their professional training’.¹⁴⁷

It is important to observe that, for Dworkin, there is not a clear line of demarcation between the dimension of fit and that of value. Dworkin rather submits that this is ‘a useful analytic device that helps us give structure to any interpreter’s working theory or style’.¹⁴⁸ Furthermore, the constraint of the texts is not only due to hard facts which everyone must agree to¹⁴⁹ there are substantive constraints as well. For example,

¹⁴⁴ J Raz 1996a ‘On the Nature of Law’ 82 *Archive fir Rechts und Sozialphilosophie* 1-25.

¹⁴⁵ J Raz 1996b. ‘Why Interpret?’ in Atria & MacCormick (eds) *Law and Legal Interpretation* pp 17-31.

¹⁴⁶ Fish *Law and Legal Interpretation* pp 387-406.

¹⁴⁷ *Ibid.*

¹⁴⁸ Dworkin *Law’s Empire* p 231.

¹⁴⁹ *Ibid* p 235.

in reference to Fish, one cannot argue that something is wrong 'because I was trained to think it is wrong'; we all accept that our judgments can transcend our training. Dworkin acknowledges that the dimension of fit may indeed be controversial, and is not imposed by disciplining rules or by the community of interpreters; instead it is an internal constraint which emanates from the interpreter taking the requirement of fit seriously. According to law as integrity, judges are required to assess their predecessors' work critically, even to the point of declaring and refusing to follow their mistakes.¹⁵⁰

What, then, is the point of Dworkin's theory of law as integrity? According to Dworkin, once it is acknowledged that law is a matter of interpretation, it would follow that all those involved in discussing the law must be engaged in the same interpretive exercise.¹⁵¹ Judges, lawyers and legal philosophers, Dworkin argues, are all participants in the same 'game' of interpretation.¹⁵² They are all engaged in debates about the nature of law. But what law is rests on how the values underpinning the legal system are interpreted. He argues therefore that all participants in legal interpretation are also concerned with what law ought to be.¹⁵³

Having looked at the object of interpretation in Dworkin's theory, it is important now to examine how Dworkin's idea of interpretation applies to law as social practice. Dworkin says that there are three analytical attitudes in terms of which a social practice may be understood. These are the pre-interpretive, the interpretive and the

¹⁵⁰ Cotterrell *The Politics of Jurisprudence* p 168.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid* p 169.

post-interpretive.¹⁵⁴ Dworkin avers that there are two ways of studying the argumentative aspect of legal practice. These are the ‘external point of view of the sociologist or historian’ who asks why certain patterns of legal argument develop in some period, or circumstances rather than others, for example, and the ‘internal point of view of those who make the claim’.

In order to understand legal practice, Dworkin argues, the viewpoint of the participant must be embraced and not the external observer’s perspective. This is because interpretation is essentially concerned with how the practice ought to be followed and applied, and these are questions which arise for the participants and not external observers.¹⁵⁵ Accordingly, *Law’s Empire* ‘tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truths participants face’.¹⁵⁶

It is beyond doubt that the Constitution of Namibia has a purpose. For purposes of the present study, a parallel and yet important enquiry therefore relates to the best way of interpreting the Constitution. Put another way, what kind of interpretation places the Constitution in its ‘best’ light, regard being had to its purposes and point? To understand the Constitution one ought to understand it in light of its purpose. This obviously presupposes that competing interpretations on what constitutes the best interpretation of the Constitution are inevitable. A good interpretation of the Constitution will therefore be one which places it in the most sensible way of looking at it. A judge’s conception

¹⁵⁴ These analytical attitudes are the three stages of constructive interpretation and will be discussed in more detail in the later pages.

¹⁵⁵ NE Simmonds 2002 *Central Issues in Jurisprudence* p 192.

¹⁵⁶ Dworkin *Law’s Empire* p 14.

of the purpose of the Constitution plays a role in how that judge approaches the interpretation of the constitution. In the context of Namibia, there can be no doubt that a total revolution occurred at independence and that a new legal order was introduced. It is no wonder then that the Namibian judiciary has long acknowledged this revolution in many of their judicial pronouncements. For example, in *Kaulinge v Minister of Health and Social Services*¹⁵⁷ the court, per Mainga J, acknowledged the revolution as follows:

Administrative bodies and administrative officials who are capable of making decisions affecting citizens should always bear in mind that, by the adoption of the Constitution of Namibia, we have been propelled from a culture of authority to a culture of justification.¹⁵⁸

Employing a Dworkinian approach to constitutional interpretation entails that in order to understand the Constitution one ought to understand it in light of its point. When Dworkin's constructive interpretation is transposed to constitutional interpretation a good interpretation of the Constitution therefore becomes one which places it in the most sensible way of looking at it. Conversely, a bad interpretation of the constitution is that which vitiates the values undergirding it or that which does not portray it in the best light possible.

In light of Dworkin's constructive interpretation, the central research question that this study addresses is whether the interpretive approach adopted by the Supreme Court of Namibia is one which portrays the Constitution in its best light. It must be conceded right at the outset that there are divergent views regarding how best to interpret a nation's constitution. Irrespective of the divergent views

¹⁵⁷ 2006 (1) NR 377 (HC).

¹⁵⁸ At 385I-J.

regarding constitutional interpretation, I maintain that the ‘point’ or ‘purpose’ of the Constitution should be paramount in its interpretation. The Constitution has a point or purpose that interpretation should strive to foster. Without doubt, different people will have differing conceptions of what constitutes the best interpretation of the Constitution, and it is not Dworkin’s view that people ought to agree on any particular interpretation.

To demonstrate the responsiveness of Dworkin’s legal theory to real legal arguments, it must be tested then against actual arguments judges use.¹⁵⁹ Dworkin’s legal theory presupposes the inevitability of tension between legal materials and their best moral construction.¹⁶⁰ In Dworkin’s view, legal materials and their interpretation must draw upon the best moral theory of a particular legal system. And this morality, according to Dworkin, is founded on the idea of treating people as equals.¹⁶¹ Guest explicates that legal practice can ‘only make sense against the background of a moral theory based on the idea of equality’.¹⁶² But how is the blend between legal materials and moral theory achieved? Guest elaborates that this meld

is achieved in the idea of integrity which requires that the law cohere in a way that is distinct from justice, according to which the right state of affairs exists in society, and distinct from fairness, a conception of equality according to which each point of view must be allowed a voice in the process of deliberation. What this means is that law should always be created, or interpreted, so as to form an integrated whole.¹⁶³

¹⁵⁹ Guest *Ronald Dworkin* p 33.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

3.5 Principles and Morals in interpretation

What can be discerned in Dworkin's developing theory of interpretation is an acknowledgement of the metamorphosis of the nature of both principles and morals. From the preceding discussion it is apparent that principles and morals are the two central elements in Dworkin's theory of interpretation. Nonetheless, just as society's sense of appropriateness change over time, principles and morals also evolve. Accordingly, Dworkin says of principles that 'their continued power depends upon (this sense of appropriateness) being sustained'.¹⁶⁴ In the same way that the morals undergirding a given society changes, so should the weight that attaches to principles governing judicial decisions. I shall argue in the later pages and attempt to show that indeed principles and morality have also evolved in Namibia just as Dworkin suggests.

Notwithstanding the evolving nature of morality and principles, some principles are foundational to a political community. And Dworkin intimates that the political morality of any given society can be traced to those foundational principles.¹⁶⁵ It is conceded that this much is also true in the context of Namibia's constitutional jurisprudence. In the preamble to the Namibian Constitution it is evident, for example, that human dignity and equality of all members are some of the foundational principles of Namibia's political morality. It is stated in the Preamble as follows:

Whereas the recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

¹⁶⁴ Dworkin *Rights* p 40.

¹⁶⁵ *Ibid* p 272.

Whereas the said rights include the right of the individual life, liberty and pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed, or social or economic status...

Being foundational to the political morality of society implies that human dignity and equality should be considered in all decisions that courts make. The Namibian Constitution makes it clear that human dignity is a foundational principle of society's political morality. As regards human dignity, *Article 8* of the Constitution makes it an imperative for courts to consider this foundational principle or value in all judicial proceedings that come before any organ of state. *Article 8* of the Constitution provides thus:

- (1) The dignity of all persons shall be inviolable.*
- (2) (a) In any judicial proceedings before any organ of state, and during the enforcement of a penalty, respect for dignity shall be guaranteed.*
 - (b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

It was shown in Chapter 2 that the Namibian courts have, on several occasions, been called upon to adjudicate on the foundational principle or value of human dignity. Sadly, not all judicial decisions have seemed to promote and protect this foundational value.

In the context of America, Dworkin focuses on human dignity and equality as foundational principles to that nation's political morality. In the same way that slavery has coloured the notion of equality in the United States of America, and the Holocaust colours the notion of equality in Germany, it is a history of colonialism, racism and

apartheid¹⁶⁶ that colours the notion of human dignity and equality in the Namibian Constitution. Not only that, but I submit further that the historical context of these foundational values should continue to colour our construction and interpretation of these constitutional principles. This, it is hoped, may be a deterrent factor to a return of a culture which has no regard for human rights.

Dworkin acknowledges that human dignity is the most significant right on account of it being foundational to political morality and that any notion of rights emanates from human dignity.¹⁶⁷ Accordingly, when the foundational principle of human dignity is threatened, it acts as a trump to other competing rights or interests. It will be propitious for purposes of this study to define the term or concept of human dignity. What is meant by human dignity? The concept of human dignity is defined by Dworkin as supposing that ‘there are ways of treating a man that are inconsistent with recognizing him as a full member of the human family ... [S]uch treatment is profoundly unjust’.¹⁶⁸ Human dignity, thus, in Dworkin’s view is a sacred value in itself;¹⁶⁹ and requires that human beings should be treated as ends, not means.¹⁷⁰

In Chapter 2 I explored the constitutional jurisprudence of Namibia and I assessed the extent to which the Namibian concept of human dignity resembles that of Dworkin; needless to say that human dignity is a universally recognised principle. The pre-eminence of human dignity as a foundational value to Namibia’s political morality is well

¹⁶⁶ It is stated again in the preamble that ‘...these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid’.

¹⁶⁷ Dworkin *Rights* p 198.

¹⁶⁸ *Ibid.*

¹⁶⁹ Dworkin *Life’s Dominion* p 236.

¹⁷⁰ *Ibid.*

established in the preamble and Article 8 of the Constitution. The question is whether the Namibian courts have consistently promoted and protected this highest value of the Constitution. Human dignity is not determined by factors such as social worth of an individual. Rather, it adheres to the mere fact of human existence. And this is how Dworkin defines the concept, that it exists independent of desert, social condition, or the individual's assertion of it.¹⁷¹ It is in this sense that the dignity of all persons is inviolable.

Every human person possesses human dignity regardless of social or economic status, and it cannot be taken away. Thus, in instances where an individual's human dignity is violated by government, such an individual has a strong right against government in the Dworkinian sense. Dworkin refers to these rights as 'human rights' because there can be no justification for abrogating them.¹⁷² This much is clear from the language of *Article 8* dealing with human dignity in the Constitution. Because the dignity of all persons is inviolable, no collective justification can justify the violation of this human right. It is for this reason that Dworkin maintains that government ought therefore to show equal concern for every member of society. The idea of equality is acknowledged as the driving force behind Dworkin legal theory and political theory.

3.6 Conclusion

The rights discourse is the golden thread that runs through Dworkin's works. Dworkin's understanding is that the purpose of law is to constrain government power and to protect individual rights. In *Taking Rights Seriously*, Dworkin makes the argument that the

¹⁷¹ *Ibid* p 238.

¹⁷² Dworkin *Rights* p 365.

function of the law is to protect the rights of individuals. He makes the argument by distinguishing principles from policies, that principles advance individual rights whereas policies advance communal goals.

From his belief that law ought to protect individual rights, Dworkin develops a theory of interpretation which he calls 'law as integrity', in terms of which coherence in principle is emphasised. In terms of this theory, government is required 'to speak with one voice, to act in a principled and coherent manner towards its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some'. Accordingly, judges are required to identify and protect individual rights, thus expressing a coherent conception of justice and fairness.

For Dworkin, judges should strive for legal interpretation which is the best constructive interpretation of the political structure and legal doctrine of their community. This entails that judges are to decide cases in ways that will further the values which are inherent in the legal system, and to portray legal doctrine in its entirety as integrated and coherent. This will ensure, according to Dworkin, that 'each person's situation is fair and just according to the same standards'.¹⁷³

The tentative argument in the study is to expose some connections between Dworkin's theory of interpretation and legal interpretation under the new constitutional order in Namibia. On Dworkin's view, the main function of the judiciary is to protect individual rights. The human rights discourse is well entrenched in the Constitution through the Bill of Rights. In the Namibian Constitution however, as

¹⁷³ Dworkin *Law's Empire* p 243.

mentioned before, the Bill of Rights is limited to civil and political rights, and does not extend to socio-economic rights. I have argued that unless there is tangible improvement in people's lives, these constitutional values are nothing but empty rhetoric. Nonetheless, I also argued in Chapter 2 that Dworkin's approach can address the lack of inclusion of socio-economic rights in the Namibian Constitution. In other words, a constructive interpretation of classical liberal rights as contained in the Namibian Constitution is inclusive of socio-economic transformation. Accordingly, this calls for the judiciary to adopt an 'activist' function with regard to the interpretation of constitutional values and principles. In my view, this is Dworkin's main contribution to contemporary legal theory.

Chapter 4

Criticisms of Ronald Dworkin

4.1 Introduction

In Chapter 3 I provided a panoramic glance of Dworkin's legal theory. In this chapter I focus on some of the criticisms of Dworkin's theory of constructive interpretation and law as integrity. In addressing some of those objections, I consider Dworkin's reply or Dworkinian responses to objections raised. My central argument is that notwithstanding all the criticisms levelled against Dworkin, his theory of constructive interpretation remains an attractive approach to constitutional interpretation for the Supreme Court of Namibia. Dworkin is widely regarded as one of the most eminent legal philosophers of the modern era and a special phenomenon of the Anglo-American jurisprudence. The attractiveness of his theory or the controversial nature of his claims account for much of the success that his legal theory enjoys, particularly his ability to situate his theory in between several jurisprudential viewpoints.¹

Dworkin's legal theory of law as integrity calls upon judges to reach out for foundational principles in legal systems so as to ensure that people are treated with equal concern and respect. However, notwithstanding the attractiveness of Dworkin's legal theory to judicial practice,² his legal theory has equally attracted a wide range

¹ See C Roederer & D Moellendorf 2004 *Jurisprudence* p 95.

² See D Patterson 1993 'The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory' 72 *Texas Law Review* 1 p 8; Roederer & Moellendorf *Jurisprudence* p 94.

of criticisms ranging from the notion that he's actually a positivist³ to the claim that his theory is nothing but a 'noble dream'.⁴ Many scholars have thus expressed reservations and an ambivalent posture to Dworkin's work, calling into question the significance and quality of his work⁵ and doubting whether he should even be considered as one of their peers.⁶

In this chapter I address some objections and criticisms of Dworkin, and also Dworkin's reply or a Dworkinian reply thereto. However, not all criticisms that have ever been levelled against Dworkin are considered and canvassed in this chapter. Some of the criticisms that are addressed in this chapter are: the notion that he is a liberal who puts individual interests ahead of communal interests; the claim that Dworkin's legal theory accords judges too much freedom; Fish's critique; the CLS' critique; and the view that law and morals cannot be objectively known.

In section 4.2.1 I briefly outline some common objections to Dworkin's constructive interpretation and law as integrity. These include the

³ Sartorius *Individual Conduct and Social Norms: a Utilitarian Account of Social Union and the Rule of Law* p. 192; J Coleman *Markets, Moral and the Law*; HLA Hart in his 'Postscript' to 1994 *The Concept of Law*; Roederer & Moellendorf *Jurisprudence* p. 101.

⁴ Hart refers to Dworkin's legal theory as a noble dream in 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream', in HLA Hart 1983 *Essays in Jurisprudence and Philosophy*.

⁵ B Leiter 2004 'The End of the Empire: Dworkin and Jurisprudence in the 21st Century' 36 *Rutgers Law Journal* 165, 165-166 (Dworkin's contribution to jurisprudence and its significance is played down and that it 'is implausible, badly argued for, and largely without philosophical merit'). A similar opinion is expressed T Brooks 2006 'Book Review' 69 *Modern Law Review* 140, 142. See also Alexander *Law and Philosophy* 419; JL Coleman 2001 *The Practice of Legal Principle: In Defence of a Pragmatist Approach to Legal Theory* 105 184-185.

⁶ See J Dickson 2001 *Evaluation and Legal Theory* p 22-23 & n 31; Hart *The Concept of Law* p 240-41; MS Moore 2000 *Educating Oneself in Public: Critical Essays in Jurisprudence* p 104, 306; MH Kramer 1999 *In Defence of Legal Positivism: Law without Trimmings* p 128; J Gardner 2004 'The Legality of Law' *Ratio Juris* 369 p 373.

accusation that Dworkin fails to understand the nature of interpretation, the nature of constraints in legal interpretation, the question of subjectivity in interpretation, and legal interpretation and intention of the legislature. Section 4.2.2 consists of Dworkin's response to objections and criticisms levelled at his theory of interpretation. In section 4.2.3 I discuss the meaning of objectivity in legal interpretation. My main claim in this Chapter is that notwithstanding the potency of some objections to Dworkin, these criticisms fail to grasp the gist of his argument, which is that the point of law is the key determining factor in legal interpretation.

4.2 Objections to Dworkin's Theory

4.2.1 Law as Integrity and 'Evil Legal Systems'

There have been notable objections to Dworkin's theory of constructive interpretation of law and the idea of projecting a practice in 'the best' light. Dworkin has been criticised for misunderstanding the nature of legal interpretation. Critics charge that it is not a concern of interpretation to make the best of what is interpreted. The reason for this is that there are legal systems or laws in general that are inherently immoral, and that there is accordingly no point in attempting to project these laws or legal systems in a better light. To this end therefore, some practices ought to be portrayed in their true state which means their poorer rather than 'best' light.⁷ The example often cited is the Nazi regime. Often the question is what is the point of attempting to portray Adolf Hitler as morally good? Or, what is the point of portraying the apartheid legal system in its best light? Is it not the case that the best way of viewing it is by showing it in its true light? Viewed from this perspective then, so the argument goes, the

⁷ *Ibid.*

'best' interpretation of Hitler cannot be achieved through the suppression of facts.⁸

The utility of law as integrity to jurisdictions like South Africa and Namibia that have legacies of apartheid has been called into question by some scholars. I particularly want to focus on the objection raised by Christodoulidis⁹ in this regard. Christodoulidis argues that Dworkin's theory is an inappropriate approach to a jurisdiction like South Africa because of law as integrity's fidelity to the doctrinal past. Christodoulidis contends that because law as integrity insists that novel judicial decisions 'fit already existing material', in the context of South Africa this would entail perpetuating wicked and repressive apartheid principles inherent in South Africa's legal system. In Christodoulidis's view, apartheid policies and principles permeated 'the interpretative set of principles and values of the legal system of South African with such weight as to foster the iniquity'.¹⁰ According to this argument, as I understand it, apartheid policies and values still form part of South Africa's current value system to which Dworkin's constructive interpretation can provide no answer.

In Christodoulidis's view, law as integrity is inappropriate for South Africa since it would mean committing again to apartheid principles as these had become 'entrenched as part of the institutional record'.¹¹ In his quest to discount law as integrity and constructive interpretation as an approach in South Africa, Christodoulidis is unpersuaded by Mureinik's¹² critical appraisal of Dworkin's legal theory in South Africa. Many South African scholars mooted the applicability of

⁸ *Ibid.*

⁹ E Christodoulidis 2004 'End of History Jurisprudence: Dworkin in South Africa' *Acta Juridica* 64.

¹⁰ *Ibid* p 69.

¹¹ *Ibid.*

¹² Mureinik in Hugh Corder (ed) *Law and Social Practice in South Africa*.

Dworkin's legal theory during the apartheid era.¹³ To this end, Mureinik, among others, mounted a robust defence of Dworkin, particularly against criticisms and objections such as that later raised by Christodoulidis. Contrary to Christodoulidis's assertions that apartheid laws formed 'a weighty, complex and detailed body of statutory law', that 'entered the interpretative set of principles and values of the legal system of South Africa with such weight as to foster iniquity', Mureinik argued that these laws were significantly small even at the pick of apartheid and they formed a small part of a large volume of South African law.¹⁴ Mureinik further contended that apartheid laws arose as a result of policy considerations and not moral principles¹⁵ as Christodoulidis argues.¹⁶

Notwithstanding Mureinik's best efforts, Christodoulidis is adamant that the 'iniquity' of apartheid cannot be countered so easily by integrity.¹⁷ This is because, for Christodoulidis, even if it is accepted that 'apartheid laws are mistakes, they are both weighty and entrenched mistakes' to which law as integrity will commit South Africa.¹⁸ I understand Christodoulidis to be saying here that apartheid principles continue to form part of South Africa's value system, the revolution notwithstanding. If my assessment of Christodoulidis is correct, the problem with Christodoulidis's argument becomes a failure to acknowledge the fact that a 'total revolution' occurred in South Africa in 1993 with the advent of the Interim Constitution. As I will argue in the later pages, this revolution creates an opportunity for a thriving Dworkinian industry in both South Africa and Namibia.

¹³ See, for example, J Dugard 1984 'Should Judges Resign?- A Reply to Professor Wacks' 101; D Dyzenhaus 1991 *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*.

¹⁴ Mureinik 'Dworkin and Apartheid' p 207.

¹⁵ *Ibid.*

¹⁶ Christodoulidis *Acta Juridica* p 69.

¹⁷ *Ibid* p 72.

¹⁸ *Ibid* p 71.

4.2.2 Dworkin's Interpretive Community?

Dworkin has written extensively describing the community as the basis of law.¹⁹ He is nonetheless criticised for failing to provide an analysis of the political and social circumstances where it would be beneficial to think of law as an expression of community values. According to Cotterrell, Dworkin

Can offer no analysis of the sociological conditions under which a community can exist or of the meaning of the concept of community as a characterisation of empirically observable patterns of social life, or of the historically specific political and social circumstances in which it is useful to think of law as expressing community values.²⁰

For Dworkin, those who participate in legal interpretation in a legal system are, through their participation, part of the community.²¹ His attempts to explain judicial creativity in terms of law itself leads to the conclusion that only by adopting a viewpoint of a lawyer or judge, can one become a participant in interpreting the law of a particular legal system.²² Dworkin's critics, therefore, find his community of interpreters unrealistic. As Cotterrell contends

It is... profoundly unrealistic to consider non-lawyer citizens, on the one hand, and lawyers or judges on the other, as part of the same community of legal interpreters. For example, can the views expressed in scholarly law review articles on the meaning of current legislation be somehow seen as part of a debate with the opinions of, say, homeless people, asylum seekers, mental patients, or other groups who urgently need law's help, as to whether the fundamental values and principles of the legal system are accurately expressed in recent judicial pronouncement? This image of community is entirely unconvincing.²³

¹⁹ Dworkin *Law's Empire* pp 195-215.

²⁰ R Cotterrell *The Politics of Jurisprudence* p 170.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid* p 171, 172.

It is Cotterrell's view that if law is to be understood as interpretation, it must be accepted that lawyers almost entirely have monopolised interpretation. Thus, any other contrary view is either naively idealistic or a willful refusal to recognise evidence from social experience.²⁴ It is beyond me why Cotterrell thinks that Dworkin's interpretive community is not in touch with social reality. Cotterrell fails to appreciate Dworkin's idea of community clearly outlined in *Law's Empire*.²⁵ Dworkin's idea of community is based on equality in the form of fraternity and so obviously embraces the poor and the dispossessed that Cotterrell refers to. Not that, if he is a sociologist, he can refer to them in any morally approving or sympathetic or disapproving way. Here is what Dworkin says about a community of integrity:

A community of principle... assimilates political obligations to the general class of associative obligations and supports them in that way. This defense is possible in such a community because a general commitment to integrity expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations according to standards for communal obligation we elsewhere accept.²⁶

Veitch²⁷ has objected to Dworkin's community for being hypocritical. Veitch charges that Dworkin's use of 'we' in his description of community is designed to mask inequalities and differences and therefore 'hides a multitude of problems'.²⁸ For Veitch, Dworkin's community is 'over-inclusive and, as such, the "we" which can be encapsulated and brought to presence by law, may seem to be hiding or masking aspects of or assumptions about group formation and

²⁴ *Ibid.*

²⁵ See *Law's Empire* p 206-216 where Dworkin discusses fraternity and political community.

²⁶ Dworkin *Law's Empire* p 216.

²⁷ S Veitch 'Ronald Dworkin and the Power of Ideas' *Acta Juridica* 48.

²⁸ *Ibid* p 48.

identity'.²⁹ In the main, Veitch charges that Dworkin's work 'is never with social reality *understood from the position* of those on the downside'³⁰ (emphasis original). Veitch contends that the

[s]ingular community that Dworkin's work projects marks the tombstone of the oppressed and silenced since one cannot ascribe this community identity without doing great damage to an understanding of what is, and how things go, wrong in the liberal community.³¹

Veitch is not alone in his view that Dworkin's community is unreal. Christodoulidis shares similar sentiments. He writes:

Dworkin's community is not vulnerable to such real dangers because it is a postulate. Postulates don't suffer breakdowns. The continuity of Dworkin's community over time is guaranteed because the community is a projection of unity, its narrative the law and its communal identity the citizen as legal personality. The unity is built into the concepts and it is therefore not vulnerable to real danger.³²

The reason why Veitch rejects Dworkin's community seems to be that it is not reflective of notorious social realities in liberal communities where divisions along 'class, race, gender, institutional, corporate, economic lines etc.' are rampart and more pronounced.³³ Admittedly, it is not my reading of Dworkin's legal theory that it aims to mask socio-economic realities, nor that Dworkin's theory suffers from some selective jurisprudential amnesia as Veitch alleges.³⁴ As I shall argue later on, Dworkin's community of integrity is aspirational and is thus not necessarily intended to accurately capture socio-economic realities. I want to suggest that it is because of the recognition of these socio-

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid* p 52.

³² E Christodoulidis 1998 *Law and Reflexive Politics* p 204.

³³ Veitch *Acta Juridica* p 50.

³⁴ *Ibid* p 59.

economic inequalities that Dworkin's theory calls on government to 'speak with one voice' and to treat each citizen with 'equal concern and respect'. It is, in my view, hard not to see Dworkin's project as an attempt to address socio-economic inequalities in society. Similarly, I argue that even the Critical Studies Movement's criticism of Dworkin is addressed by a recognition and acceptance that Dworkin's theory is not necessarily a report of actual legal practice and that constructive interpretation must be considered as Dworkin's answer to ad hoc and incoherent judicial decisions.

4.2.3 The CLS Critique

Another criticism related to the above is a bit more expansive and is posed by the Critical Legal Studies Movement.³⁵ The CLS movement offers a very radical alternative³⁶ to liberalism, and is inherently skeptical about the orthodoxy that Dworkin propagates. Whereas Dworkin believes in the efficacy of law to provide solutions to problems that face mankind, CLS Scholars contend that law is part of the problem. CLS Scholars charge that law is an instrument of injustice, and that the rights discourse that liberalism seems to confer on individuals is designed to mask inequalities within societies.³⁷ Their project therefore aims to expose the contradictions and inconsistencies they perceive in law, which they claim, lies beneath the neutral exterior of law which Dworkin vigorously defend. The significance of

³⁵ Critical Legal Studies (hereafter CLS) movement is generally acknowledged to have been the successor movement to the American Realists. Their stance can well be characterised as anti-orthodoxy, and often argue that law is part of the problem facing mankind, and accordingly has as its motto the unmasking of the true nature of law so as to expose inherent inconsistencies therein. See Freeman *Jurisprudence* p 1040. It is submitted that CLS has gone into decline: there are few CLS adherents left. I think the main reason for this decline is that they offered nothing positive.

³⁶ Though the alternative that CLS offers in its destructive path of liberal legal thought has not been clearly articulated to my best knowledge.

³⁷ CLS does not believe that the liberal legal tradition is amenable to redemption or reforms. They aim to uproot all of law's claims.

this critique is that it goes to the core of liberal legal thought in general and Dworkin's theory of constructive interpretation in particular.

According to CLS, legal rules are indeterminate and the 'doctrinal sources of law are so porous and malleable' that it is impossible for them to dictate one uniquely correct answer. Legal rules in this view are also subject to manipulation in the legitimation of whatever decision a judge wishes to make.³⁸ CLS argues that for every legal rule there is a counter-legal rule, and that for every principle there is an equally valid counter-principle. CLS rejects as exaggerations and extravagant, claims that law have an objective content and that it is neutral in its operation.³⁹ For CLS, the portrayal of law by the liberal tradition as rational, coherent, necessary and just, is designed to mask inherent contradictions in law. CLS thus maintains that 'law is arbitrary, contingent, unnecessary and profoundly unjust'.⁴⁰ Unger, for example, argues that there is no need to presume coherence in the law when it is clearly 'the outcome of contingent power struggles or of practical pressures lacking in rightful authority'.⁴¹

Accordingly, Critical Legal Scholars charge that the human rights discourse which is the focal point of theories such as Dworkin's is misleading. They also charge that liberal theories about rights tend to also create a false sense of self and wrongly put individual interests ahead of community interests.⁴² This, in turn, creates a false consciousness.

³⁸ Roederer and Moellendorf *Jurisprudence* p 251.

³⁹ McCoubrey and White *Textbook on Jurisprudence* p 227.

⁴⁰ *Ibid.*

⁴¹ R Unger 1983 'The Critical Legal Studies Movement' 96 *Harvard Law Review* 561 p 565.

⁴² D Meyerson 2007 *Understanding Jurisprudence* p 127.

Gabel argues that,

It may be necessary to use the rights arguments in the course of political struggle, in order to make gains. But the thing to be understood is the extent to which it is enervating to use it... [P]eople think they have won, but in fact what has happened is that they have had a temporary victory with potential for using it for leverage to gain more power, not an absolute abstract gain in social progress.⁴³

Marx charged that rights only existed to protect people motivated by self-interest- those who consider others as a threat to themselves. It is trite that CLS was greatly influenced by Marx. Thus their further contention is that the rights doctrine gives prominence to individualism at the expense of communal relations and solidarity.⁴⁴ Accordingly, rights are regarded as catering only for the interests of the elite and powerful in society. Marx held that the rights discourse served the interests of the capitalist class and that the promise of freedom and emancipation which it offers is just a sham.⁴⁵

As far as CLS is concerned, the rights discourse masks social and economic inequalities. Gabel and Kennedy⁴⁶ states thus:

This is the essence of the problem with rights discourse. People don't realize that what they are doing is recasting the real existential feelings that led them to become political people into an ideological framework that co-opts them into adopting the very consciousness they want to transform. Without even knowing it, they start talking as if 'we' were right-bearing citizens who are allowed to do this or that by something called the state, which is a passivizing illusion - actually a

⁴³ See P Gabel and D Kennedy 1984 'Roll over Beethoven' 36 *Stanford Law Review* 1 33.

⁴⁴ Meyerson *Understanding Jurisprudence* p 113.

⁴⁵ *Ibid* p 126.

⁴⁶ 1984: 26, quoted in Meyerson *ibid* 114.

hallucination which establishes the presumptive political legitimacy of the status *quo*.⁴⁷

It is submitted that the real problem of CLS is the movement's commitment to show law and legal practice as disjointed and serving no purpose. But perhaps CLS is too committed to their project to acknowledge that law serves purposes that are good. It is not Dworkin's argument that legislative pronouncements are always in harmony with one another, or that judicial decrees are consistent. Law as integrity recognises that statutes in any given legal system may be at variance with one another. It is for this reason, in my view, why Hercules 'tries to impose order over doctrine, not to discover order in the forces that created it'.⁴⁸ CLS's claim that because law is contradictory and therefore that there can never be any successful interpretation of law cannot be taken seriously.

It is submitted that the CLS critique is more pertinent to the Namibian Constitution than to Dworkin's legal theory. The gist of Dworkin's theory is that it calls on government to 'speak with one voice' and to treat everyone with equal concern and respect. As pointed out in Chapter 2, whereas the Namibian Constitution confers civil and political rights on everyone, it does not recognize socio-economic rights. Socio-economic rights are included in the Constitution simply as principles of State Policy,⁴⁹ which are unenforceable by the courts.⁵⁰

⁴⁷ Gabel & Kennedy *Stanford Law Review* p 26.

⁴⁸ Dworkin *Law's Empire* p 273.

⁴⁹ Article 95 of the Constitution lists policies aimed at promoting and maintaining the welfare of the people.

⁵⁰ Article 101 of the Constitution provides as follows:

'The principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any court, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them'.

Nonetheless, I argued in Chapter 2 of the potential of Dworkin's theory to address also socio-economic transformation in Namibia.

4.2.4 Constraints in Legal Interpretation

What should constrain an interpreter in ascribing meaning to legal texts? Are there any constraints in legal interpretation or are lawyers and judges at liberty to ascribe any meaning dictated by their personal tastes? In his analogy of the chain novel Dworkin likens the development of law to the writing of a chain novel by a group of novelists. He explains that in this exercise of writing a novel, the subsequent writers are not at liberty to write whatever they like, but are constrained by the 'text' of what has gone before. Essentially, Dworkin maintains that subsequent writers are constrained by the text. In the event that there are several eligible interpretations that 'fit' the legal record, again Dworkin argues that the interpretation which is morally superior in terms of the values underpinning the legal system should be preferred over any other interpretation. Again, here Dworkin points to another constraint of moral justification.

Fish is one of Dworkin's jurisprudential nemeses. Dworkin thought Fish very superficial but a wonderful wordsmith. Their critical exchanges centred on the nature of constraints in interpretation. What constrains judges during the juridical activity of interpretation? Whereas Fish concurred with Dworkin that law, just like any text in literature, was a matter of interpretation, he is nonetheless critical of Dworkin on the nature of constraints in legal interpretation. Fish argues that what is interpreted (literary texts and historical legal materials) are indistinguishable from their interpretation. I must admit that I find Fish's nihilist stance about the text too extreme and improbable, particularly in the interpretation of normative

constitutions.⁵¹ On Fish's view, the text appears only through the process of interpretation. For Fish, the interpretation of texts constitutes what is interpreted. He writes that 'linguistic and textual facts, rather than being the objects of interpretation, are its products'.⁵² Fish is too subjective in my view. Interpretation (of a practice) must be constrained by a) the facts of the practice and b) the best sense of that practice. You can't in other words make a text 'anything you want it to be'.

According to Fish, the controls that operate to limit possible interpretations are external to the text, thus statutes or precedents, for example, do not, by their nature, rule out certain interpretations.⁵³ These controls are imposed by the interpreting community⁵⁴ by means of conventions, expectations, shared understandings and structure of the interpreting community (for example, a legal profession, or judiciary) and the argumentative skills of the interpreters.⁵⁵ It is the interpretive community, for Fish, that explains the process of interpretation. The text and its reader do not exist in a vacuum, and their interaction with each other always takes place within a social milieu of interpretive strategies.⁵⁶ It follows therefore that neither text

⁵¹ I will elaborate more on this in the last part of this chapter in my analysis of the criticisms levelled at Dworkin's legal theory.

⁵² S Fish 1980 *Is There a Text in This Class?: The Authority of Interpretive Communities* p 9.

⁵³ Admittedly, this is in sharp contrast to the interpretation of a prescriptive constitution. It is the Constitution that prescribes how it ought to be interpreted. And it is the ultimate yardstick for what is legal in matters of legislation, conduct etc.

⁵⁴ The significance of interpretive communities for Fish can be deciphered from the sub-title of the book *Is there a Text in This Class? The Authority of Interpretive Communities*. In the Introduction Fish acknowledges the importance of interpretive communities, he declares:

'... the act of recognizing literature is not constrained by something in the text, nor does it issue from an independent and arbitrary will; rather, it proceeds from a collective decision as to what will count as literature, a decision that will be in force only so long as a community of readers or believers continues to abide by it'.

⁵⁵ Fish in Atria & McCormick *Law and Legal Interpretation*, p.; S Fish, 'Wrong Again' 62 *Texas Law Review* p 299.

⁵⁶ Fish *Is there a Text in This Class?* p 299.

nor reader defines meaning, but the ‘prevailing communal conventions’.⁵⁷ Fish accuses Dworkin with a fascination with textual positivism. For Fish, Dworkin credits texts with an existence of their own, independent of the interpretive community

4.2.5 The Problem of Subjectivity in Legal Interpretation

Another criticism leveled against Dworkin’s constructive interpretation revolves around the question of objectivity or its lack thereof in legal judgments. In terms of this criticism, Dworkin’s theory allows judges too much freedom to shape their decisions, according to their personal moral principles, as each judge sees his own moral convictions as embodied in settled law. Particularly, critics charge that Dworkin’s imaginary judge, Hercules, is a fraud and decides cases according to his own subjective views, passing them over as objective and right answers. This objection is generally often expressed as follows:

Hard cases are hard because different sets of principles fit past decisions well enough to count as eligible interpretations of them. Lawyers and Judges will disagree about which of two is fairer or more just, all things considered, but neither side can be “really” right because there are no objective standards of fairness and justice a neutral observer could use to decide between. So, law as integrity ends in the result that there is no law at all in hard cases like *McLoughlin*. Hercules is a fraud because he pretends that his own subjective opinions are in some sense really better than those of others who disagree. It would be more honest of him to admit that he has no ground for his decision beyond his subjective preferences.⁵⁸

The charge that legal judgments lack objectivity and that they are purely an expression of judges’ personal values is an old viewpoint in philosophical circles. In my view this charge is misdirected because in

⁵⁷ *Ibid.*

⁵⁸ See R Dworkin *Law’s Empire* p 266.

legal interpretation, there are certain conventions that are generally followed in the interpretation of legal rules that make it impossible for legal judgments to be merely expressions of judges' personal values. Notwithstanding the fact that judges arrive at the scene of the text with certain biases and presuppositions, it is submitted that these are not decisive in the construction of a legal judgment. However, if they show bias then their decisions can be challenged.

The origins of the subjectivist school may be traced to Nietzsche who proclaimed that: 'knowledge is always by someone of something; it is always bound by perspective, and it is never mere fact'.⁵⁹ In terms of this viewpoint, knowledge is subjective and never factual, and because it is 'bound by perspective' it can never be final.⁶⁰ There are severally acknowledged strands of 'subjectivism', including deconstruction, realism etc. that have fueled the notion that interpretation is a matter of personal taste.⁶¹ The implication of the subjectivist viewpoint for legal interpretation is severe as this would mean that the interpretation of rules is a matter of personal taste, which in turn implies that the meaning of those legal rules can never be final and settled. Subjectivism is expressed as follows by Fish:

All shapes are interpretively produced, and since the conditions of interpretation are themselves unstable- the possibility of seeing something in a 'new light', and therefore of seeing a new something, is ever and unpredictably present- the shapes that seem perspicuous to us now may not seem so or may seem differently so tomorrow. This applies not only to the shape of statutes, poems, and signs in airplane lavatories, but to the disciplines and forms of life within which statutes, poems, and signs become available to us.⁶²

⁵⁹ F Nietzsche (trans. W Kaufmann) (1883-1888) *The Will to Power* p 481.

⁶⁰ It is doubtful how much of Nietzsche's writings would make sense if everything was subjective as he seemed to claim.

⁶¹ See D Patterson 'Normativity and Objectivity in Law' 43 *Wm & Mary L Rev* 325 <http://scholarship.law.wm.edu/wmlr/vol43/iss1/9>. Accessed 12 June 2013.

⁶² S Fish *Doing What Comes Naturally: Change, Rhetoric, and The Practice of Theory in Literary and Legal Studies* p 302.

Notwithstanding its popularity, subjectivism appears to have come under some harsh criticism as well.⁶³ The real problem with the above approach when applied to law or legal rules is that both interpretation and meaning can never be certain. While I acknowledge that these views are quite attractive and popular in contemporary philosophy and literature, contemplating to apply these to law and the operation of legal rules seems questionable. While it is almost impossible for an interpreter to arrive at the 'scene of the text' without presuppositions, his personal perspective is not unfettered in meaning creation. Accordingly, the meaning of legal rules and their truthfulness thereof is not something that changes daily from interpreter to interpreter. Though there is merit to the view that today's dogmas may well be tomorrow's heresies, I maintain that there are limits to an interpreter's role in ascribing meaning. The meaning of legal rules is not anything that any interpretation can produce. This is particularly the case in the interpretation of a normative text like the Constitution. Take 'certainty', for example, it can be identified as a psychological state unconnected with truth. We can never be 'certain' that abortion is morally permissible in particular circumstances but we can nevertheless believe it to be true, very strongly in fact. To suppose that the moral permissibility of abortion is a matter of taste, like a

⁶³ For example, Descombes makes the following observations about subjectivism:

Is this conception of language viable? If we take away the decorations around the way it is formulated, it boils down to a decision to homogenize the question of sense or meaning. It comes down to saying that there is one and only one passages (sic) from signs to meaning: interpretation. A crucial distinction is thereby lost: that between directly accessible meaning and meaning accessible only by inference. It is the difference between understanding and interpreting. The hermeneuticist whose philosophy is expressed by Foucault recognizes no difference between the act of interpreting, which is an intellectual operation by an active mind, and the fact of understanding, which is neither an act nor a performance but the possession of a capacity. This hermeneuticist takes a capacity to be an act and, like the fact of taking the Pireus to be a man, it is an error of category, therefore a metaphysical error. Or, as Wittgenstein would say, a grammatical misunderstanding. We may also note that the distinction in question is also overlooked by those hermeneuticists inspired not directly by Nietzsche but by Heidegger. For them, too, to understand is already to interpret. Vincent Descombes, *Nietzsche's French Moment, in WHY WE ARE NOT NIETZSCHEANS* 80 (Luc Ferry & Alain Renaut eds., Robert de Loaiza trans., 1997).

predilection for strawberry ice-cream is, one might say, as tasteless as one can be.

A further concern that has been noted for subjectivists' accounts such as Fish's⁶⁴ is the tendency to collapse the distinction between interpretation and understanding, resulting in the possibility of every interpretation to go on perennially as every interpretation calls for its own interpretation.⁶⁵ Wittgenstein puts it as follows:

But how can a rule show me what I have to do at this point? Whatever I do is, on some interpretation, in accord with the rule. That is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.⁶⁶

A construction of Wittgenstein's account on rule-following aimed at promoting the subjectivism⁶⁷ that Fish propagates has been discounted as unwarranted.⁶⁸ The import, rather, of Wittgenstein's account is that understanding a rule is not one and the same thing as interpreting a rule.⁶⁹ Wittgenstein thus wrote, 'there is a way of grasping a rule which is not an interpretation'.⁷⁰

In legal practice interpretation is often actuated when there are conflicting accounts about the meaning of a legal rule or provision

⁶⁴ For some very critical reviews of Fish, see T Eagleton 'The Estate Agent' *London Review of Books* 2 March 2000 p 10, 11; C Altieri 'Going On and Going Nowhere: Wittgenstein and the Question of Criteria in Literary Criticism', in C Altieri *Cannons and Consequences* (1990) p 81-107; D Patterson 1996 *Law and Truth* p 99-127.

⁶⁵ See Patterson 'Normativity and Objectivity in Law', 43 *Wm & Mary Law Review* 325 <http://scholaship.law.wm.edu/wmlr/vol43/iss1/9>.

⁶⁶ L Wittgenstein *Philosophical Investigation* p 198.

⁶⁷ For example S Kripke 1982 *Wittgenstein on Rules and Private Language*.

⁶⁸ *Ibid* p 16.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* 201.

whereby lawyers approach courts of law for the correct interpretation of the rule in question. As Tully explains,

[Interpretation] is a practice we engage in when our understanding and use of signs is in some way problematic or in doubt. Here we attempt to come to an understanding of the sign in question by offering various interpretations (expressions) as opposed to different ones, adjudicating rival interpretations, in some cases calling the criteria of adjudication into question, and so on... interpretation should thus be seen as one important practice of critical reflection among many, resting comfortably in more basic ways of actions with words (self-understanding) that cannot themselves be interpretations.

4.2.6 Interpretation and Legislative Intent

One of the most important topics that Dworkin discusses in his constructive interpretation is that of authorial intent. As Dworkin begins his discussion of constructive interpretation he points out that

Constructive interpretation aims to decipher the author's purpose or intentions in writing a particular novel or maintaining a particular social tradition ... creative interpretation is not conversational but constructive.⁷¹

However, having stated that, Dworkin later states again:

But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.⁷²

Clearly, there is an apparent contradiction. In one breath he states that constructive interpretation aims to decipher the author's intention, and in the next he declares that the purposes at play are not those of the author but the interpreter's. It is clear that Dworkin is

⁷¹ Dworkin *Law's Empire* p 52.

⁷² *Ibid.*

seeking to replace the author's purpose with the constructive interpreter's purpose. He is moving from intention bound interpretation to a conception where the interpreter becomes the key player in interpretation. This becomes more apparent when his early views regarding the author's intention⁷³ are compared to those expressed in *Law's Empire*.

In his 'How Law is Like Literature', and while acknowledging the significance of the intention of the author in many theories of interpretation, Dworkin argues that it is not always a pre-requisite for assessing the value of a particular work.⁷⁴ He makes the argument that interpretation need not be bound to the author's intention because authors can reinterpret their own work. He states: 'an author is capable of detaching what he has written from his earlier intentions and beliefs, of treating it as an object in itself'.⁷⁵ Stanley Fish⁷⁶ has been critical of Dworkin's views regarding the author's intention. According to Fish, one cannot read or reread independently of intention, independently, that is, of the assumption that one is dealing with marks or sounds produced by an intentional being.⁷⁷ For Fish, interpretation is not one thing and assigning intention another,⁷⁸ as Dworkin suggests. Accordingly, for Fish, assigning intention is an interpretive reality and must be construed.

⁷³ Dworkin *A Matter of Principle* p 154-158.

⁷⁴ *Ibid* p 155.

⁷⁵ *Ibid* p 157.

⁷⁶ S Fish 1989 *Doing What Comes Naturally* p 98-102.

⁷⁷ *Ibid* p 99.

⁷⁸ *Ibid* p 100.

4.3 A Dworkinian Response

4.3.1 Law as Integrity and the Apartheid Legacy

The real problem with Christodoulidis's objection about the application of Dworkin's law as integrity in South Africa lies in a manifest refusal to accept that a 'total revolution' occurred in South Africa. It is submitted that there are real possibilities for a thriving Dworkinian industry in both South Africa and Namibia as a result of constitutional dispensations ushered in at independence. Cornell and Friedman⁷⁹ have written an illuminating article on the significance of Dworkin for the new South Africa. I want to suggest here that the article is a critical appraisal of Dworkin in the new South Africa and indeed Namibia, and provides a robust defense to criticisms like Christodoulidis'. The two authors reiterate the fact that a 'total revolution' occurred in South Africa in 1993 with the advent of both the interim and the final Constitution.⁸⁰ In the view of these authors, South Africa's total break with the apartheid past and its focus on respect for human dignity as the cornerstone of the new legal order makes South Africa an 'exemplary of precisely the aspirational ideal of legality' advocated by Dworkin.⁸¹ Accordingly, the application of law as integrity in South Africa is recognized and acknowledged as possible because of the paradigm shift in the values of South Africa.

If it is accepted that a total revolution took place in South Africa, it ought also to be accepted that a novel value system now underpins the legal system. As Cornell and Friedman rightly acknowledges, there was a 'transition from apartheid to democracy'.⁸² Some of the values that underpin South Africa's legal order include human dignity,

⁷⁹ Cornell & Friedman 2010 *Malawi Law Journal* p 1.

⁸⁰ *Ibid* p 2, 3.

⁸¹ *Ibid* p 83.

⁸² *Ibid*.

equality, freedom, non-racialism⁸³ etc., these values are in sharp contrast to the principles that buttressed apartheid.

In light of the above, it is submitted that the significance of Ronald Dworkin's law as integrity in South Africa is premised on the acceptance and recognition that a total revolution occurred in 1993 with the advent of the Interim Constitution and the final Constitution in 1996. As a result of South Africa's break from its apartheid past, new cases that were decided after the revolution, taking into account South Africa's constitutional values, for example *S v Makwanyane & Another*;⁸⁴ *S v Zuma & Others*;⁸⁵ *Du Plessis & Others v De Klerk & Another*;⁸⁶ *Soobramoney v Minister of Health (Kwazulu-Natal)*⁸⁷ etc. can now be regarded as the first chapters in the chain of law's development to which law as integrity should be understood to be committing South Africa, and not necessarily to cases of the bygone era before the revolution. The real appeal of Dworkin's law as integrity therefore is not that it commits South Africa to the evil principles of apartheid, but to the new values of South Africa's new legal order. Dworkin doesn't think integrity would commit one to evil principles; the virtue of integrity is its direct link to the moral principle of equality of human beings; so it must at some level conflict with apartheid. In apartheid South Africa that is why he advocated interpretations of the law – novel ones – that ignored the effect of the particular apartheid laws.

Even if it is accepted that apartheid principles are well-entrenched in the value system of South Africa as Christodoulidis argues, these

⁸³ *Ibid.*

⁸⁴ 1995 (3) SA 391 (CC); 1995 (6) BCLR 665.

⁸⁵ 1995 (2) SA 642 (CC); 1995 (4) BCLR 401.

⁸⁶ 1996 (3) SA 850 (CC); 1996 (5) BCLR 1696.

⁸⁷ 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.

would almost be impossible to justify in terms of the Constitution that now repudiates them. Firstly, Section 2 of the South African Constitution requires all laws and, conduct of government officials to be in conformity with the Constitution.⁸⁸ Secondly, Section 39(2) of the Constitution now requires all legislation, common law, and customary law to be interpreted and developed in conformity with the spirit, purport and objects of the Bill of Rights.⁸⁹ South Africa's Constitutional Court could not have been clearer on this. In *S v Makwanyane* the Court held, per Mahomed J,

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: *it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.*

The contrast between the past which it repudiates and the future to which is (sic) seeks to commit the nation is stark and dramatic... Such a jurisprudential past created what the postamble to the Constitution recognized as a society 'characterised by strife, conflict, untold suffering and injustice'. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting 'future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex' (emphasis added).⁹⁰

⁸⁸ Section 2 of the South African Constitution provides: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

⁸⁹ Section 39(2) provides as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

⁹⁰ *S v Makwanyane & Another*, at para 261.

It is submitted that under Dworkin's constructive interpretation the apartheid principles will not easily find application in the new South Africa. This is because constructive interpretation exhorts judges and lawyers alike to adopt interpretive strategies that show a practice in its best light. And showing a practice in its best light entails adopting an interpretation that is morally justifiable. Clearly, apartheid principles are not morally justifiable. In as far as the practice of constitutionalism in South Africa is concerned, it is submitted that Section 39(2) of the Constitution is aimed at achieving this.⁹¹ Be that as it may, the real challenge to the application of law as integrity in both South Africa and Namibia is the development of the common law and customary law by the lawyers and courts so as to be in conformity with the Constitution. In light of the fact that apartheid principles continue to be enforced through the common law, there is a need for constructive interpretation in order to bring this

4.3.2 The Point of a Social Practice

In his analogy of social practices like courtesy, Dworkin underscores the point that social practices are concerned with and distinguished from each other by the point or purposes they serve. This acknowledgement that social practices serve a purpose reinforces the idea that they do not just have a mere mechanical existence. To this end, the main object of interpreting a social practice like law is by making it the 'best' it can be in light of its point. As regards the objection relating to the value of justifying a legal record of previous contributors to legal doctrine, Ronald Dworkin explicates,

I do not mean that every kind of activity we call interpretation aims to make the best of what it interprets- a 'scientific' interpretation of the Holocaust would nor try to show Hitler's

⁹¹ For an illuminating insight into the transformative potential of Section 39(2) of the South African Constitution see Cornell & Friedman 2011 *Malawi Law Journal* p 1.

motives in the most attractive light, not would someone trying to show the sexist effects of a comic strip strain to find a nonsexist reading- but only that this is to do in the normal or paradigm cases of creative interpretation.⁹²

Purposive interpretation is distinguishable from mechanical activities in that the ascription of meaning in light of the object of the practice is creative. Accordingly, interpretation is not just a juridical and aimless activity. What is implicit in Ronald Dworkin's theory of law is that legal interpretation can no longer do with 'thus says the law or thus says the precedent' answers without justification. Legal arguments should thus be sustained by the best moral justification of the practice as a whole. From the above it is succinct that Dworkin's view of law, which is also implicit in the idea of 'making the best sense of social practice', is that of justification. Dworkin thinks that law should be interpreted in a way that makes moral sense. Dworkin's view is that morality supplies sense to law. Accordingly, for any action taken in the name of law there must be a moral justification.

In the context of emerging democracies like Namibia, for example, the concern is not so much the moral justification of 'wicked' legal system because this is no longer the case, but rather how to reconstruct a certain portion of the legal record that can hardly be justified in the light of the point of constitutionalism. It is submitted that even after the new legal order founded on constitutional values has been ushered in, there are still certain 'chapters' in the development of the chain of law that do not 'fit' and are contrary to the expressed aims and purposes of the Constitution. Constructive interpretation calls for boldness on the part of the judiciary in their attempts to justify previous cases in accordance with what shows the institution in the 'best light', even if this warrants setting aside some previous

⁹² Dworkin *Law's Empire* p 421.

contributions to legal doctrine. The question however, is whether there is such commitment on the part of the judiciary?

Notwithstanding the point of constitutionalism, the extent to which the Namibian Supreme Court is committed to show legal practice in its best light remains unclear. This is because in Namibian constitutional law, there is a constitutional provision I consider to be like the legendary ‘Sword of Damocles’ that hangs on Supreme Court decisions. *Article 81* of the Constitution provides that

A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, *or is contradicted by an Act of Parliament lawfully enacted.*⁹³

It is submitted that one of the implications of the above provision is that the Supreme Court justices are constantly aware of the possibility that their decisions can always be overturned by Parliament. For a Supreme Court decision to remain binding, in terms of *Article 81*, it must be acceptable to Parliament. The obvious counter-argument to this concern is the view that after all the same Act of Parliament aimed at contradicting a Supreme Court decision is itself subject to interpretation by the courts. Be that as it may, the possibility of *Article 81* creating doubt in the minds of judges on what shows a legal system in its best light remains real as judges may become reluctant to engage Parliament in a ‘tug of war’. This may particularly be the case where there are conflicting visions on what constitutes the point of constitutionalism in a particular matter.

⁹³ Article 81 of the Namibian Constitution.

Undoubtedly, *Article 81* of the Constitution raises a legitimate question about the independence of the judiciary and the viability of constructive interpretation as an approach to constitutional interpretation in Namibia.⁹⁴ It is doubtful how the Supreme Court can be independent⁹⁵ when its decisions can be contradicted by Parliament.⁹⁶ It is submitted that *Article 81* of the Constitution, in so far as it permits Parliament to contradict a decision of the Supreme Court, is in conflict with *Article 78(2)* of the Constitution that establishes the independence of the judiciary. In light of the above, it is submitted that the success of the constructive interpretation model in Namibia could well depend on both the legislature and the judiciary agreeing on the point of law. Otherwise, the Supreme Court's efforts to show the legal practice in its best light stand to be frustrated by the legislature. With that said, there is more to Ronald Dworkin's interpretive methodology than to collapse at the possible disagreements between the judiciary and the legislature.

In addition to the ideals of justice, fairness, and procedural due process that legal judgments should appeal to, Dworkin adds the political ideal of integrity. Accordingly, law as integrity,

[r]equires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some.⁹⁷

⁹⁴ A detailed analysis of Article 81 of the Constitution as a possible limitation on the applicability of Dworkin's constructive interpretation to Namibia is explored in Chapter 5.

⁹⁵ Article 78(2) of the Namibian Constitution provides that 'The Courts shall be independent and subject only to this Constitution and the law'.

⁹⁶ A scenario whereby a Supreme Court decision is contradicted by an Act of Parliament is yet to unfold in Namibia.

⁹⁷ Dworkin *Law's Empire* p 165.

The legislature purports, just as with other organs of State, to act in the interest of the governed. That granted, it is imperative to add here that the governed are entitled to principled government actions, including laws enacted in the name of the Community.

4.3.3 Constraints in Legal Interpretation

Fish's contention that interpretation constitutes what is interpreted has been dismissed by Dworkin as 'extravagant',⁹⁸ and also attempts to negate the fact of the text. For Dworkin, the 'historical' legal record ought to constitute the source of interpretation: interpretation which must fit into already existing legal material. A judge committed to law as integrity should not be thought to be required to interpret laws in light of the purposes which gave rise to them.⁹⁹ In Dworkin's own words, a judge committed to law as integrity is required to

Impose order over doctrine, not to discover order in the forces that created it. He struggles toward a set of principles he can offer to integrity, a scheme for transforming the varied links in the chain of law into a vision of government now speaking with one voice, even if this is very different from the voices of leaders past.¹⁰⁰

Furthermore, for Dworkin, the judge's 'convictions' about fit is what constrains interpretation, and not the historical legal material in some objective sense: These convictions, Dworkin submits, are 'political, not mechanical'.¹⁰¹ It is Fish's view that both social practices and social beliefs are subject to change, and therefore that interpretive community, being a social structure, is likewise bound to change.¹⁰² Accordingly, interpretation will change as belief systems and

⁹⁸ Dworkin *A Matter of Principle* p 176.

⁹⁹ Freeman *Lloyd's Introduction to Jurisprudence* p 1397.

¹⁰⁰ Dworkin *Law's Empire* p 273.

¹⁰¹ Dworkin *Law's Empire* p 257.

¹⁰² S Fish 1984 'Fish v Fiss' 36 *Stanford Law Review* p 1325.

perspectives change.¹⁰³ According to Fish, in the absence of transcendent means for calculation or objective rationality, there are only negotiated attempts available to establish dominant interpretive strategies.¹⁰⁴ In Fish's view, meaning equals persuasion and cannot be demonstrated, and interpretation is therefore both historically and politically situated.

Admittedly, there is merit in both Dworkin and Fish's arguments as regards the nature of interpretive constraints. Without doubt, interpretation is a dynamic and complex juridical activity. To emphasize one constraint, as both Dworkin and Fish seems to do, at the expense of others stifles rather than enriches interpretation. While the text usually forms the subject matter of interpretation, it is not the only constraint in interpretation. It follows therefore that an interpretive community's shared conventions, expectations etc., are also constraints on interpretation. This is so on account that interpretation entails the interaction between the text and the interpreter.

Dworkin's theory acknowledges the possibility of diverse interpretations. In instances where there are competing interpretations, the interpretation which is the best justification of the legal system is to be preferred over any alternative interpretation. In this way Dworkin's view is a better reflection of actual judicial practice, and is in tandem with the demands of the new constitutional order in Namibia. In terms of the new constitutional dispensation, whatever constraints are considered during juridical understanding of legal texts, they will be qualified or disqualified on the fundamental

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

test of passing the constitutional muster. This is best illustrated by *Section 39 (2)* of the South African Constitution

When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹⁰⁵

This, then, is the ultimate test or constraint in legal interpretation and does not contradict Dworkin's postulations.

4.3.4 On the Question of Objectivity in Law and Morals

Dworkin denies that his theory gives judges the freedom of legislators just like the positivists' judicial discretion seems to do. For him, judges are constrained by the whole structure of values undergirding the legal system. Dworkin argues that judges are required to further those values in their judicial decisions and to portray legal doctrine in its totality as an integrated and consistent expression of those values.

The abstract question of objectivity in law and morals has been one of the most potent objections to Dworkin's legal theory. Is it possible to have the kind of objectivity in law and morality in the manner that Dworkin advocates? The contention here has often been that Dworkin's legal theory can never be objective since it is moral to the full extent. The idea of making the best moral sense of law or legal practice, coupled with the concern for the periphery has often created the impression that legal argument is anything one can make of it. In this part I examine whether there is anything in Dworkin's legal theory that suggests the notion that legal argument can be anything

¹⁰⁵ *The Constitution of the Republic of South Africa, 1996.*

one makes of it. Before I address this objection it is necessary to restate Dworkin's legal theory briefly.

As stated earlier in the previous chapter Dworkin developed his legal theory as a rebuttal to legal positivism, whose central claim is that there is no connection between morality and law. In other words, morality is not germane to the identification of law. In contradistinction to legal positivism, Dworkin's legal theory moralises and dispenses with the idea that morality is not necessary to the identification of law. From the idea that law and morality are in fact inseparable, Dworkin's idea of interpretation is that of making the best moral sense of law. Does it follow then that because Dworkin's legal theory is moral it is subjective since all moral views are subject to revision and correction?¹⁰⁶ Dworkin's theory of law is that legal argument depends on the best moral justification of the practice.

Justification is the main idea that is implicit in Dworkin's idea of 'making the best sense of social practice'. Dworkin thinks that law should be interpreted in a way that makes moral sense. On Dworkin's view, it is morality that supplies sense to law. Accordingly, for any action taken in the name of law there must be a moral justification. Dworkin's concern with moral justification can also be deciphered from his view on the relationship between law and the use of force. He contends thus;

The most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by

¹⁰⁶ Guest *Analysis* p 1.

individual rights and responsibilities flowing from past political decisions about when collective force is justified.¹⁰⁷

But what is this morality in Dworkin's theory? To answer this question, it is acknowledged that the foundational principle underpinning Dworkin's theories, both legal and political, is that people should be treated with 'equal concern and respect'.¹⁰⁸ To this end then, when making sense of law the assumption is that the best moral sense is that which shows an equal concern for people. This entails that when there are two rival interpretations for the best conception of law, the interpretation which more closely accords with the foundational principle is to be preferred over any alternative interpretation.¹⁰⁹

Dworkin's idea of making the best moral sense of law so as to give effect to the foundational principle of treating people as equals may sound very subjective and thus create an impression that one can make law into anything he or she wishes. However, a careful reading of his theory does not warrant this assessment of his work. From his early works now compiled in his *Taking Rights Seriously* to his theory of 'law as integrity' articulated in *Law's Empire*, there is nothing in Dworkin's theory to warrant the notion that anything can count as law.

In his exposition of judicial discretion Dworkin makes it clear that judges are not at liberty to exercise 'their power of final decision,' but that they are legally constrained. This point is well explained by Guest. He elaborates as follows:

¹⁰⁷ Dworkin *Law's Empire* p 93.

¹⁰⁸ Guest *Ronald Dworkin* p 8.

¹⁰⁹ *Ibid* p 9.

Even although the existing legal practices might not supply a definitive answer, the judge must nevertheless make a substantive judgment about what decision best, as a matter of equality, fits the settled law. So the judge is bound by law and is not permitted to use his power of decision making in a stronger sense.

In the hard cases, which are those where the existing legal practices do not supply a definitive answer, the judge cannot rely on rules because, by hypothesis, there are no rules. Instead, he must rely on standards of legal arguments which Dworkin calls principles, paramount among which, of course, is the foundational principle that people must be treated as equals. Principles, unlike rules, do not apply in an 'all or nothing' sense, but require argument and justification of a more extensive, controversial sort.¹¹⁰

As can be noted from the above, there is nothing in Dworkin's theory of interpretation that suggests that judges can operate in an unconstrained manner. The chain novel metaphor is an excellent illustration of this.

I now turn to examine the question of objectivity in law and morality when Dworkin is transposed to Namibia's constitutional jurisprudence. The question of objectivity or subjectivity of law is hotly and very badly debated in legal interpretation. However, I do not intend to reproduce the pros and cons of the arguments here. At the heart of the debate is the question whether judges decide cases according to legal rules or according to their political affiliation. Parallel to this is the question whether morals can be objectively known since all are subject to revisions and correction. In the main, the argument has often been that morals or values are subjective, and hence the proverbial question 'whose morals or values are they anyway?' In the context of the new legal order in Namibia, this is no longer an important question in so far as gauging societal morals is

¹¹⁰ *Ibid* p 9 10.

concerned. This is so on account that the constitution, once and for all, addresses the question.

First and foremost, the question of objectivity in law and morals is, in my view, at best hypocritical and redundant because interpretation involves both subjective and objective aspects. It is subjective in the sense that regardless of how much we try to construe things objectively, we can only do so from our own perspective and no one else's. If morals can be 'corrected' that already implies objectivity. How can they be corrected? The answer is *by argument*. We engage in moral argument, just like lawyers in fact! And if judges decide along their political allegiances to political parties, everyone knows that is *wrong*. This way of thinking and talking is the opposite of subjectivity. No one is biased in their tastes; but they are often biased in their moral judgments; they don't make mistakes of fact or logic in their tastes (they just 'happen to like' vanilla ice-cream or whatever; no 'fact' or 'logic' is relevant to that) but they do in their moral judgments.

Having said the above, it is submitted that the abstract question of objectivity in law and morality is of less relevance in the new constitutional dispensation. What is now a predominant concern in the new legal order is whether a particular interpretation of any law is in tandem with the Constitution. With the advent of the new constitutional dispensation the fundamental question, particularly in light of Dworkin's legal theory, is whether the interpretations we adopt shows our legal system in the best light? The point to be underscored is that historically, politically and legally, the Constitution is a purposively situated document. This is in respect of how it came into effect and also in respect of what it seeks to achieve. Nowhere else is this point better encapsulated than in the preamble to

the Constitution. The preamble to the Namibian Constitution provides:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights includes the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed, or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have so long been denied to the people of Namibia by colonialism, racism and apartheid...;

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.¹¹¹

On the question whether morals and values can be objectively known it is conceded that this question has potential to be problematic, and obviously so. In pluralistic societies like Namibia different people will always have different views about what morality requires. I think this is what 'pluralistic' mean. Is that to say much other than ... there might be problems in enforcing the law? But is that a problem? What if some tribe does not believe in equality or freedom? Doesn't the Namibian constitution have to override what they believe (the lower caste in such societies have rights to equal dignity, for example?). However, regarding values or community values, the Constitution addresses the question perfectly well in that these are enumerated in the preamble and some substantive provisions. And admittedly, Dworkin's legal theory is the best hope for Namibia in articulating and

¹¹¹ Preamble to the Namibian Constitution.

giving effect to the foundational values entrenched in the constitution. From the provisions of the preamble just referred to above, the foundational principles or values undergirding Namibia's new legal order are explicitly enunciated. The foundational values of human dignity and equality, just like in many other jurisdictions, are the pivots of Namibia's legal order. Irrespective of cultural background, education, and religious orientation, the Constitution explicitly posits for example, democracy, the rule of law, respect for human dignity, equality, the protection of liberty, the protection of life etc. to be the values of the Namibian society.

Accordingly, the question of objectivity should then hinge on which conception of law best accords with these foundational values. In other words, the promotion and protection of these values is now a constitutional imperative. To the question, whose values are they anyway, the Constitution retorts that these are the foundational values of the Namibian society as dictated by the Constitution. But there is more, constructive interpretation is not limited by what is stated in the Constitution. It searches out for principles and values that show the practice in its 'best' light. The realistic fact of the matter is that of any two interpretations of the Constitution no-one can deny that the better of the interpretations – or the truer interpretation – is that which is the more morally just. The fundamental question that should concern us now is whether our interpretation of the Constitution gives effect to these foundational principles? But does the fact that Namibia's foundational values are known and clearly articulated in the Constitution presuppose consensus on the best way to promote these principles? Dworkin's theory does not suggest that there will always be consensus

Whereas the foundational values of human dignity and equality are well emblazoned in the Constitution, it does not follow that people will always be in unison on what constitutes the best expression of those values. This is where Dworkin's theory is a sensible and sure moral guide to what to do. For Dworkin, law is inherently an argumentative practice. For example, individual citizens may continue to have different views on how best to give effect to the foundational values of human dignity, equality, freedom of speech, democracy etc. However, as Dworkin argues, whatever views people hold, expressions of moral propositions without reasons or grounds are insufficient to count as 'genuine moral positions.'¹¹² For example, there are two topical issues in Namibia currently, namely the legalization of prostitution and abortion. It will not suffice to say prostitution is wrong and should not be legalized. Or to express a view that abortion is immoral and should thus remain illegal. People ought to provide reasons for their moral positions. However, they should also demonstrate that the reasons provided accords well with the foundational values of the Namibian legal system.

Accordingly, when lawyers argue a case before a judge, their disagreements revolve around differences of opinion on what constitutes law in a particular matter and not so much on applicable conventions 'when identifying the applicable law.'¹¹³

4.3.5 Interpretation and Legislative Intent

In *Law's Empire* Dworkin advances three arguments against the author's intention. Here Dworkin is challenging the claim that interpretation entails the retrieval of the author's intention, making it

¹¹² *Ibid* p 111.

¹¹³ M Adams 'Law as Integrity'. (http://ivr-enc.info/index.php?title=Law_as_Integrity).

possible to regard the object of interpretation as it is.¹¹⁴ Firstly for Dworkin, whereas intention must be applied, he argues that this will be a complex matter involving the individual interpreter's own artistic convictions.¹¹⁵ Secondly, Dworkin argues that the debate regarding the role of the author's intention in interpretation 'should be seen as a particularly abstract and theoretical argument about where value lies in art'.¹¹⁶ From the first two arguments, Dworkin is maintaining that arguments favouring authorial intent must nonetheless depend on a constructive interpretation approach to establish their arguments.¹¹⁷ It is clear that Dworkin is attempting to show that there is a link between authorial intent and constructive interpretation. Finally, Dworkin argues that in order to make social practices the best they can be, they must be constructively interpreted, and not with reference to particular participants' intentions.¹¹⁸ It can be noted that while Dworkin acknowledges the role of authorial intent, he maintains that it must nonetheless be interpreted constructively.

By authorial intent under the new constitutional legal order reference is to how the question of the intention of the legislature has been addressed by courts in the New Dispensation of Constitutionalism. Under the new constitutional order the question is no longer much about what the legislature intended but whether there is compliance with the constitution. Du Plessis submits that:

The decisive question of statutory interpretation no longer is what the legislature intended the statute to mean, but which of the possible meanings of the text is most compatible with the Constitution. The intention of the legislature plays second fiddle at best.¹¹⁹

¹¹⁴ Honeyball & Walter 1998 *Integrity, Community and Interpretation* p 89.

¹¹⁵ *Ibid* p 90.

¹¹⁶ Dworkin *Law's Empire* p 60.

¹¹⁷ Honeyball & Walter *Integrity, Community and Interpretation* p 90.

¹¹⁸ *Ibid* p 91.

¹¹⁹ *Re-Interpretation of Statutes* p 145.

And in *Matiso v The Commanding Officer, Port Elizabeth*,¹²⁰ Froneman J stated as follows:

The interpretive notion of ascertaining the intention of the legislature does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the legislature ... The purpose now is to test legislation and administrative action against the values and principles imposed by the Constitution.¹²¹

To substantiate his argument Dworkin considers, as an example, Justice Rehnquist's interpretation of the *American Civil Rights Act*, that it did not permit voluntary affirmative action in private businesses. Justice Brennan opposed Justice Rehnquist's interpretation. For Justice Brennan, voluntary affirmative was in accordance with the past institutional facts of both statutory and legislative history, 'fitting' both equally well.¹²² For Dworkin, the correct interpretation between these two opposing views would be the one which shows the *Civil Rights Act* in the best appealing moral light.¹²³

Dworkin has further been attacked for 'thinking that value-laden judicial decisions can be pronounced right or wrong with any degree of confidence'.¹²⁴ For his critics, a legal system must 'possess substantial social, cultural and political homogeneity' in order to provide 'demonstrably right' or even 'professionally compelling' answers which Dworkin says are possible: 'The significance of Dworkin as an

¹²⁰ 1994 3 BCLR 80 (SE) 87E-G.

¹²¹ At para 87E-G.

¹²² Dworkin *A Matter of Principle* p 328.

¹²³ *Ibid* p 328,329.

¹²⁴ Van Blerk *Jurisprudence* p 101.

apologist for an ‘activist judiciary’ and his association... of legal positivism with hostility to an active judiciary become transparent’.¹²⁵

4.3.6 The Question of Individual versus Community interests

Dworkin has been accused of being a liberal who puts individual interests ahead of community interests.¹²⁶ Implicit in this charge is the notion that Dworkin’s legal theory is bent on promoting individual rights at the expense of community rights. Greenawalt makes the point that contrary to Dworkin’s view, judges usually decide cases with reference to policy considerations, especially when considering third part beneficiaries in tort or delict.¹²⁷ Roederer explicates that whereas Dworkin’s community is a liberal one, respecting individual rights, a distinction should be observed between parties before a court entitled to the best principled decision and the right of an individual to do as he or she pleases in trumping individual and group rights to more communal and positive rights, like economic redistribution, affirmative action etc.¹²⁸

Roederer makes the point that Dworkin does not advocate the notion that individuals be left alone to gain whatever benefits they can gain from the ‘free market’.¹²⁹ On the contrary, it must be noted that Dworkin endorses redistribution, affirmative action, and other egalitarian principles. For Dworkin, the demands of equality require either ‘redistributive capitalism or limited socialism-not in order to compromise antagonistic ideal of efficiency and equality, but to achieve the best practical realisation of the demands of equality

¹²⁵ Posner *The Problem of Jurisprudence* p 23.

¹²⁶ See Roederer and Moellendorf *Jurisprudence* p 100 note 71.

¹²⁷ K Greenawalt ‘Policy, Rights, and Judicial Decision’ in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* p 88-118.

¹²⁸ Roederer & Mollendorf *Jurisprudence* p 101.

¹²⁹ *Ibid* p 101 note 72.

itself.¹³⁰ Viewed from this perspective, it may not be an accurate assessment to accuse Dworkin of being a liberal who puts individual interests ahead of community interests. The point to be underscored here is that in Dworkin's view, the rights of individuals in society are paramount, and that by protecting individual rights the law ensures that community members are treated with equal concern and respect.

There is another factor that makes Dworkin's conception of law as integrity more relevant. In emerging democracies like Namibia, there is real potential for majority voices to drown those of minorities into oblivion unless constantly checked to ensure that the interests of minorities and individuals alike are protected. There is a growing and troubling tendency in modern democracies that seem to engender a notion that equates the majority will with correctness and truth, and relegating individuals and minorities to a footnote of a basic political text. In this atmosphere, the voices of minorities such as gays and lesbians, prostitutes, the politically incorrect etc. are constantly suppressed. The significance of Dworkin's legal theory is that it calls on government to treat all its citizens with 'equal concern and respect', by acting in a principled and coherent manner towards all its citizens.¹³¹

There is merit in the argument that if the rights discourse tends to mask social injustice and economic inequalities, a need exists to expose such practices. However, it is a different argument whether such injustices warrants dispensing with rights. It has been argued that even if there were no class or interest conflicts, rights would still

¹³⁰ R Dworkin 'Liberalism' in MJ Sandel (ed) 1984 *Liberalism and Its Critics* p 69.

¹³¹ Dworkin *Law's Empire* p 165.

be indispensable.¹³² In the context of South Africa, the importance attached to rights is exemplified by the entrenchment of the Bill of Rights in the Constitution. *Section 7 (1) and (2) of the Constitution* provides that the Bill of Rights is the cornerstone of democracy in South Africa, and ‘the state must respect, protect, promote and fulfill the rights in the Bill of Rights’.

As regards the argument by communitarians, it is evident that while the South African Constitution acknowledges individual rights, this is not at the expense of community values. The Constitution places emphasis also on values such as equality, dignity, transparency etc. According to Van Blerk

The precedence which the Constitution appears to give to equality over extreme liberty is clearly expressed in the injunction of South Africa’s highest Court that indigenous African value systems are a premise from which courts must endeavour to achieve the goal ‘open and democratic society’.¹³³

She concludes that there exists a possibility in South Africa for the formation of new philosophy in which the ideal of community is stressed.¹³⁴

4.4 The Meaning of Objectivity in Legal Interpretation

An objective account of a legal rule differs markedly from what may be characterized as objective in fields such as the sciences. In law, by objective interpretation does not entail a complete absence of human input. However, this is not to suggest that in legal practice the

¹³² See A Buchanan 1982: 165.

¹³³ Van Blerk *Jurisprudence* p 216.

¹³⁴ *Ibid.*

interpretation of legal rules or norms resulting in legal judgments consist entirely of the opinions of the individual judges. There are recognisable standards which interpretation adheres to for such an interpretation to be rendered objective. Owen Fiss is thus on point when he submits that,

Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something than one's own notions of correctness.¹³⁵

While this may well be the position in respect of statutory interpretation, the situation is more complex in interpreting constitutional values. I will deal with question of objectivity of constitutional values below. Being the argumentative practice that it is, there are various approaches in law to the interpretation of legal norms or legal rules. However, with regard to constitutional interpretation, for an interpretation to be objective, it should be capable of justification in terms of the value system that underpins the legal system.¹³⁶ As Dworkin has acknowledged, legal practice is argumentative in nature. There are recognisable techniques to legal interpretation. In almost all disputes that come before courts, lawyers often advance one or two of these approaches as the correct approach to the interpretation of a legal norm or rule. The first of these is the literal approach. The essence of this approach is that it urges the interpreter to seek meaning of a legal rule in the very words used to the exclusion of all other considerations such as context. With the literal approach, as Devenish writes, 'the true meaning of the text is to be sought virtually exclusively in the *ipsissima verba* used by the

¹³⁵ O Fiss 1982 'Objectivity and Interpretation' 34 *Stanford Law Review* p 739.

¹³⁶ Dworkin has made the argument that interpretation is purposive.

legislature'.¹³⁷ What the literal approach implies thus, as Du Plessis submits, is that 'statutory language as it stands, on the condition that it is clear and unambiguous, is a reliable expression of legislative intent'.¹³⁸

In the minority decision in *Riggs v Palmer*, Dworkin's famous paradigm case, Judge Gray argued for this approach. He maintained that the provisions of the will were too explicit to warrant any confusion as to whom the beneficiary was, and that there was accordingly no need for the consideration of factors that were extraneous to the words employed. Though the literal approach is fraught with problems,¹³⁹ courts often interpret legal norms using the literal approach.

Another approach to legal interpretation is known as the purposive approach. In terms of this approach, the interpreter is enjoined to adopt an interpretation which promotes the overall scheme¹⁴⁰ of the Act and is in tandem with the general legislative purpose underpinning a provision in question.¹⁴¹ For example, in *Secretary for*

¹³⁷ GE Devenish 1992 *Interpretation of Statutes* p 26.

¹³⁸ Du Plessis *Re-Interpretation of Statutes* p 93.

¹³⁹ The main criticisms levelled at this approach to legal interpretation are that it equates meaning with words. As Devenish explains, 'the literal modus operandi is problematic because words do not have intrinsic meaning in language, but their meaning is invariably determined by a concatenation of contextual factors. The relationship between words and their meaning is not mathematical or quantitative but is variable'; Devenish *Interpretation of Statutes* p 26. Du Plessis submits that the 'root error of literalism lies in its denial of the distinction between meaning and language, and its consequential confusion of the medium as the means', Du Plessis *Interpretation of Statutes* p 50.

¹⁴⁰ The object or purpose of a statute is often found in the Long Title of a statute which provides a brief description of the subject matter of legislation. For interpretive purposes, the long title is considered to be part of a statute and it is permissible to have regard to it in ascertaining the purpose of the legislation. See *Bhyat v Commission for Immigration* 1932 AD 125; Devenish *Interpretation of Statutes* p 105.

¹⁴¹ E Kellaway 1995 *Principles of Legal Interpretation of Statutes, Contracts and Wills* p 66.

*Inland Revenue v Sturrock Sugar Farm (Pty) Ltd*¹⁴² Ogilvie Thompson JA held,

Even where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction.¹⁴³

With the purposive approach therefore, the interpreter ought to ensure that his construction of a provision does not conflict with the object of the Act. The third approach to interpretation is the comparative analysis. With a comparative approach judges look to foreign case law and international law to see how courts of foreign jurisdictions have interpreted similar provisions. For example, in *S v Makwanyane*¹⁴⁴ the South African Constitutional Court relied heavily on international instruments to sustain a conclusion that the death penalty was in conflict with international norms and standards.

The last approach I will consider is the teleological approach. This is often termed the value-coherent approach. According to Du Plessis, teleological interpretation is purposive interpretation and aims to realize ‘the scheme of values’ that informs the legal order.¹⁴⁵ As an approach to interpretation, teleological interpretation seems popular in constitutional interpretation. In *Minister of Defense v Mwandingi*¹⁴⁶ for example, the Namibian Supreme Court declined to employ a narrow and mechanical interpretation of the phrase ‘anything done’ in *Article 140(3)* of the Constitution with the aim of limiting its operation to lawful actions only. The Court concluded thus,

¹⁴² 1965 (1) SA 877 (A) 903.

¹⁴³ *Ibid.*

¹⁴⁴ 1995 6 BCLR (CC) at pars 33-39.

¹⁴⁵ Du Plessis *Re-Interpretation of Statutes* p 247.

¹⁴⁶ 1992 2 SA 355 (Nm).

The Namibian Constitution must therefore be purposively interpreted to avoid the ‘austerity of tabulated legalism’. The interpretation of *Article 140(3)* which limits the operation of the words ‘anything done’ to acts lawfully done ascribes to words used in the Constitution a narrow and pedantic meaning. It avoids a construction that is ‘most beneficial to the widest possible amplitude.’

In the South African Constitution, for example, *Section 39(2)* is an example of teleological interpretation. There it is stipulated that,

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.¹⁴⁷

Regarding the impact of the interpretation clause on statutory interpretation, Botha submits that it,

[Forces] the interpreter to have one foot in the Bill of Rights of the Constitution. This inevitably means that the interpreter is consulting extra-textual factors before the legislative text is even considered... In short, the interpretation of statutes starts with the Constitution and not with the legislative text.¹⁴⁸

Devenish¹⁴⁹ submits that the interpretation clause ‘is not merely an exhortation to the courts to seek and discover the values underlying the Bill of Rights, rather it is a prescription to apply the values encompassed in the Bill of Rights in the process of all interpretation’.¹⁵⁰ He contends that *Section 39(2)* ‘in effect authorizes a value-coherent or teleological methodology of interpretation...’,¹⁵¹ and that it ‘can be employed in all cases before any court in which there is

¹⁴⁷ *Article 39(2)* of the South Constitution, popularly known as the interpretation clause.

¹⁴⁸ C Botha 2012 *Statutory Interpretation: An Introduction* p 101.

¹⁴⁹ Devenish *A Commentary on the South African Constitution* p 103.

¹⁵⁰ *Ibid* p 103.

¹⁵¹ *Ibid* p 102.

no direct challenge based on one or more of the rights and freedoms protected in Chapter 2'.¹⁵² In the context of Namibia, Article 101 of the Constitution authorizes the Namibian courts to have regard to principles of state policy in the interpretation of 'laws based on them'.

It is submitted that *Section 39(2)* has become an important constraint in legal interpretation. It is now a constitutional imperative that in the interpretation of 'any legislation' or legal norm, a judge ought to be alive to the values expressed in the Bill of Rights. As I will argue in Chapter 5, *Section 39(2)* of the South African Constitution can be read in the guise of Dworkin's constructive interpretation in terms of which an interpretation should cohere with the values undergirding the legal system.

In light of the above discussion, there is insufficient evidence to suggest that judges interpret legal norms on the basis of personal opinion. There are constraints placed on judges during the interpretation process, and there are conventional rules that are followed during this process. If anything, a judge is more likely to be concerned with how his judgment is to be perceived than a preoccupation with expressing his personal values.

4.5 Conclusion

Rights discourse is the golden thread that runs through Dworkin's works. Dworkin's understanding is that the purpose of law is to constrain government power and to protect individual rights. In *Taking Rights Seriously*, Dworkin makes the argument that the function of the law is to protect the rights of individuals. He makes the

¹⁵² *Ibid* p 103.

argument by distinguishing principles from policies and further arguing that principles advance individual rights whereas policies advance communal goals.

From his belief that law ought to protect individual rights, Dworkin develops a theory of interpretation that he calls 'law as integrity', in terms of which coherence in principle is emphasised. In terms of this theory, government is required 'to speak with one voice, to act in a principled and coherent manner towards its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some'. Accordingly, judges are required to identify and protect individual rights, thus expressing a coherent conception of justice and fairness. For Dworkin, judges should strive for legal interpretation which is the best constructive interpretation of the political structure and legal doctrine of their community. This entails that judges are to decide cases in ways that will further the values which are inherent in the legal system, and to portray legal doctrine in its entirety as integrated and coherent. This will ensure, according to Dworkin, that 'each person's situation is fair and just according to the same standards'.¹⁵³

What this study shows is that there are some parallels between Dworkin's theory of interpretation and legal interpretation under the new constitutional order. On Dworkin's view, the main function of the judiciary is to protect individual rights; Article 5 of the Namibian Constitution enjoins the judiciary to protect and enforce the fundamental rights and freedoms enshrined in Chapter 3. Dworkin's constructive interpretation requires judges to decide cases in ways which will further the values underpinning the legal system. *Section*

¹⁵³ Dworkin *Law's Empire* p 243.

39 (2) of the South African Constitution exemplifies this. It provides that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. It is trite that the rights discourse is well entrenched in the Constitution through the Bill of Rights and that the judiciary is empowered to promote and protect entrenched legal rights. However, unless there is tangible improvement in people’s lives, these constitutional values are nothing but empty rhetoric.

I want to suggest that the significance of the Critical Legal Scholars critique of liberal legal thought is that they criticize hollow promises and empty rhetoric about rights. So long as the actual impact on the quality and standard of life continues to be marginal and peripheral, and so long as the vast disparities of wealth and power in society persist, the bill of rights will be a political gimmick without any substance. It follows that in order to escape the accusations levelled at the liberal legal tradition by the Critical Legal Scholars, the contrary must be demonstrated, that the liberal legal tradition does not pay mere lip service to the rights discourse. The judiciary, also, must adopt a more ‘activist’ function with regard to the values in the Constitution during interpretation. It is incumbent on the state, therefore, to devise means to meet its obligations toward its citizens. I submit that this is the main contribution of Dworkin to contemporary legal theory. Accordingly, it is propitious to conclude with Mureinik’s words,

Even if every claim that Ronald Dworkin has ever made were ultimately proved wrong, and it is clear now that that is monstrously improbable, we would still almost certainly have learnt more from his errors than from what all his critics got right.¹⁵⁴

¹⁵⁴ Mureinik ‘Dworkin and Apartheid’ p 181.

Chapter Five

Towards a Moral Reading of the Namibian Constitution

5.1 Introduction

In the previous chapters I dealt with the constitutional jurisprudence of the Supreme Court of Namibia¹ and Dworkin's legal theory.² In the present chapter I attempt to identify some elements in Dworkin's legal theory that have the potential to enrich the constitutional jurisprudence of the Supreme Court. In this chapter I revisit the study's two central research questions. These are:

- (a) How should the Supreme Court decide cases to ensure the progressive realisation of the nation's aspirations as set out in the Constitution?
- (b) Is Dworkin's theory of constructive interpretation and law as integrity a model to be aspired to by the Supreme Court?

In respect of the first question, I claim that in order to ensure the progressive realisation of the nation's aspirations as set out in the Constitution judges ought to be alive to the point of constitutionalism in their interpretation of civil and political rights.³ In this Chapter I tentatively consider the argument that if constitutionalism becomes the main guiding principle of constitutional interpretation the

¹ The Constitutional jurisprudence of the Supreme Court is discussed in Chapter two of this thesis.

² Chapter three of this thesis I outline Dworkin's legal theory.

³ In the South African context, for example, Iain Currie made a 'judicious avoidance' argument (Currie *SAJHR* 146; whereas AJ Van der Walt has argued for subsidiarity (Van der Walt 2008 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' 1 *Constitutional Court Review* 77).

Supreme Court may always arrive at the right answers to all constitutional questions. In light of this conclusion, the notion that there are no right answers in constitutional interpretation on account that the Constitution is a value-laden document is questioned. I defend a view, after Dworkin, that there are right answers to constitutional questions. My second claim, in respect of the second question is that Dworkin's theory of constructive interpretation is a model that can be aspired to by Namibia's Supreme Court in its endeavors to interpret the Constitution.

My task in the present chapter is to evaluate the constitutional jurisprudence of Namibia's Supreme Court in light of Dworkin. By examining Namibia's constitutional jurisprudence in light of Dworkin, I seek to underscore the significance of his legal theory for Namibia's constitutional jurisprudence. To this end, the following questions are raised: i) What are the connections between some Supreme Court decisions and the legal theory advanced by Dworkin? ii) What is the significance of Dworkin's legal theory to Namibia? Put another way; are there elements in Dworkin's interpretative methodology that can add value to Namibia's constitutional jurisprudence? iii) What are the limitations of Dworkinian scholarship to Namibia's constitutional jurisprudence?

I argue that there are some connections between some Supreme Court decisions and the theory of interpretation advanced by Dworkin. Furthermore, Dworkin's legal theory is of great importance to post-independent Namibia because I believe there are some elements in the theory that can enrich Namibia's constitutional jurisprudence. This is underpinned by the assumption that Dworkin's legal theory can provide a better reading of Namibia's Constitution, thus bringing

about the realization of the nation's aspirations as entrenched in the Constitution.

In addressing the above questions, this chapter is organized as follows: in section 5.2 I provide a brief overview of Dworkin's legal theory. Here, the essential elements of Dworkin's legal theory are summarized. In section 5.3 I discuss some connections between some Supreme Court decisions and Dworkin's legal theory. I do not only propose Dworkin's legal theory here as an approach to Namibia's constitutional jurisprudence, but I also demonstrate that there are already Supreme Court decisions that are akin to Dworkin's legal theory. The argument here is that the Namibian judiciary should continue to build on this foundation of cases that are akin to Dworkin's legal theory in order to bring about the nation's aspirations as contained in the Constitution.

After highlighting some connections between some decided cases and Dworkin's legal theory, in section 5.4 I outline the significance or utility of Dworkin's legal theory to Namibia. This is done by way of analyzing some selected Supreme Court decisions in light of Dworkin, showing how those cases could have been decided were a Dworkinian approach employed. Section 5.5 concludes the chapter by highlighting possible limitations of Dworkinian scholarship. Whereas Dworkin's legal theory can contribute immensely to Namibia's constitutional jurisprudence, this study also acknowledges some factors that may inhibit its application to jurisdictions like Namibia.

Dworkin's legal theory has been discounted and dismissed in many circles as being theoretically too ambitious and irrelevant for purposes

of practical adjudication.⁴ Currie,⁵ for example, has charged that Dworkin's model judge Hercules neither fits nor brings value to South Africa's legal practice.⁶ Some have argued that Dworkin's legal theory overstates the place of moral theory in law.⁷ Admittedly, and to a large extent, the complexity of Dworkin's legal theory has accounted for much of the negative reception it has met. Some have contended that Dworkin's legal theory as outlined in *Law's Empire* bears no resemblance to legal practice, let alone being an accurate description of legal practice.⁸ Thus, in contemplating to relate Dworkin's legal theory to South Africa's Constitutional Court, Currie has remarked that,

Herculeanism is both an unrealistic and inappropriate aspiration for the South African Constitutional Court. It is unrealistic to strive for an interpretation of the Constitution that is uncontentiously the "best" justification of the legal record in a society bitterly fractured on the meaning of the Constitution and the legitimacy of the legal system's past record.⁹

Whereas some have considered Dworkin's legal theory to be uniquely American and therefore not suited to jurisdictions other than western jurisdictions, I make the argument in this study that some elements in Dworkin's legal theory can enrich Namibia's constitutional jurisprudence. Not only that, but it is further submitted that there are also similarities between some Supreme Court decisions and the legal theory put forward by Dworkin.

⁴ Roederer & Moellendorf *Jurisprudence* p 105, 106.

⁵ Currie 15 *SAJHR* p 146.

⁶ Roederer & Moellendorf *Jurisprudence* p 105, 106.

⁷ *Ibid*; Wells 22 *Georgia Law Review* p 1733; Posner 111 *Harvard Law Review* 1637 p 1700-07.

⁸ It should always be borne in mind that Dworkin's project is not intended to capture actual legal practice. It is a prescriptive theory of law and not necessarily an accurate description of legal practice.

⁹ Currie 15 *SAJHR* p 146.

5.2 The point of constitutionalism

Dworkin posits that the point or purpose of a practice ought to be its main ‘chart and compass’ for its interpretive methodology. To this end then, the point of law ought always to inform the interpretation of law as a practice. In other words, the juridical activity of interpretation should never lose sight of the point or purpose of law it interprets. In light of the above, it is clear that interpretation is a purposive activity which requires the interpreter to ask constantly whether the interpretation adopted is such as to further the point of law. I submit that an interpretation which ignores the point of law cannot be a correct interpretation of the legal practice. Accordingly, this presupposes that there is a perennial question that must be tackled for every interpretation. And the question is, is the interpretation I have adopted in this matter of such a nature as to further the aims of the practice?

Dworkin is adamant that legal interpretation, just as in the interpretation of a social practice, is purposive and that the ‘best’ interpretation of law is that which serves that purpose. I claim here that the point of law as suggested by Dworkin is akin to the point of constitutionalism. What, then, is the point of law according to Dworkin? In Dworkin’s own words,

Governments have goals: they aim to make the nations they govern prosperous or powerful or religious or eminent; they also aim to remain in power. They use the collective force they monopolize to these and other ends... the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and

responsibilities flowing from past political decisions about when collective force is justified.¹⁰

It is debatable, however, whether most governments ‘aim to make the nations they govern prosperous’. There is a strong suggestion that most governments pursue policies that can hardly be said to be in the interest of their nations. As a result, perpetual conflicts and strife are a common phenomenon in many parts of the world. Paradoxically, it is for this same reason that constitutionalism as a practice is not only desirable but urged.

The concept of constitutionalism is generally understood as an attempt in constitutional democracies to prescribe and define the powers of government. This is due to the general realization that when most governments ascend the reins of power, the propensity to abuse that power is greater, with acute human rights violations the consequence. Constitutionalism thus aims to prescribe and restrict government power in the interest of society.¹¹ But how is government power to be limited so as to ensure the protection of individual human rights as conferred by the Constitution?

For centuries the idea of separating the functions of government has been espoused as a pre-requisite to the limitation and restriction of its powers. A tripartite system of government consisting of the executive, the legislature, and the judiciary is associated with the French philosopher Baron de Montesquieu.¹² It is clear that the overriding concern undergirding the doctrine of separation of powers is to curb

¹⁰ Dworkin *Law's Empire* p 93.

¹¹ Currie & De Waal *The New Constitutional and Administrative Law* p 10.

¹² P De Vos & W Freedman (eds) 2014 *South African Constitutional Law in Context* p 62.

abuses.¹³ It is noteworthy that many governments that aspire for constitutional democracy espouse the doctrine of the separation of powers. Sadly, more often than not, governments tend to undermine the very idea of separating the spheres of government entrenched in their constitutions.

Diescho laments a developing trend about human rights protection in post-colonial Africa. He observes a growing trend whereby during the liberation struggles to liberate their countries from colonialism and oppression, the liberation movements were vocal about human rights abuses. However, once the same liberation movements gain independence and freedom and form governments, they become the worst violators of human rights of their own people. He writes:

The outcome of the colonial experiences that provided the new breed of African rulers, the so-called liberation leaders, was that they usually acquired exactly the habits of oppression from their alter ego, their cruel oppressors, from whom they had masterfully learned the art. Both the oppressors and the new oppressive political elite had one thing in common: they were the only free humans, whilst the rest were required to show gratitude for the benevolence of the harbingers of freedom and independence.¹⁴

Admittedly, the above picture as painted by Diescho is not only a phenomenon peculiar to Africa, but it is a recurring occurrence in many countries around the world where the distinction between the spheres of government is blurry and often undermined.¹⁵ To recap

¹³ *Ibid* p 63.

¹⁴ Diescho in Bosl *et al*, *Constitutional Democracy in Namibia* p 25.

¹⁵ In Namibia, for example, the separation between the executive branch of government and the legislature is almost non-existent as most members of the executive are the same members composing the legislature. *Article 35(1)* of the Constitution deals with the composition of Cabinet and provides as follows:

(1) *The Cabinet shall consist of the President, the Prime Minister and such other Ministers as the President may appoint from the Members of the National*

then, it is clear from the above discussion that the idea of constitutionalism entails both prescriptive and normative aspects. It is prescriptive in the sense that it dictates how state power ought to be exercised, rather than a mere explication of how it is exercised.¹⁶ Further, its normative character stems from the fact that it sets out values or standards which should be upheld in the governing process.¹⁷ Barnett¹⁸ summarises the essential point of constitutionalism as follows: a) that the exercise of power be within the legal limits conferred by Parliament on those with power- and that those who exercise power are accountable to law; b) the exercise of power- irrespective of legal authority, must conform to the notion of respect for the individual and individual citizen's rights; c) that the powers conferred within the state, whether legislative, executive or judicial, be sufficiently dispersed between the various institutions so as to avoid the abuse of power; and, d) that the government, in formulating policy, and the legislature, in legitimating that policy, are accountable to the electorate on whose trust power is held.

Following from the above discussion, it is of utmost importance therefore that the point of constitutionalism ought to guide judges in all interpretation. Because constitutionalism is purposive or has a point, it matters how the Supreme Court decides cases. The reason is to ascertain whether the Court's approach to constitutional interpretation is such as to further the point of constitutionalism. It is submitted that unless the point of the constitutionalism is paramount in all interpretation, the relevance and legitimacy of the Constitution will be undermined. At a time when many Namibians are grappling to

Assembly, including Members nominated under Article 46(1)(b) hereof, for the purposes of administering and executing the functions of the Government.

¹⁶ See Currie & De Waal *The New Constitutional and Administrative Law* p 332.

¹⁷ *Ibid.*

¹⁸ HA Barnett 2004 *Constitutional and Administrative Law* (4th Ed) p 5.

understand the meaning of independence and the Constitution amid poverty and other social ills, the point of constitutionalism ought to provide the overall framework for constitutional interpretation if the Namibia's constitutional democracy is to survive. As Wiechers submits:

By stressing the importance of human rights and freedoms as well as socio-economic advancement, the authoritative interpretation of the Constitution by the courts enhances and strengthens its legitimacy. Such interpretation should, apart from clearly establishing the law, also assure the unity and integrity of the body of laws and should serve justice.¹⁹

Dworkin advances another reason why we should be interested in law and its interpretation. He submits:

We take an interest in law not only because we use it for our own purposes, selfish or noble, but because law is our most structured and revealing social institution. If we understand the nature of our legal argument better, we know better what kind of people we are.²⁰

Following from the discussion above on the point of constitutionalism, it is inevitable therefore that there will be Acts, practices, conduct etc. that will fall foul of the Constitution and be rendered unconstitutional. These can be classified as practices or conduct or laws that are in conflict with the expressed aims of the Constitution. Accordingly, right answers are possible in constitutional interpretation. And right answers, for that matter, are those answers that can be justified in terms of the values or aims of the Constitution. I will develop this argument further when I discuss the objectivity of constitutional values and right answers in constitutional

¹⁹ M Wiechers 2010 'The Namibian Constitution: Reconciling Legality and Legitimacy' in Bosl *et al* (eds), *Constitutional Democracy in Namibia* p 56.

²⁰ Dworkin *Law's Empire* p 11.

interpretation. In the immediate pages, I consider possible connections between Dworkin's theory and some Supreme Court decisions.

5.3 Dworkin and the Supreme Court of Namibia

5.3.1 Value Judgments in the Supreme Court

The teleological or the value-coherent approach to interpretation is commonly used in statutory interpretation, but more so in the interpretation of human rights texts or constitutional provisions. It is a system of equitable interpretation that is said to have been developed by English judges in the 16th and 17th centuries.²¹ According to Corry, this doctrine distinguished between 'the sense or spirit of a statute and its words and justified the judges in extending or restricting the operation of the later'.²² It has been submitted that the concern of the teleological approach is that statutory interpretation must 'endeavor to effect a harmonization or synthesis within the legal system, which gives expression to the fundamental principles and ethos of the system as a whole'.²³ I want to suggest that the value-coherent approach is akin to constructive interpretation.

As Devenish²⁴ acknowledges, this approach takes into account the fact that 'in the background...are vaguer, more general purposes of the law: justice and security...which will often demand a creative effort by the courts'.²⁵ Du Plessis submits that teleological interpretation is

²¹ Devenish *Interpretation of Statutes* p 51.

²² JA Corry 1936 'Administrative Law and the Interpretation of Statutes' 1 *University of Toronto Law Journal* 286 p 296.

²³ DV Cowen 1980 'The Interpretation of Statutes and the concept of "the Intention of the Legislature"' 43 *THRHR* p 378.

²⁴ Devenish *Interpretation of Statutes* p 46.

²⁵ JM Kernochan 1977 'Statutory Interpretation: An Outline Method' 3 *Dalhousie Law Journal* 344.

purposive interpretation and aims to realize ‘the scheme of values’ that informs the legal order.²⁶

It follows that the concern of the value-coherent approach to interpretation is that judges should give effect to the values undergirding the legal system. As a technique of interpretation, teleological interpretation has met with acclaim in constitutional interpretation. A survey of the decisions of both the High Court and the Supreme Court of Namibia reveals that the value-coherent approach to interpretation is greatly espoused by the Namibian judiciary, though not at the level that Dworkin theorises. It is submitted that this approach to interpretation is akin to Dworkin’s theory of interpretation. Though Dworkin’s theory of interpretation is not the same as the teleological approach, there are some connections in the call to give effect to the values that informs a particular legal order. In *S v Acheson*²⁷ the Namibian High Court appealed to the scheme of values underpinning the Namibian legal order in granting bail to Acheson. The court held, per Mahomed AJ (as he then was)

The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.²⁸

Some of the values appealed to in the *Acheson* case were the protection of personal liberty in *Article 7*, the respect for human dignity in *Article 8*, the right of an accused to be brought to trial within a reasonable time in *Article 12(1)(a)*, and the presumption of innocence in *Article 12(1)(d)*. In *Ex Parte: Attorney General: Corporal Punishment by*

²⁶ Du Plessis *Re-Interpretation of Statues* p 290.

²⁷ 1991 NR 1 (HC).

²⁸ At 9J.

Organs of State²⁹ the Supreme Court of Appeal, in declaring corporal punishment by organs of state to be unconstitutional, held that the practice of inflicting corporal punishment on people was in conflict with Namibia's new norms, values, and ethos. And the primary value which was a key consideration in the Court's decision was respect for human dignity. *S v Tcoelib*³⁰ is another decision where the Supreme Court referred to the value of human dignity. At issue in *Tcoelib*'s case was the constitutionality of life imprisonment. The Court held, per Chief Justice Mahomed, that in Namibia if life imprisonment meant incarcerating a prisoner for the remainder of his natural life, then it would reduce such a prisoner to an object, thus eliminating any continuing obligation to respect his human dignity. There are several other cases that may lend support to the view that the Namibian judiciary, particularly the Supreme Court, has on several occasions appealed to the 'scheme of values' undergirding the legal order in their interpretation. On the strength of the above, it is submitted that there is ample evidence to support the thesis that there are some connections between some Supreme Court decisions and Dworkin's theory of interpretation.

It is submitted that moral principles are the pivots of Dworkin's theory of interpretation. Dworkin defines principles as standards that must be observed not necessarily on account that they will advance an economic, political or social situation, but because justice and fairness demands them.³¹ One way in which the use of the concept 'principle' in a Dworkinian sense may be found in Namibian case law is to regard constitutional values as moral principles themselves.³²

²⁹ 1991 (3) SA (NmSc).

³⁰ 1993 (1) SACR (Nm).

³¹ Dworkin *Rights* p 22.

³² *Ibid* p 27.

One characteristic feature of Namibia's constitutional order is that it has some foundational principles. In terms of *Article 1(1)* of the Constitution, there are three foundational principles of the Namibian constitutional state. These are: principles of democracy, the rule of law and justice for all. That is not all. As a value-oriented document, the Constitution also contains principles that are of a moral nature. My concern here is to establish whether there are some connections in the manner in which the Supreme Court have interpreted these moral principles and the theory of interpretation advocated by Ronald Dworkin. There is no doubt that the Constitution is a value-oriented document and that with its adoption as the supreme law of the Republic, Namibia dispensed with traditional positivism's central tenet that law and morals were separate domains. At the dawn of Namibia's new constitutional dispensation, Mahomed AJA expressed what has become a ground-breaking *dictum* in *S v Acheson* where he stated the following:

The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.³³

Importantly, Justice Mahomed went on to identify some constitutional values that were crucial in the exercise of his discretion. He added,

Crucial to that tenor and that spirit is its insistence upon the protection of liberty in *Article 7*, the respect for human dignity in *Article 8*, the right of an accused to be brought to trial within a reasonable time in *Article 12(1)(b)*, and the presumption of innocence in *Article 12(1)(d)*.³⁴

³³ At 9J.

³⁴ At 10B.

It is submitted that most values of the new constitutional order are contained in the Constitution, particularly Chapter Three of the Constitution entitled 'Fundamental Human Rights and Freedoms'. These constitutional values form the basis of Namibia's constitutional order, and act as moral principles in a Dworkinian sense. As with most constitutional provisions, Namibia's constitutional provisions that express constitutional values are also couched in 'declarative forms'.³⁵ However, when the sentence structure of these declarative forms is changed to normative, it becomes easier to understand these constitutional values as moral principles in a Dworkinian sense.

It can be inferred from Justice Mahomed's *dictum* referred to above in *Acheson's* case that the Constitution is not value-neutral and that the resolution of cases was to be heavily influenced by constitutional values. In *Minister of Defence v Mwandighi*, the Supreme Court approved the *dictum* in *Acheson*:

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the 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 tenor of the constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.³⁶

One concern regarding the Namibian constitutional values has been their ascertainment. This concern was expressed as follows by the then Chief Justice Strydom:-

³⁵ For example, *Article 7* provides that 'No person shall be deprived of personal liberty except according to procedures established by law'; *Article 8(1)* provides that 'the dignity of all persons shall be inviolable'; and *Article 10(1)* provides that 'all persons shall be equal before the law'.

³⁶ *S v Acheson*, at 10A-B.

To determine the contemporary norms, aspirations and expectations of the Namibian people is a most important requirement when it comes to the interpretation of the Constitution and how it should be applied. What those norms and aspirations are is not always easy to determine and the parameters thereof are always not limitless. When the Constitution says that there shall be no discrimination on the grounds of sex, even if there is a majority who may be in favour of such discrimination, it cannot change the express prohibition against discrimination set out in the Constitution.

Many of the norms and aspirations of the people are contained in the Constitution itself. Discrimination on the basis of certain stereotypes is voted out. The dignity of all persons is guaranteed by the Constitution. The theme against the violation of a person's dignity starts with the preamble of the Constitution and can be traced to many of the provisions of chapter three and other provisions of the Constitution. These and other provisions should constantly be in the mind of the judge called upon to interpret the Constitution.³⁷

To determine and to ascertain contemporary Namibian norms and aspirations may be a challenging task. And this, it is submitted, is the reason why there should be more research and development on Namibia's foundational values. The entrenchment of Namibia's constitutional values does not mean that their content is easily ascertainable. This is particularly compounded by the fact that constitutional provisions are notoriously couched in broad and sometimes vague language. Nonetheless, and as Chief Justice Strydom acknowledged in the above *dictum*, these 'norms and aspirations of the people are contained in the Constitution'.

In *Ex Parte Attorney-General, Namibia: in re Corporal Punishment*, the late Chief Justice Mahomed referred to national institutions as

³⁷ Former Chief Justice Strydom, speaking at the first retreat of the Office of the Attorney-General at Swakopmund on 20-22 November 2002. The address was entitled 'Namibia's Constitutional Jurisprudence- the First Twelve Years'.

sources for the identification of norms and values. He said he following:

The question as to whether a particular form of punishment authorized by law can be said to be inhuman or degrading involves the exercise of value-judgment by the court. It is, however, a value-judgment which requires objectively to be articulated and identified, regard being to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution; and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.³⁸

But what are these national institutions being referred to as possible sources of Namibian norms and values? In *Chairperson of the Immigration Selection Board v Frank & Another*,³⁹ some of these institutions identified by the court were:

The Namibian Parliament, Courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community based organisations can be regarded as institutions for the purposes hereof.⁴⁰

I have no quarrel with the view that all these institutions can be legitimate sources of Namibian norms and values. However, whatever norms and values may be sourced from these institutions, they ought to be in conformity with the Constitution since it is the ultimate yardstick for conduct, practice and legality. What is important therefore is for these institutions to ensure that their practices and

³⁸ At 188D-F.

³⁹ 2001 NR 107.

⁴⁰ At 137H.

belief systems are developed in such a way as not to conflict with the Constitution or the foundational values entrenched therein. In *S v Namunjepo* the court accepted that- Parliament, being the chosen representative of the people of Namibia, is one of the most important institutions to express the current-day values of the people. Yet it is not uncommon for Parliament to express views or enact laws that conflict with the Constitution. Again, just because the Constitution expresses values and norms of the Namibian people, it does not follow that these values are well understood by the Namibian society. Accordingly, continued education and development on constitutional values, particularly foundational values of liberty, respect for human dignity, equality etc. is warranted.

5.3.2 Conceptualising and Interpreting Rights

The exposition of Dworkin's legal theory in chapter 3 makes it clear that Dworkin considers government to be the ultimate protector of individual rights. Whereas Dworkin endorses legislative activity in the extension and realisation of such rights, he nonetheless underscores that the work of a policy-driven government should be separated from that of a principle-driven judiciary.⁴¹ For Dworkin, principles and individuated rights such as the general right to equal concern and respect, the right to freedom of speech or right to recover damages may be sacrificed to the collective welfare by the legislature but not by the judiciary.⁴² In making the distinction between principles and policies, Dworkin makes the point that principles favour individual rights, whereas policies advance community goals.

⁴¹ *Ibid.*

⁴² Dworkin *Taking Rights Seriously* p 90-96.

It is important to note the significance of principles in Dworkin's scheme. For him, rights are related to principles in the sense that principles are said to inform the judiciary of the rights of parties in litigation.⁴³ However, whereas Dworkin believes that government is the ultimate protector of individual rights, his conception of rights is that they are asserted against the state.⁴⁴ In other words, Dworkin is more concerned about the vertical application of rights. The state does not have 'rights' in the sense that Dworkin uses the word. This is so on account that usually the state advances arguments of policy, which may in turn be weighed against the individual's right.⁴⁵ However, to Dworkin, however, policy arguments cannot override certain kinds of rights.

It is submitted that Dworkin's rights discourse in respect of 'state action' is not uniquely American, but could have application in other non-American jurisdictions. The entrenchment of the human rights discourse in most national constitutions is aimed at serving as a buffer against state action. However, this does not imply that rights may not be violated by private individuals. Whereas rights may be violated by individuals, it is state violation of rights that is the central concern of human rights protection in national constitutions. Accordingly, how the judiciary interprets human rights violations is the central concern of Dworkin's project, and needless to say, it is also the central concern of this thesis.

By now, it is clear that this is not the extent of Dworkin's theory because it may suggest real limitations since it may appear to be

⁴³ JB Hall 1994 'Taking 'Rechts' Seriously': Ronald Dworkin and the Federal Constitutional Court of Germany' 9 *Germany Law Journal* p 771, 779.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

incapable of protecting rights against legislative interference.⁴⁶ Dworkin's theory has a broader political import. The reason is that Dworkin argues that rights cannot be overridden by government using utilitarian arguments of what is best for community.⁴⁷ On Dworkin's view, individual rights precede legislation and give it meaning.⁴⁸

Accordingly, legislation which infringes rights can only be justified when necessary to protect rights of others, or to prevent a calamity.⁴⁹ Dworkin argues that once it is accepted that rights and obligations are not dependent on the will of the majority, it will become clear that the judge's role is not that of the legislator who uses discretion in the interest of the community on grounds of policy.⁵⁰ Rather, the role of the judiciary is to identify and protect rights which already inhere in a legal system, irrespective of whether or not the goals are 'served and some political aim is disserved thereby'.⁵¹

Dworkin's concept of rights outlined above may be seen to operate in Namibia's Supreme Court. Sadly, this conception of rights has not been uniformly applied in all cases adjudicated upon. In *Kauesa v Minister of Home Affairs & Others* for example, the Supreme Court was called upon to adjudicate on a conflict between an individual's freedom of speech and expression under *Article 21(1) (a)* of the Constitution and a law of general application. Although freedom of speech and expression are guaranteed by *Article 21(1) (a)*, *sub-Article 2* of *Article 21* imposes some restrictions on the conferred rights and freedoms.

⁴⁶ See Van Blerk *Jurisprudence* p 88.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Dworkin *Taking Rights Seriously* p 191.

⁵⁰ *Ibid* p 191.

⁵¹ *Ibid.*

At issue in *Kauesa's* case was the constitutionality of Regulation 58(32), deemed to have been made under the auspices of the *Police Act of 1990*. The appellant was charged with the offence of contravening the provisions of the aforesaid regulation in that he publicly commented unfavourably about the administration of the police force on national television. In terms of Regulation 58(32), members of the Police Force were proscribed from publicly making unfavourable remarks about the force. Having made remarks deemed unfavourable, the appellant was charged with the offence of contravening Regulation 58(32).

Prior to the commencement of his disciplinary hearing, the appellant applied to the full bench of the High Court for an order declaring Regulation 58(32) unconstitutional. Unfortunately, the court a quo ruled that Regulation 58(32) was in conformity with *Article 21* of the Constitution. Regulation 58(32) provided as follows:

‘58 A member shall be guilty of an offence and may be dealt with in accordance with the provisions of chapter 11 of the Act and these regulations if he-

(32) comments unfavourably in public upon the administration of the Force or any other government department’.

The court reasoned that the Regulation 58(32)

- i) Imposed reasonable restrictions on the exercise of the rights and freedoms contained in *sub-Article 1* of *Article 21*, including on the freedom of speech and expression;
- ii) The restrictions were reasonable in a democratic society; and
- iii) Were required in the interest of sovereignty and integrity of Namibia, national security and public order.

Following the above reasoning, the application was dismissed with costs in the court *a quo*. However, on appeal the Supreme Court dispensed with the reasoning of the court *a quo*. In upholding the appeal the determination of the matter hinged on whether Regulation 58(32) constituted a permissible restriction on the right to freedom of speech and expression of a serving member of the Namibian Police. Accordingly, the Supreme Court balanced the interests of the appellant or his freedom of speech, with those of the state in maintaining the restrictions. As regards restrictions, the court noted that the limitations had to be reasonable and necessary. Thus a strict interpretation of the restrictions was required. This, the court noted, was to ensure that individuals are not unnecessarily deprived of the enjoyment of their rights and freedoms.

Furthermore, in assessing the extent and applicability of the limitation to rights and freedoms in *Article 21(2)*, the court noted the importance of being guided by the values and principles undergirding a free and democratic Namibia in which the inherent dignity of the person, equality, non-discrimination, social justice and other values are respected. Regard being had to these considerations the Court ruled that Regulation 58(32) was arbitrary and unfair. The regulation's objective was ruled to be overbroad. Accordingly, freedom of speech and expression was considered essential in the new constitutional dispensation and thus a strong right which could not be trumped by a rule of general application. Whilst acknowledging the need for a disciplined police force, the court held that Namibia was a democracy in which police officers have as much a right to freedom of speech and expression as citizens. Thus, Regulation 58(32) was declared invalid and without force and effect in law, and accordingly inconsistent with *Article 21(1)* and *(2)* of the Constitution.

In some cases the Supreme Court has been able to identify and protect the rights as entrenched in the Constitution. However, in some cases however, it appears the Supreme Court has tended to prefer policy considerations over the individual rights protection.

It merits emphasis that the theory which Dworkin postulates is more than the judicial protection of established rights but also it has a broader dimension of entrenching some rights, be they against government or between individuals.⁵² His theory is intended to give special place to rights as ‘trumps’ over the general utilitarian justifications in all cases during the legal process and not only during hard cases.⁵³ Judges, on Dworkin’s view, are the protectors of rights. Dworkin’s theory therefore is aimed at providing guidance in the process of uncovering the rights that a ‘particular political theory supposes men and women to have’.⁵⁴ Van Blerk notes that the rights on which Dworkin’s theory ‘focuses are intrinsic to the political system’.⁵⁵ On Dworkin’s view, the judicial function is therefore aimed at ‘trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community’.⁵⁶

5.3.3 Right answers and the objectivity of value-judgments

In the above section I suggested some connections between some Supreme Court decisions and the theory of interpretation propagated by Dworkin. Of necessity I now address the question of objectivity of

⁵² McCoubrey & White *Jurisprudence* p 164.

⁵³ *Ibid.*

⁵⁴ Van Blerk *Jurisprudence* p 89.

⁵⁵ *Ibid.*

⁵⁶ Dworkin *Law’s Empire* p 255.

value-judgments. In what sense can value judgments be said to be objective? The objectivity of value judgments is a hotly debated topic in legal philosophy to which many pages have been devoted. Moral skeptics charge that it is impossible for value judgments to be objective. The main contention, as I understand it, is that morals cannot be objectively known since they are all subject to revision and correction, and that there is no standard with which morals can be measured. This problem, moral skeptics charge, is compounded by the fact that there is no consensus among moral philosophers on the contours and content of morals. My argument here is that values can be objectively known; and secondly, following Dworkin, I suggest that there are right answers⁵⁷ to moral questions that arise in constitutional law.

Marmor has distinguished between three conceptions of objectivity: namely, semantic objectivity, metaphysical objectivity, and epistemic objectivity. A statement is said to be semantically objective if, and only if, it describes an object or entity. Accordingly, statements are objective if in terms of their structure semantically, they can be qualified as true or false. Metaphysical objectivity (ontological) refers to the existence of entities or objects irrespective of how they are perceived. Thus, a statement is objective if the object to which the statement refers actually exists irrespective of the speaker's thoughts. On the converse, a statement will be subjective if no such object exists.⁵⁸ It has been suggested that moral judgments 'correspond to some fact in an observer-independent external world. With regard to

⁵⁷ It is accepted that law is an argumentative practice. Accordingly, by right answers I mean answers that are supported by sound reasons and justifiable in terms of the values that now underpin Namibia's legal order and are sensitive to the point or purpose of constitutionalism.

⁵⁸ E Bulyagin 2004. 'Objectivity of Law in the View of Legal Positivism', Online: <http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi/15bulygin.pdf> p 2.

law, it implies that there exist right answers as a matter of law'.⁵⁹ Epistemic objectivity (Discourse or Justificatory Objectivity) entails that statements can be objectively valid on condition that they are verifiable or justifiable.⁶⁰ This means that a statement can 'be actually qualified as true or false, and any reasonable agent must accept its validity'.⁶¹

Canale⁶² has formulated three theses from the above conceptions of objectivity which are all a reaction to moral scepticism. These are: the Semantic thesis, in terms of which a value is objective on condition that it is taken 'to be a property of fact, a state of affairs, an event', but will be subjective if that value 'is taken to be a property of a mental state'.⁶³ In terms of the metaphysical thesis, a value is objective where 'there exists a fact, a state of affairs or an event in the world which instantiates such a value',⁶⁴ but is subjective if no such fact exists in the actual world.⁶⁵ Finally, with discourse thesis a value is objective where it is 'instantiated by a fact, state of affairs, an event or a relation, although they do not occur in the world'.⁶⁶ However, 'each person is required to invoke those values in any bedrock justification of choice'. In this last view a value will be subjective where a person is not called upon to justify such choice or actions.⁶⁷

Following from the above discussion, I submit that Dworkin's constructive interpretation falls under epistemic objectivity. Since law

⁵⁹ JR Sieckmann 'Objectivity of Law', http://ivrenc.info/index.php?title=objectivity_of_law; Accessed on the 7th of July 2013.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² D Canale 2008 'Legal Interpretation and the Objectivity of Values' p 20 21. Available at SSRN 1116546.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid* p 21.

⁶⁷ *Ibid.*

is by and large an argumentative practice underpinned by moral sense, answers to legal questions involve value-judgments and the answer which is the ‘best justification for that institutional history as a matter of political morality’ is therefore the right answer.⁶⁸ Right answers are as a result of value-judgments and ‘instantiates an objective, political value’.⁶⁹

Before I elaborate on the question of right answers to moral questions, I need to address the question of whether it is at all possible for values to be objectively known. Here I particularly want to focus my attention on Leiter’s objection. Leiter has devoted a substantial amount of pages to argue that it is impossible for morals to be objectively known.⁷⁰ In Leiter’s view, scientific objectivity is the only sensible conception of objectivity. Morality, for Leiter, is subjective since no moral facts exist. He accordingly rejects epistemic objectivity which appeals to reason as a viable conception of objectivity.⁷¹ For Leiter, morality and law are indeterminate.⁷² He writes:

It is my view that the predicament has no solution and that the law is, in fact, indeterminate. The latter issues are, however, beyond the scope of this paper.⁷³

Leiter is the kind that Dworkin characterises as an ‘external critic’ who has engaged with issues of morality from an external point of view and not an internal viewpoint of participants. Leiter is so impressed with science that for him for there to be moral objectivity, moral truth ought to pass the test of ‘scientific scrutiny’. For Leiter, ‘the type of objectivity found in natural sciences is the relevant type of

⁶⁸ Dworkin *Law’s Empire* p 141.

⁶⁹ Canale ‘Legal Interpretation and Objectivity of values’ p 21.

⁷⁰ Leiter in Leiter (ed) *Objectivity in Law and Morals* p 66.

⁷¹ *Ibid* p 6.

⁷² *Ibid* p 70-72.

⁷³ *Ibid* p 68.

objectivity to aspire to in all domains'.⁷⁴ It is regrettable that people like Leiter want to make science the standard and measure of all things while discounting other fields to a footnote of knowledge. And the reason why scientific knowledge is exalted above all else is because 'science has delivered the goods',⁷⁵

Science has earned its claim to be a guide to the real and unreal by depopulating our world of gods and witches and ethers and substituting a picture of the world and how it works of immense practical value.⁷⁶

For Leiter and people like him, scientific knowledge is the only truth and therefore the 'alpha' and 'omega' of all learning. According to Leiter,

Only that which makes a causal difference to experience can be known, and only that which makes a causal difference to experience is real.⁷⁷

Morality, therefore, can only be objective if it is 'mind independent and causally efficacious'.⁷⁸ It is rather disconcerting how Leiter spends little time to demonstrate the efficacy of his claims scientifically. For example, it is yet to be demonstrated that the world has indeed been depopulated 'of gods and witches' when the world still has people who believe in those 'gods and witches'. I find the insistence that morality be subjected to scientific methodologies for validation unacceptable. Science and morality are two separate domains with different standards for what counts as science and morality respectively. Whereas science may require law for validation, law does not need

⁷⁴ *Ibid* p 67.

⁷⁵ *Ibid* p 77.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* p 75.

⁷⁸ *Ibid* p 67.

science for its validation as a practice. Accordingly, Leiter's attack on Dworkin is unwarranted. Leiter attacks Dworkin that,

What we have yet to find in Dworkin is any argument for insulating the domain of morality from the demands of scientific epistemology.⁷⁹

Before moving on to defend the objectivity of value judgments and the notion of right answers to legal questions, it is important to consider the implications of Brian Leiter's thesis for Namibia's constitutional jurisprudence. Leiter's main contention is that 'there are no objective moral truths or facts'. As regards the value judgments discussed in the above section, this entails that constitutional values such as liberty protected by *Article 7* of the Constitution and considered in *Acheson*, the right to life protected under *Article 6* and discussed in *Tcoeib's* case, human dignity protected by *Article 8* and considered in *Ex Parte: Attorney-General: Corporal Punishment* etc. cannot be objectively known. The reason often advanced for this view is the fact that there are perennial disagreements over the content and contours of these values. To a question whether death may be prescribed as a competent sentence in Namibia, Brian Leiter's view would make him hold that the answer to this question cannot be objectively known. And, that there is no determinate right answers to this question since people will more often disagree on the competence of capital punishment as a sentence.

5.4 Towards a Narrative for Post-Colonial Jurisprudence

Dworkinian scholarship may be viewed from two equally potent perspectives. The first of these is the easily recognisable theme in this

⁷⁹ *Ibid* p 78.

thesis that there should be consistency in judicial decision making, thus guaranteeing the protection of individual citizens' rights from capricious and *ad hoc* judicial decisions. Secondly, and with a bit more humility and read constructively, Dworkin's entire project can be regarded as a 'struggle against disenchantment'. It is well documented that the period during which Dworkin began to proffer his views was characterized by social upheavals that shook the faith of many in orthodoxy. Some of the events include the Vietnam War, the Watergate scandal, student protests, the Black Consciousness movement etc.⁸⁰ The combined effect of some of these scandals caused many to lose confidence in government affairs.⁸¹ In the light of these and many other challenges, legal theory was no longer regarded as a 'sacred cow' that was beyond the reach of critical scrutiny. Accordingly, there were calls for law's underlying objectives to be made manifest along with its underlying politics.⁸² It was a period that witnessed the rise and fall of many movements. For example, the law and economics movement called for a review of traditional views on happiness, fairness and justice, that they be substituted by wealth maximization calculations.⁸³ The legal realists were being replaced by the Critical Legal Studies movement.⁸⁴ The women's liberation movement was also gaining momentum.⁸⁵ In essence, many trajectories of knowledge and knowledge claims were called into question, thus shaking and laying bare the foundations of liberal jurisprudence.

In the light of the above, the question was whether the liberal jurisprudence's notion of legality or the rule of law could be reworked

⁸⁰ Van Blerk *Jurisprudence* p 84.

⁸¹ See W Morrison 1997 *Jurisprudence: from the Greeks to post-modernism* p 416.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Van Blerk *Jurisprudence* p 84.

and clarified employing a novel technique of interpretation? It has been rightly acknowledged that the notion of interpretation may well seem to welcome nihilism, thus inviting the response to the writer's statements that 'after all your argument is just your interpretation and therefore I am secure in giving my own and you cannot claim that your interpretation is better than mine!'⁸⁶ By implication, this entails that the notions of 'neutrality, objectivity, universality and impartiality become redundant, or that they simply obscure the basic issue, specifically that knowledge is a question of power and politics'.⁸⁷ Disenchantment (theorised by Weber) is the opposite of nihilism (theorised by Nietzsche). Morrison explicates that disenchantment occurs when man discovers that there is no 'objective meaning' in the world, and he reconciles that it is a man's task thus to create that 'objectivity for meaning'; and further that 'the interconnection of meaning and reality is his responsibility'.⁸⁸ There are necessarily two outcomes that disenchantment invites: people either give up on science 'and come to accept that all claims that knowledge gives us the truth are fraudulent and that life is itself meaningless (negative nihilism), or we take up the challenge and accept that social science becomes a human project'.⁸⁹ The problem with the first outcome is that it promotes 'passivity, or decadence'.⁹⁰ As regards the second outcome, it encourages human responsibility⁹¹ in the face of challenges. Accordingly, it is the second outcome that is the concern of Ronald Dworkin's project. As Morrison submits, Dworkin 'seeks a new objectivity for legal discourse and a new meaning for legal practice'.⁹²

⁸⁶ See Morrison *Jurisprudence* p 418.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* p 419.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

Following from the discussion above, it becomes clear why Dworkin's project has been rightly acknowledged to be partly defensive and partly 'aspirational'.⁹³ The defensive nature of Dworkin's project relates to his attempt to re-galvanize faith in liberal legal thought amidst challenges highlighted above.⁹⁴ Dworkin's project is also aspirational as he attempts to provide a 'morality of aspiration'.⁹⁵

Although there are not many parallels that can be drawn between the social revolution which occasioned the reinterpretation of the notion of individual rights in the 60s and 70s and the current concerns in the Namibian legal landscape, there is at least a recognisable common denominator in the waning confidence in Namibia in conventional methodologies of legal practice and legal interpretation. The discussion on the constitutional jurisprudence of Namibia's Supreme Court in Chapter 2 exposed some shortcomings in the Court's current approach to guarantee the realization of the nation's aspirations contained in the Constitution. The reality is that the Namibian society is still bitterly fractured along tribal, regional and political party colours, the meaning of the liberation struggle etc. I want to suggest that this is similar to CLS situation in the 70s. Notwithstanding all these differences and challenges, Namibians of all backgrounds still have faith in the aims of the Constitution. Accordingly, it becomes fundamentally important how judges interpret the Constitution. My claim, then, is that the interpretation of the Constitution that is perennially at odds with the point or purpose of constitutionalism is bound to destroy the confidence of many in the relevance of the Constitution, and particularly the capacity of our judges to interpret the Constitution.

⁹³ *Ibid* p 415.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

In the light of the above concern, Namibia needs a new narrative for the post-colonial jurisprudence that will inspire faith in the law and legal practice. By implication, the current approach to constitutional interpretation should make a case for its continued existence. Particularly regard being had to some Supreme Court judgments that are substantively lacking in reasoned elaboration and exegesis steeped in our constitutional values. The question is whether Dworkin's interpretive methodology can be of any significance for post-colonial jurisprudence in Namibia? In the next pages I focus on some salient features and elements in Dworkin's legal theory that in my view can contribute importantly to Namibia's constitutional jurisprudence.

5.5 The Significance of Dworkin's Legal Theory to Namibia's Constitutional Jurisprudence

In the section below I am concerned with identifying elements in Dworkin's legal theory that have the potential to enrich the Supreme Court's constitutional jurisprudence. Some connections discussed above between some Supreme Court decisions and Dworkin's legal theory underscore the importance of Dworkinian scholarship for Namibia's constitutional jurisprudence. However, as was demonstrated in Chapter 2 of this thesis, there are also some Supreme Court decisions that warrant a paradigm shift toward Dworkin's theory of interpretation as it offers more than the conventional approach adopted by the Court thus far. As some reviewed cases above indicate, the Supreme Court has on several occasions appealed to values of human dignity, the right to equality, the right to liberty, freedom of expression and speech to decide cases. However, the values underpinning Namibia's legal order have not always been a reference point in some of the Court's decisions. It is submitted that unless the

Supreme Court is consistent and creative in upholding and protecting human rights, the nation's aspirations contained in the Constitution may take long to realize, if at all.

Several reasons can be advanced here as to why Dworkin's legal theory should be taken seriously in post-colonial Namibia. First and foremost, Dworkin's legal philosophy has been rightly acknowledged as a 'philosophy of adjudication'.⁹⁶ It therefore comes as no surprise then that judges and courts are central in Dworkin's legal theory. Given that his legal theory is primarily concerned with adjudication, Dworkin regards courts as powerful and influential institutions in the protection and enforcement of human rights.⁹⁷ Accordingly, and because judges ought to decide cases on the basis of principle, judges then ought always come to the accused persons' rescue where it is shown that their rights have been infringed. I now turn to what I consider to be the essential elements in Dworkin's legal theory which have the potential to enrich Namibia's constitutional jurisprudence.

5.5.1 Interpreting the Practice as a Whole

What emerges from Dworkin's constructive interpretation is his emphasis on interpreting a practice as a whole. Hence, the general thesis of Dworkin's legal theory is that interpretation is inescapably linked to a practice that it interprets, and is accordingly 'governed by or sensitive to one's sense of the purpose or point' of the practice in question. To this end, interpretation should thus strive to show the practice in its best light, all things considered. The success of Dworkin's constructive interpretation thus is dependent on a demonstration that law is an interpretive practice.

⁹⁶ R Cotterrell 1987 'Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy' 12 (2-3) *Law and Social Inquiry* p 509 511.

⁹⁷ *Ibid.*

Bobbit is one of the writers on constitutional law to have argued that constitutionalism is a practice. He wrote, 'law is something we do', and 'not something we have as a result of what we do'.⁹⁸ It is submitted that 23 years after independence, the greatest challenge facing constitutionalism as a practice is that not everything became constitutional on independence day.⁹⁹ In respect of laws, for example, *Article 140(1)* of the Constitution provides as follows:

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 declared unconstitutional by a competent court.¹⁰⁰

Notwithstanding the point of constitutionalism discussed above, it is submitted that constitutionalism as a practice in Namibia faces serious challenges. Not only are laws still contradictory by virtue of Article 140(1) of the Constitution, but government actions and policies are contradictory and incoherent as well. In addition, the diverse fields of law and their interpretation do not yet speak to the point of constitutionalism. The real appeal of constructive interpretation is that it underscores the need to show a practice as a whole in its best light. Constructive interpretation thus calls for coherence in the interpretation of all laws. Accordingly, the law of contract, law of property, law of evidence, insurance law, criminal law, criminal and civil procedure etc. ought to be interpreted and applied in ways that further the point of constitutionalism. This is because the central insight of constructive interpretation is not so much the interpretation of individual laws rather, it is about interpreting the practice as a

⁹⁸ P Bobbit 1991 *Constitutional Interpretation* p 24.

⁹⁹ Namibia became independent on the 21st of March 1990.

¹⁰⁰ *Article 140(1)* of the Constitution.

whole, in this case the practice of constitutionalism. Therefore, no area of law should resist the point of constitutionalism.

Regard being had to the preceding discussion and analysis, I want to suggest here that for constitutionalism as a practice to succeed, constitutional interpretation should be consistently sensitive to the point of constitutionalism and in all cases. Secondly, since integrity is both a legislative and a judicial principle, there is a need for the legislature to enact laws that are morally coherent. Equally, the executive branch of government should be coherent in the enforcement of government policies and service delivery. Thus all spheres of government should speak to the point of constitutionalism.

Cornell and Friedman identify two potent threats to constitutionalism in South Africa. The discussion on threats to constitutionalism in South Africa is significant because there might be some lessons for Namibia's constitutional project as well. The first threat to constitutionalism is what Cornell and Friedman note as,

a Leninist tendency within the African National Congress (ANC) to promote the executive or, perhaps more precisely, the party itself (as it represents the truth of the masses) as the ultimate decision-maker in the country.¹⁰¹

The second threat to constitutionalism is what the authors observe as attempts,

to restrict the impact of the Constitution on private law, and den[y] that there was a substantive legal revolution in South Africa; or, if there was a revolution, it was not one that could found a new law such as the Constitution.¹⁰²

¹⁰¹ Cornell & Friedman 5 *Malawi Law Journal* p 1.

¹⁰² *Ibid.*

Some remarks in respect of the above concerns will be in order at this stage. Firstly, constitutionalism in as far as it aims to prescribe and limit the power of government is often resisted by the executive. Hence, attempts are often made to sidestep the imperative of the separation of powers doctrine. Secondly, it merits pointing out that constitutionalism as a practice has not been embraced by all. This is illustrated by those who seek to limit, for example, the impact of the Constitution on certain spheres of both public and private life. It is this which makes constitutionalism in both South Africa and Namibia an aspirational ideal. Contrary to Dworkin's community of integrity whereby values evolve or emanate from the community, the values undergirding Namibia's constitutionalism are aspirational. In other words, they are not values that are already espoused by the Namibian society, but rather values that the new Namibia aspires to have. For this reason, I want to suggest that this is the import of the preamble to the Namibian Constitution.¹⁰³

I want to suggest that it is precisely because of the aspirations of 'securing to all our citizens justice, liberty, equality and fraternity' that it is incumbent upon

Government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some.¹⁰⁴

It is submitted that the nation's aspirations set out in the preamble above are akin to what Dworkin's law as integrity requires of government. Accordingly, if government is indeed committed to

¹⁰³ 'Whereas we the people of Namibia- Committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity'.

¹⁰⁴ Dworkin *Law's Empire* p 165.

realizing the aims of the Constitution, a principled and a coherent approach to constitutionalism is an imperative. Furthermore, the Supreme Court should be consistent in its appeal to the values underpinning the legal order so as to make law more coherent. As Dworkin puts it:

Law should also make government more coherent in principle; it should seek to help to preserve what we might call the integrity of the community's government, so that the community is governed by principles and not just rules that might be incoherent in principle.¹⁰⁵

5.5.2 The Integrity of Law

Individual citizens are often left bemused at how contradictory and incoherent judicial pronouncements emanating from our courts are, thus questioning the real relevance of the equality clause in the Constitution. I want to suggest at the outset that the integrity of the judiciary as the final arbiter in dispensing justice is dependent on the courts' ability and willingness to dispense justice to all persons without discrimination and in tandem with the equality principle. From the Prosecutor-General's decisions to prosecute or not to prosecute, to sentences imposed by the courts, members of society are often baffled at the lack of consistency in judicial decisions. Not only do courts appear to apply different standards to similar cases, but there is a strong suggestion that there is also selective appeal to values underpinning the legal order. In some cases the courts have been unequivocal in their appeal to the values undergirding the new constitutional order; and yet in some cases there is complete non-referral to these constitutional values. Accordingly, there is a growing

¹⁰⁵ Dworkin in Atria & MacCormick (eds) *Law and Legal Interpretation* p 6, 11.

and persistent perception that contrary to the constitutional promise of treating people equally before the law, not all are treated equally.¹⁰⁶

There is a growing perception that contrary to the constitutional promise that all shall be equal before the law, factors such as ‘sex, race, colour, ethnic origin, social or economic status’ etc. play a role in judicial decisions. To compound the issue even further, not only are judicial pronouncements incoherent, but legislative pronouncements are also incoherent. For example, the justification of sentences pursuant to the *Stock Theft Amendment Act of 2004*¹⁰⁷ has left many confused. *Section 2* of this Act provides as follows:

- (1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry –
 - (a) Of which the value-
 - (i) Is less than N\$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
 - (ii) Is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine;
 - (b) Shall be liable in the case of a second or subsequent conviction, to imprisonment for a period not less than thirty years without the option of a fine.

The question is why should a person convicted of stealing a goat worth N\$500 be sentenced to a jail-term of 20 years. According to Dworkin, it

¹⁰⁶ *Article 10* of the Constitution provides as follows:

- (1) *All persons shall be equal before the law.*
- (2) *No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

¹⁰⁷ *Act No 19 of 2004.*

is the object of interpretation to interpret a practice constructively so as 'to make of it the best possible example of the form or genre to which it is taken to belong'.¹⁰⁸ In order to achieve this, Dworkin posits that judges must accept the theory of law as integrity which 'instructs judges to identify legal rights and duties, so far as possible, on the assumption that they created by a single author- the community personified'.¹⁰⁹ Dworkin has further submitted that

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make the complex structure and record the best it can be.¹¹⁰

The concept of integrity is generally defined as 'the quality of being honest and having strong moral principles; the state of being whole and unified; the state of being sound in construction'.¹¹¹ Integrity comes from the Latin word *integer*, which means whole or complete.¹¹² Accordingly, the essence of law as integrity is a call for a conception of law that shows it as though it has been created by a single author and that it is applied consistently in all cases. It is submitted that nothing does more harm to law's legitimacy than the *ad hoc* and inconsistent application of legal rules by the judiciary. Accordingly, the purpose of law can never be said to be the attainment of justice, fairness or due process when it is not applied consistently in all the cases. Accordingly, law cannot be said to have integrity when there are different applicable standards to like similar cases. To ensure that law has integrity, Dworkin proposes two requirements for legal judgments.

¹⁰⁸ Dworkin *Law's Empire* p 52.

¹⁰⁹ *Ibid* p 255.

¹¹⁰ *Ibid*.

¹¹¹ M Waite (ed) 2007 *Oxford Dictionary and Thesaurus*.

¹¹² <http://www.bartleby.com/61/70/I0177000.html>. *The American Heritage Dictionary of the English Language* (4th edition) 2000. Retrieved on the 18th of July 2012.

The first requirement calls upon judges to ensure that every legal judgment is a continuation of the doctrinal past. This is so on account that judges are

to assume... that the law is structured by a coherent set of principles about justice and fairness and procedural due process and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.¹¹³

Amidst the waning confidence in government's commitment to treat all people on the principle of equality, it is submitted that Dworkin's law as integrity is the best hope for engendering faith in the law. In his paradigm analogy of the chain novel Dworkin draws parallels on how a legal judgment should be constructed to ensure law has integrity. Integrity exhorts judges to decide novel cases in tandem with the past legal record, except where the doctrinal past is declared a 'mistake' in that it cannot be justified in terms of the values underpinning the legal system. In Dworkin's view, this ensures that like cases are treated alike. Law as integrity is at work when judges 'identify legal rights and duties, so far as possible, on the assumption that they were created by a single author- the community personified'.¹¹⁴ Admittedly, it is only in this way that law will be seen to 'speak with one voice'.¹¹⁵

It is conceded that legislative pronouncements are often contradictory. However, the legislature should not always be the scapegoat in this. The judiciary has the constitutional mandate to review legislation in the light of the Constitution. And I want to think that it is for this reason that constructive interpretation calls upon judges to 'impose

¹¹³ Dworkin *Law's Empire* p 243.

¹¹⁴ *Ibid.*

¹¹⁵ This is Dworkin's expression in his exposition of law as integrity.

order' over contradictory legislative doctrine to ensure coherence and consistence. Accordingly, I submit that the greatest threat to the integrity of the judiciary are judges who apply different sorts of standards to similar cases

The notion of coherence is well embedded in legal thought.¹¹⁶ From the definition above, it is clear that the purpose of coherence as a value in law is essentially that the legal system as a whole should make sense. As Berteza submits,

Coherence relates to the idea that the system has to make sense as a whole. And making sense as a whole is a precondition of intelligibility, which in turn is a requirement essential to law, at least to the extent that is understood as an institution purposing to guide actions.¹¹⁷

But there is another reason why coherence should hold special significance as a value for Namibia's Supreme Court. There is little doubt that equality is the foundational and main guiding principle of Namibia's new legal order. In order to achieve this equality,¹¹⁸ it is

¹¹⁶ See for example R Alexy and Peczenik 1990 'The Concept of Coherence and its Significance for Discursive Rationality' 3 *Ratio Juris* 130-147; S Berteza 2005 'The Arguments from Coherence' 25 *Oxford Journal of Legal Studies* 369-391; Kress in Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* 533-552; B Levenbook 1984 'The Role of Coherence in Legal Reasoning' 3 *Law and Philosophy* 355-374; N MacCormick 1984 'Coherence in Legal Justification', in A Peczenik (ed) *Theory of Legal Science* 235-251; N MacCormick 1994 *Legal Reasoning and Legal Theory*; A Peczenik 1990 'Coherence, Truth and Rightness in Law' in P Nerhot (ed) *Law, Interpretation and Reality* 275-309; J Raz 1994 'The Relevance of Coherence' in J Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 277-325; LM Soriano 2003 'A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice' 16 *Ratio Juris* 296-323.

¹¹⁷ S Berteza 25 *Oxford Journal of Legal Studies* 369-391.

¹¹⁸ Although Kress argues that there is nothing in analogical arguments that like cases be treated alike which insists that they should be understood as coherence accounts of adjudication, he nonetheless observes that 'the idea that law is a seamless web, that it is holistic, that precedents have a gravitational force throughout the law, that argument by analogy has an especial significance in law, and the principle that all are equal under the law' makes the notion of coherence to be of great significance for law. See Kress in Patterson (ed) *A Companion to*

fundamentally important that law be seen to speak with one voice in the decisions of the Court. Accordingly, the selective appeal to constitutional values evident in *S v Mushwena & Others* does not bode well for constitutionalism as a practice in Namibia. This brings me now to Dworkin's second requirement of a legal judgment to ensure that law has integrity.

The second requirement of law as integrity is moral justification. In Dworkin's view, where there are several eligible interpretations that fit the past record, an interpretation that is morally superior in terms of the political morality of the legal system should be preferred over any other alternative interpretation. Earlier I raised an argument that there appears to be selective appeal to constitutional values by the Supreme Court. Consequently, this necessarily raises an important question pertaining to the objectivity of constitutional values. Andrei Marmor succinctly puts the question thus, 'Do we value things because they are valuable, or are things valuable only in so far as we value them'?¹¹⁹ What is problematic in the Supreme Court's approach is the argument I raised above regarding the Court's selective appeal to constitutional values.

On the evidence of the cases reviewed and analysed above, it can safely be asserted that for the Supreme Court, it appears that constitutional values are 'valuable only in so far as' it values them. This *ad hoc* and unprincipled approach makes it possible for the Court to appeal to constitutional values when it deems it fit, with rationalisations apparent in *S v Mushwena & Others*, but which rationalisations are unjustifiable in terms of the values underpinning

Philosophy of Law and Legal Theory p 536. Joseph Raz is of the same viewpoint, see Raz in Raz *Ethics in the Public Domain*.

¹¹⁹ A Marmor 2001 *Positive Law and Objective Values* p 160.

the new legal order. It is this approach to constitutional interpretation that makes it impossible for law to be seen ‘to speak with one voice’, hence the accusations that not all are equal before the law contrary to the constitutional promise. I submit that constitutional values should at all times be considered valuable by the Court because they are valuable. I think this is the import, for example, of *Article 8* of the Constitution, where the following is provided regarding respect for human dignity:

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.¹²⁰

From the formulation of the dignity clause for example, I conclude that a selective appeal to human dignity as a value in judicial proceedings is not permissible under the Constitution. Accordingly, the Court cannot pick and choose when to observe the provisions of *Article 8* of the Constitution, because respect for human dignity is guaranteed in all judicial proceedings. Since all humans have dignity, respect for their dignity in all judicial proceedings should accordingly be acknowledged by the Court. To this end, the Court should be consistent in its appeal to this foundational and constitutional value. For Dworkin, coherence is the main value and guiding principle of law as integrity.¹²¹

¹²⁰ *Article 8(1)(2)* of the Constitution.

¹²¹ As Marmor explains,

‘Law as integrity urges judges to grasp their adjudicative assignment as guided primarily by concern with the moral value of coherence. Judges ought to interpret past political decisions only in a way and to the extent that would render (or reveal)

The importance of judges and the courts, in Dworkin's view, is that they are particularly concerned, unlike other organs of state, 'with the safeguarding and enforcement of rights and with the interpretation of law in terms of principle'.¹²² This concern should be consistently demonstrated in novel cases on the basis of principle. In *S v Mushwena & Others* for example, the concern to 'safeguard and enforce' the appellants' rights was apparent in the High Court, but the same concern was non-existent in the Supreme Court. In allowing the appeal, the Supreme Court discussed at great length foreign case law to justify its finding and thus exonerate the conduct of Namibia's security forces. Whereas foreign case law was extensively canvassed, it cannot be a key consideration in the finding of the court.

The significance of Dworkin's theory of interpretation is that it implores judges to justify their decisions in accordance with the values and moral principles undergirding their legal systems. It is submitted that this is the significance of Justice Mainga's *dictum* in *Kaulinge v Minister of Health and Social Services* where the following was stated:

Administrative bodies and administrative officials who are capable of making decisions affecting citizens should always bear in mind that, by the adoption of the Constitution of Namibia, we have been propelled from a culture of authority to a culture of justification.

It must be pointed out that the call in *Kaulinge's* case to justify decisions should not be construed to be only applicable to administrative bodies and officials, but more so to the judiciary. To this end, the majority decision in *Mushwena* can hardly be justified in

these past political decisions consistent in principle'. See A Marmor 2005 *Interpretation and Legal Theory* p 52.

¹²² *Ibid.*

terms of the constitutional values of respect for human dignity,¹²³ equality,¹²⁴ liberty,¹²⁵ right to a fair trial¹²⁶ etc. The attractiveness of Dworkin's legal theory lies in its insistence that law ought to speak with one voice to all citizens. According to law as integrity, propositions of law are true only if they emanate from principles of justice, fairness and procedural due process, thus providing the best constructive interpretation of legal practice. Accordingly, judges ought to assume that law is founded on these principles and must enforce them consistently so as to treat every person equally.

It is submitted that every citizen's right to 'equal concern and respect' is only possible when the judiciary base all their decisions on principle, which in turn calls for the protection of established rights. Accordingly, when judges are sensitive to principle, attempts will be made to have moral convictions that will make it possible for them to construe moral consistency throughout the law every time a part of the law is interpreted.¹²⁷ Admittedly, this calls on the judiciary to rely on moral principles that are not necessarily posited in the Constitution, but which ultimately shows our legal practice in the 'best' light.

5.5.3 The Legality of Law: Keeping and Maintaining Faith in the Law

The Namibian historical experience teaches that law is capable of being fundamentally manipulated to further aims that can hardly be said to resonate with human dignity, freedom, let alone the notions of

¹²³ *Article 8.*

¹²⁴ *Article 10.*

¹²⁵ *Article 7.*

¹²⁶ *Article 12.*

¹²⁷ Cotterrell *Law and Social Inquiry* p 513.

equality and justice. For this reason, many people in the pre-independent Namibia had lost faith in the law's underlying objectives and its capacity as a vehicle for social justice. Accordingly, at the dawn of independence and the attainment of statehood, a deliberate attempt was made to restore faith in the law by the adoption of the Constitution in terms of which social transformation, or so it appears, can be achieved by founding the State on values of human dignity, equality, freedom, the rule of law etc. Twenty-three years after independence, it is unclear whether faith in the law has indeed been restored. I argue that faith in the law is yet to be attained. To many, law is still regarded as an instrument that perpetuates social injustice.

It is generally acknowledged that modernity presupposes a notion that man is capable of taking control of the world processes so as to create conducive conditions for progressive and happy societies in the world.¹²⁸ This confidence is clearly evident in the Namibian Constitution, particularly the preamble. However, the fundamental question is, 'what is to guide man in this project when the foundations that gave the medieval synthesis, namely, religion and custom, are discarded?'¹²⁹ Can law be trusted as a vehicle that can bring about social transformation? Dworkin is unequivocal in his response that there is still hope for law amidst 'the contingencies of political and cultural human affairs', but only if judges and lawyers can adopt a judicial attitude whereby they see their work as 'a moral business'. Dworkin thus calls upon judges and lawyers alike to see themselves not merely as servants of the state, but that 'they hold the keys to the development of society'.¹³⁰ Accordingly, Dworkin's entire project is designed 'to convince us of "law's optimism" and "law's integrity"'.¹³¹

¹²⁸ Morrison *Jurisprudence: From the Greeks to Post-Modernism* p 446.

¹²⁹ *Ibid* p 447.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

It is submitted that the one thing that does considerable harm to law and the legal system's legitimacy is unprincipled, inconsistent and *ad hoc* judicial decisions. The significance of Dworkin's legal theory is that it exhorts judges to resolve cases on the basis of moral principles, in terms of which the standards of fairness and justice are consistently extended to all and sundry so as to ensure the right to 'equal concern and respect'. By so doing, this may in turn engender faith in the law and legal practice by the disenfranchised and those minorities with alternative views and imaginations.

5.6 Limitations of Dworkinian Scholarship to Namibia

Community of principle

Notwithstanding the attractiveness of Dworkin's legal theory for constitutional jurisprudence in Namibia, there are factors that may inhibit its effectiveness as an approach to constitutional interpretation. Dworkin has written extensively describing the community as the basis of law.¹³² As a matter of fact, Dworkin's theory presupposes that the ideals and values of a community are in a large measure reflected in the law. It is common cause that Dworkin's legal theory is deeply rooted in the US context where one can arguably speak of a community of principle. Accordingly, transposing his theory to young nations like Namibia that suffered grave atrocities under apartheid and colonialism for decades could be problematic. This is mainly because of the relatively short period of time (24 years of independence) that Namibia as a constitutional community has existed to become a 'community of principle'. In other words, Namibia is not yet at a stage where it can be said to be a community of

¹³² Dworkin *Law's Empire* pp 195-215.

principle. Accordingly, a political culture that is supportive of the ideals entrenched in the Constitution is still in its developmental stage. Hence, the political ideals that are reflected in the Constitution should be understood as aspirational in nature and not that they are deeply embedded in the Namibian society.

Integrity as legislative and judicial principle

Law as integrity is both a legislative principle and also a judicial principle. As a legislative principle, law as integrity calls upon lawmakers to enact laws that are morally coherent.¹³³ The challenge, however, is whether the Namibian legislature can be committed to law as integrity in terms of which it can be expected to make laws that are morally coherent. It is submitted that in the absence of morally-coherent policies from which laws can be enacted, it is unlikely that the legislature will effect a harmonization and subsequent promulgation of laws that are morally coherent. Although principles of state policy are well articulated in the Constitution,¹³⁴ it is their implementation that remains *ad hoc* and unsystematic. Since independence, Parliament has enacted several statutes that have since been declared unconstitutional by the Namibian courts.

As a judicial principle, again it all depends on whether it is a concern to Namibia's Supreme Court that law speaks with one voice. In terms of law as integrity, law has integrity only where like cases are treated alike and judicial decision making is founded on 'principle rather than whim, policy or expediency'.¹³⁵ Integrity's call that judicial decisions be based on principle is to ensure that people are treated with 'equal

¹³³ Dworkin *Law's Empire* p 176.

¹³⁴ *Article 95* of the Constitution deals with policies that guides government in the promotion of the welfare of the people

¹³⁵ Roederer & Moellendorf *Jurisprudence* p 98.

concern and respect'. The question is whether the Supreme Court is committed to defend the ideals of fairness and due process unconditionally and consistently to regard the protection of human rights as crucial to legality.

Article 81 of the Constitution

Another challenge of constructive interpretation as an approach to constitutional interpretation pertains to the problem posed by *Article 81* of the Constitution. *Article 81* of the Constitution provides that,

A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.

It is submitted that one of the implications of the above provision is that the Supreme Court justices are constantly aware of the possibility that their decisions can always be overturned by Parliament. For a Supreme Court decision to remain binding, in terms of *Article 81*, it must be acceptable to Parliament. The obvious counter-argument to this concern is the view that after all the same Act of Parliament aimed at contradicting a Supreme Court decision is itself subject to interpretation by the courts. Be that as it may, the possibility of *Article 81* creating doubt in the minds of judges regarding that which shows a legal system in its best light remains real as judges may become reluctant to engage Parliament in a 'tug of war'. This may particularly be the case where there are conflicting visions of the point of constitutionalism.

Undoubtedly, *Article 81* of the Constitution raises a legitimate question about the independence of the judiciary and the viability of

constructive interpretation as an approach to constitutional interpretation in Namibia. It is doubtful how the Supreme Court can be independent¹³⁶ if its decisions can be contradicted by Parliament.¹³⁷ It is submitted that *Article 81* of the Constitution, in so far as it permits Parliament to contradict a decision of the Supreme Court, is in conflict with *Article 78(2)* of the Constitution that establishes the independence of the judiciary. Regard being had to the above, it is submitted that the success of the constructive interpretation model in Namibia could well depend on both the legislature and the judiciary agreeing on the point of constitutionalism as a practice. Otherwise, it is more likely that the Supreme Court's efforts to show the practice of constitutionalism in its best light stand to be frustrated by the legislature.

5.7 Conclusion

I have no doubt that the two negative aspects discussed in this thesis can be real impediments to transformation in Namibia. However, in its positive aspect this thesis sought to explore how Dworkin's approach could assist in addressing the failures in the constitutional practice of Namibia. Accordingly, if the transformative aims of the Constitution are to be realised, there is a need for a constructive interpretation of the Constitution. Admittedly, it is only in this way that the Supreme Court of Namibia will be said to have integrity and that the Constitution will have relevance to the majority of Namibians.

¹³⁶ Article 78(2) of the Namibian Constitution provides that 'The Courts shall be independent and subject only to this Constitution and the law'.

¹³⁷ A scenario whereby a Supreme Court decision is contradicted by an Act of Parliament is yet to unfold since the establishment of the Judiciary.

Chapter Six

Conclusion: In Defence of a Constructive Interpretation of the Constitution

In this thesis I sought to explore the constitutional jurisprudence of the Supreme Court of Namibia in light of Dworkin's legal theory. In this exploration, it was noted that the Namibian Constitution grounds the legal system in values such as the rule of law, democracy, equality, respect for human dignity and freedom amongst others. To this end, the Supreme Court has over the past 23 years sought to interpret the Constitution 'broadly, liberally and purposively'. Accordingly, my aim in this study was to approach the Constitution as a transformative document. However, there are two negative aspects in this thesis and one positive aspect. The first negative aspect pertains to the fact that the Namibian Constitution does not entrench socio-economic rights. In this regard I raised the question whether the lack of socio-economic rights undermines the Constitution's transformative goals.

The second negative aspect in this thesis is that whereas the Supreme Court has underscored the need to interpret the Constitution broadly, liberally and purposively, the Court has failed to appeal to constitutional values and principles consistently. In other words, in some of its decisions the Supreme Court has been unequivocal in its appeal to the constitutional values of dignity,¹ equality,² the rule of

¹ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271; *Ex Parte Attorney-General: In re Corporal Punishment* 1991 NR 178.

² *Government of the Republic of Namibia v Mwilima & Others* 2002 NR 235.

law,³ freedom etc. and yet the same zeal is conspicuously lacking in a host of other cases.⁴

Notwithstanding the two negative aspects above, the positive aspect of the thesis is that I have sought to explore how Ronald Dworkin's notion of constructive interpretation and law as integrity can inform and address the two negative aspects identified in this thesis. My aim was therefore to consider to what extent the approach of Ronald Dworkin could address the failures in the Namibian constitutional practice.

In chapter 2 I set out to show how the Supreme Court has interpreted some fundamental rights and freedoms entrenched in the Constitution. In what can be noted as a negative aspect of this thesis, I argued that while the Supreme Court has in the past 23 years underlined the need to interpret the Constitution 'broadly, liberally and purposively', it has itself failed to do so consistently. Accordingly, I argued that the Supreme Court's current approach undermines the transformative goals of the Constitution. This is mainly because of the Court's selective appeal to constitutional values and principles. If the transformative goals of the Constitution are to be achieved, the Supreme Court should be coherent and consistent. Accordingly, I argued that the Court's selective appeal to constitutional values and principles has the effect of undermining the Constitution's transformative goals. To do this the Court will have to be consistently alive to the purpose of our constitutional practice. Another negative aspect noted in this thesis is that the Namibian Constitution does not entrench socio-economic rights. Given the fact that human rights are 'universal, indivisible and interdependent', I argued that civil and

³ *Government of the Republic of Namibia v Sikunda*

⁴ *S v Mushwena & Others; Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107.

political rights can only be enjoyed when they are accompanied by socio-economic transformation.

In Chapters 3, 4 and 5, I presented a synopsis of Dworkin's legal theory, its criticisms and significance to post-colonial Namibia. Contrary to those who doubt the utility and significance of Dworkinian scholarship, I have suggested that Dworkin's notion of constructive interpretation and law as integrity could be the anti-dote to both the lack of coherence in the Supreme Court's current approach to constitutional interpretation and the lack of inclusion of socio-economic rights in the Namibian Constitution. Constructive interpretation exhorts judges to interpret law in a manner that shows a legal system in its best light, taking into account the point or purpose of law.⁵ When constructive interpretation is transposed to the interpretation of the Constitution it would mean interpreting the Constitution in a manner that gives effect to its aims and purposes.

In light of the fact that the Namibian Constitution aspires to build a nation founded on the values of human dignity, equality, freedom and justice for all amongst others, I approached the Constitution in this thesis as a transformative document. I suggested in this thesis that the way in which Dworkin's notion of constructive interpretation could help address the failure of the Namibian Constitution to entrench socio-economic rights is to interpret the civil and political rights as not precluding socio-economic rights. A constructive interpretation of the right to life, human dignity and equality, for example, would recognise the 'universality, indivisibility and interdependence' of human rights and that all these rights would be less meaningful amidst socio-economic conditions that threaten their meaningful enjoyment such as indigence, poor living and working conditions, unemployment, lack of

⁵ Dworkin *Law's Empire* p 256.

access to health facilities etc. Accordingly, it is submitted that only an interpretation that is aimed at a holistic improvement of human life can indeed bring about transformation envisaged in the Constitution.

The value of law as integrity lies in its insistence that government should ‘speak with one voice to all its citizens’. It is submitted that law as integrity, could be seen as reflecting the notion of equality before the law.⁶ It is submitted that when judicial decisions are *ad hoc* and unprincipled, it tends to destroy the confidence of many in the Courts’ ability to live up to the judicial oath. Accordingly, law cannot be said to have integrity if there are different applicable standards to like cases. Accordingly, the purpose of law can never be said to be the attainment of justice, fairness or due process when it is not applied consistently in all the cases. It is my submission that Dworkin’s notion of constructive interpretation and law as integrity has more to offer to the Supreme Court in its quest to address the nation’s aspirations as expressed in the Constitution.

The short-comings of Dworkinian scholarship will continue to be debated in both legal and political spheres for many years to come. Nonetheless, my focus was on how Dworkin’s legal theory could be of assistance to Namibia. I find it appropriate therefore to conclude with the words of Mureinik,

Even if every claim that Ronald Dworkin has ever made were ultimately proved wrong, and it is clear now that that is monstrously improbable, we would still almost certainly have learnt more from his errors than from what all his critics got right.⁷

⁶ Article 10 of the Constitution.

⁷ Mureinik in H Corder (ed) *Law and Social Practice* 1988 p 181.

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