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A CONSTRUCTIVE INTERPRETATION OF THE NAMIBIAN CONSTITUTION: TRANSPOSING DWORKIN TO NAMIBIA'S CONSTITUTIONAL JURISPRUDENCE

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ABSTRACT

This article aims to recommend a moral reading of the Namibian Constitution, one based on Dworkin's theory of 'constructive interpretation' and 'law as integrity'. To this end, I argue for the application of Dworkin's theory in interpreting the Namibian Constitution. It is submitted that the attainment of social justice for all Namibians is at the heart of Namibia's constitutional project, hence the constitutional promise of 'securing to all our citizens justice, liberty, equality and fraternity'. This paper addresses two concerns: firstly, the fact that the Namibian Constitution does not include socio-economic rights – the question is how to respond to this problem. I argue that by applying Dworkin's theory of law as integrity and because the Constitution includes social justice as a broad principle, it would be consistent to use the Constitution to address socio-economic inequality through constructive interpretation. Secondly, the Supreme Court of Namibia has not done too well in 'hard cases' and its approach is inadequate for the realisation of the transformative aims of the Constitution.

1. INTRODUCTION

The attainment of social transformation is at the heart of Namibia's constitutional project. The Constitution promises to build a society founded on respect for the rule of law, democracy, respect for human dignity and equality. In this article I address two challenges to Namibia's constitutional project: first, the fact that the Namibian Constitution does not include socio-economic rights – the question is how to respond to this problem. In this paper I call for a moral reading of the Namibian Constitution,

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one based on Dworkin's[1] theory of 'constructive interpretation' and 'law as integrity'. My argument is that by applying Dworkin and because the Constitution includes social justice as a broad principle, using the Constitution to address socio-economic inequality through 'constructive interpretation' should be done consistently. Secondly, the Supreme Court of Namibia's current approach to constitutional interpretation is inadequate for the realisation of the transformative aims of the Constitution. While Namibian independence and the ushering in of a new legal order based on constitutional supremacy are justly celebrated, it is suggested that there may be a danger of reading too narrowly what has been entrenched in the Constitution, falling back into legal positivism.

Assuming that the Namibian Constitution[2] is a transformative document in limited areas of civil and political rights, Dworkin's interpretive methodology of 'constructive interpretation' and 'law as integrity' can assist the Supreme Court of Namibia in its interpretation of the Constitution. Of course, there are many who do not agree with Dworkin and some are positively hostile to him.[3] My claim 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. Through Dworkin's approach of 'constructive interpretation' and 'law as integrity' Namibia's civil and political rights could be interpreted to include socio-economic transformation. I argue that if indeed social transformation is an underlying principle of the Namibian Constitution, law as integrity would mean that rights such as equality, dignity, and their underlying values should be interpreted so as to give effect to socio-economic transformation as well. This transformation is against the backdrop of the fact that at independence a new legal order was established with the adoption of the Constitution. Assuredly, there are real possibilities for a thriving Dworkinian industry in Namibia as a result of constitutional dispensation ushered in at independence. Dworkin's methodology of 'constructive interpretation' and 'law as integrity' in my opinion is the

1 Ronald Dworkin was arguably one of the most original legal philosophers and public intellectuals in the English-speaking world. His theory of law as integrity, in which judges interpret the law in terms of consistent and communal moral principles, especially justice and fairness, is among the most influential contemporary theories about the nature of law.

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

3 See, for example, Brian Leiter, 'The End of the Empire: Dworkin and Jurisprudence in the 21st Century' (2004) 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 by Thom Brooks, 'Book Review' (2006) 69 Modern Law Review 140, 142. See also Larry Alexander, 'Striking back at the Empire' (1987) 6 Law and Philosophy 419; Jules Coleman, *The Practice of Legal Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) 105 184–185. See also Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) 22–23 and (n 31); Herbert Hart, The Concept of Law (Oxford University Press 1961) 240–41; Michael Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford University Press 2000) 104, 306; Matthew Kramer, *In Defence of Legal Positivism: Law without Trimmings* (Oxford University Press 1999) 128; John Gardner, 'The Legality of Law' (2004) Ratio Juris 369, 373.

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'.

Cornell and Friedman[4] 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 defence against some objections to Dworkin's theory.[5] The authors reiterate the view that a 'total revolution' occurred in South Africa in 1993 with the advent of both the interim and the final Constitution.[6] 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.[7] Accordingly, the application of law as integrity in South Africa is recognised 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 Namibia, it ought to be accepted also that a novel value system now underpins the legal system. As Cornell and Friedman rightly acknowledges, there was a 'transition from apartheid to democracy'.[8] Some of the values that underpin South Africa's legal order include human dignity, equality, freedom, non-racialism,[9] these values are in sharp contrast to the principles that buttressed apartheid.

2. THE SUPREME COURT OF NAMIBIA AND TRANSFORMATIVE ADJUDICATION: *GOVERNMENT REPUBLIC OF NAMIBIA V MWILIMA*

My paradigm case of how the Supreme Court of Namibia could go about constructively interpreting the Constitution is *Government of the Republic of Namibia and Others v Mwilima and Others.*[10] In *Mwilima* 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. It seems that the key consideration in the Supreme Court decision in the *Mwilima* case was whether the accused persons would receive a fair trial in the absence of legal aid being granted. The Court acknowledged that the resources of the state were not limitless, as well as

4 Drucilla Cornell and Nick Friedman, 'The significance of Dworkin's non-positivist jurisprudence for law in the post-colony' (2010) 4 Malawi Law Journal 1.

5 I address some objections to Dworkin's theory of constructive interpretation and law as integrity in the later sections of this article.

6 ibid 2, 3.

7 ibid 83.

8 ibid.

9 ibid.

10 [2002] NR 235 (SC).

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.[11] 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 are 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,

> 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.[12]

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.[13] 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.[14] However, the obligation does not arise by virtue of Article 95 (h) of the Constitution, but it arises because of the duty to uphold fundamental rights and freedoms.[15] In light of the above, the Court ruled that it was imperative for the respondents to be legally represented. It is worth noting that in *Mwilima* the Supreme Court also referred to international agreements binding on Namibia, particularly the International Covenant on Civil and Political Rights (ICCPR).[16] It is evident that the point of constitutionalism was the guiding principle in *Mwilima* and accordingly, the court arrived at the right decision. It is the right decision in the sense that it is one that is capable of justification in accordance with the moral values undergirding the legal system. It is submitted that if Namibia's constitutional project is to succeed, the Supreme Court's approach in *Mwilima* should be embraced. This is the only way in which the transformative aims of the constitution may be realised.

11 At 53C-D.
12 At 60B-D.
13 At 75D-E.
14 ibid.
15 At 76; Art 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.
16 ICCPR. The relevant provision referred to is art 14 (3) of the Covenant.

3. LAW AS INTEGRITY AND CONSTRUCTIVE INTERPRETATION

Dworkin believes that a judge is not only immersed in the interpretation of his legal practice, but that he is equally committed to furthering its aims and purposes. For this reason, a judge, on Dworkin's characterisation, is both a critic and an artist. Not only must he observe, but he must also perform.[17] To ensure that law as a social practice has integrity, Dworkin proposes two requirements or dimensions of a legal judgment. These are the dimension of 'fit' and 'moral value'. In terms of the requirement of 'fit', Dworkin believes that every new judgment ought to be a continuation of the already existing legal materials or chapters. To illustrate these two dimensions Dworkin employs the example of an imaginary chain novel,[18] which he describes as follows:

> [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.[19]

Dworkin believes that 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.[20]

But what happens in the event that various interpretations 'fit' the bulk of the text of institutional legal record? Dworkin describes the situation as follows:

> 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.[21]

In terms of the second dimension, where there is a choice between different interpretations which both fit the bulk of the text, the novelist should prefer an interpretation which they believe makes the novel the best it can be.[22] Similarly, judges are enjoined to tell the best story and construct the best interpretation of previous works of contributors to legal doctrine. Judicial decisions, therefore, should not only fit but must also provide justification of already decided cases. Under the old dispensation in both Namibia and

17 ibid 229.
18 ibid 228–238.
19 ibid 230.
20 ibid 243.
21 ibid 231.
22 ibid.

South Africa, it was this requirement in Dworkin's interpretive programme 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? In regard to wicked legal systems Dworkin replies,

> 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 non-sexist reading—but only that this is so in the normal or paradigm cases of creative interpretation.[23]

A judge must choose an interpretation 'which shows the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality'.[24] Two points are worth mentioning regarding the justification requirement, the first of which for Dworkin is that the juridical activity of interpretation is contestable. Accordingly, there will always be a possibility for competing interpretations. For 'law as integrity' however, the interpretation which is morally superior should be preferred over alternative interpretations. It is submitted that this stage of a legal judgment requires judges to make a moral or value judgment.[25]

Fish[26] 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 is centred on the nature of the 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 and so on. 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.[27]

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'.[28] Furthermore, the constraint of the texts is not only due to hard facts which everyone must agree to, but that there are substantive constraints as well.[29] For

23 Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 421.
24 ibid 256.
25 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.
26 Stanley Fish, *Law and Legal Interpretation* (Ashgate Publishing 2003) 387–406.
27 ibid.
28 Dworkin (n 23), 231.
29 ibid 235.

example, with reference to Fish, one cannot argue that something is wrong 'because I was trained to think it is wrong'; if we accept that our judgments transcend our training. Dworkin acknowledges that the dimension of 'fit' indeed may 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. 'Law as integrity' calls on judges to assess their predecessors' work critically even to the point of declaring and refusing to follow their interpretation.[30] 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.

Undoubtedly, there are some connections between Dworkin's theory and what Mainga J stated in *Kaulinge v Minister of Health and Social Services*[31] the court acknowledged the significance of the new constitutional order 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.[32]

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 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. Dworkin believes that 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.[33]

Christodoulidis has questioned the utility of 'law as integrity' to jurisdictions like Namibia and South Africa that have apartheid legacies.[34] Christodoulidis argues that Dworkin's theory is an inappropriate approach to these jurisdictions because of law as integrity's fidelity to the doctrinal past. Christodoulidis contends, 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 Africa with such weight as to foster the iniquity'.[35] According to

30 Roger Cotterrell, *The Politics of Jurisprudence* (Oxford University Press 2003) 168.
31 [2006] 1 NR 377 (HC).
32 At 385I-J.
33 ibid.
34 Emilios Christodoulidis, 'End of History Jurisprudence: Dworkin in South Africa' (2004) Acta Juridica 64.
35 ibid 69.

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 offers no solution.

In Christodoulidis's view, 'law as integrity' is inappropriate for South Africa since it entails a recommitment to apartheid principles as these have become 'entrenched as part of the institutional record'.[36] In his quest to discount 'law as integrity' and 'constructive interpretation' as an approach to follow in South Africa, Christodoulidis is unpersuaded by Mureinik's[37] critical appraisal of Dworkin's legal theory in South Africa. Many South African scholars mooted the applicability of Dworkin's legal theory during the apartheid era.[38] To this end, Mureinik, among others, mounted a robust defence of Dworkin, particularly against criticisms and objections such as those 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 height of apartheid and they formed a small part of a large volume of South African law.[39] Mureinik further contends that apartheid laws arose as a result of policy considerations and not moral principles,[40] as Christodoulidis argues.[41]

Despite Mureinik's best efforts, Christodoulidis is adamant that the 'iniquity' of apartheid cannot be countered so easily by integrity.[42] 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.[43] 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. 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 values of South Africa's new legal order. Dworkin does not think integrity commits one to evil principles; the virtue of integrity is its direct link to the moral principle of the equality of human beings; so at most levels it is in conflict with

36 ibid.
37 Etienne Mureinik in Hugh Corder (ed), *Law and Social Practice in South Africa* (Juta 1988).
38 See, for example, John Dugard, 'Should Judges Resign? A Reply to Professor Wacks' (1984) 101; David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford University Press 1991).
39 Etienne Mureinik, 'Dworkin and Apartheid' 207.
40 ibid.
41 Christodoulidis (n 34) 69.
42 ibid 72.
43 ibid 71.

apartheid. South Africa's Constitutional Court could not have been clearer on this. In *S v Makwanyane* the Court held, per Mahomed J,

> 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[44].

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 in some of its decisions is one which portrays the Constitution in its best light.

4. THE SUPREME COURT OF NAMIBIA

Over the past twenty-six years, the Supreme Court of Namibia has underlined the need to interpret the Constitution 'broadly, liberally, and purposively' so as to avoid the austerity of 'tabulated legalism'.[45] In *Government Republic of Namibia v Cultura 2000*[46] the Supreme Court approved the *dictum* in *S v Acheson*[47] and reasoned that the rationale for a 'broad, liberal and purposive' interpretation was to ensure that the Constitution plays

> [A] creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.[48]

Unfortunately, despite the Court's declaration of the need to interpret the constitution 'broadly, liberally, and purposively',[49] myopic and pedantic approaches still haunt that Court's approach to constitutional interpretation particularly in 'hard cases'. There are two problems to be noted in the constitutional jurisprudence of the Supreme Court of Namibia. First, a 'plain fact'[50] view of the law that is still evident in some Supreme

44 *S v Makwanyane* at para 261.

45 *Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC); *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC); *Ex Parte Attorney-General: In re Corporal Punishment* 1991 NR 178 (SC).

46 [1993] NR 328 (SC).

47 [1991] 2 SA 805 (Nm).

48 [2000] 1 SA 407 at 418.

49 I understand a 'broad, liberal and purposive' interpretation to be one that is capable of rising above what has been posited or tabulated in the Constitution, in order to give effect to the lofty aims of the Constitution.

50 Dworkin describes the problem of legal positivism as a theory 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

Court decisions and, second, there are inconsistencies in the judicial method as regards the Supreme Court's appeal (which I consider to be selective) to constitutional values and principles. My paradigm cases in this regard are *S v Mushwena & Others*,[51] and *Chairperson of the Immigration Selection Board v Frank & Another*.[52] What makes these cases paradigmatic is that they were all 'hard cases'.

4.1. Chairperson of the Immigration Selection Board v Frank

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, 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. Accordingly, she 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, *inter alia*, were 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 (the Chairperson of the Immigration Selection Board) 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 that her right to family was infringed, the Court ruled that Article 14 was inapplicable because, 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.[53]

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 O'Linn AJA that

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of law can always be answered by looking in the books where the records of institutional decisions are kept'. See Dworkin (n 23) 7.

51 [2004] NR 274 (SC).

52 [2001] NR 107 (SC).

53 At 146 F-G.

> 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.[54]

As regards Article (10) (1) the court made an interesting and controversial finding, concluding but without explanation, 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'.[55] 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 unrecognised lesbian relationship with obligations different from that of marriage' in comparison with 'a recognised marital relationship' amounts only to differentiation – but not discrimination.[56] In the light of the above, it is inescapable that the Supreme Court has employed a 'plain-fact' view of the law in some of its decisions.

4.2. S v Mushwena

The Supreme Court decision in *Mushwena* 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. The Supreme Court overturned the High Court decision with a slim majority of three judges out of five.[57] Strydom ACJ and O'Linn AJA[58] dismissed the appeal in respect of most of the accused persons, while the majority of the Court allowed the appeal.[59] In setting aside the order of the court *a quo* and remitting the matter back to the High Court, the Supreme Court of Namibia appears to have done what Lord Devlin warned against in *Connelly v DPP*[60] where the judge cautioned that:

> The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.

Mushwena can also be said to be a classic example of selective appeal to applicable foreign case law. As demonstrated in the minority judgment, there is sufficient foreign and international case law[61] that the Court should have relied on to uphold the order

54 At 146 G-H.
55 At 155E–F.
56 At 155I–156C.
57 George Coleman and Esi Schimming-Chase, 'Constitutional Jurisprudence in Namibia since Independence' in Anton Bosl, Nico Horn and Andre du Pisani (eds), *Constitutional Democracy in Namibia* (Konrad Adenauer Stiftung 2010) 208.
58 It is submitted that the minority decision of Strydom ACJ and O'Linn AJA is in tandem and justifiable in accordance with the moral principles and values that now underpin Namibia's new legal order.
59 ibid.
60 [1964] 2 All ER 401 at 442, [1964] AC 125 1354:
61 See, for example, *Ocalan v Turkey* 15 BHRC (App No 4622 1/99); *Stocke v Germany* 11 EHRR 46;

of the court *a quo*.[62] Furthermore, prior to *Mushwena* the Supreme Court had often invoked respect for human dignity as a guide to constitutional interpretation. Sadly, the Court abandoned its 'dignity jurisprudence'. 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.[63]

Mushwena 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[64] have extradition treaties in terms of which the rendition of 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 to follow deportation or extradition procedures. Notwithstanding the overwhelming evidence to the contrary, it is baffling 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 as to disentitle Namibia from assuming jurisdiction as a receiving state.[65]

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*

United States v Alvares-Machain; Mahomed v President of the Republic of South Africa [2001] 3 SA 893 (CC); *Bennett v Horseferry Rd Magistrate Court* [1993] 3 All ER 138 (HL).

62 See S v Ebrahim [1991] 2 SA 553; S v Beahan [1992] 1 SACR 307 (ZS). In Ebrahim, for example, Steyn JA stated the following: 'In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State'.

63 Art 8 (2) (a).

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

65 At 433B.

> *and age when the world has been and continues to be ravaged by terrorist activity it is otiose to apply that rationale* (Emphasis added).[66]

More disconcerting is Justice 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.[67]

From a Dworkinian perspective, *Mushwena* can be criticised on two grounds. 'Law as integrity' calls for a conception of law that views it as though it has been created by a single author and applies the law consistently in all cases. Assuredly, 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. Law cannot be said to have integrity when there are different applicable standards to similar cases. To ensure that law has integrity, Dworkin proposes two requirements for legal judgments. The first requirement calls upon judges to ensure that every legal judgment is a continuation of the doctrinal past. The reason for this requirement is 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.[68]

Amidst the waning confidence in governments' commitment to treat all people on an equal footing, Dworkin's 'law as integrity' offers the best hope for engendering faith in the law. In his chain novel metaphor[69] Dworkin draws a parallel as to how a legal judgment should be constructed to make sure 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 guarantees 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'.[70] Surely, it is only in this way that law will be seen to 'speak with one voice'.[71] It is concluded that the Supreme Court decision in *Mushwena* is a radical departure from that court's legal record established, for example, in *Minister*

66 At 268E–F.
67 At 269G–H.
68 Dworkin (n 23) 243.
69 See Dworkin (n 23) 228– 232.
70 ibid.
71 This is Dworkin's expression in his exposition of law as integrity.

of Defence v Mwandinghi[72]*; Government of the Republic of Namibia v Cultura 2000*[73]*; Namunjepo & Others v Commanding Officer, Windhoek Prison*[74]; *Government of the Republic of Namibia v Sikunda*[75]; *S v Tcoeib*[76] et cetera. Furthermore, *Mushwena* can hardly be justified in terms of the moral principles and values that now underpin Namibia's legal order.

5. SOCIAL JUSTICE AND CONSTRUCTIVE INTERPRETATION OF LIBERAL RIGHTS

Without doubt, the protection and promotion of civil and political rights is pivotal in a 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'[77] could remain a mirage for most Namibians. This could be the situation because, whereas the Namibian Constitution is vocal about the entrenchment of civil and political rights, it does not entrench socio-economic rights. The question is how to respond to this problem. It has been acknowledged that Namibia's fundamental rights and freedoms emanates from the 1948 Universal Declaration of Human Rights.[78] 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.[79]

Naldi further submits 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.[80]

72 [1993] NR 63 (SC).
73 [1993] NR 328 (SC).
74 [1999] NR 271 (SC).
75 [2002] NR 203 (SC).
76 [1999] NR 24 (SC).
77 Preamble to the Namibian Constitution.
78 John Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 African Journal of Legal Studies 1 at 8.
79 Gretchen Carpenter, 'The Namibian Constitution-ex Africa Aliquid Novi After All?' in Dawid van Wyk, John Dugard and Bertus de Villiers (eds), *Namibia: Constitutional and International Law Issues* (Juta 1991) 32.
80 Gino Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Juta 1995) 96.

It is indisputable that the Namibian Bill of Rights pays little attention to socio-economic rights.[81] It is submitted that what may well be described as socio-economic rights in the Namibian Bill of Rights are children's rights[82] and the right to education.[83] The right to property[84] may also be included in this category. Other than those, the Namibian Constitution does not expressly provide for socio-economic rights.[85] I agree with Fourie who contends, 'the authors of the Constitution chose to handle economic (and social) matters outside the rights context and specifically as policy goals'.[86] 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,[87] and that they are not constitutional rights in the context of Namibia.[88] As the rubric suggests, these are 'principles of state policy' without any force of law.[89] The African Charter on Human and Peoples' Rights[90] acknowledges that the 'satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.[91] I now consider how a Dworkinian approach of constructive interpretation of liberal rights could include socio-economic transformation.

Despite governmental efforts to improve the social and economic conditions of all Namibians, inequality and the unequal distribution of wealth remains a characteristic feature of Namibian society. As long as inequalities persist in society, transformative goals and constitutional rights as expressed in the Constitution remain a 'political gimmick' without any real significance in people's lives.

81 Mubangizi (n 78) 9.
82 Art 15.
83 Art 20.
84 Art 16.
85 However, it is important to mention that though the Namibian Constitution does not provide for socio-economic rights, Namibia has ratified the UN International Covenant on Economic, Social and Cultural Rights (CESCR). By virtue of Art 144 of the Constitution, which provides that international law and the treaties duly ratified by Namibia are part of Namibia law, the provisions of CESCR are thus part of Namibian law and therefore enforceable and justiciable. However, the provisions of duly ratified treaties do not have a constitutional status in the Namibian legal system. I must add that even the application of Art 144 in the Constitution calls for a constructive interpretation in a Dworkin sense.
86 Frederick Fourie, 'The Namibian Constitution and Economic Rights' 6 SAJHR (1990) 363, 365.
87 ibid.
88 ibid.
89 Art 101 of the Constitution provides 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.
90 The African Charter, also known as the Banjul Charter, was adopted on 17 June 1981 and entered into force on 21 October 1986.
91 The preamble to the African Charter on Human and Peoples' Rights (1986).

Can Dworkin's theory help address the lack of inclusion of socio-economic rights in the Namibian Constitution? My tentative attempt to consider if 'law as integrity' can be extended to include socio-economic transformation is presented in the guise of a 'constructive interpretation' and application of Dworkinian theory itself. 'Constructive interpretation' entails adopting an interpretation of a practice that shows it in its best light.[92] In Dworkin's view, the purpose of a practice ought to be its main guide in the determination of what constitutes 'the best light'.[93] 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 inescapably is linked to a practice that it interprets, and accordingly is 'governed by or sensitive to one's sense of the purpose or point' of the practice in question. Interpretation should 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. If it is accepted that human rights are 'universal, indivisible and interdependent',[94] it should be accepted also that a constructive interpretation of civil and political rights includes socio-economic reforms. Though the Namibian Constitution does not entrench socio-economic rights, it is submitted 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 construction 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. I consider this to be the import of Article 98 of the Constitution which recognises the importance of economic growth for the human dignity of the Namibian people. It provides as follows:

> 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.[95]

The implications of a 'constructive interpretation' of the Namibian Constitution are that courts must have regard to rights and moral values that may go far beyond what has been posited as rights in the Constitution by the Constituent Assembly. This understanding of constitutional interpretation calls for the rejection of a 'plain fact' view of the Constitution since the 'plain fact' view in the context of Namibia would mean that only civil and political rights may be judicially enforceable to the exclusion of socio-economic rights[96] because civil and political rights are what the Constitution posits as

92 Dworkin (n 5) 52.

93 ibid.

94 UN, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF 157/23 art 5.

95 Art 98 (1) of the Constitution.

96 It appears that the Constitutional Assembly determined that socio-economic rights will be precluded from the province of the Courts. Probably, the reason why the Constituent Assembly decided this is that 'socio-economic' rights are of progressive realisation, and that these rights would not directly be amenable to immediate enforcement by the courts. Again, it is for this same reason why socio-

rights. Although the principles of state policy are not legally enforceable by virtue of Article 101, courts nonetheless are 'entitled to have regard to the said principles in interpreting any laws based on them'.[97] Clearly, this seems to me to be an invitation for constructive interpretation. 'Constructive interpretation' therefore recognises the 'universality, indivisibility and interdependence' of human rights and that the right to dignity, equality before the law and life is less meaningful amidst indigence, poor living and working conditions, unemployment, lack of access to health facilities and so on. 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 is in this regard therefore that a 'constructive interpretation' of the Namibian Bill of Rights would be construed to include socio-economic rights.

6. SOME POSSIBLE LIMITATIONS OF DWORKINIAN SCHOLARSHIP TO NAMIBIA

6.1. 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.[98] As a matter of fact, Dworkin's theory presupposes that the ideals and values of a community in a large measure are reflected in the law. It is common cause that Dworkin's legal theory is deeply rooted in the US context where arguably one can speak of a community of principle. Accordingly, transposing his theory to young nations like Namibia that for decades suffered grave atrocities under apartheid and colonialism could be problematic. This is the result mainly because of the relatively short period of time (twenty-six years of independence) that Namibia as a constitutional community has existed for it to become a 'community of principle'. Namibia is not yet at a stage where it can be said to be a community of 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 viewed as deeply embedded in the Namibian society.

economic rights should have been entrenched.

97 Art 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'.

98 Dworkin (n 23) 195–215.

6.2. 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 law-makers to enact laws that are morally coherent.[99] The challenge, however, is whether the Namibian legislature can commit 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 in terms of which laws can be enacted, it is unlikely that the legislature will effect a harmonisation and subsequent promulgation of laws that are morally coherent. Although principles of state policy are well articulated in the Constitution,[100] it is their implementation that remains ad hoc and unsystematic. Since independence, Parliament has enacted several statutes that later have been declared unconstitutional by the Namibian courts.

As a judicial principle, all depends on whether it is of concern to Namibia's Supreme Court that law speaks with one voice. In terms of 'law as integrity', law has integrity only if like cases are treated alike and judicial decision-making is founded on 'principle rather than whim, policy or expediency'.[101] Integrity's call that judicial decisions be based on principle is to ensure that people are treated with 'equal concern and respect'. The question is whether the Supreme Court is committed unconditionally to the defence of the ideals of fairness and due process, and consistently to regard the protection of human rights as crucial to legality.

7. CONCLUSION

The success of Namibia's constitutional practice and the realisation of its transformative potential (socio-economic transformation included) calls for a constructive interpretation of the Constitution. Accordingly, Dworkin's approaches of 'constructive interpretation' and 'law as integrity' can contribute immensely to Namibia's quest to realise the nation's aspirations as contained 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 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. Law therefore cannot be said to have integrity if there are different applicable standards to like cases.

99 Dworkin (n 23) 176.

100 Art 95 of the Constitution deals with policies that guides government in the promotion of the welfare of the people.

101 Chris Roederer and Darrel Moellendorf (eds), *Jurisprudence* (Juta 2004) 98.