A Delicate Balance:
Equality, Non-Discrimination and Affirmative Action in Namibian Constitutional Law – as Compared to South African and US Constitutional Law

Elizabeth Kandravy Cassidy

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Professor MG Erasmus, Supervisor
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I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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ABSTRACT

LLM Thesis by Elizabeth Kandravy Cassidy, "A Delicate Balance: Equality, Non-Discrimination and Affirmative Action in Namibian Constitutional Law – As Compared to South African and US Constitutional Law" (2002)

This thesis examines the constitutional law of equality, non-discrimination and affirmative action in Namibia, and compares it to that of South Africa and the United States. Namibian judicial interpretation in these areas seeks to balance the need to safeguard the internationally recognized human rights that the Namibian Constitution guarantees with the need to ensure that Namibian constitutional law is seen as grounded in Namibia's historical experience and culture. This latter imperative derives from the Namibian Constitution's origins in an international negotiation process, which has led to some popular criticism of the Constitution as foreign and imposed. As a result, Namibian courts have been careful to ensure that reliance on foreign precedent (where there is no local authority) does not diminish the Constitution's unique character and its suitability to the Namibian situation. To that end, the Namibian courts have given great weight to the role of current Namibian societal values in constitutional interpretation. In the areas of equality, non-discrimination and affirmative action, Namibian courts have generally followed the South African approach, except with respect to discrimination on the basis of sexual orientation. The author concludes that the adoption of the South African approach generally makes sense for Namibia, and specifically criticizes the Namibian courts' approach to sexual orientation discrimination.

The statutes enacted in Namibia to carry out the Constitution's equality and non-discrimination guarantees, including in the area of affirmative action, are also considered. While these statutes have not yet been subject to judicial interpretation, it seems likely that future cases presenting issues arising under these statutes will necessitate the same balancing referred to above.

The thesis begins with an overview of each Constitution's textual treatment of equality, non-discrimination and affirmative action, and a discussion comparing the background and basic structure of the three Constitutions. It then focuses on the judicial and legislative interpretation of the concepts of equality and non-discrimination in Namibia, as compared to that in South Africa and the US. Following that, the author discusses the judicial and legislative interpretation of the concept of affirmative action in Namibia, also as compared to that in South Africa and the United States. The thesis ends with the author's conclusions and some predictions as to how the Namibian courts might rule on certain issues that seem likely to arise in these areas in the future.

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OPSOMMING

LLM Tesis deur Elizabeth Kandravy Cassidy, "'n Delikate Balans: Gelykheid, nie-diskrimnasie en gelykberegtiging in Namibiese staatsreg – 'n vergelykende studie met Suid-Afrikaanse en Amerikaanse Staatsreg" (2002)

Hierdie tesis ondersoek die staatsregtelike beskerming van gelykheid, nie-diskriminasie en gelykberegtiging in Namibië in 'n regsvergelykende studie van Suid-Afrikaanse en Amerikaanse staatsreg. Namibiese geregtelike interpretasie op hierdie gebied poog om 'n balans te handhaaf tussen die behoefte om internasionaal erkende menseregte deur die Namibiese grondwet te waarborg en die behoefte om te verseker dat die grondslag van die Namibiese staatsreg soos gevestig in sy geskiedenis en kultuur behoue bly. Laasgenoemde beweegrede spruit voort uit die feit dat die Namibiese grondwet sy oorsprong te danke het aan 'n internasionale onderhandelingsproses, wat gelei het tot die algemene siening dat die grondwet vreemd is en nie uit eie geledere afgedwing word nie. Gevolglik steun die Namibiese howe met omsigtigheid op buitelandse presedente (waar daar geen plaaslike gesag is nie) met die oog op behoud van die grondwet se unieke karakter en gepastheid binne die Namibiese konteks. Met hierdie doel voor oë, plaas die Namibiese howe in grondwetlike interpretasie, groter klem op die rol van kontemporêre gemeenskapswaardes in Namibië. Op die gebied van gelykheid, nie-diskriminasie en gelykberegtiging volg die Namibiese howe oor die algemeen die Suid-Afrikaanse benadering, behalwe in die geval van diskriminasie op grond van seksuele oriëntasie. Die skrywer kom tot die gevolgtrekking dat die toepassing van die Suid-Afrikaanse benadering in die algemeen sinvol is binne die Namibiese konteks and kritiseer die Namibiese howe se benadering tot diskriminasie op grond van seksuele orientasie.

Die wetgewing wat in Namibië uitgevaardig is om die grondwetlik gewaarborgde gelykheid en nie-diskriminasie, insluitend gelykberegtiging te verseker word ook ondersoek. Alhoewel hierdie wetgewing nog nie aan geregtelike interpretasie onderwerp is nie, blyk dit dat toekomstige uitsprake waar die wetgewing ter sprake kom ook die balansering van hierdie belange sal noodsaak.

Die tesis begin met 'n oorsigtelike bespreking van die benadering tot gelykheid, nie-diskriminasie en gelykberegtiging van die onderskeie grondwette en 'n regsvergelykende bespreking van die agtergrond en basiese struktuur van die drie grondwette. Vervolgens fokus die tesis op die geregtelike interpretasie van die beginsels van gelykheid en nie-diskriminasie in Namibië, in vergelyking met Suid-Afrika en die Verenigde State. Daarna bepreek die skrywer die geregtelike en wetgewende interpretasie van die beginsel van gelykgeregtiging in Namibië, ook in 'n regsvergelyking met die Suid-Afrikaanse en Amerikaanse posisie. Die tesis sluit af met die skrywer se gevolgtrekkings en 'n paar voorspellings oor die moontlike benadering wat die Namibiese howe in die toekoms sal volg tot sekere regskwessies wat in hierdie vakgebied kan voorkom.

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I. Introduction

Like every country's struggle for democracy and self-determination, Namibia's is unique. Its Constitution derives in varying degrees from the lofty values of international human rights covenants, from the more prosaic hopes of those who suffered under the colonial dispensation, and from a contentious negotiating process under the auspices of the United Nations and the "Western Contact Group."

Not surprisingly, the vigorous debate that led up to the drafting of Namibia's Constitution has echoes today. While most Namibians are satisfied with most elements of their country's legal framework, there remain popular reservations about various constitutional provisions – some expressed quietly and some not. The Namibian courts, then, find themselves in the difficult position of making independent Namibia's initial case law in an atmosphere of some suspicion. They must safeguard the internationally recognized human rights that the Constitution guarantees while ensuring that the law is seen as grounded in Namibia's historical experience and culture. Even more difficult, they must do so without becoming a lightning rod for would-be critics, since Namibia's newness means that respect for judicial precedent is not yet fully entrenched. In interpreting the constitutional guarantees of equality and non-discrimination, Namibia's judiciary generally – but not universally – has done a commendable job at striking this delicate balance.

The Namibian courts are, in the areas of equality and non-discrimination as well as in other areas of constitutional interpretation, concerned that reliance on foreign precedent where there is no relevant local authority not diminish the Namibian Constitution's unique character and its suitability to the Namibian situation. To that end, the Namibian Supreme Court has placed a heavy reliance on the role of current Namibian societal values in its constitutional interpretation. This seems to be a judicial response to some popular concern that the Constitution is foreign and was imposed, a criticism that is sometimes leveled because of the way the Constitution came about.

In cases involving equality and non-discrimination decided thus far, the Namibian courts have closely followed South African case law, except with respect to discrimination on the basis of sexual orientation. In general, the adoption of the South African approach, including its use of a substantive rather than formal conception of equality and its use of the value of human dignity to inform the right to equality,

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makes sense for Namibia. In the recent case rejecting a sexual orientation discrimination claim, the court's failure to follow South African precedent is not completely surprising, given the textual differences on that subject between the Namibian Constitution and the South African Constitution and the controversial nature of the issue of homosexuality in Namibia. The decision, however, was based on an unsupported conclusion by the court that there is a consensus among Namibians against providing equal rights for homosexuals. Moreover, the result seems inconsistent with the constitutional values of equality and human dignity, which the Namibian courts have stated are fundamental to the new constitutional dispensation and should inform all constitutional and legal interpretation.

Namibia has enacted a number of statutes since independence to carry out the Constitution's equality and non-discrimination guarantees, including one that outlaws discrimination in the workplace on more grounds than those listed in the Constitution. Unlike the constitutional provisions themselves, most of these statutes have not yet been subject to judicial interpretation. There also exist a number of statutes in the related area of affirmative action, which the Namibian Constitution expressly permits, including the recently enacted Affirmative Action (Employment) Act. While these measures seem to comply with the Constitution's intention that affirmative action should consist of corrective measures and not constitute reverse discrimination, the courts also have not yet examined the statutes. It is likely, in light of the courts' approach so far, that future cases presenting issues arising under these statutes will also necessitate the careful balancing referred to above.

It is hoped that, in describing and critically analyzing the judicial interpretation and legislative implementation of the Namibian Constitution's provisions concerning equality, non-discrimination and affirmative action, this dissertation will contribute to a better understanding of how Namibian constitutional law on these important issues is developing. Thus far, there has been insufficient academic writing on the Namibian approach to these concepts.[1]

The Namibian developments are compared to two other countries' approaches: those of South Africa and the United States. The Constitutions of these three countries have similar philosophical underpinnings. All are supreme Constitutions

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[1] In particular I hope that this study will be useful to students in the law faculty of the University of Namibia. Having lectured on Namibian constitutional law there since 1999, I have experienced firsthand the difficulty in teaching and learning in a subject area where not much scholarship yet exists.

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that create representative but limited government based on principles of democracy, the rule of law, separation of powers and checks and balances, the independence of the judiciary, and the presence of an enforceable bill of rights. These ideas were revolutionary when they were embodied in the US Constitution in 1787. They were equally revolutionary two centuries later in Namibia and South Africa when they replaced longstanding systems of white minority rule, apartheid and parliamentary supremacy. In fact, in terms of their bills of rights, the Namibian and South African Constitutions go even farther than that of the US, espousing a broader view of the types of rights that should be constitutionally protected. For example, in addition to the widely recognized civil and political rights, both of these Constitutions include the rights to education, culture and language. The South African Constitution even includes enforceable rights of access to adequate housing, food, health care, and social security.

The Namibian and South African Constitutions are contemporaries, and both achieved historic transitions to all-race democracy and majority rule in countries with intertwined and similarly repressive pasts. Therefore it is not surprising that equality plays a central role in both documents. The two constitutions also contain some textual similarities. South African constitutional developments are often influential on the Namibian courts' interpretation of the Namibian Constitution, as has generally been true with respect to the Namibian equality provisions. South Africa also provides a useful comparator because thus far, there has been more constitutional litigation there than there has been in Namibia.[2]

US constitutional law was chosen as the second comparator because of the breadth and depth of material concerning equality, non-discrimination and affirmative action that it can provide. Although protecting equality (or protecting any individual rights, for that matter) was not a primary concern of the drafters of the original US Constitution, who were focused instead on the more pressing problem of creating an effective national government,[3] the US courts and Congress have now had years of experience wrestling with the questions of how the law should prevent and correct

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[2] Namibia is the much smaller country of the two, with a population of about 1.8 million people (compared to South Africa's more than 40 million), and few lawyers (approximately 270 in the entire nation) and civil society organizations.

[3] As noted in Chapter II, it was nearly 100 years into its history before a guarantee of equality was included in the US Constitution, and almost another 100 years until that guarantee was meaningfully enforced.

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inequality and discrimination. It is hoped that consideration of the long US experience will provide some useful lessons – both in terms of what to do and what *not* to do -- for Namibia and South Africa.

The choice of countries also takes into account one of the unique difficulties of constitutional comparision: the fact that constitutional law, like other areas of public law, reflects a country's history and culture more than private law usually does.[4] As a result, more than book knowledge is important to this type of study. For an American lawyer who has lived in Namibia for four years researching and teaching in the areas of constitutional law and comparative law, and who during this time has closely followed the South African legal situation and spent time there doing academic research, these three countries are more familiar than others. In addition, because the United States is different in many ways (constitutionally, historically, politically, socially) from Namibia and South Africa, its law can provide a useful contrast to that of the two other countries studied, which share some historical, political and cultural similarities. Hopefully, consideration of whether, and if so how and why, the approach to equality, non-discrimination and affirmative action has developed differently in the US will provide an interesting counterpart to the approaches that are being taken in Namibia and South Africa.

The next Chapter gives the constitutional context for the issues examined in the paper. It first provides an overview of each Constitution's textual treatment of equality, non-discrimination and affirmative action, and then briefly discusses and compares the background and basic structure of the three Constitutions. This section is not intended to be a comprehensive history of or treatise on each Constitution, but only to provide some context for readers who may not be familiar with all of them.[5] Chapter III then focuses on the judicial and legislative interpretation of the concepts of equality and non-discrimination in Namibia, as compared to that in South Africa and the US. Chapter IV discusses the judicial and legislative interpretation of the concept of affirmative action in Namibia, also as compared to that in South Africa and the US. Chapter V provides the author's conclusions and offers some predictions as

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[4] *See* Venter *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (2000) 19-20.

[5] A number of sources discussing the Constitutions in greater depth, particularly the South African and US Constitutions (about which much has been written) are referenced in the bibliography.

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to how the Namibian courts might rule on certain issues that seem likely to arise in the future.

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II. The Constitutional Context

A. Equality, Non-Discrimination and Affirmative Action in the Namibian, South African and US Constitutions

The Namibian Constitution,[1] which came into force with Namibian independence on March 21, 1990, replaced a system of minority rule and apartheid with a non-racial democracy, and therefore it is not surprising that equality has a central place in the document. In the words of the Namibian Supreme Court, the provisions of the Constitution "demonstrate how deep and irrevocable the constitutional commitment is to . . . equality and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences."[2]

The Namibian Constitution's commitment to equality and non-discrimination is evident from its first lines. The Preamble affirms 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" and that "the said rights include 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." It continues that, after "emerg[ing] victorious in our struggle against colonialism, racism, and apartheid," the people of Namibia seek to establish the Republic of Namibia to "secur[e] to all our citizens justice, liberty, equality and fraternity."

Specific provisions guaranteeing equality and forbidding discrimination on certain enumerated grounds are enshrined in Article 10, which is part of Chapter 3, the Bill of Fundamental Human Rights and Freedoms. Article 10 contains two provisions: Article 10(1) states that "[a]ll persons shall be equal before the law," and Article 10(2) states that "[n]o persons may be discriminated against on the grounds of

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[1] The Constitution of Namibia Act 1 of 1990 (hereinafter Nam. Const.)

[2] *State v. Van Wyk* 1993 NR 426 452I (SC) (Ackermann, AJA); *see also id.* 456G-I (Mohamed, AJA). The court saw this commitment in various provisions: the Preamble, Article 6 (the right to life), Article 8 (the right to dignity), Article 10 (the rights to equality and non-discrimination), Articles 131 and 24(3) (which provide that the foregoing rights may not be amended in a way that lessens them or suspended in a state of emergency), and Article 23 (which permits Parliament to outlaw apartheid, racism and racial discrimination and allows for affirmative action).

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sex, race, colour, ethnic origin, religion, creed, or social or economic status." In addition, subsection (1) of Article 14, which deals with family rights, provides that

> Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed, or social or economic status, shall have the right to marry and found a family. They shall be entitled to equal rights as to marriage, during marriage, and at its dissolution.

Like all other provisions in the Namibian Bill of Rights, these provisions apply to "the Executive, Legislative and Judiciary and all organs of the Government and its agencies, and where applicable to them, [to] all natural and legal persons in Namibia. . . ."[3] As part of Chapter 3, Articles 10 and 14 cannot be amended "in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined [therein.]"[4] These articles, moreover, are among the articles that may not be derogated from or suspended during a state of emergency.[5]

In addition, Article 23 recognizes that in order to achieve the Constitution's stated goal of securing equality, affirmative action in favour of "persons within Namibia who have been socially, economic or educationally disadvantaged by past discriminatory laws or practices," is permitted. Furthermore, in enacting or applying any affirmative action legislation, policy or programme, the Constitution provides that "it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation."[6]

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[3] *Id.* Article 5.
[4] *Id.* Article 131.
[5] *Id.* Article 24(3).
[6] *Id.* Article 23(3). In its entirety, Article 23 reads as follows:

> (1) 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 publishable 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.
> (2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

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Like Namibia, South Africa has now emerged from many years of colonialism and apartheid, and its Constitution,[7] which came into force on February 4, 1997, also expresses a strong commitment to equality. Indeed, the Constitutional Court has recognized that "the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos on which the Constitution is premised."[8]

The Preamble to the South African Constitution states that one of its purposes is to "[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law." Equality, non-racialism and non-sexism are among the "founding values" of the Republic of South Africa set forth in Chapter 1, Section 1. Moreover, Section 1, which contains these and other founding values,[9] is particularly difficult to amend. Section 74(1) provides that an amendment of Section 1 requires majorities of at least three-quarters of the National Assembly and six of the nine provinces represented in the National Council of Provinces. This requirement also applies to any amendment of Section 74(1) itself.[10] Further, the Constitutional Court has even suggested that certain fundamental aspects of the new constitutional order might not be amendable at

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(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

[7] The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter RSA Const.) Constitutional change in South Africa was a two-stage process. First, an Interim Constitution (Act 200 of 1993), which created an interim government and included principles to guide the drafting of the Final Constitution, was agreed to by a multi-party negotiating forum. The Interim Constitution was adopted in 1993 and came into force on April 27, 1994. The Final Constitution was then drafted by a Constitutional Assembly elected in South Africa's first democratic elections, which took place on the day the Interim Constitution came into force. The Final Constitution, which under the Constitutional Principles had to be certified as compliant with those Principles by the Constitutional Court, was adopted by the Constitutional Assembly on May 8, 1996, certified by the court on October 11, 1996 and came into force on February 4, 1997. It is the Final Constitution (Act 108 of 1996) that is the principal focus of the discussions on South African law in this dissertation. Nevertheless, the importance of the interim constitution cannot be overstated: it was the first time in South Africa's history that the country had a supreme, justiciable constitution with an enforceable bill of rights.

[8] *Fraser v. Children's Court, Pretoria North, & Others* 1997 (2) SA 261 (CC) para 20.

[9] The founding values listed in Section 1 are human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsibility and openness.

[10] By contrast, amendments to the bill of rights (contained in Chapter 2) and amendments that affect or relate to the Provinces require a two-thirds majority of the National Assembly and six of the nine

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all. In *Premier of KwaZulu-Natal v. President of the Republic of South Africa*, the court indicated that "[i]t may perhaps be that a purported amendment to the Constitution, following the normal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."[11] The court relied for this proposition on Indian cases holding that the legislature's power to amend the Indian Constitution cannot be used to destroy its basic features and structure, such as constitutional supremacy, the rule of law, the principle of equality, the independence of the judiciary, and judicial review.[12]

The South African Constitution's Bill of Rights (Chapter 2), in Section 9, specifically guarantees the rights to equality and to not be unfairly discriminated against, directly or indirectly, by the government or by any person, on certain listed grounds or on other unlisted but analogous grounds.[13] The listed grounds are: race,

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provinces in the National Council of Provinces. Any other amendment may be passed by a two-thirds majority of the National Assembly alone.

[11] 1996 (1) SA 984 (CC) para 47.

[12] *Id.* However, this case was decided before the Final Constitution was enacted, and so it may well be that this *obiter dictum* was trumped by the Final Constitution, which contains Section 74(1)'s express procedure for amending Section 1.

[13] In its entirety, Section 9 provides:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The equivalent section of the 1993 Interim Constitution of South Africa was Section 8, which read:

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, or language.
> (3) a. This section shall not prelude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons

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gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. As part of the Bill of Rights, Section 9 is fairly difficult to amend,[14] and its prohibition of unfair discrimination on the grounds of race, colour, ethnic or social origin, sex, religion, or language cannot be derogated from in a state of emergency.[15] Further, the provisions of the Bill of Rights, including Section 9, may only be limited "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . . ."[16] The Constitution also provides that Section 9, and all other provisions in the South African Bill of Rights, must be interpreted in a way that "promote[s] the values that underlie an open and democratic society based on human dignity, equality and freedom. . . ."[17] Finally, like the Namibian Constitution, the South African Constitution expressly allows for affirmative action, providing that "legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken."[18]

The US Constitution, by contrast, in its original form not only did not guarantee equality, it recognized slavery and permitted it to continue. Providing a guarantee of equality was not a high priority for the men who drafted the US Constitution; instead, their focus was on creating an effective national government and defining the relationship between that government and the governments of the individual states. Thus, despite its professed intention to "establish Justice, . . . promote the general Welfare, and secure the Blessings of Liberty. . .,"[19] the US Constitution of 1787 provided that the federal Congress could not outlaw the slave trade for 20 years, that a slave would be counted as only three-fifths of a free man for

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disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

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(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

[14] *See* n.10 *supra.*
[15] RSA Const., Section 37.
[16] *Id.* Section 36(1).
[17] *Id.* Section 39(1)(a).
[18] *Id.* Section 9(2).

[19] Constitution of the United States of America (hereinafter USA Const.), Preamble.

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purposes of representation and taxation, and that states were required to return escaped slaves to the person claiming their service.[20] These provisions were the result of compromises between the state delegations negotiating the Constitution that were necessary at the time for the negotiations to succeed. It should be noted, however, that US constitutional history is not unique among the Constitutions considered here in this respect: difficult, and to some people objectionable, compromises were also necessary in the making of the Namibian and South African Constitutions. In particular, both Constitutions expressly guarantee existing private property rights,[21] despite the fact that land ownership in Namibia and South Africa is vastly unequal as a result of colonialism and apartheid. Without such compromises, however, independence in Namibia and constitutional transition in South Africa – both of which, unlike the US constitutional negotiations, were negotiated among former warring parties -- would not have been achieved.[22]

It was not until nearly 80 years after its enactment, following the Civil War of the 1860's, that the US Constitution was amended to end slavery, grant black Americans the right to vote, and, in the Fourteenth Amendment, guarantee all persons "the equal protection of the law." Even then, however, women were not constitutionally guaranteed the right to vote for another 50 years,[23] and there is still no constitutional amendment specifically guaranteeing equality on the basis of sex.[24] Moreover, despite the existence of the equal protection clause, racial segregation was held to be constitutional by the US Supreme Court in 1896.[25] This situation did not

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[20] *See id.* Article I, Sections 2, 9; Article IV, Section 2; Article V.
[21] *See* Nam. Const. Article 16; RSA Const. Section 25.
[22] *See* Erasmus "The Impact of the Namibian Constitution on the Nature of the State, its Politics and Society: The Record After Ten Years" (paper presented at the Ten Years of Namibia's Constitution and Independence Conference, Windhoek, 11-13 September 2001) 4-5; Harring "The Constitution of Namibia and the 'Rights and Freedoms' Guaranteed to Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100 and Schedule 5" 1996 (3) *SAJHR* 467 476; Harring "The 'Stolen Lands' under the Constitution of Namibia: Land Reform" (paper presented at the Ten Years of Namibia's Constitution and Independence Conference, Windhoek, 11-13 September 2001) 4-5.
[23] USA Const. Nineteenth Amendment (ratified August 18, 1920).
[24] An Equal Rights Amendment, providing that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," was proposed by the Congress in the 1970's but failed to achieve ratification by the States. For a discussion of why the Equal Rights Amendment failed, see Tobias *Faces of Feminism: An Activist's Reflections on the Women's Movement* (1997) 134-54.
[25] *Plessy v. Ferguson* 163 U.S. 537 (1896).

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change until the famous Supreme Court decision of *Brown v. Board of Education*[26] in 1954.

Textually the Fourteenth Amendment's equal protection clause binds only the states.[27] However, the US Supreme Court has held that the Fifth Amendment's due process clause[28] includes an equal protection component that forbids the federal government from unjustifiable discrimination,[29] and that the approach to Fifth Amendment equal protection claims and Fourteenth Amendment equal protection claims is the same.[30] Unlike in Namibia and South Africa, these provisions make no mention of applying to private parties, and in most instances they do not. Rather, it is only in limited circumstances, such as where the private entity has taken on a state function or is intertwined with the state, that the US equal protection requirement has been applied to private entities. (There are, however, many federal and state statutes that forbid private entities from discriminating in such contexts as employment, housing, public accommodation, etc., so this does not mean that in the US private entities are free to discriminate at will.) In this respect, the Fourteenth Amendment, and indeed the entire US Bill of Rights, reflects the traditional conception of a bill of rights: that it only regulates the relationship between the individual and the state. In South African constitutional law this is referred to as "verticality" or "vertical application,"[31] although US constitutional law calls it the "state action doctrine." By

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[26] 327 U.S. 483 (1954).

[27] USA Const. Fourteenth Amendment Section 1. The Fourteenth Amendment reads, in relevant part:

> (1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * *
>
> (5) The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Sections 2, 3 and 4 of the Fourteenth Amendment, which are not reproduced here, repealed the three-fifths rule for counting slaves for purposes of representation, provided for reduced representation if states denied blacks the vote, prohibited former Confederate officials from holding certain government positions, and repudiated Confederate war debts.

[28] The Fifth Amendment, in relevant part, prohibits the federal government from depriving any person "of life, liberty or property, without due process of law."

[29] *See Bolling v. Sharpe* 347 US 497 (1954); *Weinberger v. Wiesenfeld* 420 US 636 (1975).

[30] *See Adarand Constructors, Inc. v. Pena* 515 US 200 226-27 (1995).

[31] *See, e.g.*,Currie & DeWaal *The New Constitutional and Administrative Law Vol. 1* (2001) 322-23.

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contrast, as previously mentioned, the Namibian and South African Bills of Rights, at least in some circumstances, apply "horizontally" to private parties.

Furthermore, unlike the other two Constitutions considered, the US Constitution contains no language prohibiting discrimination on certain specifically enumerated grounds. However, the US Supreme Court has singled out discrimination on certain grounds -- particularly race, national origin, and sex -- as constitutionally suspect. The US Constitution also does not make the guarantee of equal protection any more difficult to amend than any other constitutional provision.[32] Further, the US Constitution makes no mention of affirmative action or "fair" versus "unfair" discrimination, and the US Supreme Court has held that all governmental classifications based on race, regardless of whether they burden or benefit members of that race, are subject to the most exacting form of constitutional review, strict scrutiny.[33] As Justice Ackermann of the South African Constitutional Court has correctly explained, this means that, in US constitutional law, "where a classification is based on race, even when its purpose is benign, it is still inherently suspect and presumptively unconstitutional unless the government can demonstrate that the racial classification is narrowly tailored to promote a compelling government interest."[34]

B. The Namibian Constitution Generally

1. Background

Namibia, formerly known as South West Africa, was a German colony until the end of World War I. Thereafter it was administered by South Africa, first under a League of Nations mandate obliging South Africa to govern the territory for the benefit and development of the Namibian people, then under UN supervision, and finally, after the UN revoked South Africa's mandate, in an occupation that was illegal under international law.[35] The periods of German and South African rule,

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[32] An amendment to any provision of the US Constitution must be approved by two-thirds majorities of both houses of Congress (the Senate and the House of Representatives) and ratified by three-quarters of the legislatures of the States. USA Const. Article V. In practice this procedure is difficult to achieve: only 26 Amendments have been enacted since the original US Constitution was ratified in 1788.

[33] *Adarand Constructors, Inc. v. Pena* 515 U.S. 200 (1995).

[34] Ackermann "Equality and the South African Constitution: The Role of Dignity" *Bram Fischer Lecture* (delivered at Rhodes House, Oxford, 26 May 2000) 18-19.

[35] After World War II, South Africa refused to convert its mandate over South West Africa to a United Nations Trusteeship. In 1950, the International Court of Justice (ICJ) ruled that South Africa could not

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contrary to the requirements of the mandate, were marked by pervasive discrimination against and mistreatment of the native Namibian peoples by the colonizers, including but not limited to the near genocide of the Namibian Herero people by the Germans in the early 1900's and the imposition of apartheid in Namibia by the South African National Party government beginning in the 1950's.

Namibia became independent in 1990, as the result of the implementation of an internationally brokered agreement ending a 20-year armed struggle by the South West Africa Peoples' Organization (SWAPO) against South African rule. Negotiations during the late 1970's, mediated by five nations on the UN Security Council known as the "Western Contact Group" (the US, Great Britain, France, Canada and West Germany) led to the agreement, which was embodied, in 1978, in UN Security Council Resolution 435.[36] Resolution 435 provided for a free and fair election under UN supervision, in which Namibians would elect a Constituent Assembly to draw up a Constitution for an independent Namibia. Pre-conditions to the election included the return of refugees, the repeal of discriminatory and restrictive legislation, a cease-fire between the combatants, the withdrawal, demobilization or confinement to bases of the various armed forces, and the maintenance of law and order by South African police, all monitored by UN military and police forces. However, due to South African resistance and the US Reagan administration's linkage of settlement of the Namibian question to the withdrawal of Cuban forces from Angola, Resolution 435 was not implemented for 11 years.[37]

Finally in the late 1980's, after the US and USSR had reached détente and South Africa's involvement in Angola had become unsustainable,[38] Resolution 435

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be compelled to conclude a trusteeship agreement, but also could not unilaterally change the territory's status (and therefore could not, as it desired, incorporate South West Africa into South Africa). As a result, the UN General Assembly began to supervise South West Africa, although South Africa refused to recognise or cooperate with this supervision. In 1966 the UN General Assembly revoked South Africa's mandate, and in 1971, the ICJ upheld this revocation and declared South Africa's continued presence in Namibia to be illegal. *See generally* Crocker *High Noon in Southern Africa: Making Peace in a Rough Neighborhood* (1992); Diescho *The Namibian Constitution in Perspective* (1994); Katjavivi *A History of Resistance in Namibia* (1988); Nujoma *Where Others Wavered* (2001).

[36] UN Doc. S/12865 (1978).

[37] The complicated diplomacy that took place in the 1980's to bring about the implementation of Resoluation 435 is described in detail in Croker *High Noon in Southern Africa: Making Peace in a Rough Neighborhood* (1992). The author, Chester A. Croker, was the US Assistant Secretary of State for Africa between 1982 and 1989.

[38] By mid-1988, Cuban and Angolan forces had achieved air superiority over southern Angola and had defeated a South African attempt to retake the town of Cuito Cuanavale. In addition, South Africa's

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was implemented. In November 1989 an election was held in Namibia under UN supervision pursuant to Resolution 435 to choose the Constituent Assembly. The Assembly consisted of 72 members, elected by proportional representation from party lists. Seven parties were represented. SWAPO, the former independence movement, obtained 41 seats in the Assembly, a majority of 57%. The Democratic Turnhalle Alliance (DTA), received 21 seats; United Democratic Front (UDF), 4 seats; Aksie Christelik Nasionaal (ACN), 3 seats; and National Patriotic Front (NPF), Federal Convention of Namibia (FCN) and Namibia National Front (NNF), one seat each.

The Constituent Assembly completed its task of drafting the Namibian Constitution between November 21, 1989 and February 9, 1990, in what has been called "the 80-day miracle."[39] Several factors contributed to the Constituent Assembly's speed and success. First, the election results had a significant effect. It had been agreed beforehand that a two-thirds majority would be necessary to adopt the Constitution, and no one party held such a majority in the Assembly. As a result, the various parties had to cooperate and compromise in order for the Constituent Assembly to do its work.[40]

Second, certain other aspects of the Constitution also had been agreed to by the former disputants in advance. In July 1982, as part of the internationally mediated peace negotiations, the parties agreed to "Principles concerning the Constituent Assembly and for the Constitution for an Independent Namibia."[41] In addition to specifying the two-thirds majority adoption requirement, these Principles provided that the future Constitution would have to contain the following elements: that Namibia would be a unified, sovereign and democratic state; that the constitution would be supreme; that government power would be separated into three main organs; that an independent judiciary would interpret and enforce the constitution; that there

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high national debt and the depreciation of the Rand had made the cost of maintaining troops in Namibia and Angola a political issue.

[39] Diescho *Perspective* 29.

[40] This was not the result that was expected prior to the election, when "the common assumption . . . was that the atmosphere in the Constituent Assembly would be one of bitter opposition among the parties, that deadlocks were likely, and that all types of procedural devices would be tried, particularly by the majority party, in order to prevail." Diescho *Perspective* 29.

[41] UN Doc. S/15287 (1982). These principles are often referred to as the "1982 Principles." According to a Namibian historian, "[t]he idea of constitutional principles was influenced by the Lancaster House agreement on Zimbabwe: they were designed to reassure white settlers in Namibia and the whites in South Africa itself." Katjavivi *Resistance* 125.

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would be regular elections by secret ballot using the same electoral system used to elect the Constituent Assembly; that there would be a judicially-enforceable bill of fundamental rights based on the Universal Declaration of Human Rights;[42] that expropriation of private property without just compensation would be forbidden; that there would not be retroactive punishment; that an independent public service, police and defence institutions would be established to afford fair access to all and a balanced structure; and that there would be elected councils for local and/or regional government. At its first session in November 1989, the Constituent Assembly unanimously adopted SWAPO's proposal that the 1982 Constitutional Principles form the basis for the Constitution that they would draft.[43] Moreover, the fact that these Principles had been agreed to years before the Assembly actually began its work meant that, by that time, the various parties had adjusted their constitutional proposals to more or less comply with the Principles.[44] Thus the differences between the parties' proposals were not as extreme as they otherwise might have been.

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[42] Interestingly, a limited bill of rights was in effect in Namibia between 1985 and 1990. In 1985, the South African government promulgated the South West Africa Legislative and Executive Authority Proclamation, R101 of 1985, which established a national assembly and a cabinet for Namibia, although it made foreign affairs and defence South Africa's responsibility and required that the South-African appointed Administrator-General approve all laws the national assembly passed. The interim government was required to protect certain fundamental rights: no execution without due process, liberty, security of person, privacy, equality before the law, fair trial, freedom of expression, peaceful assembly, freedom of association, participation in political activity, freedom of culture, language, tradition and religion, freedom of movement and residence, and ownership of property. Moreover, the Namibian courts could review acts of the assembly for compliance with the bill of rights, although this review power did not extend to acts of the South African parliament. During the period between 1985 and 1990 the Namibian courts invalidated a number of laws and official actions based on this bill of rights, although many of the cases were overturned by the South African appellate division. *See* Bjornlund "The Devil's Work? Judicial Review Under a Bill of Rights in South Africa and Namibia" 1990 (26) *Stanford J Int'l Law* 391; Cleary "A Bill of Rights as a Normative Instrument: South West Africa/Namibia 1975 --1988" (1988) XXI *CILSA* 29.

[43] Weichers views the 1982 Principles as binding on UN members as well as the parties to the Namibian negotiations who agreed to them, and sees the Constituent Assembly's vote to follow the Principles as an acknowledgement of their binding legal force. Weichers "Namibia: The 1982 Constitutional Principles and Their Legal Significance" (1989/90) 15 *SAYIL* 1. Namibians sometimes criticize their Constitution as "foreign" because it was based on the Principles. The Principles were, however, a necessary compromise to end the international dispute over Namibia's independence, and the Namibian parties understood and agreed to them. *See, e.g.,* Erasmus "Impact" 5. The smaller parties were satisfied because the Principles created a system of limited government and thus assuaged their fears about a future under SWAPO rule, and SWAPO accepted them because they would bring about majority rule and independence. *Id.* 4-5

[44] *See* Van Wyk "The Making of the Namibian Constitution: Lessons for Africa" (1991) XXIV *CILSA* 341, 349; Weichers "Principles" 15 *SAYIL* 8-13. Based on the Namibian experience, Van Wyk suggested that "a set of generally accepted constitutional principles could be a prerequisite for an effective process of constitution-making, especially in societies where historically the political

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Finally, the confidentiality of the process was very important. The Constituent Assembly did most of its work behind closed doors, primarily in a committee made up of members from all the parties, none of the various constitutional drafts were made public, and only one week of public debate on the draft constitution took place. This allowed for sensitive negotiations and the necessary compromises to be conducted out of the public view.[45]

2. Structure of Government

The Namibian Constitution, adopted by the Constituent Assembly on February 9, 1990, came into force with Namibian independence on March 21, 1990.[46] The Constitution establishes Namibia as "a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all."[47] Consistent with the doctrine of separation of powers, government power is divided among three branches: the executive (the President and Cabinet), the legislature (the Parliament, which consists of the National Assembly and the National Council), and an independent judiciary (the Supreme Court, the High Court, and the lower courts), all of which exercise certain checks and balances upon each other. The Constitution is the supreme law of the land.[48]

The President is directly elected by the people, and serves a five-year term.[49] Except for the current President, who is allowed three terms, the President is limited to two terms.[50] The President is removed from office if two-thirds of the National Assembly and two-thirds of the National Council adopt a resolution impeaching him or her for "a violation of the Constitution or a serious violation of the laws of the land

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competitors do not share common values." Van Wyk "Lessons" XXIV *CILSA* 349. This approach was indeed used successfully in South Africa's constitutional transition.

[45] The Assembly carefully guarded the confidentiality of the committee's and Assembly's work, out of concern of the "gallery" that could have been played to. Van Wyk "Lessons" XXIV *CILSA* 350.

[46] On the same day, SWAPO leader Sam Nujoma, who had been unanimously elected by the Constituent Assembly, was sworn in as Namibia's first president and the Constituent Assembly became Namibia's first National Assembly.

[47] Nam. Const. Article 1(1). Although Namibia is divided into regions and does have units of regional and local government, the powers of these governments are not defined in the Constitution itself, but rather are left to be determined by Act of Parliament. *See id.* Chapter 12.

[48] *Id.* Article 1(6).

[49] *Id.* Articles 28, 29.

[50] The Namibian Constitution First Amendment Act 34 of 1998 provides that "[n]otwithstanding Article 29(3) [the two-term limit], the first President of Namibia may hold office as President for three terms." This language was added to Article 134, which deals with the election of the first President, as sub-article (3).

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or . . .such gross misconduct or ineptitude as to render him or her unfit to hold with dignity and honour the office of the President."[51] Also, any action taken by the President is subject to review, reversal or correction by a resolution proposed by at least one-third of the National Assembly and approved by at least two-thirds of it.[52]

The Cabinet consists of the Prime Minister[53] and other ministers. Members of the Cabinet are appointed by the President from among the members of the National Assembly,[54]and Ministers remain members of the National Assembly while they serve in the Cabinet. Ministers are accountable to both the President and the National Assembly. A Cabinet member must be terminated by the President upon a no-confidence vote by a majority of the National Assembly.[55]

The National Assembly consists of 72 voting members who are elected by the Namibian voters based on proportional representation from party lists, and no more than 6 non-voting members appointed by the President.[56] Each National Assembly sits for a maximum of five years.[57] The National Assembly may be dissolved at any time by the President on the advice of the Cabinet, although if this occurs a new election for National Assembly and President must be held within ninety days.[58] The National Council consists of two members from each of Namibia's thirteen Regional Councils, who are chosen to serve in the National Council by the relevant Regional Council.[59] Members of the National Council serve six-year terms.[60]

The Constitution vests the lawmaking power in the National Assembly, although this power is subject to the review power of the National Council and the assent of the President.[61] Every bill passed by the National Assembly is referred to

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[51] Nam. Const. Article 29(2).
[52] *Id.* Article 32(9). It does not appear that this has ever happened, nor that it is likely to in the near future given that the President's party, SWAPO, currently holds more than two-thirds of the seats in the National Assembly.
[53] The Prime Minister is not a Prime Minister of the British type, however. The President of Namibia is both head of state and head of government. *Id.* Article 27(1).
[54] *Id.* Article 35(1).
[55] *Id.* Article 39.
[56] *Id.* Article 46.
[57] *Id.* Article 50.
[58] *Id.* Articles 29(5), 32(3)(a), 57(1).
[59] *Id.* Article 69.
[60] *Id.* Article 70.

[61] *Id.* Article 44.

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the National Council. The National Council may confirm the bill or recommend amendments to it, or may, by a two-thirds majority with respect to certain types of bills, object to the bill's principle.[62] However, the National Assembly is not required to accept any amendments proposed by the National Council, and it has the power, by a two-thirds majority, to override the National Council's objection to the principle of a bill.[63] Moreover, if the National Assembly's passage of a bill was by a two-thirds majority, the President is required to give his or her assent to it.[64]

The Namibian Constitution vests the judicial power in a Supreme Court, a High Court, and lower courts established by Act of Parliament, all of which are independent, cannot be interfered with, and are subject only to the Constitution and the law.[65] Decisions of the Supreme Court are binding on all courts and persons in Namibia, unless reversed by the Supreme Court itself or contradicted by an Act of Parliament that is lawfully enacted.[66] Judges of the Supreme Court and the High Court are appointed by the President on the recommendation of the Judicial Service Commission,[67] and may be removed during their tenure only in the same way and only on grounds of mental incapacity or for gross misconduct.[68]

3. Bill of Rights

The Namibian Constitution includes a Bill of Fundamental Human Rights and Freedoms.[69] These rights and freedoms must be respected by all government organs, and by natural and legal persons "where applicable to them,"[70] and are judicially enforceable. This means that the Namibian Bill of Rights will at least in some instances apply "horizontally" (that is, to private parties), as opposed to only "vertically" (to the government).

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[62] *Id.* Article 75. The National Council cannot object in principle to bills dealing with the levying of taxes or the appropriation of public money. *Id.* Article 75(7).
[63] *Id.* Article 75.
[64] *Id.* Articles 56, 64, 75. However, if the President believes that a bill is unconstitutional, he or she may withhold assent. *Id* Article 64.
[65] *Id.* Article 78.
[66] *Id.* Article 81.
[67] *Id* Article 82. The Judicial Service Commission consists of the Chief Justice, a Judge appointed by the President, the Attorney General, and two lawyers nominated by the professional organization(s) representing the legal profession in Namibia. *Id.* Article 85. The magistrates or judicial officers who preside over the lower courts are appointed as specified by Act of Parliament.
[68] *Id.* Article 84.
[69] *Id.* Chapter 3 (Articles 5-25).
[70] *Id.* Article 5.

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The Namibian Bill of Rights cannot be repealed or amended "in so far as such repeal or amendment diminishes or detracts from" the rights and freedoms contained therein,[71] and certain rights and freedoms cannot be derogated from or suspended in a state of emergency, national defence or martial law.[72]

The Namibian Constitution's Bill of Rights was intended to be based on the Universal Declaration of Human Rights, and has been found to closely reflect, and in some aspects exceed, the rights protected under international human rights law.[73] The rights guaranteed in the Bill of Rights are primarily the so-called first generation, or civil and political rights. (These are "the 'classical' rights requiring the state to refrain from interference,"[74] such as the rights to free speech; free press; freedom of religion, thought, conscience, and belief; freedom of association, etc.) In addition, some second generation, or economic, social and cultural rights – such as the rights to form and join trade unions, to education, to culture, to family, and certain rights of children – are also protected.

Additional second generation rights, as well as some rights that would be considered third generation -- people's, group or collective rights, such as the right to development and to the environment -- are mentioned in the Namibian Constitution, although they are not among the justiciable rights contained in Chapter 3. (Second generation rights are "rights that need to be claimed from the state, in other words, rights which require positive action on the part of the state," and third generation rights are "'rights of collectivities' such as peoples, nations and minorities, group rights and rights to peace, development and an unspoilt environment."[75]) Chapter 11 of the Constitution lists certain "Principles of State Policy" which are not legally enforceable in court, but are meant to guide the Namibian government in its policy making. These principles encourage the enactment of legislation to promote the

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[71] *Id.* Article 131.

[72] The rights and freedoms that cannot be derogated from or suspended are: life, dignity, equality and non-discrimination, fair trial, family, children's rights, administrative justice, culture, free speech and expression, free press and media, free thought, conscience and belief, academic freedom, religious freedom, and freedom of association. Access to legal practitioners or a court of law also cannot be denied. The obligation of the government and all persons to respect fundamental rights and the enforceability of such rights in the courts also cannot be derogated from, suspended or denied. *Id,* Article 24(3).

[73] *See generally* Naldi *Constitutional Rights in Namibia* (1995).

[74] Venter *Constitutional Comparsion* 130.

[75] *Id.* 130-31.

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welfare of the people, such as by ensuring equality of opportunity for women, protecting workers' health and rights, providing fair and reasonable access to public facilities and services, and ensuring senior citizens an adequate pension. The courts may, however, use these principles in interpreting any laws based on them,[76] although this has not yet occurred.

Unlike the South African Bill of Rights, the Namibian Constitution does not contain one general limitations clause applicable to all of the provisions in its Bill of Rights. Instead, some of the rights provided for in Articles 6 through 20 are self-limiting,[77] while the freedoms provided for in Article 21 are "subject to the law of Namibia, insofar as such law imposes reasonable restrictions on [their] exercise . . . which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency, morality, or in relation to contempt of court, defamation, or incitement to an offence."[78] In addition, a limitation on any right or freedom guaranteed in Chapter 3 must be of general application, it cannot negate the essential content of the right or freedom, it cannot be aimed at a particular individual, and it must specify the ascertainable extent of the limitation and the constitutional provision that authorizes its enactment.

4. Amendment

No amendment that diminishes or detracts from the rights and freedoms contained in the Bill of Rights is permitted. With respect to other amendments, a bill containing a proposed amendment or repeal must indicate the specific Articles sought to be amended or repealed and may deal with no other matter.[79] Such a bill must be passed by two-thirds majorities in both the National Assembly and the National Council before going to the President for his or her assent.[80] If, however, the bill

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[76] Nam. Const. Article 101.

[77] *See, e.g. id.* Article 7 ("No persons shall be deprived of personal liberty except according to procedures established by law).

[78] *Id.* Article 21(2). These freedoms are: freedom of speech and expression, including freedom of the press and other media; freedom of thought, conscience, and belief, including academic freedom; freedom of religion; freedom of assembly; freedom of association; freedom to withhold labour; freedom of movement; freedom to reside and settle in any part of Namibia and to leave and return to Namibia; and freedom to practice any profession, occupation, trade or business.

[79] *Id.* Article 132.

[80] *Id.*

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receives a two-thirds majority in the Assembly but fails to receive such a majority in the National Council, the President may call a national referendum. If the bill is approved by a two-thirds majority of all votes case in the referendum, it is submitted to the President for assent. The majorities that are required to pass an amendment in Parliament or in a referendum also cannot be diminished. SWAPO has held a two-thirds majority in both houses of Parliament since 1994, but thus far only one constitutional amendment – in 1999, to allow President Nujoma to run for a third term – has been adopted.

C. The South African Constitution Generally

1. Background

South Africa's recent history involved first Dutch and British colonization, and then "independence" consisting of repressive white minority rule over South Africa's black majority. Although South Africa had several Constitutions beginning in 1910, these Constitutions adopted the British doctrine of parliamentary supremacy, in terms of which laws made by the Parliament could not be challenged. In apartheid-era South Africa, where the Parliament only represented whites,

> the adoption of parliamentary supremacy ensured that the white minority were politically empowered to manipulate the legal system to perpetuate their dominance over South African society. In Britain, the unchallenged power of Parliament to make law reflected the victory of democratic forces over the monarchy. By contrast, in South Africa parliamentary supremacy legalised the subjugation of the black majority in the name of democracy.[81]

Finally, after years of violent struggle by the African National Congress (ANC) and other anti-apartheid organizations, negotiations toward a peaceful transition to democracy began in the late 1980's, around the time neighboring Namibia was approaching independence. Several factors led to the parties coming together in negotiations: apartheid was collapsing under its own weight, there were strong pressures from both within the country and outside for peaceful change, and certain National Party leaders (most notably, State President FW de Klerk) decided

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[81] Currie & DeWaal *NewConstitutional Law* 46.

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that it was the time for peaceful change.[82] In addition, Namibia's ultimately successful experience contributed to the peaceful transition in South Africa. At the time of Namibian independence,

> the regional stakes were high. Had the experiment of 'transition through constitutionalism' failed in Namibia, it would have had serious consequences, not only for Namibia itself, but for the region as a whole. Political developments in South Africa would have been directly affected. The preparedness of the National Party government in South Africa to risk a transition towards black majority rule would have been cast in doubt."[83]

South Africa's constitutional transition occurred in two stages. First, in 1993, a multi-party negotiating forum agreed to an Interim Constitution that established an interim coalition government and set forth Constitutional Principles for the democratically-elected national legislature to follow in drafting a Final Constitution. The Interim Constitution[84] came into force on April 27, 1994, the date of South Africa's first democratic elections. The negotiating parties had differed sharply as to the relative roles of the non-elected negotiating forum and the elected assembly to determine the details of the final constitution, and the Constitutional Principles were a compromise: they provided some certainty as to the elements that the Final Constitution would contain yet still allowed the Constitutional Assembly to write it.[85] The Principles provided that they would bind the Constitutional Assembly in its work; that while the Final Constitution was being written, one-third of the members of the Assembly could refer any provision to the Constitutional Court for a ruling as to whether it complied with the Principles; that the Final Constitution had to be certified

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[82] *See* de Klerk "The Process of Political Negotiation: 1990-1993" in de Villiers (ed) *Birth of a Constitution* (1994) 3-5; *see also Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 671(CC) para 2 ("During the eighties it became manifest to all that our country with all its natural wealth, physical beauty and human resources was on a disaster course unless that conflict [between the white minority government and the black majority] was reversed. It was this realisation which mercifully rescued us in the early nineties as those who controlled the levers of state power began to negotiate a different future with those who had been imprisoned, silenced, or driven into exile in consequence of their resistance to that control and its consequences.")

[83] Erasmus "Impact" 1.

[84] Act 200 of 1993.

[85] The ANC had been of the view that only very broad and general principles could be negotiated, and that the elected Constitutional Assembly should determine all of the details of the new Constitution. Other parties however wanted the negotiators to negotiate as much detail as possible and the Constitutional Assembly to be bound by the agreements that the negotiators had made. See de Villiers "Principles" in de Villiers *Birth* 37-39; Ebrahim *The Soul of A Nation: Constitution-Making in South Africa* (1998) 96.

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by the Constitutional Court as complying with the Principles before it could become effective; that provincial constitutions also would have to comply with the Principles; and that there could be no amendments aimed at reducing the binding nature of the Principles. The Principles further provided that the Final Constitution would be supreme and would have to provide for certain things, including: common South African citizenship; a representative, democratic system of government based on regular elections; separation of powers and checks and balances; an independent judiciary to enforce the Constitution; an entrenched and justiciable bill of rights protecting "all universally accepted fundamental rights, freedoms and civil liberties;" the prohibition of discrimination and promotion of equality; the recognition of linguistic and cultural diversity and certain collective rights of minority groups; the recognition of the right of individuals and trade unions to engage in collective bargaining; the institution of three levels of government with constitutionally guaranteed powers; the requirement of special procedures involving special majorities for any constitutional amendments; a guarantee of independence for certain government bodies including the Public Service Commission, Public Protector and Auditor-General; and a guarantee that the security forces would serve the national interest and not the interest of a particular political group.

In addition, the Interim Constitution expressed a strong commitment to national reconciliation. Its Epilogue stated that "amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past," and required that a law be adopted providing for "the mechanisms, criteria, and procedures, including tribunals, if any, through which such amnesty shall be dealt with." Pursuant to this requirement, the Promotion of National Unity and Reconciliation Act[86] establishing the Truth and Reconciliation Commission was enacted in 1995. As the Constitutional Court has explained, these provisions reflect the reality that,

> [f]or a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a "democratic society based on freedom and equality". If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have

[86] Act 34 of 1995.

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> been forthcoming, and if it had, the bridge [between past and future that the Constitution creates] itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.[87]

The Constitutional Assembly that drafted the Final Constitution consisted of the 400 members of the National Assembly (directly elected, by proportional representation, in the 1994 elections) and the 90 members of the Senate (10 members nominated by each of the nine provincial legislatures, the members of which were elected by proportional representation in the 1994 elections). Seven parties were represented: the ANC, with 312 seats (a majority of 63.7%); the NP, with 99 seats, the Inkatha Freedom Party (IFP), with 48 seats; the Freedom Front, with 14 seats; the Democratic Party, with 10 seats; the Pan-Africanist Congress, with 5 seats; and the African Christian Democratic Party, with 2 seats.[88]

Under the Interim Constitution, the Constitutional Assembly had two years to draft, and pass by a two-third majority, a Final Constitution that complied with the Constitutional Principles. To ensure conformity with the Principles, the Constitutional Court was required to certify that the Constitutional Assembly's final constitutional text complied with them. This was a change from the process that was followed in Namibia: although negotiated principles also governed the Namibian constitution-making process, judicial certification of the Namibian Constitution as in compliance with those principles was not required.

Like the other Constitutions studied here, the successful completion of this process in light of South Africa's history has been called a miracle.[89] However, unlike the constitution-making processes in Namibia and the US, the negotiations culminating in the Interim Constitution were, for the most part, open to the media, the

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[87] *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 19 (footnotes omitted).

[88] The IFP pulled out of the Constitutional Assembly in February 1995. Because the Principles required passage of the Constitution by a two-thirds majority and the ANC fell short of this majority by 15 seats, the IFP's withdrawal meant that the NP became the ANC's main trading partner. *See* Bell *Making* 36.

[89] *See* Bell *Making* 12; Eloff, "The Process of Giving Birth" in de Villiers *Birth* 12.

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public and civil society.[90] And the Constitutional Assembly process in which the Final Constitution was drafted was even more transparent and involved even more public participation than the earlier negotiations[91] -- that is, until closed-door meetings were found to be necessary toward the end of the process, to hammer out some particularly controversial issues.[92]

The Constitutional Assembly began its work on May 24, 1994, and nearly did not complete its task by the expiration of the two-year deadline. It was only on May 8, 1996, that the Assembly adopted a final constitutional text. The Constitutional Court, however, refused to certify the May 8 text, finding that certain provisions did not comply with the Constitutional Principles.[93] As a result the Constitutional Assembly reconvened and revised the text, approving an amended text on October 11, 1996. On December 4, 1996, this text was found by the Constitutional Court to conform with the Constitutional Principles, and it was signed into law by President Nelson Mandela on February 4, 1997.

2. Structure of Government

Consistent with the Constitutional Principles, the South African Constitution is a supreme, justiciable Constitution that creates a representative, democratic government based on the ideas of separation of powers, checks and balances, and the independence of the judiciary. Unlike the unitary system created in Namibia, however, the South African Constitution creates a federal system of "co-operative government," establishing national, provincial and local levels of government that share some of the same competencies and responsibilities.[94] For example, both the

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[90] See Eloff "Managing Negotiations: Lessons and Pitfalls 1990 to 1994" in de Villiers & Sindane (eds) *Managing Constitutional Change* (1996) 21, 30; Eloff, "Giving Birth" in de Villiers *Birth* 17-18.

[91] Soon after its election, the Assembly embarked on a national campaign to encourage the public to contribute to the constitutional debate. A web site was created, and public meetings were held around the country. As a result, more than 2 million public submissions were received. Bell *Making* 22. The vast number of submissions, however, caused concern as to whether they could or would be seriously considered. Ebrahim *Soul* 192.

[92] The first closed-door retreat occurred over a weekend in early April 1996 and, according to one author, was necessary because compromises had to be found and the process of compromise is not always dignified. Bell *Making* 44. Further closed-door discussions also occurred in the last few days of the process. *See id.* 46, 53-54.

[93] The Constitutional Court found problems with provisions of the draft constitution relating to provincial powers, local government, entrenchment of the bill of rights, and the Public Service Commission. *See Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744 (CC); *see also* Bell *Making* 62-63; Ebrahim *Soul* 228-29.

[94] *See* Currie & De Waal *New Constitutional Law* 119-24.

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national and the provincial legislatures have the power to make laws concerning certain areas[95] although national legislation is given precedence where there is a conflict with a provincial law.[96] The Constitution specifies that the different levels of government are "distinctive, interdependent and interrelated," and provides principles of cooperative government to which all spheres of government must adhere.[97]

At the national level, the government is divided into the usual three branches (executive, legislative and judicial), and these branches exercise checks and balances vis-à-vis each other.[98] The national legislature consists of the National Assembly and the National Council of Provinces. The National Assembly is made up of no fewer than 350 and no more than 400 members, directly elected by the voters, from party lists through a system of proportional representation.[99] The National Assembly's term is five years.[100] However, the Assembly can dissolve itself by a majority vote if at least three years have passed since it was elected.[101]

The National Council of Provinces consists of a delegation (of ten delegates) from each of South Africa's nine provinces, for a total of 90 delegates.[102] Each delegation is selected by the relevant provincial legislature.[103] The delegates in the Council generally do not vote individually; rather, except where the Constitution specifies otherwise, each delegation has only one vote.[104] The Council is a perpetual body without a fixed term and may not be dissolved, although the terms of individual delegates may end if they are recalled by their provincial legislature, if a new provincial legislature is elected, or if new special delegates are appointed.[105]

Under the Constitution, the national legislature has the power to make laws with regard to "any matter," except in areas where the provinces are given exclusive

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[95] Such as education, the environment, health, housing, industrial promotion, public transport, trade, urban and rural development, and welfare services.
[96] For a detailed discussion of the legislative competencies of the national, regional and local levels of government, see Currie & De Waal *New Constitutional Law* 163-69, 201-12, 217-20.
[97] RSA Const. Articles 40, 41.
[98] At the regional level, there are provincial executives and provincial legislatures with constitutionally defined powers, *id.* Chapter 6; and at the local level there are only Municipal Councils, which possess both executive and legislative powers, *id.* Chapter 7.
[99] *Id.* Section 46.
[100] *Id.* Section 49.
[101] *Id.* Section 50.
[102] *Id.* Section 60. Each delegation consists of four special delegates and six permanent delegates.
[103] *Id.* Section 61 & Schedule 3, Part B.
[104] *Id.* Section 65.
[105] Currie & de Waal *New Constitutional Law* 154-55.

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competence.[106] The national legislative power thus includes areas of concurrent national and provincial legislative competence,[107] and also includes the residual power to legislate in areas not enumerated in the Constitution.[108] In addition, the national legislature has limited power to legislate in areas of exclusive provincial competence in certain circumstances: if national legislation in such an area is necessary to maintain national security, economic unity or essential national standards, or to establish minimum standards required for the rendering of services, or to prevent unreasonable action by a province which is prejudicial to the interests of another province or the country as a whole.[109]

The process that the national legislature must follow to enact a law depends on the area to which the law relates, although in all instances the assent of the President is required. If the bill is an ordinary bill that does not affect the Provinces,[110] it must originate in and be passed by the National Assembly and then be reviewed by the National Council, although the National Assembly can by a simple majority override the rejection of or any amendments proposed by the Council and send the bill to the President.[111] If the bill is an ordinary bill that affects the Provinces or falls within other areas specified by the Constitution,[112] it may generally originate in either the Assembly or the Council,[113] and follows a different procedure.[114] To become law, a bill must be passed by the house in which it originated, and then must be referred to the other house.[115] If the second house passes the bill, or passes it with amendments that are then adopted by the original house, it goes to the President for assent. If,

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[106] RSA Const. Sections 43, 44. Schedule 5 to the Constitution lists the areas in which the provinces have exclusive legislative competence.
[107] *Id.* Art. 44(1)(a)(ii). The areas of concurrent competence are listed in Schedule 4.
[108] *See* Currie & De Waal *New Constitutional Law* 164.
[109] RSA Const. Section 44(2).
[110] *I.e.,* is not within a functional area set forth in Schedules 4 or 5.
[111] *Id.* Section 75. With respect to these types of bills, the delegates of the Council each vote individually and a simple majority is required to pass the bill.
[112] This means bills falling within a functional area set forth in Schedule 4 or bills promulgated under certain provisions of the Constitution that are listed in Section 76(3). The latter include legislation through which Parliament is intervening in an area of exclusive provincial competence under extraordinary circumstances (Section 44(2)), legislation providing for the functioning of the Financial and Fiscal Commission (Section 220(3)), and financial legislation under Chapter 13 that will affect the financial interests of provincial government.
[113] Although a few specified bills may only be introduced in the Assembly. *See id.* Sections 44(2), 220(3), & Chapter 13.
[114] *Id.* Section 76.
[115] In this case, each delegation in the Council votes as a bloc.

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however, the second house rejects the bill or the first house rejects the second house's amendments, it must go to a mediation committee, which may agree with either house's version or may come up with a compromise version.[116] The committee's decision must be confirmed by the other house if the committee agrees with one house's version, or by both houses if the committee's decision is a compromise. If the mediation committee fails to come to a decision or if the relevant house(s) do not confirm its decision, the bill lapses if it originated in the Council. If, however, it originated in the Assembly and the Assembly passes the original bill again by a two-thirds majority, the bill goes to the President for assent. If the bill is a money bill – *i.e.*, it allocates public money or imposes taxes, levies or duties – it must be introduced in the Assembly (and only by the Minister of Finance), cannot deal with any other matter, and is passed in the same manner as ordinary bills not affecting the provinces.[117] Thus, as discussed above, a simple majority of the Assembly can override proposed amendments or objections to money bills by the Council. If a bill has been properly passed following the applicable procedures, the President must assent to and sign the bill.[118]

The national executive consists of the President and the Cabinet. The President is not directly elected by the people, but rather is elected by the National Assembly from among its members. The Cabinet is appointed by the President, and consists of a Deputy President selected from among the members of the National Assembly and Ministers, all but two of whom must also be from the National Assembly. The President loses his or her membership in the National Assembly when elected,[119] but Ministers retain their National Assembly seats. A majority of the National Assembly has the power, through a vote of no confidence, to either force the President to reconstitute the Cabinet or to force the President and the Cabinet to

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[116] The mediation committee is made up of nine members from the Assembly and one delegate from each provincial delegation in the Council, and its decisions must be taken by a majority of each component (*i.e.,* five of the Assembly members and five of the Council members).
[117] *Id.* Section 77.
[118] *Id.* Section 79. If, however, the President has reservations about the bill's constitutionality he or she may refuse to sign and must refer the bill back to the National Assembly and if relevant the National Council for reconsideration. If the bill is passed again by the relevant houses, the President must either assent to and sign the bill, or refer it to the Constitutional Court for a decision on its constitutionality. If the Constitutional Court declares the bill constitutional, then the President must assent to and sign it.
[119] *Id.* Section 87.

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resign.[120] In addition, the President may be removed from office by a two-thirds majority of the National Assembly on the grounds of a serious violation of the Constitution or the law, serious misconduct, or inability to perform the functions of the office.[121] If the President is forced to resign, then the National Assembly must elect a new President within 30 days, failing which the Action President must dissolve the Assembly and a general election must be held.[122]

The South African Constitution creates an independent, impartial judiciary that cannot be interfered with and is subject only to the Constitution and the law.[123] It establishes a hierarchy of courts as follows: the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts, and other courts equivalent to Magistrates' Courts created by statute. The Constitutional Court, the Supreme Court of Appeal and the High Courts have jurisdiction over constitutional matters, with the Constitutional Court being the highest court in such matters and having exclusive jurisdiction over certain types of constitutional matters.[124] A court is required, when "deciding a constitutional matter within its power," to declare law or conduct that is inconsistent with the Constitution invalid to the extent of the inconsistency.[125] A court decision or order binds all persons to whom and organs of state to which it applies.[126]

Judges are appointed as follows:[127] The President and Deputy President of the Constitutional Court are appointed by the President after consultation with the Judicial Service Commission[128] and the leaders of parties represented in the National

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[120] *Id.* Section 102.
[121] *Id.* Section 89.
[122] *Id.* Section 50.
[123] *Id.* Section 165.
[124] *Id.* Sections 167, 168, 169. Magistrates' Courts "may not enquire into or rule on the constitutionality of any legislation or any conduct of the President." *Id.* Section 170.
[125] *Id,* Section 172.
[126] *Id.* Section 165(5).
[127] *Id.* Section 174.
[128] The Judicial Service Commission consists of the Chief Justice of the Supreme Court of Appeals, the President of the Constitutional Court, one Judge President designated by the Judges President of the High Courts, the Minister of Justice, two practicing advocates nominated by the advocates' profession, two practicing attorneys nominated by the attorneys' profession, one teacher of law nominated by the deans of South African law faculties, six members of the National Assembly (at least three of whom are opposition party members), four permanent delegates from the National Council of Provinces, and four persons designated by the President after consulting the leaders of the parties represented in the National Assembly. In addition, when the Commission is considering matters relating to a High Court,

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Assembly. Other Constitutional Court judges are appointed, from a list of nominees prepared by the Judicial Services Commission, by the President after consultation with the President of the Constitutional Court and the leaders of the parties in the National Assembly. The Chief Justice and Deputy Chief Justice of the Supreme Court of Appeal are appointed by the President after consultation with the Judicial Service Commission. All other superior court (*i.e.* Supreme Court of Appeals and High Court) judges are appointed on the advice of the Judicial Services Commission.[129] The Constitution specifies that, in the appointment of judicial officers, "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered."[130] The salaries, allowances and benefits of judges may not be reduced.[131] A judge may only be removed from office by the President if the Judicial Service Commission "finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct" and if at least two-thirds of the members of the National Assembly pass a resolution calling for the judge's removal.[132]

3. Bill of Rights

The Bill of Rights, contained in Chapter 2 of the South African Constitution, "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state" (*i.e.,* is vertically applicable).[133] In addition, it is, in at least some instances, horizontally applicable, in that "a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[134] The South African non-discrimination clause is expressly horizontally applicable: Section 9(4) provides, in relevant part, that "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds. . . ."

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the Judge President of that court and the Premier of the province sit on the Commission as well. *See id.* Section 178.

[129] Other judicial officers, such as Magistrates, are appointed pursuant to statute. The Constitution requires, however, that such a statute "must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice." *Id.* Section 174(7).

[130] *Id.* Section 174(2).

[131] *Id.* Section 176(3).

[132] *Id.* Section 177.

[133] *Id.* Section 8(1).

[134] *Id.* Section 8(2).

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In terms of its specific provisions, the South African Bill of Rights includes not only the typical first generation rights, but also enforceable second generation and even third generation rights. In addition to workers' rights, children's rights and the rights to language, culture and education, the Bill of Rights guarantees access to adequate housing, health care services, food and water, and social security. The right to a non-harmful environment and to environmental conservation for the benefit of present and future generations is protected, as are certain rights of cultural, religions and linguistic communities. Because of this, the South African Bill of Rights is often characterized as among the most progressive and liberal bills of rights in the world. With respect to social and economic rights – such as the rights to access to adequate housing, health care services, sufficient food and water, and social security -- the state is required to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of these rights. With respect to language and cultural rights, these rights cannot be exercised in a manner inconsistent with any other provision of the Bill or Rights.

It should be noted that the inclusion of enforceable social and economic rights in the South African Constitution raises a separation of powers issue. It is often asserted that such rights should not be justiciable because their enforcement requires the judiciary to direct the other branches of government as to how government resources should be distributed, which is beyond the judicial function. However, although other institutions may well be better suited to implement social and economic rights, including them among the justiciable rights in the Constitution means that politically powerless groups have a forum in which to raise questions about the failures of other institutions to adequately promote these rights.[135] The Constitutional Court is cognizant of the difficult issues posed by the judicial enforcement of these rights, and thus far has been "slow to interfere with rational decisions taken in good faith by the political organs" in such cases.[136] In *Government of the Republic of South Africa v. Grootboom*,[137] a group of homeless persons challenged the constitutionality of the government's housing policy, which provided

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[135] Currie & DeWaal *New Constitutional Law* 30-31.
[136] *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 29.

[137] 2001 (1) SA 46 (CC).

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access to formal housing via a waiting list (involving a waiting period of up to seven years). Although the court held that the existing policy did not meet the government's obligation to take reasonable measures, within its available resources, to achieve the progressive realization of access to adequate housing, it did not order the government immediately to provide housing to the applicants, nor did it tell the government exactly what its housing policy should be. Rather, the court left it up to the government to "devise and implement a coherent, co-ordinate programme designed to meet its Section 26 obligations."[138] Another case raising these issues – involving the question of whether the government is obligated to provide the drug Nevirapine to HIV-positive pregnant women and their babies at all public health facilities -- is currently pending before the Constitutional Court.[139]

The South African Bill of Rights contains a general limitations clause that applies to all the rights contained in it.[140] Under this provision, rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

a. the nature of the right
b. the importance of the purpose of the limitation
c. the nature and extent of the limitation
d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.[141]

Finally, the Bill of Rights specifies that certain rights cannot be derogated from during a state of emergency.[142] Specifically, the rights to human dignity and life are entirely non-derogable. In addition, the equality clause's prohibition on unfair

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[138] *Id.* para 95.
[139] *Minister of Health and Others v. Treatment Action Campaign and Others* CCT 9/02. In December 2001, the High Court in Pretoria ordered the government to provide Nevirapine to all HIV-positive pregnant women who give birth in public facilities and their babies where in the opinion of the attending physician such treatment is medically indicated. (The government's existing policy is to only provide Nevirapine in certain facilities that are covered by its present programme for the prevention of mother to child HIV transmission.) The government's application for leave to appeal this order and the merits of the appeal were argued before the Constitutional Court on May 2 and 3, 2002.
[140] RSA Const. Section 36.
[141] *Id.* Section 36(1).
[142] *Id.* Section 37(5)

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discrimination on the grounds of race, colour, ethnic or social origin, sex, religion, or language, is non-derogable, as are certain aspects of the rights to freedom and security of the person, the right not to be subjected to slavery and servitude, certain aspects of children's rights, and certain aspects of the rights of arrested, detained and accused persons.

4. Amendment

A bill seeking to amend the South African Constitution may not include any other matter than the proposed amendment and matters connected thereto.[143] It must be published in the *Government Gazette* for public comment and submitted to the provincial legislatures for their views at least thirty days before its introduction.[144] Any comments received must be tabled in the Assembly and, where its approval is also required, the National Council of Provinces.[145] Even where the National Council's approval is not required for passage, the Council must have the chance to publicly consider the amendment.[146] Finally, an amendment bill may not be put to vote in the Assembly within 30 days of its introduction if the Assembly is sitting or thirty days after its tabling if the Assembly is in recess when the bill is introduced.[147]

The requirements for passage are different for different types of amendments.[148] An amendment of Section 1, which sets forth the founding values of the country – the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsibility and openness -- is the most difficult to achieve. It requires a 75 percent majority in the National Assembly and the assent of 6 provinces in the National Council of Provinces. In addition, an amendment of this procedure for amending Section 1 requires the same majorities. An amendment to any provision in Chapter 2, the Bill of Rights, requires a two-thirds majority in the Assembly and the assent of six provinces in the Council. An

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[143] *Id.* Section 74(4).
[144] *Id.* Section 74(5).
[145] *Id.* Section 74(6).
[146] *Id.* Section 74(5)(c).
[147] *Id.* Section 74(8).
[148] *See id.* Section 74.

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amendment to the procedure for amending the Bill of Rights also requires these majorities.[149] An amendment dealing with provincial matters requires the assent of two-thirds of the Assembly and six provinces in the Council and, if the amendment affects certain provinces(s), the consent of the relevant provincial legislature(s). All other amendments require a two-thirds majority of the Assembly only. In all cases, amendments to the Constitution require Presidential assent.[150] As described above, if an amendment is properly passed the President must assent and sign it, unless he or she has reservations about its constitutionality.

D. The US Constitution Generally

1. Background

a. The Original Constitution

The US Constitution was drafted between May and September 1787 by a Convention of 55 delegates appointed by 12 of the then 13 states.[151] At the time the United States was a loose confederation of the 13 states that had declared their independence from Great Britain in 1776, with a weak central government consisting only of a Congress with few powers. This arrangement was not working well, and the Convention was called to revise the Articles of Confederation to render them "adequate to the exigencies of government and the preservation of the Union."[152]

In the end, however, the Convention did not just revise the Articles of Confederation. It drafted a new constitution, creating the national government that still exists today. As in Namibia and South Africa, the Convention's success was viewed as a miracle.[153] The compromises that were necessary to accomplish this miracle, moreover, were likely only possible due to the fact that, like the Namibian

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[149] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) paras 68-71.
[150] *Id.* Section 74(9).
[151] The participating states were New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Georgia, North Carolina, and South Carolina. Rhode Island refused to participate.
[152] Drinker Bowen *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (1966) xvi.
[153] *Id.* xxiii, 279 (quoting delegates George Washington and James Madison, both of whom later became President of the United States).

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Constituent Assembly two hundred years later, the Convention did its work in private.[154]

The delegates to the US Constitutional Convention were not following any set of already agreed-to principles, and extensively debated many issues: the threshold question of whether there should be a supreme national government; if so, what such a government should look like, how it should be selected, and what its powers should be; how the Constitution should be ratified; how it should be amended; how new states should be admitted to the union; and more. On the various questions, several lines of division were often seen: those in favor of centralization versus those in favor of preserving state sovereignty, large states versus small states, North versus South.

One of the most contentious issues had to do with the way the states' representation in the national legislature would be determined. The large states wanted representation to be based on population, while the small states wanted each state to be equally represented. There also was a North/South divide: The Southern states wanted slaves to be counted in the population for representation purposes; the Northern states did not. These questions were debated for weeks, and almost caused the Convention to dissolve. Ultimately, in what has been called "the Great Compromise," it was agreed that representation in the House of Representatives would be based on population, and that in the Senate, the states would be equally represented. In the "Three-Fifths Compromise," it was agreed that in determining the population of a state, a slave would be counted as three-fifths of a person.

Another hard-fought issue had to do with giving Congress the powers to pass navigation acts, collect taxes and imposts, and regulate interstate and foreign commerce.[155] The Southern states, fearing that the commercial Northern states would use these powers to the detriment of the South's agricultural (and slave-dependent) economy, insisted that a two-thirds majority should be necessary for the

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[154] *Id.* 4, 22-23.

[155] Instead of simply using the Virginia plan's vague statement that Congress' power extended to matters where the states were incompetent, the delegates chose to enumerate a list of specific delegated powers, although the list ended with the broad power to make all laws "necessary and proper" to carry out the delegated powers. This enumeration has been said to have had "profound" significance – "it expressed in unmistakable terms the central theme of American constitutionalism: the limitation of legislative power by fundamental law. That the new government had only the powers assigned to it meant that other powers were kept by the states or the people, the constituent elements of the new

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passage of commerce or navigation laws. Eventually, in the "Commercial Compromise," it was agreed that commerce and navigation laws would only require a simple majority but that ratification of treaties with foreign governments would require a two-thirds majority, that Congress would not be allowed to tax exports, that any import tax imposed by Congress on slaves would not exceed $10 per head, that slaves would be counted for purposes of taxation by the three-fifths ratio, and that Congress would not be able to outlaw the slave trade for 20 years, until 1808.

By early September a draft constitution, prepared by a five-member committee, was finally ready and was presented to the Convention for approval. At this late date, the issue of a bill of rights was raised for the first time. On September 12, 1787, George Mason, a delegate from Virginia, moved that such a bill should be prepared, based on the bills of rights in various state constitutions,[156] and added. The motion, however, was defeated, after other delegates argued that the state bills of rights were sufficient protection of individual rights, as the federal constitution would not repeal them.[157] It also was argued that it was unnecessary to forbid Congress to do things that it did not have the power to do in the first place.[158]

The draft constitution was agreed to by all of the state delegations on September 15, 1787, but by its terms required ratification by popularly-elected conventions in three-fourths of, or nine of the thirteen, states. During the ratification process, the supporters of ratification, who supported the Constitution and the strong national government it created, became known as Federalists and the opponents as Anti-Federalists.[159] The Anti-Federalists used the absence of a bill of rights as a major reason for their opposition, although they opposed the Constitution for other

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government." Kelly, Harbison & Belz *The American Constitution: Its Origins & Development 6th Edition* (1983) 105.

[156] At this time eight of the thirteen states had constitutions that included bills of rights. Also, in the Northwest Ordinance of 1787, Congress had enacted a bill of rights applicable to territorial inhabitants which, among other things, prohibited sex discrimination in land ownership and banned slavery in the Northwest Territory.

[157] It is not clear that this was correct, given that the Constitution's supremacy clause makes it supreme to the state constitutions and laws.

[158] Two days after Mr. Mason's motion, another delegate moved to insert a clause guaranteeing the freedom of the press. This motion too was defeated, on the ground that it was unnecessary because the powers of Congress did not extend to the press. Levy *Origins of the Bill of Rights* (1999) 13.

[159] The "Anti-Federalists," however, insisted that they were the true federalists, as they were in favor of preserving a federation of states with strong state governments, and that the "Federalists", who supported a strong central government, should really be called Consolidationists or Nationalists. *See* Kelly, Harbison & Belz *Origins & Development* 107.

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reasons (particularly reasons of state sovereignty) as well.[160] After vigorous public debate,[161] and very close votes in some of the conventions, the requisite nine state ratifications were completed on June 21, 1788. However, in addition to ratifying, the conventions in several states recommended amendments to Congress. Some of these proposals – particularly Virginia's proposal of a bill of rights containing twenty articles – would become important to the enactment of the Bill of Rights contained in the first ten Amendments to the Constitution.[162]

b. Amendments I to X

During the ratification process, some Federalists began to believe that a bill of rights was indeed necessary, both to ensure ratification and to preserve the powers that the Constitution had given to the new national government. In addition to proposing amendments, four states had called for a second constitutional convention, and the Federalists worried that this would result in severe limitations on the new government's powers. As a result, they decided that it was necessary to convince the new Congress to adopt a bill of rights.

Accordingly, on June 8, 1789, Virginia Congressman James Madison, a prominent Federalist who had been a delegate to the Constitutional Convention, proposed a bill of rights to the House of Representatives.[163] After an initially lukewarm reception, in August 1789 the House approved seventeen proposed amendments protecting individual citizens' civil and political rights. The Senate accepted most but not all of the House proposals and combined some of the amendments, reducing the number to twelve. Importantly, the Senate rejected language in the House version that would have prohibited the states, in addition to the

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[160] *See id.* 108-10 for a discussion of the Anti-Federalists' positions.

[161] During this time, proponents and opponents of ratification published their views in the newspapers. The most famous of these were series of 85 essays in favor of ratification published in New York newspapers, written by James Madison, Alexander Hamilton, and John Jay, which have become known as *The Federalist Papers*, and *Lee's Letters from the Federal Farmer to the Republican*, written by Richard Henry Lee in opposition to ratification. *The Federalist Papers* have since been used by lawyers, judges and scholars as an authoritative source on the meaning of the Constitution.

[162] As Levy notes, "[e]very right that became part of the first ten amendments was included in state recommendations except the clause in the Fifth Amendment requiring just compensation for private property taken for public use." Levy *Origins* 32. It must be noted, however, that the various states that recommended amendments were not only concerned by the Constitution's lack of a bill of rights. As Levy notes, "the states also recommended crippling restrictions on [the new national government's] delegated powers." *Id.* 31.

[163] Madison's proposed amendments were based primarily on state constitutions and the recommendations of the state ratifying conventions, particularly those of Virginia.

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federal government, from infringing on speech, press, religion and trial by jury.[164] The rejection of this provision demonstrates that the drafters were more concerned with states' rights than with individual rights:

> This was, of course, a momentous change which shows that federalism—rather than a desire to protect individual liberty against government encroachment from whatever source—was the chief concern of Congress in approving the Bill of Rights. Madison and his colleagues [in the House] had sought to appease states'-rights sentiment by offering general guarantees of individual liberty, but the states'-rights men [in the Senate] enacted a higher price by turning the amendments exclusively into restrictions on the federal government."[165]

The original Bill of Rights' chief concern was federalism; it was not until after the enactment of the Fourteenth Amendment, which was directed at the states and was concerned with preventing majorities from trampling minority rights, that the Bill of Rights came to be viewed as primarily protecting the rights of persons rather than of the states.[166]

A joint committee then reconciled the differences in the two houses' versions, and on September 24 and 25, 1789, the House and Senate, respectively, approved the amendments as provided in the joint committee report. As a result, twelve amendments were submitted to the states for ratification. As Vermont had been added to the Union, eleven states were needed for ratification. Within six months, nine states had ratified the second through twelfth proposed amendments, rejecting the first and second.[167] Vermont became the tenth state to ratify the ten amendments that comprise the US Bill of Rights in November 1790, and Virginia the eleventh on December 15, 1791.[168] These ten amendments protect various civil and political rights – the freedom of religion, speech, press, and assembly; the rights to bear arms, to be free from unreasonable searches and seizures, to property, to liberty, to fair trial, and to be free from cruel and unusual punishment – from government interference.

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[164] *See* Levy *Origins* 289.
[165] Kelly, Harbison & Belz *Origins & Development* 121-22.
[166] *See* Amar *The Bill of Rights* (1998).
[167] The first rejected amendment dealt with the relationship between population and the number of representatives from each state, and the second would have prohibited an increase in Congressional salaries until after the next election.
[168] Connecticut and Georgia refused to ratify the amendments. Massachusetts also did not ratify at the time – its two houses separately approved eight of the amendments, but the legislature as a whole

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c. The Post-Civil War Amendments

During the period following the Civil War of the 1860's, three additional amendments protecting individual rights were added to the US Constitution: the Thirteenth, Fourteenth and Fifteenth Amendments. The Thirteenth Amendment, ratified in 1865, abolished slavery. The Fourteenth Amendment, which was ratified in 1868, provides that all persons born or naturalized in the United States are citizens of the United States and of the state where they reside, and forbids any state from "abridg[ing]the privileges or immunities of citizens of the United States," depriving any person of "life, liberty or property, without due process of law," or denying any person "the equal protection of the laws." The Fourteenth Amendment also ended the three-fifths rule for counting slaves for purposes of Congressional representation, determined which Southern leaders would be eligible to hold state or federal office, and guaranteed Union war debts while repudiating Confederate ones.[169] The Fifteenth Amendment, ratified in 1870, prohibited the denial of the right to vote on account of race, color, or previous condition of servitude. All three amendments gave Congress the power to enforce their guarantees through the enactment of appropriate legislation. Because of the importance of the Fourteenth Amendment to the topic of this dissertation, the circumstances surrounding its drafting and ratification are discussed in some detail in the following paragraphs.

The Fourteenth Amendment was drafted by the 39th Congress, which convened in December 1865. The primary drafter and proponent of the Amendment was Congressman John Bingham of Ohio, and much of the work on the Amendment was done by the Congress' Joint Committee on Reconstruction, of which Bingham was a member. Several concerns motivated the Amendment. Various Southern states had recently passed "Black Codes" restricting the rights and freedoms of the newly-freed former slaves, as well as of whites who sympathized with blacks or questioned the Codes. These Codes prompted the 39th Congress to enact the 1866

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never promulgated a bill approving the amendments. All three of these states belatedly ratified the Bill of Rights on the occasion of the Constitution's 150th anniversary in 1939.

[169]With respect to representation, the Amendment also provided that, if a state denied any of its male citizens over the age of 21 the right to vote, except for participation in rebellion or commission of a crime, its representation would be reduced in proportion to the denial. This provision, however, was never enforced and many states, both Southern and Northern, denied blacks the franchise until they were prohibited from doing so by the Fifteenth Amendment.

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Civil Rights Act, but some Congressmen remained concerned that the Thirteenth Amendment was not a sufficient constitutional basis to allow Congress to enact national civil rights legislation and wanted a new amendment to clearly authorize such legislation. The proponents of the Amendment also sought to invalidate the infamous 1857 case of *Dred Scott v. Sanford*, in which the Supreme Court had held that blacks were not citizens of the United States. Lastly, but not least, Northern Republicans, who controlled Congress in the absence of the Southern states, were concerned that the return of the Southern, predominately Democratic representatives (of which there would be more due to the freeing of the slaves) would endanger their control of the national government and threaten the principles for which the North had fought and won the Civil War.[170]

On January 12, 1866, Bingham proposed to the Joint Committee an amendment that would give Congress "power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property."[171] The proposal was considered by a subcommittee, which amended the language to read "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property."[172] The Joint Committee, however, further amended the proposal to read: "Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each state all privileges and immunities of citizens in the several states (Art. IV, Sec.2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)."[173] As Nelson has noted, the change in the language of the rights proposal from "political rights and privileges" to "privileges and immunities," the

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[170] This final concern led to the inclusion of the never-to-be-enforced rule diminishing representation if the freed slaves were denied the vote. As Meyer explains, "[b]efore the secession, a state with a million blacks and a million whites had been represented as if it had had a population of 1.6 million. Now such a state would be entitled to representation based on the entire population of two million, even if it continued to confine the privilege of voting to its whites. Its voters would outvote the voters in a free state by two to one, instead of by 1.6 to one. This reward for rebellion was so unfair that there had to be a remedy, even if legislators' prejudices – or their constituents' prejudices – would not permit them to enact prompt suffrage for the freedmen." Meyer *The Amendment that Refused to Die: Equality and Justice Deferred, the History of the Fourteenth Amendment* (2000) 46.

[171] Nelson *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988) 49.

[172] *Id.* 49.

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language used in the Fourteenth Amendment, was significant: "With this substitution, a key question in Fourteenth Amendment jurisprudence became: what are the privileges and immunities of citizens and how, if at all, do they differ from the "rights of life, liberty and property?"[174]

The Joint Committee then proposed this language, as well as a second amendment providing that House representation would be based on population but that if the franchise were denied by a state on account of race, creed or color, all persons of that race, creed or color would be excluded from determining that state's representation, to the Congress, but neither secured the approval of both houses.

After the defeat of these two proposals, Congressman Robert Dale Owen Jr. proposed a compromise that became the basis for the future Fourteenth Amendment. Owen's proposed amendment contained five sections: the first prohibiting "discrimination . . . as to the civil rights of persons because of race, color or previous condition of servitude," the second prohibiting such discrimination as to voting rights after 1876, the third reducing the representation of states if they denied blacks the vote prior to 1876, the fourth prohibiting the payment of Confederate war debts, and the fifth granting enforcement power to Congress.[175] On Bingham's motion, the Joint Committee added an additional section to the Owen proposal, the language of which would become part of the Fourteenth Amendment's section one: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Four days later, however, the Joint Committee voted to delete

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[173] *Id.* 50.

[174] *Id.* 51. Nelson offers three possible reasons for the change. First, the drafters may have been more interested in finding the most inspiring rhetoric than in defining the specific content of the rights protected. Second, the vague language may have been chosen to ease passage of the proposal in the face of opposition to granting blacks political rights. Third, the language may have been chosen because of distinctions in the law of the time between the rights of aliens and the rights of citizens: all persons possessed certain basic rights, although citizens possessed additional rights, including but not limited to political rights. Thus the elimination of the words "political rights" may have been meant to show that all of the special rights of citizens (*i.e.,* the right to serve on a jury and in the militia, to hold a passport, and in some states to own property) were protected, not just the political rights of voting and holding office. *Id.* 52-53.

[175] *Id.* 55.

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Bingham's additional section, perhaps because they viewed it as redundant to Owen's provisions.[176]

Before making a final proposal to the full Congress, the Joint Committee amended Owen's sections two and three, which would have guaranteed voting rights to blacks after 1876 and reduced the representation of states who denied blacks the vote prior to that date. The Committee instead adopted what became section two of the Fourteenth Amendment, which reduced the representation of states that did not allow blacks to vote, and a section that denied all persons who had supported the Confederacy the right to vote in federal elections until 1870. With Owen's language guaranteeing black suffrage deleted, Bingham moved to again add his proposed section in place of Owen's section one, which mentioned only civil rights. This motion passed, and the Committee approved and sent their proposed language to both Houses of the Congress.[177]

The Committee's recommended amendment passed the House as proposed. The Senate, however, changed it in two ways. First, the Senate added to section one a sentence stating that all persons born or naturalized in the United States are citizens of the United States and of the state in which they reside, to overrule the *Dred Scott* holding that blacks were not US citizens.[178] Second, it changed section three to provide that only supporters of the Confederacy who had taken an oath to support the Constitution prior to the war would be barred from holding federal office. The House approved these changes, and on June 13, 1866 what became the Fourteenth Amendment was sent to the states for ratification. After the requisite twenty-six states had ratified, on July 28, 1868 the US Secretary of State proclaimed the Fourteenth Amendment to be part of the US Constitution.

2. Structure of Government

The US Constitution creates a federal system, expressly delineating the powers of both the national government and the state governments. The Constitution

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[176] *Id.* 56.

[177] As Nelson notes, these changes to the Owens proposal meant that Committee's final recommendation was nearly identical to the two earlier proposals that had failed, except that the new proposal used self-executing language for the protection of rights (which made its guarantees judicially enforceable even if Congress failed to legislate to protect them) and had a separate grant of enforcement power to Congress (which applied to all sections of the proposed amendment). *Id.* 57-58.

[178] *Id.* 58.

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sets forth a three-part national government, establishing a legislature, an executive, and an independent judiciary that exercise checks and balances on each other's powers. The Constitution expressly provides that it is the "supreme Law of the Land," binding not only on the national government but also the government of the states.

The Constitution vests the national lawmaking power in a bicameral legislature, the Congress, consisting of a House of Representatives, where each state is represented based on its population, and a Senate, where each state has two representatives.[179] Members of both houses are popularly elected.[180] To become a law, a bill must receive a majority vote in both houses.[181] It then must be presented to the President (the chief executive). If the President signs the bill, it becomes law. If the President objects to the bill and returns it within ten days to the house where it originated without his signature, it will not become law, unless both houses of the Congress override the President's veto by two-thirds votes. If the President does not return the bill within ten days, it becomes law without his signature, unless Congress has adjourned during the ten-day period, in which case it is automatically vetoed.[182]

The Constitution grants the House the power of impeachment -- the power to accuse an official (including the President) of wrongdoing that may result in removal from office -- and the Senate the power to try impeachment cases.[183] A majority vote in the House impeaches an official, and a two-thirds vote of the Senate convicts him or her.

The executive power is vested in the President, who with the Vice President serves a four-year term. Since the Twenty-Second Amendment was ratified in 1951,

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[179] The US House of Representatives contains 435 members, each of whom is elected for two years. This number was set in 1929, to keep the House from growing too large and unwieldy. Today, this amounts to one representative for roughly every 600,000 persons. As there are fifty states, the US Senate consists of 100 members, each elected for six years.

[180] Prior to the ratification of the Seventeenth Amendment in 1913, Senators were elected by the state legislatures

[181] If the bill is a revenue bill, it must have originated in the House, although the Senate may propose amendments to such bills.

[182] This is referred to as the "pocket veto."

[183] Article II, Section 4, provides that "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." Only two US Presidents have ever been impeached, and neither was convicted: Andrew Johnson in 1868 and Bill Clinton in 1999. Senators and Representatives are not removed from office by impeachment and conviction. Rather Article I gives each house the power to expel a member by a two-thirds vote

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the President has been limited to two terms. The President and the Vice President are chosen by electors selected in the manner specified by each state's legislature.[184] Originally electors were chosen by the state legislatures, but today they are chosen based on the popular vote in each state. Most states' laws award all of its electors to the candidate who wins the popular vote, although a few states allow the electors to be split based on the votes received.[185] Each state's electors equal the number of its Senators and Representatives.[186] A majority of the electoral votes cast[187] is required to become President or Vice President. If no Presidential candidate receives a majority, the House selects the President from among the three candidates with the most votes. Each state (not each Representative) has one vote, at least two-thirds of the states must participate, and a majority of the votes is required to elect a President. If no Vice Presidential candidate receives a majority, the Senate chooses the Vice President from among the two candidates with the most votes. Each Senator has one vote, two-thirds of the Senators must participate, and a majority of the votes is required to elect a Vice President.

The Constitution vests the federal judicial power in the US Supreme Court and any inferior courts created by Congress, and establishes their jurisdiction.[188] The judiciary is independent: federal judges, who are appointed by the President with the

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[184] The electoral system as it exists today is set out in Article I, Section 1, as amended by the Twelfth Amendment, which was ratified in 1804.

[185] As demonstrated in the 2000 Presidential election this predominately "winner take all" system allows for the possibility that one candidate may win the electoral college vote and therefore the Presidency, even though another candidate won the nationwide popular vote.

[186] The total number of electors today is 538. Even though it is not a state and is not represented in Congress, pursuant to the 23rd Amendment (ratified in 1961) the District of Columbia has three electors, equal to the number of electors allowed the smallest states.

[187] 270, assuming all 538 electoral votes are cast.

[188] Under Article III, federal jurisdiction extends to "all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties. . . ," cases affecting Ambassadors, other public ministers and consuls, admiralty and maritime cases, cases to which the US is a party, controversies between two or more states, controversies between citizens of different states, and controversies between citizens of the same state claiming land under grants of different states. Initially the federal courts also heard cases between a state and citizens of another state and between a state and a foreign country or citizens, until the ratification of the Eleventh Amendment in 1795 removed these cases from federal jurisdiction. The Supreme Court has original jurisdiction in cases involving Ambassadors, public ministers and consuls and in cases involving a dispute between states. In the other types of cases listed, the Supreme Court has appellate jurisdiction. Each of the US states also has its own system of courts.

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approval of the Senate, serve life terms absent misbehavior,[189] and their salaries may not be lowered while they remain in office. In deciding cases,[190] federal judges can invalidate Congressional and state legislation and acts of federal and state officials if they find them to be unconstitutional.[191]

3. Amendment

The Constitution requires that an amendment must be proposed by two-thirds of both houses of the Congress, or by special conventions called by Congress at the request of two-thirds of the states' legislatures. It then must be ratified by three-fourths of the state legislatures or by special conventions in three-fourths of the states. This is a difficult procedure to complete, and only 26 amendments have been enacted since the Constitution was ratified.

4. The Bill of Rights

The original US Constitution did not include a bill of individual rights and freedoms, although it did forbid Congress from interfering with the right of *habeas corpus*[192] or from passing bills of attainder[193] or *ex post facto* laws,[194] guarantee a jury trial in all criminal cases, require the states to recognize the "privileges and immunities of Citizens in the several States," and outlaw any religious qualification for public office. What is referred to as the US Bill of Rights is contained in the first ten amendments to the Constitution, which were ratified in 1791.

These amendments initially applied only to the federal government, although most of the rights contained therein now have been judicially held to apply to the states as well. In what has been called "incorporation" of the Bill of Rights against the states, the courts reasoned that the states were bound to respect these rights under

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[189] Like the President, Vice President, and other US officeholders, federal judges may only be removed from office if they are impeached and convicted of "Treason, Bribery, or other high Crimes and Misdemeanors."

[190] Article III's use of the words "cases" and "controversies" means that the federal courts can only adjudicate concrete disputes, as opposed to hypothetical cases, and cannot issue merely advisory opinions.

[191] Although not expressly mentioned in the Constitution, the power of judicial constitutional review was recognized in *Marbury v. Madison* 1 Cranch 137, 2 L.Ed. 60 (1893) and has been applied in innumerable cases since then.

[192] A writ of *habeas corpus* is a legal remedy used to test the legality of the detention or imprisonment of a person.

[193] A bill of attainder is a law that punishes a single individual without trial.

[194] An *ex post facto* law is a law passed after an occurrence or action which changes its the legal consequences. For example, a law that, after the fact, makes an innocent action a crime.

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the Fourteenth Amendment's due process clause, which forbids the states to deny any person "life, liberty or property without due process of law." Only four rights in the Bill of Rights have not been incorporated against the states: the right to bear arms, the guarantee against the quartering of soldiers in private homes, and the rights to grand and civil juries.[195] However, unlike the Namibian and South African bills of rights, the US Bill of Rights generally does not apply to private entities or individuals. In certain limited instances, for example where the private entity has taken on a government function or is in a symbiotic relationship with the government, the US Supreme Court has applied the Bill of Rights to a private entity,[196] but this is the exception rather than the rule.

Unlike the other Constitutions studied here, the US Bill of Rights guarantees only the first generation civil and political rights. The US Bill of Rights also contains no general limitations clause. Many of the rights therefore seem absolute on their face, although limitations have been developed through judicial decisions. For example, the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech," yet the US Supreme Court has permitted Congress and the states to legislate in many areas affecting speech and expression, such as to punish defamation and to restrict obscenity.[197]

E. Conclusion

The three Constitutions studied are based on the same underlying principles. All follow "the modern normative conception of constitutionalism," which requires that government be divided into three separate branches (executive, legislature, and judiciary) whose powers are balanced against one another, which holds that the people's agreement to obey the government is based on the government's restricting the exercise of its power to that given in the Constitution, and which uses judicial review as the mechanism for enforcing the Constitution's arrangements and guarantees.[198] However, the Constitutions do differ in their details.

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[195] *See* Amar *Rights* 220.
[196] *See* Chapter III Part B.6 *infra.*
[197] *See generally* Lockhart, Kamisar, Choper & Shiffrin *Constitutional Law 6th Edition* (1986) Chapter 8.
[198] Currie & DeWaal *New Constitutional Law* 11. This is different conception of constitutionalism than the earlier, British conception that simply described the institutions and functions of government.

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Thus, all three Constitutions separate the government into the same three branches, but the organization and powers thereof, particularly in terms of the executive and the legislature, vary. In the US there is a separation of personnel between the executive (the President and Cabinet) and the legislature (meaning that a person cannot serve in the executive and the legislature at the same time), whereas in South Africa and Namibia, Cabinet members are selected from and remain members of the legislature.[199] In this respect South Africa and Namibia follow the British Westminster system. In South Africa, as in the British system, Cabinet members are accountable to the legislature; in Namibia Cabinet members are accountable to both the legislature and the President; and in the US Cabinet members are accountable to the President only. Further, like the Prime Minister in the Westminster system, in South Africa the chief executive (the President) is chosen by the National Assembly and his or her term is linked to that of the Parliament. Further, the South African National Assembly may pass a motion of no confidence against the President, or, in the case of a serious violation of the Constitution or law, serious misconduct or an inability to perform the functions of the office, may by two-thirds vote remove him or her from office.[200] In Namibia, by contrast, the chief executive (the President) is directly elected by the people for a set term and can only be impeached by the legislature for a violation of the Constitution or law or gross misconduct or ineptitude; there is no provision for a vote of no confidence against the President. In this respect Namibia is similar to the US system, where the President can only be removed upon impeachment and conviction for "Treason, Bribery or other high Crimes and Misdemeanors,"[201] and not by a vote of no confidence. However, in the US system the President cannot dissolve the legislature as he/she can in Namibia (although in Namibia this triggers a new legislative and Presidential election within 90 days).

Rather, modern normative constitutionalism is closer to the German concept of "Rechstaat" which places express limitations on the state's powers of governance. *See id.* 12 & n.26.

[199] As the Constitutional Court has recognized, in this respect South Africa (and Namibia) follow the approach to separation of powers of many other Commonwealth countries, where there is not a strict separation between the executive and legislative branches, although there is an independent judiciary. *See Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* 1995 (4) SA 877 (CC) paras 55, 60.

[200] However, either of these events triggers the requirement that the National Assembly must elect a new President within 30 days and, if it fails to do so, the Acting President must dissolve the Assembly and an election will follow. RSA Const. Section 50.

[201] US Const. Article II, Section 4.

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Finally, all three systems include bicameral (two-house) legislatures, but the respective roles of the houses differ. In the US the two houses share the lawmaking power equally, whereas in both Namibia and South Africa one house (in both cases the National Assembly) holds the upper hand in lawmaking. However, in all three systems, consistent with the idea of checks and balances, the President has a role in the law-making process, and the courts have the power to invalidate legislation that is inconsistent with the Constitution.

Each of the Constitutions also includes a judicially-enforceable bill of rights, although again here the specifics differ. In this respect the US Constitution is the most limited of the three, protecting only first generation civil and political rights. The Namibian and South African Constitutions, on the other hand, both include second generation rights such as the rights to education, culture and language. In addition, the South African Constitution contains enforceable third generation rights to access to adequate housing, food, health care, and social security, while the Namibian Constitution includes some second and third generation rights as hortatory "principles of state policy." Furthermore, the Namibian and South African bills of rights, at least in some instances, apply to private actions, whereas the US Bill of Rights typically does not. The Namibian and South African Constitutions also have made their bills of rights more difficult to amend than other sections, in Namibia going so far as to prohibit any amendments that reduce or detract from the rights. In the US, by contrast, all types of amendments follow the same process.

Finally, with respect to the topics that are the focus of this dissertation, it is clear from the above discussion that the protection and achievement of equality is given an emphasis in the Namibian and South African Constitutions that is not found in the US Constitution. For example, the South African Constitution not only provides a right to equality and to not be discriminated against, it also explicitly places equality among the nation's founding values (which are made very difficult to amend), specifies that any right in the Bill of Rights may be limited only to the extent justifiable in an open and democratic society based on freedom and equality, and requires that all rights in the Bill of Rights must be interpreted to promote the values which underlie such a society. In addition, both the Namibian and South African Constitutions expressly permit affirmative action to help achieve equality and provide

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that their provisions concerning equality cannot be suspended during states of emergency. This emphasis is not surprising, given the histories of Namibia and South African and the contexts in which the Namibian and South African Constitutions came about.

The specific ways in which the constitutional provisions concerning equality have been applied and interpreted in the three countries is the focus of the next two Chapters.

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III. Equality and Non-Discrimination

A. The Concepts of Equality and Non-Discrimination

What is, or should be, meant by a guarantee of equality? Equality has long been an important value in Western legal and political thought, and can be traced back to as early as Greek and Roman times.[1] Even at a time when slavery was accepted and women were afforded no legal rights, the drafters of the American Declaration of Independence nevertheless felt it important to announce that "all men are created equal." Yet, although the concept is familiar, it is not necessarily easy to understand or explain:

> The concept of equality is, by any measure, a complex and elusive construct. While most of us, when pressed, would confidently assert that we know what equality means, any close consideration of the concept will invariably bring us to varying interpretations, dead-ends and confusions difficult to reconcile with our vast but previously unexamined certainties on the subject. And while there seems to be a broad consensus in modern democratic states that equality is a good thing – something akin to motherhood, apple pie and the right to vote – there is no agreement, not even within the liberal democratic discourse, on the nature and scope of this concept.[2]

Many writers have raised more questions than answers on the subject. Does equality mean the Aristotlean concept that those that are alike must be treated alike, while those that are not alike must be treated differently to the extent of their difference? If so, on what basis is likeness or difference determined? With respect to what is equality measured – is it equality of welfare, utility, resources, goods, opportunity, or something else? Does equality mean the formal Lockean notion that all humans are equal bearers of rights, and therefore simply require the treatment of every human according to the same neutral norm or standard? Or, does it instead contemplate a substantive approach, where what is required is equality of outcome in light of actual social, political and economic circumstances, rather than simply equality of treatment? Is equality the same thing as the right not to be discriminated against, or are they distinct concepts?

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[1] *See* Chemerinsky "In Defense of Equality: A Reply to Professor Westen" 81 *Mich L Rev* 575 & n.1 (1983).

[2] De Vos "Substantive Equality After *Grootboom*: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence" (paper presented at Conference on Equality: Theory and Practice in South Africa and Elsewhere, Cape Town, 18-20 January 2001) n.6.

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Equality is comparative, and thus has been described as an "empty" idea.[3] This is because it requires some external standard of comparison, and it is only the external standard that provides the concept with any content. "[A]ssertions of equality and inequality in law and morals have no meaning apart from the prescriptive rules they necessarily incorporate by reference."[4] Thus, for example "blacks and whites are undeniably equal to each other just as they are undeniably unequal. Like all persons and things, blacks and whites are undeniably equal to one another by some descriptive standards, and unequal by others: descriptively unequal by descriptive standards of skin pigmentation; descriptively equal by the descriptive standard of *possessing* human skin."[5] Stated another way, "the real question is not 'equal or unequal,' but 'equal in what respect.'"[6] In addition, the concept of equality is also confusing, because while it presupposes these external standards of comparison it often does not express them clearly. Accordingly it has been argued that it would be better not to talk indirectly of "equal protection" but rather to directly focus on the underlying right to be free of stigmatic classification, such as classification based on race.[7]

With these questions and criticisms in mind, the remaining sections of this Chapter consider the way in which the concepts of equality and non-discrimination are being interpreted and applied in Namibia, as compared to in South Africa and the United States.

B. Judicial Interpretation

All three of the jurisdictions considered, and others, have recognized that constitutional guarantees of equality and non-discrimination do not prevent government from making distinctions between people or categories of people. Governments make distinctions between people or categories of people all the time – for example, taxing persons with different income levels at different rates, or permitting only persons of a certain age or older to drive automobiles -- and it would be impossible to govern without doing so. Since some distinctions are allowed, the

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[3] Westen "The Empty Idea of Equality" 95 *Harvard L Rev* 537 (1982); Westen "The Meaning of Equality in Law, Science, Math and Morals: A Reply" 81 *Mich L Rev 605* (1983).
[4] Westen "The Meaning of Equality" 623.
[5] *Id.* 624.
[6] *Id.* 628.
[7] *Id.* 663.

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focus then necessarily becomes how to determine which distinctions are permissible and which are not. This depends on the ground upon which a particular distinction is made.

Namibian constitutional law distinguishes between grounds that are listed in the Namibian Constitution's non-discrimination clause and grounds that are not. South Africa's approach is similar, distinguishing between the grounds listed in its non-discrimination clause and analogous grounds, on the one hand, and non-listed non-analogous grounds, on the other hand. In both of these jurisdictions, distinctions based on the former sort of grounds are unconstitutional if they amount to unfair discrimination, which is primarily determined by their effect on the victim's dignity, while distinctions of the latter type are only unconstitutional if they are unreasonable. As the US Constitution does not include a clause prohibiting discrimination on certain listed grounds, the US approach categorizes distinctions based on whether or not they involve a suspect criterion or affect the exercise of a fundamental right. Distinctions involving suspect criteria or affecting fundamental rights receive a heightened form of scrutiny (depending on the ground, they must be shown either to be necessary to achieve a compelling governmental interest or substantially related to an important governmental interest), whereas all other distinctions simply must pass a reasonableness test.

The sections that follow more fully explain these approaches.

1. Simple Differentiation

All three countries use the same approach to test the constitutionality of simple differentiation. This means differentiation that: in Namibia, is not based on one of the grounds listed in Article 10(2) of the Constitution; in South Africa, is not based on one of the grounds listed in Section 9(3) of the Constitution or a non-listed ground that either impairs the fundamental dignity as human beings of the persons affected or in some other invidious way adversely affects them in a comparably serious manner; and in the US, does not involve a suspect criteria or burden a fundamental right. The South African cases have referred to such differentiation as "mere differentiation." For this, all three jurisdictions apply what is referred to as rationality review: the differentiation is constitutional if it has a rational connection to a legitimate government interest.

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The Namibian case of *Mwellie v. Minister of Works, Transport and Communication and Another*[8] illustrates the approach. In this case, a former public employee alleging wrongful termination of his employment challenged the constitutionality of a section of the Public Service Act setting a twelve-month statute of limitations for claims arising under the Act. He argued that the section violated Article 10(1)'s guarantee of equality before the law by providing for a limitations period applicable to certain litigants and cases but not to others. The Namibian High Court found that, despite its unlimited wording, Article 10(1) is not absolute, but rather permits reasonable classifications which are rationally connected to a legitimate object. Applying this analysis, the court rejected Mr. Mwellie's claim. The court noted that although the law classified public employees in a class of their own, it treated all public employees the same. The court further found it reasonable for the law to treat public employees differently from non-public employees in terms of the time within which they must bring a lawsuit. It based this finding on a number of factors: the size of the public service, its geographic dissipation, the high number of ministries and departments involved, the high rate of staff turnover, the need for the state to be able to timely investigate allegations against it, budgetary constraints, and the urgency involved in these types of cases.

The *Mwellie* court recognized that it was adopting the interpretation applied in other countries with similar equality clauses, including South Africa, the US, and India. The court noted that like Article 10(1), the text of the US Fourteenth Amendment seems absolute, but that US courts have recognized that the clause permits reasonable legislative classifications. As described in a US constitutional law treatise quoted by the court,

> the [US] equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or "draw lines" in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria arbitrarily used to burden a group of individuals. If the government's classification relates to a proper governmental purpose, then the classification will be upheld. Such a classification does not violate the guarantee when it distinguishes persons as "dissimilar" upon some permissible basis in order to advance the legitimate interests of society.[9]

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[8] 1995 (9) BCLR 1118 (NmH).

[9] *Id.* 1127E (quoting from Nowak, Rotunda & Young *Constitutional Law 3d Edition* 525).

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In sum, the court explained,

> the courts, in all the countries referred to by me, accepted that equality before the law is not absolute and that the legislature must for good and proper government and also for the protection of those who are unequal, legislate. In this legislation reasonable classifications may be made and as long as these classifications are rationally connected to the object of the statute the courts will accept the constitutionality of such legislation.[10]

An illustrative South African case (and one cited by the *Mwellie* court) is *Prinsloo v. van der Linde*.[11] This case involved the Forest Act, which seeks to prevent and control veld, forest and mountain fires by designating areas in which fire-control measures are required. Outside of these areas such measures are not mandatory, although owners are encouraged to undertake them. One method of encouragement is the challenged section, which presumes negligence on the part of the landowner when a fire occurs in a non-controlled area. There is no such presumption applicable to controlled areas.

The differentiation between owners of land in controlled areas and non-controlled areas was not based on any of the grounds listed in the Interim Constitution's equivalent to Section 9(3),[12] nor was it based on a ground that impaired the landowners' fundamental human dignity or adversely affected them in a comparably serious manner.[13] As a result, the differentiation at issue was "mere differentiation." Such differentiation by government is necessary to regulate the affairs of a country. And with respect to mere differentiation, the court explained,

> the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for

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[10] *Id.* 1131C-D.

[11] 1997 SA 1012 (CC). *Prinsloo* and several other important Constitutional Court cases on equality were decided under the Interim Constitution. However, the Constitutional Court has indicated that its analysis of the Interim Constitution's equality clause (Section 8) applies to Section 9 of the Final Constitution, as the provisions are similar. *See National Coalition for Gay & Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) para 15.

[12] The relevant provision of the Interim Constitution, Section 8(2), listed race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, and language. All of these grounds are also listed in Section 9(3), and Section 9(3) also lists pregnancy, marital status, and birth.

[13] *Prinsloo* paras. 31-33, 41.

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> governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority . . . to a culture of justification". Accordingly, before it can be said that mere differentiation infringes section 8 [of the Interim Constitution] it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8.[14]

In applying this test, the court found that the Act's objective was to provide for the prevention and combating of veld, forest and mountain fires, which is a legitimate government purpose.[15] The court further found that there was a rational connection between this purpose and the presumption of negligence imposed on landowners in non-controlled areas. The Act imposed obligations on landowners in fire control areas to prevent fires from spreading, but these obligations did not apply outside of controlled areas. The presumption of negligence therefore ensured that owners in non-controlled areas were also vigilant about fire prevention, by creating a risk that they would be held legally responsible for damage caused by a fire spreading from their land.[16] The court further rejected the applicant's argument that the provision was irrational because it did not use the least onerous means to achieve its objective, stating that "as long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."[17]

It has been correctly noted that the rational connection test is a difficult one for a plaintiff alleging a constitutional violation to overcome.[18] At least three reasons have been identified to explain why this is so: first, in a modern democracy it is unlikely for the government to choose irrational means to achieve a legitimate object; second, courts are often extremely deferential to the legislature's choice of both objectives and means, because of judicial sympathy to the difficulties of legislating

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[14] *Id.* paras 25-26 (footnotes omitted).
[15] *Id.* paras 35, 39.
[16] *Id.* para 40.
[17] *Id.* para 36. *See also Jooste v. Score Supermarkets Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para 17 ("[I]t is irrelevant [to rationality review] whether the scheme chosen by the legislature could be improved in one respect or another.").
[18] *See, e.g.,* De Vos "Equality for all? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court" 2000 (63) *THRHR* 62 70.

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and/or a belief in judicial restraint; and third, it is almost always possible to define a legislative purpose in such a way that the classification is rationally related to it.[19]

Some commentators have argued that the South African Constitutional Court has actually applied two variations of rationality review: a very deferential form where the question is only whether there is reason to believe that the law's purpose *can be achieved* (measured at the time of the law's enactment), and a more exacting version that asks whether the law *actually achieves* its purpose based on the court's own evaluation of the evidence before it.[20] The latter approach has sometimes, although not consistently, been used in cases where the differentiation at issue impacts on constitutional rights, benefits or procedural guarantees.[21] An example of this is the case of *S. v. Ntuli*,[22] which challenged the rule that prisoners without legal representation, but not other prisoners, must obtain a judges' certificate before they could exercise their right to appeal. Recently, the High Court of Namibia followed the reasoning of the *Ntuli* case in invalidating the judges' certificate requirement in Namibia as violating Articles 10(1) and 12 (which relates to fair trial) of the Namibian Constitution.[23] Providing a higher level of review in such cases is similar to the US approach, which applies strict scrutiny in cases where fundamental rights, including the right to access to the courts, are impacted, although the type of scrutiny that is applied in the US cases is different.

2. Differentiation that Amounts to Discrimination

Under the Namibian and South African Constitutions, differentiation that amounts to discrimination is treated differently than simple differentiation. In Namibia differentiation amounts to discrimination if it is based on sex, race, colour, ethnic origin, religion, creed or social or economic status. In South Africa differentiation amounts to discrimination if it is based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, or any other ground that impairs the fundamental dignity of the persons affected or in some other invidious way adversely affects them in a comparably serious manner. However, not

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[19] Freedman "Understanding the Right to Equality" (1998) 115 *SALJ* 243 249.
[20] Currie & De Waal *New Constitutional Law* 350-54.
[21] *Id.*
[22] 1996 (1) SA 1207 (CC).

[23] *S. v. Ganeb*, Case No. 85/98 (NmH 13 December 2001).

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every differentiation on such a ground will be unconstitutional; rather, in both countries, such a differentiation is only unconstitutional when it amounts to "unfair discrimination," which is determined primarily by considering its impact on the victim or victims, particularly its effect on their dignity.

This approach was articulated by the South African Constitutional Court in cases such as *President of the Republic of South Africa v. Hugo*[24] and *Harksen v. Lane NO*,[25] and was adopted by the Namibian Supreme Court in *Muller v. President of the Republic of Namibia and Another*.[26] The approach is one of substantive equality, which seeks equality of outcome in light of actual circumstances (rather than formal equality, which requires equal treatment of all persons according to the same neutral standard regardless of their circumstances.) It has been called "a 'contextual approach' to equality, in which the actual impact of an alleged violation of the right to equality on the individual within and outside different socially relevant groups must be examined in relation to the prevailing social, economic and political circumstances in the country."[27]

The recognition that a differentiation on an otherwise impermissible ground may not always be unfair takes into account both the texts of the Namibian and South African Constitutions (which expressly allow affirmative action[28]) and the circumstances that exist in these countries. It has been said, in the South African context, that a formal understanding of equality would "risk[] neglecting the deepest commitments of the Constitution."[29] The same is true in Namibia. Both the Namibian and the South African Constitutions seek not only to guarantee equality in the present and for the future, but also to undo the imbalances that still exist from the past. To meet this latter goal, it is not enough that the discriminatory laws that once existed are no longer in force and that neutral standards are now being applied.[30]

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[24] 1997 (6) BCLR 708 (CC).
[25] 1998 (1) SA 300 (CC).
[26] 2000 (6) BCLR 655 (NmS).
[27] De Vos "Equality for All?" 66-67.
[28] Nam. Const. Article 23(2) & (3); RSA Const. Section 9(2).
[29] de Waal, Currie & Erasmus *The Bill of Rights Handbook 4th Edition* (2001) 200.
[30] *See National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Another* 1999 (1) SA 6 (CC) para 60 ("It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."); *see also* De Vos *Equality for All?* at 67 ("[F]ormal equality is blind to entrenched structural

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As the Constitutional Court explained in *Hugo*, "[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[31] However, because the Constitution "contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination,"

> [e]ach case . . . will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether the impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context. . . . To determine whether th[e] impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.[32]

In *Harksen*, the court specified several factors to be taken into account in the unfairness inquiry. These factors, which are to be assessed objectively and do not constitute a closed list, are:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question . . .;

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inequality. It ignores actual social and economic disparities between people and constructs standards that appear to be neutral, but which in truth embody a set of particular needs and experiences which derive from socially privileged groups. Reliance on formal equality may therefore exacerbate inequality. Substantive equality, on the other hand, requires courts to examine the actual economic and social and political conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. Such an inquiry reveals a world of systematic and pervasive group-based inequality, which needs to be taken into account in the formulation of jurisprudential approaches to equality rights.").

[31] *Hugo* para 41.

[32] *Id.* paras 42-43.

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(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[33]

When the Constitutional Court applied these factors in both *Hugo* and *Harksen,* it found the discrimination at issue in each case not unfair. *The Hugo* case involved a Presidential Act that granted remission of the remainder of their sentences to certain prisoners, including mothers of children under the age of twelve years. A prisoner who was the single father of an under twelve year old son challenged the act as discriminatory. A majority of the Constitutional Court noted that the provision discriminated on the combined basis of sex and parenthood of a young child, the first of which was a listed ground. Therefore, unfairness was presumed. The majority, however, found the presumption to be rebutted.

The majority recognized that the Act was based on the generalization that mothers are primarily responsible for the care of small children, which it viewed as a valid statement of the situation in South Africa.[34] This fact, moreover, was "one of the root causes of women's inequality in our society."[35] Thus, if the generalization were used to justify depriving women of a benefit or advantage or imposing a disadvantage on them, it would be unfair discrimination. In this case, however, the generalization was instead used to afford mothers an opportunity that was not afforded to fathers.[36] And this, the majority found, was not unfair. As Justice Goldstone explained:

> In this case, two groups of people have been affected by the Presidential Act: mothers of young children have been afforded an advantage: an early release from prison; and fathers have been denied that advantage. . . . [Mothers of young children are a group] who have been the victims of discrimination in the past. The release of mothers will in many cases be of real benefit to children which was the primary purpose of their release. The impact of the remission on those prisoners was to give them an advantage . . . . It is true that fathers of young children in prison were not afforded early release from prison. But although that does, without doubt, constitute a disadvantage, it did not restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result

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[33] *Harksen* para 51.
[34] *Hugo* para 37.
[35] *Id.* para 38.
[36] *Id.* paras 39-40.

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> of their conviction, not as a result of the Presidential Act. The Act merely deprived them of an early release to which they had no legal entitlement. . . . The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers was, therefore, in all the circumstances of the exercise of the Presidential power, not unfair.[37]

Justice O'Regan, concurring in the majority opinion, explained further that

> In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our constitution would be better served if the responsibility for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of the discrimination in this case.[38]

She agreed with the majority that, if reliance on this generalization resulted in a greater disadvantage for mothers, it almost certainly would amount to unfair discrimination. However, the harmful impact at issue in the case was experienced by fathers, and in Justice O'Regan's view this impact was not severe. As she explained

> Fathers were denied an opportunity of special remission of sentence. There is not doubt that an early release from jail is beneficial. But in assessing the impact of the discrimination, it must be remembered that their imprisonment resulted, not from the President's act in denying them remission, but from their having been convicted of criminal offences. In addition, they still have the right to apply for special remission of sentence in light of their own circumstances. The effect of the discriminatory act was, therefore, in my view not to cause substantial harm. The harm would have been far more significant in my view if it had deprived fathers in a permanent or substantial way of rights or benefits attached to parenthood.[39]

Justice Kriegler dissented, concluding that the presumption of unfairness attaching to discrimination on a specified ground had not been rebutted. Although he accepted that the Presidential Act was based on a praiseworthy objective and that it did benefit some members of a traditionally disadvantaged class,[40] in his view it perpetuated a stereotype that was in large part responsible for women's disadvantaged position in society. He reasoned that

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[37] *Id.* para 47.
[38] *Id.* para 113.
[39] *Id.* para 114.
[40] *Id.* para 73.

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> the limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth there is no advantage to women *qua* women in the President's conduct, merely a favour to perceived child minders. On the other hand there are decided disadvantages to womenkind in general in perpetuating perceptions foundational to paternalistic attitudes that limit the access of women to the workplace and other sources of opportunity. There is also more diffuse disadvantage when society imposes roles on men and women, not by virtue of their individual characteristics, but on the basis of predetermined, albeit time-honoured, gender scripts. I cannot agree that because a few hundred women had the advantage of being released from prison early, the Constitution permits continuation of these major societal disadvantages.[41]

Justice Kriegler's approach is similar to the US approach, where laws that favor women based on sexual stereotypes have typically been found unconstitutional.[42] The Kriegler/American approach has, however, been criticized as inappropriate for South Africa, as it is inconsistent with the "fundamentally transformative purpose behind the South African Constitution's promise of substantive, not formal, equality."[43]

Harksen was a challenge to provisions of the Insolvency Act providing that when the estate of an insolvent person who is married out of community of property is sequestered, the estate of his or her spouse also falls within the sequestration and will only be released after the solvent spouse proves his or her claim to the property. The Act further provides that the solvent spouse can be summoned for interrogation before and be required to produce documentation about his or her own financial affairs to the creditors of the insolvent spouse. In the court's view, the Act's discrimination between solvent spouses and other persons who had dealings with insolvents[44] was not unfair. Proceeding through the factors it had enumerated, the court found as follows: First, solvent spouses were not a vulnerable group that had suffered discrimination in the past. Second, the purpose of the Act was to protect creditors of

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[41] *Id.* para 83. Justice Mokgoro also concluded that the Act was unfair discrimination, but in his view it was justified under the Constitution's general limitations clause. *See id.* paras 89-106.

[42] *See* Kende "Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation" (2000) 117 *SALJ* 745 752-56.

[43] *Id.* 760, 762-63 ("It is impossible to imagine that the South African Constitution could be so different from how the American Constitution has been interpreted in the equality area and yet the American prohibition on virtually all stereotypes could be transmuted to the South African context. Yet that's the mistake that Kriegler J made.").

[44] This was not a differentiation on a ground specified in the Interim Constitution (which, unlike the Final Constitution, did not include marital status as a specified ground), but the Court found it to be an analogous unspecified ground. The court stated "The differentiation does arise from their attributes or characteristics as solvent spouses, namely their usual close relationship with the insolvent spouse and

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insolvent estates, and this purpose was not inconsistent with the values of the non-discrimination clause. Third, although the Act may cause some inconvenience to solvent spouses, it "is the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary," and does not lead to an impairment of fundamental dignity or another impairment of a comparably serious nature.[45]

The South African "unfair discrimination" approach was adopted by the Namibian Supreme Court in the case of *Muller v. President of the Republic of Namibia and Another*,[46] despite the fact that, unlike the South African provision, the Namibian non-discrimination clause does not use the word "unfairly". The case was brought by a man who wanted, upon his marriage, to change his surname to that of his wife. Under the Aliens Act, compliance with certain formalities, including publication of the intended name change and authorization of the change by the Ministry of Home Affairs, is required for a person to change his or her surname, except in the case of a woman who is assuming the name of her husband upon marriage. Mr. Muller argued that providing an exemption from the name change formalities for a woman changing her name upon marriage but requiring him to follow those formalities in the same circumstances violated Article 10(2)'s prohibition of discrimination on the ground of sex. (He did not claim a violation of Article 14(1)'s guarantee of equality in marriage.)

The Supreme Court rejected Mr. Muller's claim. The court first held that the rational connection test that applied to Article 10(1) should not also apply to Article 10(2). In the case of Article 10(2), the court found there to be

> no basis, on the strength of the wording of the sub-article, to qualify the extent of the limitation thereof and to save legislation which discriminates on one of the enumerated grounds from unconstitutionality on the basis of a rational connection and legitimate legislative objective test. . . . [T]his would permit a relevant legislative purpose to override the constitutional protection of non-discrimination. Article 10(2) which guarantees non-discrimination on the basis of the grounds set out therein would be defeated if the doctrine of reasonable classification is applied thereto and would be to negate that right.[47]

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the fact that they usually live together in a common household. These attributes have the potential to demean persons in their inherent humanity and dignity." *Harksen* para 61.

[45] *Id.* paras 63-68.

[46] 2000 (6) BCLR 655 (NmS).

[47] *Id.* 664F-G.

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The court then set forth a four-step analysis to determine whether there has been a violation of Article 10(2). First, one must ask if a differentiation has been made between people or categories of people. Second, one must ask if this differentiation is based on one of the grounds enumerated in the sub-article. Third, one must determine whether this differentiation amounts to discrimination against such people or categories of people. And finally, if the differentiation amounts to discrimination, it is unconstitutional unless it is covered by Article 23's allowance of affirmative action measures. Finding that in Mr. Muller's case the first two questions must be answered "yes," the court then turned to the third question, how to determine whether the differentiation at issue discriminated against Mr. Muller.

On this question, the court held that differentiation on an enumerated ground will amount to unconstitutional discrimination under Article 10(2) only if it constitutes "unfair discrimination," such as is contemplated in the South African Constitution. The court explained that it was adopting the "unfair discrimination" standard because, "in the context of our Constitution and bearing in mind the background and history which inspired its drafting, I am satisfied that the words "discriminate against" in Article 10(2) of our constitution refer to the pejorative meaning of discrimination."[48]

> This stems from the fact that the grounds enumerated in Article 10(2) are all grounds which in the past were singled out for discrimination and which were based on personal traits where the equal worth of all human beings and their dignity was negated. This is the history against which the drafters of the Constitution formulated the provisions of the Constitution and more particularly Article 10. Furthermore, read with Article 23, the purpose of Article 10 is not only to prevent further discrimination on these grounds but also to eliminate discrimination which occurred in the past. To that extent, and where Article 23 does not cover the situation, Article 10 should not become an obstacle in the elimination process.[49]

Thus, the court explained: "not every differentiation based on the enumerated grounds will be unconstitutional but only those which unfairly or unjustly discriminate against a complainant on the lines [articulated by the South African Constitutional Court]."[50] (The court, however, recognized that South African jurisprudence concerning its Constitution's presumption that discrimination on one or more of the grounds listed in

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[48] *Id.* 665-667.
[49] *Id.* 666J-667B.
[50] *Id.* 667I-J.

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Section 9(3) is unfair unless it is established to be fair[51] is inapplicable to the Namibian Article 10(2) analysis, as the Namibian Constitution does not contain such a presumption.)

The *Muller* court described the approach followed by the South African Constitutional Court to determine whether discrimination is unfair as follows:

> [V]arious factors play a role, the cumulative effect of which must be examined. . . .In this regard, the Court must not only look at the disadvantaged group but also the nature of the power causing the discrimination as well as the interests which have been affected. This enquiry focuses primarily on the "victim" of the discrimination and the impact thereof on him or her. To determine the effect of such impact consideration should be given to the complainant's position in society, whether he or she suffered from patterns of disadvantage in the past and whether the discrimination is based on a specified ground or not. Furthermore, consideration should be given to the provision or power and the purpose sought to be achieved by it and with due regard to all such factors, the extent to which the discrimination has affected the rights and interests of the complainant and whether it has led to an impairment of his or her fundamental human dignity.[52]

Applying this approach, the court found that the Aliens Act's differentiation between men and women wanting to change their surname upon marriage did not unfairly discriminate against Mr. Muller. The court explained its conclusion as follows:

> Although it was accepted that the differentiation created by sec. 9(1) of the Aliens Act is based on one of the specified grounds contained in Article 10(2), there is no question that such differentiation in any way impairs the dignity of the Appellant. Nor was it alleged that that was the case. The Appellant, being a white male, who immigrated to Namibia after Independence, cannot claim to have been part of a prior disadvantaged group. It can furthermore not be said that the purpose of the section was to impair the dignity of males individually or as a group or to disadvantage males. . . . Surnames fulfil important social and legal functions to ascertain a person's identity for various purposes such as social security, insurance, license, marriage, inheritance, election and voting, passports, tax, police and public records as well as many other instances where proper identity plays a role. . . .
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> In this instance the power was exercised by the South African Parliament which was empowered to do so at the time and which, together with the public, had a clear interest in regulating the use of names. The many cases quoted to us show that in most countries of

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[51] RSA Const. Section 9(5).
[52] *Muller* 2000(6) BCLR 667C-F.

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> the world the change of a surname is subject to certain conditions and control.
>
> The effect of the differentiation on the interests and rights of Appellant must be seen . . . against the background that the Aliens Act gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband. In this regard, there is also the uncontested evidence of [the Deputy Permanent Secretary of the Ministry of Home Affairs] that he is not aware of any other husband in Namibia who wanted to assume the surname of his wife. What is more, the Appellant is not without a remedy. Sec. 9 provides a specific mechanism which would enable the Appellant to fulfil his aim. This may involve a certain inconvenience, but . . . there is a necessity for the sake of certainty, for Parliament to regulate the change of a person's surname. The impact of this differentiation on the interests of the Appellant is, to say the least, very minimal, nor does it affect his standing in the community in any detrimental way. The fact that sec. 9 does not accord to a husband the same right to assume on marriage the surname of his wife, as is accorded to the wife, i.e. without complying with the formalities, serves in my opinion the purpose of the Aliens Act without discriminating against the Appellant in the context of our Constitution.[53]

This author, although in agreement with the court's rejection of the rational connection test and adoption of a distinction between benign and unfair discrimination for purposes of Article 10(2), has criticized its application of that test in the *Muller* case.[54] Firstly, as explained in more detail in Part B.5 below, the court's emphasis on the fact that Mr. Muller was not part of a previously disadvantaged group is potentially problematic. The court should have stressed that although relevant, this consideration is not dispositive. Otherwise it might appear that Article 10 protects only members of historically disadvantaged groups.

Secondly, the court asserted that it was in the public interest that name changes should be legally regulated, yet did not offer any reason why it is not necessary to regulate women changing their surname upon marriage but is necessary to regulate men doing so. Mr. Muller was not arguing that name changes could not or should not be regulated. He simply was contending that the exemption from the name change formalities for women taking their husbands' names upon marriage be

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[53] *Id.* 668A-H.
[54] *See* Cassidy "Article 10 of the Namibian Constitution: A Look at the First Ten Years of Interpretation of the Rights to Equality and Non-Discrimination and Predictions for the Future" (paper

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extended to include men taking their wives' names in the same circumstances. The exception would still be limited to marriage, only it would apply to both spouses. This would seem to be a fair and reasonable way to eliminate the sex-based differentiation while protecting the state's interest in controlling changes of name. Alternatively, it has been suggested that both men and women should be required to go through formalities to change their names upon marriage, because a regime that makes it easy for women to take their husbands' surnames upon marriage unfairly discriminates against women. [55] This raises an interesting question: whether the result in the *Muller* case might have been different if both the husband and wife had been the plaintiffs, rather than only the husband.

Thirdly, the court's reliance on the generalization that wives in Namibia normally take their husbands' surnames and that apparently no husbands other than Mr. Muller had ever applied to do the converse is worrying. Tradition should not equal constitutionality, especially in terms of a Constitution that was intended to make a sharp break from Namibia's past. It was, for example, a longstanding tradition in many Namibian communities that corporal punishment could be imposed as a sanction by traditional tribunals, yet the High Court nevertheless found such punishment to be unconstitutional.[56]

And lastly, the court's comment that Mr. Muller was not without a remedy (in that, by complying with the formalities prescribed by the Aliens Act he would be able to change his name) begs the question presented in the case, which is whether the fact that there is a different procedure for men than for women is unfairly discriminatory.

The US approach is that if a classification affects a suspect class or burdens the exercise of a fundamental right, it receives heightened judicial scrutiny, as opposed to the deferential rationality review. The idea that heightened scrutiny should be used in certain instances is often traced to a footnote in a 1938 US Supreme Court case, where the court noted that classifications directed at "discrete and insular minorities" may require "a correspondingly more searching judicial inquiry" than mere rationality review.[57]

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presented at the Ten Years of Namibia's Constitution and Independence Conference, Windhoek, 11-13 September 2001).

[55] See Bonthys "Deny Thy Father and Refuse Thy Name: Namibian Equality Jurisprudence and Married Women's Surnames" (2000) 117 *SALJ* 464.

[56] *State v. Sipula* 1994 NR 4 (HC).

[57] *United States v. Carolene Prods. Co* 304 US 144 153 n.4 (1938).

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Race and national or ethnic origin are suspect classes and receive the most exacting judicial scrutiny. Although the Fourteenth Amendment was originally intended to protect blacks in the US from repression by the white majority, the equal protection clause is framed in universal terms, without reference to any particular race. And, by the time the clause "began to attain a genuine measure of vitality" in the late-1930s, after being "virtually strangled in its infancy by post-civil-war judicial reactionism,"[58]

> it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.[59]

To justify a suspect classification, the government must show that its purpose or interest is compelling,[60] and that the use of the classification is necessary to accomplish that purpose or interest. This is a very difficult standard for the government to meet, and as a result, classifications to which strict scrutiny is applied are often invalidated.

Alienage has also been considered a suspect classification, because aliens are a discrete and insular minority in need of extra protection.[61] There is, however, a "governmental function" exception to this rule: the less stringent rationality review

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[58] In *The Slaughter-House Cases* 83 US (16 Wall) 36 (1873), the first decision interpreting the Civil War Amendments, the US Supreme Court expressed doubt that the Fourteenth Amendment's equal protection clause could ever apply to anything other than discrimination against blacks on account of their race. The court also rendered the Amendment's privileges and immunities clause virtually meaningless by interpreting it only to protect the privileges and immunities of federal citizenship. In US constitutional law most rights depend on the states for their existence and protection, and so the privileges and immunities of federal citizenship only include such things as the right to petition the federal government, to use the writ of habeas corpus against the federal government, and to use the navigable waters of the United States.

[59] *Regents of University of California v. Bakke* 438 US 265 291-92 (1978).

[60] Different cases have said that, for this prong of the test, the purpose must be "compelling," "overriding," "substantial," or "important," but the distinction is not significant. *See* Lockhart, Kamisar, Choper & Shiffrin *Constitutional Law 6th Edition* (1986) 1168 n.9.

[61] *In re Griffiths* 413 US 717 (1973) (invalidating state law excluding resident aliens from law practice); *Sugarman v. Dougall* 413 US 634 (1973) (invalidating state law requiring American citizenship for any permanent civil service position); *Graham v. Richardson* 403 US 365 (1971) (invalidating state laws denying welfare benefits to aliens). Illegal aliens, however, are not a suspect class. *Plyler v. Doe* 457 US 202 (1982).

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applies to state "laws that exclude aliens from positions intimately related to the process of democratic self-government."[62] In addition, in light of the national government's plenary power over these matters, "a narrow standard of review [applies to] decisions made by the Congress or the President in the area of immigration and naturalization."[63]

Classifications based on sex are deemed to be "quasi-suspect" and are subject to an intermediate standard of review: they must be shown to be substantially related to the achievement of an important governmental objective.[64] As the Supreme Court explained in *United States v. Virginia,*

> Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.
>
> In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed* . . . . Since *Reed,* the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature--equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.
>
> Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves `important governmental objectives and that the discriminatory means employed' are `substantially related to the achievement

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[62] *See Bernal v. Fainter* 467 US 216 220 (1984). Under the rational connection standard, citizenship requirements have been upheld for the jobs of police officer, probation officer, and public school teacher. *See id.*

[63] *Mathews v. Diaz* 426 US 67 82 (1976).

[64] *Craig v. Boren* 429 US 190 (1976).

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> of those objectives.' " The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. [65]

In the *Virginia* case the court, applying this standard, found the Virginia Military Institute's (VMI) policy of excluding women to be unconstitutional. The state argued two justifications for this policy: First, that it provided diversity in education (in offering the option of single sex education), and second, that VMI's "unique method of character development and leadership training" would have to be modified if women were admitted. The court found the first justification to be a post-hoc rationalization for an action that was in fact differently grounded, as it saw no persuasive evidence that VMI's all male policy was established or maintained in support of a state policy of educational diversity. With respect to the second, the court stated that

> the notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, [and is] a prediction hardly different from other "self fulfilling prophec[ies]" once routinely used to deny rights or opportunities." . . . [Moreover, w]omen's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The State's justification for excluding all women from "citizen soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.[66]

Illegitimacy has been held to not be a suspect class, although the Supreme Court has wavered in the standard that it has applied to such cases. In *Matthews v. Lucas,* the court – although recognizing that a person's illegitimacy is not within his or her control to change and has no bearing on his or her ability to participate in and contribute to society -- concluded that, since "discrimination against illegitimates has never approached the severity of pervasiveness of the historic legal and political discrimination against women and Negroes," illegitimate individuals do not require extraordinary protection from the majoritarian political process.[67] There, the court seemed to apply rationality review, although it also stated that review of illegitimacy

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[65] 518 US 515 531-33 (1996) (citations and footnotes omitted).
[66] *Id.* 542-43.
[67] *Mathews v. Lucas* 427 US 495 (1976) (upholding as reasonable a federal law requiring proof of parenthood and proof of dependency for illegitimate children to receive Social Security survivor's benefits).

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classifications should not be "toothless." In subsequent cases involving legitimacy, however, the court looked for "more than the mere incantation of a proper state purpose,"[68] applying the somewhat heightened review that the classification must be substantially related to a legitimate state interest.[69]

Age and mental retardation have been held not to be suspect or quasi-suspect, and therefore merely subject to rationality review. With respect to age, the Supreme Court reasoned that "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[70] "With respect to mental retardation, the court found that "because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both state and federal governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded in individuals, is rooted in considerations that the Constitution will not tolerate."[71] Poverty also has not been accepted as a suspect classification.[72]

The highest standard of review, strict scrutiny, is also applied to classifications that burden a fundamental right or interest, such as the rights to vote, to access to the courts, and to interstate movement. Thus, for example, laws restricting the franchise by requiring the payment of a poll tax in order to vote have been held unconstitutional under strict scrutiny.[73] Protection as a fundamental right or interest is based not on societal importance, however, but on whether the particular right/interest is explicitly or implicitly guaranteed by the US Constitution; as a result, classifications affecting

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[68] *Trimble v. Gordon* 430 US 763 (1977) (invalidating provision of state intestate succession law that barred illegitimate children from inheriting from their fathers).
[69] *Lalli v. Lalli* 439 US 259 (1978) (plurality opinion) (upholding law requiring a judicial finding of paternity during the father's lifetime for an illegitimate child to inherit from his or her father's intestate estate). *See also Mills v. Habluetzel* 456 US 91 (1982) (requiring showing of a substantial relationship to a legitimate state interest and invalidating a law requiring that a paternity suit to identify the father for purposes of child support must be brought before the child is one year old).
[70] *Massachusetts Board of Retirement v.Murgia* 427 US 307 313 (1976).
[71] *Cleburne v. Cleburne Living Center, Inc.* 473 US 432 (1985).
[72] *Harris v. McRae* 448 US 297 (1980); *San Antonio School District v. Rodriguez 411 US 1 (1973).*
[73] *Harper v. Virginia Bd. of Elections* 383 US 663 (1966).

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education, which is not expressly or impliedly a constitutional right, are not subject to strict scrutiny.[74]

Before the South African Constitutional Court had fully articulated the standards described above for determining unfairness, it was suggested that

> United States jurisprudence relating to levels of scrutiny might provide some assistance in teasing out the meaning of 'unfair' [in Section 8(3) of the Interim Constitution]. It is difficult to conceive of any form of racial discrimination which could be considered to be fair (other than that envisaged in ss (2) [the provision allowing for affirmative action]). The word 'unfair' would thus have the equivalent status of strict scrutiny as employed in the United States. However, it is likely that the South African courts will adopt a stricter form of scrutiny with regard to gender than have the United States courts. [US intermediate scrutiny] might prove to be too weak to support the kind of commitment envisaged by the Constitution to gender equality. By contrast an airline pilot who seeks employment and is refused employment on the ground of age would probably find that the word 'unfair' works against his equality challenge; that is rationality review will operate in these cases.[75]

The South African Constitutional Court, and the Namibian Supreme Court in following the South African approach, have indeed applied two levels of scrutiny -- rationality review for "mere" differentiation (which in Namibia would include the example given, age, although in South Africa age is among the grounds listed in Section 9 of the final Constitution) and the unfair discrimination test for differentiation based on listed grounds or analogous grounds – although they do not exactly correspond to the American approach. Rationality review in all three jurisdictions is essentially the same, but as this passage predicted, in Namibia and South Africa there is no intermediate level of scrutiny applicable to sex/gender, which receives the same analysis applicable to race and other listed (and, in the case of South Africa, analogous) grounds.

3. Unlisted Grounds

Sections 9(3) and (4) of the South African Constitution prohibit not only discrimination on the specified grounds (race, gender, sex, etc.), but also discrimination on other, unspecified grounds (although there is an important distinction between the two: pursuant to Section 9(5), discrimination on a specified

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[74] *San Antonio Ind. School Dist. v. Rodriguez* 411 US 1 (1973) (upholding Texas system of financing public education, which relied heavily on local property taxes, under rational basis standard).

[75] Cheadle & Davis "Equality" in Davis, Cheadle & Haysom *Fundamental Rights in the Constitution: Cases and Commentary* (1997) 62.

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ground is presumed to be unfair, whereas the complainant must prove that discrimination on an unspecified ground is unfair). The Constitutional Court explained in *Harksen* that "[t]here will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."[76] Thus, not every unlisted ground can be the basis for a discrimination claim, but rather only those that meet this standard. The court, however, refused to comprehensively define what these "attributes or characteristics" would be, although it did caution against interpreting them in too narrow a manner. The court stated:

> What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) [the Interim Constitution's equivalent to Sections 9(3) and (4)] seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.[77]

Citizenship, marital status (under the Interim Constitution, where it was not a listed ground), and HIV positive status have been held to be analogous grounds.[78]

Unlike in South Africa, the grounds listed in Article 10(2) of the Namibian Constitution as prohibited bases for discrimination is an exclusive list. As a result, the *Muller* court stated, "any discrimination based on other grounds than those mentioned in Article 10(2) will have to be dealt with and will have to be brought in under Article 10(1) [the requirement of equality before the law] and/or Article 8(1) which provides that the dignity of all persons shall be inviolable."[79] The *Muller*

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[76] *Harksen* para 46.
[77] *Id.*
[78] *Larbi-Odam v. MEC for Education (North-West Province)* 1998 (1) SA 745 (CC) (citizenship); *Harksen, supra* (marital status); *Hoffman v. South African Airways* 2000 (1) SA 1 (CC) (HIV positive status).
[79] 2000 (6) BCLR 663J-664A.

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court's recognition of the potential use of the right to dignity to analyze a claim of alleged discrimination based on a ground that is not contained in Article 10(2) has interesting implications. As explained above, the South African Constitutional Court has held that unlisted grounds may provide the basis for a claim of unfair discrimination if they are based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparatively serious manner. Thus, the Namibian Supreme Court's apparent widening of the Namibian Constitution's protections to include discrimination on non-enumerated grounds that violate the right to dignity therefore could mean that the treatment of non-enumerated grounds in Namibia would be virtually the same as it is in South Africa.

However, the Namibian courts have not yet further elaborated on this suggested use of the right to dignity. The Supreme Court's first opportunity to do so could have come in the case of *Chairperson, Immigration Selection Board v. Frank and Another,*[80] which involved an allegation of discrimination based on sexual orientation, a ground that is not enumerated in Article 10(2). The court, however, did not address the right to dignity in the *Frank* case, as the respondents had not alleged a violation of that right.[81]

4. The Ground of Sexual Orientation

The question of how differentiations based on sexual orientation should be treated is not answered the texts of the Constitutions of Namibia and the United States. In South Africa the treatment is clear: since the South African Constitution includes sexual orientation as a listed ground in Section 9(3), discrimination based on sexual orientation is unconstitutional if it is unfair.

The South African approach is seen in the cases of *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* (the *"Immigration Case"*),[82] in which the Constitutional Court addressed the question of the consideration of long-term homosexual relationships in immigration matters, and *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice*

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[80] Case No. SA 8/99 (NmS March 5, 2001).
[81] *Id.* majority opinion 93 (O'Linn, J. and Teek, J.)
[82] 2000 (2) SA 1 (CC).

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and Others, (the *"Sodomy Case"*),[83] in which the Court addressed the criminalisation of sodomy.[84]

The *Immigration Case* was a challenge to the provision of South African immigration law that facilitated the grant of immigration permits to non-South African spouses, but not same-sex life partners, of permanent South African residents. The court held that the provision at issue violated the closely-related rights to equality and dignity[85]of homosexuals in permanent relationships, and ordered that to remedy this defect, the provision must be read to provide the same preferential immigration treatment to a partner in a permanent same-sex life partnership as it does to a spouse.

The court reasoned that gays and lesbians were a vulnerable minority that had been and continued to be subject to patterns of disadvantage and discrimination that occurred at a "deeply intimate level of human existence and relationality" and that denied them their equal dignity and worth.[86] The court further found the impact of the provision -- the asserted purpose of which was to protect family life -- to be to reinforce "harmful and hurtful stereotypes" of gays and lesbians that are no longer consistent with societal and legal attitudes toward same sex partners and families.[87] It stated:

> The message and impact [of the provision] are clear. Section 10 of the Constitution [the South African dignity clause] recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.[88]

Similarly, in the *Sodomy Case,* the Constitutional Court found that the common law and statutory criminalisation of sodomy violated the rights to equality

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[83] 1999 (1) SA 6 (CC).
[84] The differentiation at issue in the *Sodomy Case* was based on sexual orientation, and that in the *Immigration Case* on the overlapping grounds of sexual orientation and marital status. These grounds are listed in Section 9(3) of the South African Constitution and discrimination based on them is presumed, pursuant to Section 9(5), to be unfair.
[85] Section 10 of the South African Constitution provides: "Everyone has an inherent dignity and the right to have their dignity respected and protected."
[86] *Immigration Case* paras 42-43.
[87] *Id.* paras 45-54.
[88] *Id.* para 54.

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and dignity of homosexual men. With respect to the equality analysis, the court noted that the prohibitions at issue outlawed sodomy between men only, not between women or a man and a woman, and thus differentiated on the ground of sexual orientation. In terms of the impact on homosexual men, the court found that the laws reinforced societal prejudices against gay men and increased the negative effect of these prejudices on their lives, by treating them as "unapprehended felons," and legitimizing and encouraging "blackmail, violence ('queer-bashing') and peripheral discrimination, such as refusal of facilities, accommodation and opportunities."[89] It further found the demeaning impact of the discrimination to be greater because of the vulnerable position of gay men in society: "they are a political minority not able on their own to use political power to secure favourable legislation for themselves [and thus are] almost exclusively reliant on the Bill of Rights for their protection."[90] In addition, it noted that "the nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society."[91] As a result, the court found the discrimination to be unfair. With respect to the right to dignity, the Constitutional Court stated that outlawing sodomy between males

> punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant portion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[92]

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[89] *Sodomy Case* paras 23-24 (discussing common law offence of sodomy); *see also id.* para 76 (discussing sodomy statute).
[90] *Id.* para 25.
[91] *Id.* para 26(b).
[92] *Id.* para. 28.

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The Constitutional Court is currently considering two more cases involving sexual orientation discrimination: *Satchwell v. President of the Republic of South Africa and Another*,[93] and *DuToit and Another v. Minister for Welfare and Population Development and Others*.[94] In the *Satchwell* case, the Pretoria High Court ruled that the Constitution requires the government to extend the same benefits to public servants' permanent same-sex life partners as it extends to spouses. In the *DuToit* case, the Pretoria High Court ruled that same-sex couples must be permitted to jointly adopt children. Given the Constitutional Court's strong statements in the *Immigration* Case that gays and lesbians must be accorded equal rights and respect in their family lives as married couples receive, it seems likely that the court will confirm the correctness of both of these rulings.

In the *Frank* case, by contrast, the Namibian Supreme Court found the difference between the South African and Namibian Constitutions on the subject of sexual orientation discrimination to be significant. There, a German citizen who had resided in Namibia since 1990 and her Namibian lesbian partner challenged the denial of a permanent residence permit to the German citizen. The High Court[95] upheld the women's challenge and directed the Board to issue the permit. On appeal, a majority of the Supreme Court (consisting of Judges O'Linn and Teek) reversed the High Court's decision and ordered the Immigration Board to reconsider the matter.[96] Although the primary reason for the court's decision was that the Board violated the Constitution's administrative justice requirement, the majority opinion also considered respondents' arguments based on the rights to equality, non-discrimination, family, privacy and freedom of movement.[97]

With respect to Article 10, the majority found the South African *Immigration* and *Sodomy Cases* to be irrelevant, since the Namibian Constitution does not expressly forbid discrimination on the ground of sexual orientation. Although the

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[93] CCT 45/01 (argued February 28, 2002).
[94] CCT 40/01 (argued May 9, 2002).
[95] Case No. A 56/99 (NmH June 24, 1999).
[96] After reconsidering, the Ministry of Home Affairs granted Ms. Frank a permanent residence permit on June 25, 2001. It did not, however, publicly state its reasons for this decision. *The Namibian* 28 June 2001 (http://www.namibian.com.na/2001/June/news/01FF47481C.html).
[97] All three judges agreed regarding the administrative justice violation, although Chief Justice Strydom would have affirmed the High Court order because he felt that the Board's counsel's negligence in filing the record of appeal more than five months late should not be condoned. The majority, by contrast, condoned the late filing. Given his views on administrative justice and condonation, Chief Justice Strydom did not deal with the other constitutional issues in his opinion.

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Namibian Supreme Court followed the South African approach in adopting the "unfair discrimination" test in the *Muller* case despite differences in wording between the two constitutions, it refused to do so here. Rather, the majority felt that South Africa's inclusion of sexual orientation in its Constitution reflected a difference in values between the two nations. Noting precedents holding that the Namibian Constitution must be interpreted in light of the values of the Namibian people,[98] the majority concluded that Namibian values on the issue of homosexuality were closer to the values of the people in Zimbabwe (where the constitution does not prohibit sexual orientation discrimination and where the Supreme Court recently refused to decriminalise sodomy) than to those of the people in South Africa.

In light of its assessment of Namibian values, the majority opinion concluded that "[e]quality before the law for each person, does not mean equality before the law for each person's sexual relationships."[99] Furthermore, the majority found that

> the failure to include in Section 26(3)(g) of the Namibian Immigration Control Act an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage, may amount to 'differentiation,' but it does not amount to 'discrimination' at all. In providing for a special dispensation for partners in recognized marriage institutions or the protection of those institutions, Parliament has clearly given effect to Article 14 of the Namibian Constitution and to similar provisions in the African Charter relating to the protection of the family, being the 'natural and fundamental unit' of society. In this regard, Parliament has also given effect to this court's repeated admonitions that the Namibian Constitution must be interpreted and applied 'purposively'. A Court requiring a 'homosexual relationship' to be read into the provisions of the Constitution and or the Immigration Act would itself amount to a breach of the tenet of construction that a Constitution must be interpreted purposively.[100]

The majority, however, cautioned that

> Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprive[s] them of the protection of other provisions of the Namibian Constitution. What I dealt with in this judgment is the alleged infringement of the Namibian Constitution in that Section 26(3)(g) of the Namibian Immigration Control Act does not provide for homosexual partners on a basis equal to that of spouses in recognized heterosexual marriage relationships and the alleged failure of the board to regard the applicants'

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[98] *See Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 78A (NmS) (hereinafter the *"Corporal Punishment Case"*) (stating that the Namibian Constitution reflects the "aspirations and values of the new Namibian nation" and must be interpreted accordingly).

[99] *Frank* majority opinion 92.

[100] *Id.* 93 -94.

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> lesbian relationship as a factor strengthening the first applicant's application for permanent residence.[101]

It emphasized that Ms. Frank's case should be considered on its own merits "as the application of an unmarried alien who is not a spouse for the purposes of section 26(3)(g)," and that in so doing, the Board may in its discretion consider "the special relationship between respondents and decide whether or not to regard it as a factor in favour of granting the application for permanent residence."[102] As to the question of whether Section 26(3)(g) should be amended to cover permanent same-sex life partners as well as spouses, the majority concluded that was a matter for Parliament.

While Namibian society is in many respects socially conservative, the *Frank* majority's conclusion about Namibian values concerning homosexuality was unsubstantiated. The court stated that such a value judgment should be based on "the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established belief, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution, as well as the consensus of values or emerging consensus of values in the civilized international community."[103] The institutions that should be considered, according to the majority, include "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 organizations. . . ."[104] Relevant sources for determining Namibian values would thus include "debates in Parliament and in regional statutory bodies and legislation passed by parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of court; referenda; publications by experts."[105]

However, the only evidence cited by the majority in support of its conclusion regarding Namibian values on homosexuality was that the Namibian President and Minister of Home affairs "have expressed themselves repeatedly and in public against the recognition and encouragement of homosexual relationships" and that when these

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[101] *Id.* 94-95.
[102] *Id.* 95.
[103] *Id.* 59.
[104] *Id.* 60.
[105] *Id.* 61.

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comments were raised in the Parliament, "nobody on government benches, which represent 77 percent of the Namibian electorate, made any comment to the contrary."[106] The decision assumes, without including any additional support, that the comments of two government officials (albeit ones in very high positions) necessarily reflect the views of the majority of Namibians on this matter. The majority did not consider, for example, the possibility that the silence of the ruling party Parliamentarians may have reflected party loyalty[107] and/or respect for the President and Minister rather than agreement with their views. It also did not take account of the fact that a number of individuals (including opposition Parliamentarians) and organizations publicly criticized the President's and Minister's comments when they were made. Nor did the majority recognize the possibility that the President's and Minister's views might in fact be inconsistent with Namibian values, which the Supreme Court had previously described as including "the commitment of the Namibian people to the creation of a democratic society based on respect for *human dignity*, protection of liberty, and the rule of law."[108] If the protection of dignity is indeed an important Namibian value, then the South African Constitutional Court's findings in the *Immigration* and *Sodomy Cases* as to the detrimental effects on dignity of discrimination against homosexuals should have been influential in the *Frank* case despite the language differences between the non-discrimination clauses in the two Constitutions.

Given Article 10(2)'s failure to expressly prohibit sexual orientation discrimination and the controversial nature of the issue of homosexuality in Namibia, it is not surprising that the *Frank* majority left the question of whether Namibian immigration law should treat homosexual relationships the same as heterosexual marriages to be debated and decided by Parliament. However, the sparse evidence relied upon by the majority in the *Frank* case should not be taken as conclusive of the views of the Namibian people about homosexuality in future debates or cases.

In addition, the Namibian courts must be careful not to let public opinion on this or any other matter dictate their interpretation of constitutional provisions. Doing so would be inconsistent with the constitutional supremacy that is provided for in

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[106] *Id.* 84.
[107] Especially in light of the facts that members of the National Assembly are elected from party lists and must give up their seat in Parliament if they are ejected from or quit the party.
[108] *Corporal Punishment Case* 1991 (3) SA 78A (emphasis added).

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Article 1(6). As the South African Constitutional Court explained in its decision finding the death penalty to be unconstitutional despite evidence of public opinion supporting the practice,

> public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order. . . .[109]

If a court places too much emphasis on public opinion, it risks becoming unable to fulfil its duty "to protect the social outcasts and marginalized people of . . . society, the 'worst and the weakest among us.'"[110]

As previously discussed, although the US Constitution does not list any specific grounds upon which discrimination is prohibited, certain grounds have been singled out as meriting heightened review if the government makes distinctions based on them. Sexual orientation, however, is not such a ground. In *Romer v. Evans*,[111] the US Supreme Court applied rationality review to assess the constitutionality of a classification based on sexual orientation. The case was a challenge to an amendment to the Constitution of the State of Colorado which sought to invalidate municipal ordinances banning sexual orientation discrimination in many contexts, including housing, employment, education, public accommodation, and the provision of social services. The amendment not only invalidated these ordinances, it prohibited legislative, executive or judicial action at any level of state or local government designed to protect homosexuals, lesbians or bisexuals.

The Supreme Court of Colorado held that the amendment was subject to strict scrutiny because it infringed the fundamental right of gays and lesbians to participate in the political process, and invalidated it under this standard.[112] The US Supreme Court affirmed the invalidity of the statute, but applied rationality review to do so. The court reasoned that, not only was the amendment unprecedented in singling out a

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[109] *S. v. Makwanyane* 1995 (6) BCLR 665 (CC) para 88.
[110] Currie & DeWaal *New Constitutional Law* 336.
[111] 517 US 620 (1996).
[112] The Colorado trial court, the court of first instance, rejected the plaintiffs' arguments that homosexuals constituted a suspect or quasi-suspect class, and the plaintiffs did not appeal this holding to the Colorado Supreme Court. *See id.* 640 n.1 (Scalia., J., dissenting).

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particular group and denying them the possibility of legal protection, but its breadth was so far removed from the reasons offered for it – respect for other citizens' freedom of association and the state's interest in conserving resources to fight discrimination against other groups – that it could be inferred that "it is born of animosity toward the class of persons affected."[113] In sum, the court stated, the amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[114] However, the court never explained why it disagreed with the lower court's use of strict scrutiny. Perhaps the court felt that, because the amendment even failed the usually easy test of rationality, there was no need to address the more controversial question of whether the stricter test should apply.

Despite its failure to apply heightened scrutiny, *Romer* has been characterized as a "trial balloon" – "an invitation but not an insistence that the lower courts and the political processs rethink some antigay discrimination."[115] Historically, the US Supreme Court has not employed the equal protection clause to protect groups that are marginalized due to social prejudice until there is a national consensus in favor of doing so:

> the Equal Protection Clause was no great friend to women, people from Asia, and the freed slaves and their descendants as long as there was a national consensus that women belonged at home rearing children, Asians were an alien race, and blacks were morally and intellectually inferior to whites.[116]

Accordingly, if the political consensus in the United States moves in a pro-gay direction, *Romer* may be followed by bolder rulings, but if the political consensus remains stable or turns in an anti-gay direction, it may be followed by judicial retreat.[117]

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[113] *Id.* 634.
[114] *Id.* 635. Justice Scalia, in dissent, argued that the court's previous decision in *Bowers v. Hardwick* 478 US 186 (1986), that it was not a violation of due process for states to criminalize sodomy, provided a legitimate rational basis for the amendment. Justice Scalia's argument was that if it is constitutionally permissible for a state to criminalize homosexual conduct, it surely is constitutionally permissible for a state to disfavor it.
[115] Eskridge "Destablizing Due Process and Evolutive Equal Protection" 47 *UCLA L Rev* 1183 1217 (2000).
[116] *Id.* 1214.
[117] *Id.* 1217-18.

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5. Discrimination against the Historically Advantaged

As discussed above, the Namibian Supreme Court in *Muller* found it important, in holding the discrimination at issue in the case to be fair, that Mr. Muller, a white German male who did not arrive in Namibia until after independence, was not part of a previously disadvantaged group. Although consideration of the victim's status is a significant aspect of the South African unfairness analysis, the court should have emphasized that its reliance on the fact that Mr. Muller was not part of a previously disadvantaged group was not conclusive, as the South African Constitutional Court has. Otherwise, the erroneous impression might be given that only historically disadvantaged Namibians are protected by the Constitution's equality and non-discrimination provisions.

In South Africa, the Constitutional Court has recognized that "equality is one of the core values of the Constitution. Whilst the section clearly calls for more than 'formal equality' and recognises the need to address past disadvantage, the guarantees that it gives extend to all sections of the community, not only those who have been disadvantaged in the past."[118] Thus, in *Hugo* the court stated that "the fact that the individuals who were discriminated against by a particular action . . . were not individuals who belonged to a class who had historically been disadvantaged does not necessarily mean that the discrimination is fair. . . . It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must still show in the context of this particular case that the impact of the discrimination on the people who were discriminated against was not unfair."[119]

In Namibia and South Africa, the historically advantaged persons and groups – white people, and in particular white males – are political minorities who need the Bill of Rights to protect their rights from being trampled by the will of the majority. As the Constitutional Court recognized in *City Council of Pretoria v. Walker,*[120] whites in South Africa "belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special

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[118] *City Council of Pretoria v. Walker* 1998 (2) SA 363 (CC) para 73.
[119] *Hugo* 1997 (6) BCLR 728-29.
[120] 1998 (2) SA 363 (CC).

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sense, must look to the Bill of Rights for protection. When that happens a Court has a clear duty to come to the assistance of the person affected."[121]

Although they are now politically vulnerable minorities, whites in Namibia and South Africa were not disadvantaged or discriminated against in the past. Thus, in these countries the concern for protecting minorities is in tension with the "asymmetrical" conception of non-discrimination. This means the idea that anti-discrimination law should be

> directed at protecting groups which have suffered from *structural* disadvantage, from *patterns* of exclusion, and not just from some incidental negative impact. . . . The rationale of a prohibition on the basis of race, for instance, lies (at least in western countries) in the oppression of black and coloured people, not whites, and the prohibition of discrimination on the basis of sex find its roots in the structural subordination of women, not men. Sensitive groups thus need stronger protection against classifications with a negative impact. The "suspectedness" of classifications based on race or sex derives from a specific, sensitive group being affected, not from the abstract use of those criteria themselves. Such an asymmetrical conception of discrimination acknowledges that harm caused by measures which disadvantage vulnerable and subordinate groups is, indeed, a greater evil which merits more suspicion than measures which disadvantage powerful and otherwise privileged groups.[122]

Whites in South Africa and Namibia are now politically vulnerable, but they have been and remain privileged, and accordingly one cannot justify protecting them from unfair discrimination by arguing that that they suffered from oppression or exclusion in the past. The justification rather must be found in their minority status.

Current US law does not follow the asymmetrical conception of discrimination.[123] Rather, the equal protection clause has been interpreted to apply in the same manner to the historically disadvantaged and the historically advantaged. The Supreme Court recently held that classifications based on race are subject to the highest standard of review regardless of whether they discriminate against blacks or whites, and previously had held that classifications based on gender also are subject to

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[121] *Id.* para. 48. The court cautioned, however, that "[c]ourts should . . . always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other." *Id.*

[122] Loenen "The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective" (1997) 13 *SAJHR* 401 407-08.

[123] *See also* Loenen "Remarks" 411 ("in a recent decision the American Supreme Court has made it clear that it is not willing to accept an asymmetrical approach to discrimination . . . , but applies the different levels of strictness within a symmetrical conception of discrimination.")

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heightened review whether they discriminate against women or men.[124] As a result, the US law in this area has shifted from "protecting classes of people who suffer prejudice, such as African Americans or females, to prohibiting any use of classifications, such as race or sex, thus extending protection to dominant classes that historically have not suffered prejudice (such as whites and males)."[125] This change, however, is not necessarily consistent with the court's longstanding recognition of a special need for extraordinary judicial protection of "discrete and insular" minorities from the majoritarian process, [126] a concern that had often been relevant in the determination of which classifications fall into the suspect category. The American approach of forbidding any use of classifications based on race or gender would not be appropriate for Namibia or South Africa, where affirmative action on such bases is expressly permitted.

6. Horizontality

The verticality (or vertical application) of a bill of rights means that the rights it contains bind only the state. This is the traditional conception of a bill of rights, and all three Bills of Rights studied here apply this way, protecting the rights of individuals against state infringement. Horizontality (or horizontal application), on the other hand, means that the rights in a bill of rights bind private individuals and entities. A further distinction may also be drawn between direct and indirect horizontality: direct horizontality means that a private individual/entity can assert a right against another private individual/entity directly based on a provision in the bill of rights, and indirect horizontality means that the content of the bill of rights will influence the interpretation and development of the law as it applies between individuals.[127]

The South African Bill of Rights applies horizontally, both directly (at least in some cases) and indirectly. With respect to direct horizontal application, Section 8(2) provides that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and

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[124] *See, e.g., Adarand Constructors, Inc. v. Pena* 515 US 200 (1995); *Mississippi Univ. for Women v. Hogan* 458 US 718 (1982).
[125] Nice "Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach" 85 *Cornell L Rev* 1392 1400 (2000).
[126] *United States v. Carolene Prods. Co.* 304 US 144 153 n.4 (1938) (noting in 1938 -- before the development of varying levels of scrutiny in equal protection jurisprudence -- that statutes directed at "discrete and insular minorities" may require "a correspondingly more searching judicial inquiry.")
[127] *See* Ackermann "The Role of Dignity" 20.

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the nature of the duty imposed by the right."[128] As already mentioned, the right not to be unfairly discriminated against is directly horizontally applicable by its terms: Section 9(4) provides that "no person may unfairly discriminate directly or indirectly against anyone on one or more grounds. . . ." As for Section 9(1) (the right to equality before the law), however, its horizontality will have to be determined under the standard set forth in Section 8(2). With respect to indirect horizontal application, Section 39(3) 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."

The Namibian Bill of Rights also is directly horizontal at least in some instances. Article 5 provides in relevant part that "the fundamental rights and freedoms enshrined in [Chapter 3] shall be respected and upheld . . . , where applicable to them, by all natural and legal persons in Namibia. . . ." The effect of this provision on the equality and non-discrimination clauses in Article 10, neither of which are expressly horizontally applicable, has not yet been addressed by the Namibian courts, however. With respect to indirect horizontality, the Namibian Constitution contains no clause like the South African Section 39(3). However, given that under Articles 5 the judiciary is bound to respect and uphold the provisions of the Namibian Bill of Rights, it would seem that the courts should indirectly apply it in their interpretations of the common, statutory and customary law.

In the United States, the individual rights provisions of the Constitution, including the Fifth and Fourteenth Amendments, generally apply only vertically. In US constitutional law this is referred to as the "state action" doctrine. This doctrine holds that, because of their language and history, these provisions impose obligations only on the federal and/or state governments.[129] A private actor is bound by constitutional provisions only if it is performing a "government function," such as

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[128] Section 8(3) further provides that, in giving direct horizontal applicability to a right in the Bill of Rights, a court must "apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right" and may "develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)" of the Constitution, the limitations clause.

[129] *See, e.g., The Civil Rights Cases* 109 US 3 (1883). In this case, the Supreme Court held that, under the Fourteenth Amendment "it is state action of a particular character that is prohibited" and "[i]ndividual invasion of individual rights is not the subject-matter of the amendment." In this respect the court noted a contrast between the Fourteenth and Thirteenth Amendments, the latter of which "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. . . ."

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holding a primary election or managing a municipal park,[130] or if the state is significantly involved with the private actor or conduct. Examples of the latter include private discrimination where the private entity is operating a business on public property,[131] and private discrimination (such as a racially restrictive covenant in a property deed) where state involvement, such as judicial or police action, is called upon to enforce it.[132]

However, the passage of a myriad of federal and state civil rights statutes prohibiting private discrimination, particularly in the 1960's, has filled much of the gap left by the state action doctrine.[133] In the federal arena, Amendments Thirteen (outlawing slavery), Fourteen (guaranteeing equal protection and due process), Fifteen (outlawing race discrimination in voting), and Nineteen (outlawing sex discrimination in voting) authorize Congress "to enforce [their provisions] by appropriate legislation," and the Commerce Clause broadly allows Congress to regulate interstate commerce.[134] Pursuant to these authorizations, between 1866 and 1875 and then starting again in 1957, Congress passed the many federal civil rights statutes that are in force in the US today. Under these various provisions, private persons or entities may be held civilly or criminally liable for conspiring to interfere with others' constitutional or legal rights.[135] Private actors are also prohibited from discriminating in employment on the basis of race, sex (including pregnancy), colour, religion, national origin, age or disability if they employ more than a certain number of employees.[136] In addition, private employers who are engaged in or whose business affects interstate commerce cannot discriminate on the basis of sex in terms of pay.[137] Private entities also are prohibited from engaging in race, religion or

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[130] *See Smith v. Allwright* 321 US 649 (1944), *Terry v. Adams* 345 US 461 (1953), *Evans v. Newton* 382 US 296 (1966).
[131] *Burton v. Wilmington Parking Authority* 365 US 715 (1961).
[132] *Shelley v. Kraemer* 334 US 1 (1948).
[133] Lockhart, Kamisar, Choper & Shiffrin *Constitutional Law* 1414.
[134] US Const. Article 1 Section 8.
[135] 18 USC Section 241 (criminal provision; originally enacted in 1870); 42 USC Section 1985 (civil provision; originally enacted in 1871).
[136] Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act of 1978, prohibits discrimination in employment based on race, sex, pregnancy, colour, religion or national origin and applies to employers with more than 15 employees for each working day in 20 or more calendar weeks. The Age Discrimination in Employment Act of 1967 prohibits discrimination against persons over 40 and applies to employers with more than 20 employees in 20 calendar weeks. The Americans with Disabilities Act of 1990 prohibits employment discrimination against qualified individuals with disabilities.
[137] The Equal Pay Act of 1963.

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national origin discrimination in any federally-funded program[138] and from engaging in sex discrimination in any federally-funded education program.[139] Further, private entities that operate public accommodations cannot discriminate on the basis of race, colour, religion, sex, or national origin.[140] Private entitles also cannot discriminate on the basis of race, colour, religion, national origin, sex, handicap or familial status in housing.[141] Therefore, even though an individual in the United States generally cannot bring a direct constitutional claim of discrimination against another individual or a private entity, he or she may bring a claim against a private discriminator under one or more of the statutes described above.

7. Indirect Discrimination

Indirect discrimination occurs when a law or action is neutral on its face, but discriminatory in effect, in that it has a disproportionately negative impact on a particular group. The Namibian courts have not yet faced a case involving an allegation of indirect discrimination. The South African Constitutional Court has addressed indirect discrimination in two cases, *Pretoria City Council v. Walker*[142] and *Democratic Party v. Minister of Home Affairs.*[143]

In *Walker*, a resident of a formerly all-white neighborhood in Pretoria challenged the way the City Council charged for water and electricity and the way it recovered arrears. Residents of the former white areas were charged based on consumption measured by meters on each property, while residents of the former black townships, where meters had historically not been present, were charged a flat rate. Because the flat rate was lower than the metered rate, Mr. Walker argued that the city unconstitutionally was requiring the residents of the former white areas to subsidize those of the former black areas. Also, although the Council was in the process of having meters installed in the former black areas, it was continuing to charge only the flat rate there until all properties had meters installed. Mr. Walker argued that this failure uniformly to apply the metered rate where there were meters was also unconstitutional. Finally, Mr. Walker challenged the fact that the Council pursued legal action against customers living in the former white areas who were in

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[138] Title VI of the 1964 Civil Rights Act.
[139] Title IX of the 1964 Civil Rights Act.
[140] Title II of the 1964 Civil Rights Act.
[141] Title VIII of 1968 Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988.
[142] 1998 (2) SA 363 (CC).
[143] 1999 (3) SA 254 (CC).

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arrears on their accounts, but admittedly did not do so against customers in the former black areas.

The Constitutional Court found that the differentiation at issue in the case amounted to indirect discrimination based on race. As the court explained,

> The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) [of the Interim Constitution] evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).
>
> The emphasis which this Court has placed on the impact of discrimination in deciding whether or not section 8(2) has been infringed is consistent with this concern. It is not necessary in the present case to formulate a precise definition of indirect discrimination. . . . It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this.
>
> I have had the opportunity of reading the judgment of Sachs J in which the view is expressed that the differentiation in the present case was based on "objectively determinable characteristics of different geographical areas, and not on race". I cannot subscribe to this view or to the proposition that this is a case in which, because of our history, a non-discriminatory policy has impacted fortuitously on one section of our community rather than another. There may be such cases, but in my view this is not one of them. The impact of the policy that was adopted by the council officials was to require the (white) residents of old Pretoria to comply with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them, whilst the (black) residents of Atteridgeville and Mamelodi were not held to the tariff, were called upon to pay only a flat rate which was lower than the tariff, and were not subjected to

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> having their services suspended or legal action taken against them. To ignore the racial impact of the differentiation is to place form above substance.[144]

The court then went on to determine whether the discrimination was unfair. As race is a listed ground, the discrimination was presumed to be unfair. With respect to the subsidization and the failure to apply the metered rate uniformly, the court found that the presumption was rebutted and the discrimination was not unfair. In the court's view, the Council's use of the flat rate in the former townships until all meters were installed was a reasonable, temporary measure in light of the difficulties it faced in the period of transition, and was consistent with the way in which electricity was supplied throughout South Africa. Further the residents of Old Pretoria did not suffer any deterioration in the standard of service delivery.

However, the court found that the City Council's selective pursuit of debtors affected Mr. Walker in a manner comparably serious to an invasion of his dignity and therefore that this discrimination was unfair. The selective enforcement policy had been adopted and implemented by city officials – apparently out of the desire to avoid provoking a hostile reaction from residents of Atteridge and Mamelodi while contractors were engaged in installing meters in the townships -- without the authority of the City Council, and was in contravention of City Council policy that arrears should be collected from all consumers. It also was implemented in secrecy, after officials had made untrue and misleading statements about the policy. In addition, the policy applied to all residents of the former townships, regardless of their financial circumstances or ability to pay for the services. As the court explained, the effect of the policy was

> to single out white defaulters for legal action while at the same time consciously adopting a benevolent approach which exempted black defaulters from being sued. No members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups. That is the grievance that the respondent has and it is a grievance that the council officials foresaw when they adopted their policy. The conduct of the council officials seen as a whole over the period from June 1995 to the time of the trial in May 1996 was on the face of it discriminatory. The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity. This was exacerbated by the fact that they had

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[144] *Id.* paras 31-33.

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> been misled and misinformed by the council. In the circumstances it must be held that the presumption has not been rebutted and that the course of conduct of which the respondent complains in this respect, amounted to unfair discrimination within the meaning of section 8(2) of the interim Constitution.[145]

Noting the US position (discussed below), the Constitutional Court made clear in *Walker* that there is no requirement that discriminatory intent be shown for indirect discrimination to violate the South African non-discrimination clause. As the court explained,

> The purpose of the anti-discrimination clause, section 8(2), is to protect persons against treatment which amounts to unfair discrimination; it is not to punish those responsible for such treatment. In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken. There is nothing in the language of section 8(2) which necessarily calls for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination. Consistent with the purposive approach that this Court has adopted to the interpretation of provisions of the Bill of Rights, I would hold that proof of such intention is not required in order to establish that the conduct complained of infringes section 8(2). Both elements, discrimination and unfairness, must be determined objectively in the light of the facts of each particular case. This seems to me to be consistent not only with the language of the section, but also with the equality jurisprudence as it has been developed by this Court. It is also consistent with the presumption in section 8(4) [that discrimination on a listed ground is presumptively unfair] which would be deprived of much of its force if proof of intention was required as a threshold requirement for the proof of discrimination.[146]

The court cautioned, however that, "[t]his does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits '*unfair*' discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness."[147]

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[145] *Id.* paras 80-81.
[146] *Id.* para 43.

[147] *Id.* para 44.

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In the *Democratic Party* case the Constitutional Court held that a litigant alleging indirect discrimination must show a causal connection between the challenged law and the indirect discrimination suffered by the affected person or group.[148] Moreover, this showing must be based on the circumstances at the time the law was adopted.[149] However, "[t]his comes close to requiring the complainant to show that at the time of adoption it was clear that the Act will have discriminatory effects, which is of course requiring the applicant to show that the discrimination was indended. In the light of the *Walker* decision, this result should be avoided."[150]

The *Democratic Party* case was a challenge to provisions of the Electoral Act 73 of 1998 that required voters to identify themselves with a bar-coded identity document. The requirement was challenged as indirectly discriminating on, among other grounds, race, age, and residence, as most persons without that type of identity document were whites, young people, and rural dwellers. The court rejected the challenge, finding that there was insufficient evidence that the identity document requirement indirectly discriminated against such persons. There was no proof that voters in the identified categories had in fact registered in smaller numbers than voters outside those categories, and even if there had been such evidence, it could have been the result of voter education drives directed at voters outside the listed categories, not the effect of the Electoral Act.[151] It has been argued that this reasoning is incorrect:

> we do not believe that the complainants in the *Democratic Party* [case] should have been required to show that the registration requirement actually resulted in a smaller number of the affected groups voting. Such an approach undermines the purpose of protection against indirect discrimination. It should be enough to show that the law is likely to impact disproportionately on the listed or analogous group. Th[e] next question should then be whether the discrimination is unfair. [T]he actual impact of the discrimination on the affected group is the determining factor when considering whether discrimination is unfair.[152]

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[148] 1999 (3) SA 254 (CC) para 12 ("Whatever the different impact, if any, might be, it is not possible to determine whether such impact constitutes unfair discrimination within the principles endorsed by this Court, unless it is established that such different impact is caused by the impugned legislation, and is not the result of some other cause.").

[149] *Id.* para 17 ("It is by no means clear that evidence of subsequent events is relevant to the question of the constitutionality of the impugned provisions of the . . . Act.").

[150] Currie & DeWaal *New Constitutional Law* 357.

[151] 1999 (2) SA 254 (CC) para 12.

[152] Currie & DeWaal *New Constitutional Law* 357.

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Under US law, proof of a discriminatory purpose is required for constitutional claims alleging indirect discrimination to receive heightened judicial scrutiny.[153] This is a difficult standard to meet, since discriminatory purpose

> implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group.[154]

Proof of intent is not, however, required for claims of indirect discrimination brought under Title VII of the 1964 Civil Rights Act, the US federal legislation that prohibits discrimination in employment on the grounds of race, colour, religion, sex and national origin. Although Title VII does not specifically refer to indirect discrimination, the Supreme Court has held that the statute can be violated by a facially neutral practice that has a "disparate impact" on a particular group.[155]

Unlike the South African Constitution, the Namibian Constitution does not expressly mention indirect discrimination. However, given the Constitution's strong commitment to eliminating discrimination and achieving equality, it is probable that the Namibian courts will find that the non-discrimination clause outlaws both direct and indirect discrimination. It also seems likely that the Namibian courts will follow the South African approach in this area and not require proof of intent in cases of indirect discrimination. Not requiring intent is more consistent with the substantive equality analysis that both the South African and Namibian courts have adopted for their anti-discrimination clauses. An intent requirement "poses an almost insurmountable barrier to any claim of indirect discrimination. . . , as more often than not structural forms of discrimination, which are often indirect, are not the result of any conscious policy of disadvantaging particular groups."[156]

8. The Relationship Between Equality and Dignity

The Namibian and South African courts view equality and non-discrimination as closely related to dignity. Dignity plays a role in the Namibian Article 10 cases in two ways: First, the impact on the affected person's or persons' dignity is an important consideration in determining whether discrimination on an enumerated ground is unfair and therefore in violation of Article 10(2). Second, the Supreme

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[153] *Washington v. Davis* 426 US 229 (1976).
[154] *Personnel Administrator of Massachusetts v. Feeney* 442 US 256 (1979).
[155] *Griggs v. Duke Power Co.* 401 US 424 (1971).
[156] Loenen "Remarks" 421.

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Court has indicated that discrimination on a non-enumerated ground, which cannot constitute "unfair discrimination" in terms of Article 10(2), may nevertheless violate the Namibian Constitution's dignity clause. However, as mentioned above, the Namibian courts have yet to apply the *Muller* court's suggestion that the right to dignity may prohibit discrimination on grounds other than those listed in Article 10(2).

Dignity also plays an important role in the South African's Constitutional Court's Section 9 analysis. First, a differentiation on an unspecified ground may constitute discrimination, if the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner. Second, in determining whether a particular instance of discrimination is unfair and therefore in violation of Section 9(3) or (4), an important consideration is the effect of the discrimination on the dignity of the victim(s). In addition, dignity is a consideration in determining justification under Section 36, the limitations clause.[157]

It should be noted that it is the *value* of dignity, and not the separately-protected right to dignity that is important to unfair discrimination test.[158] It therefore is not required that there be a finding of a violation of the right to dignity before a violation of the right to equality can be established. However, since the rights to dignity and equality both protect the value of dignity, in some circumstances there may be a violation of both rights, as was true in the *Immigration* and *Sodomy Cases*. But, as the South African Constitutional Court has recognized, in many instances

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[157] Section 36 permits the limitation of a right in the South African Bill of Rights if the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . . ." A two stage analysis is therefore required in constitutional cases: the court must first determine if a right in the Bill of Rights has been infringed and, if a right has been infringed, it must then consider whether the infringement is a justifiable limitation. In theory, therefore, legislation or conduct that violates Section 9 might nevertheless be constitutional if it satisfies the limitation clause. However, it is difficult to imagine how a differentation that is not rationally related to a legitimate government purpose or that is unfair discrimination because it impairs the fundamental human dignity of individuals could ever be held to meet Article 36's standard. *See* Currie & De Waal *New Constitutional Law* 359;De Waal, Currie & Erasmus *Handbook* 204-06. Indeed, the Constitutional Court has thus far not found an instance in which a violation of the equality clause was justified under Section 36. Currie & De Waal *New Constitutional Law* 359. However in a dissenting opinion in *Hugo*, Justice Mokgoro found the Presidential pardon of mothers to be unfair discrimination but justified under the limitations clause.

[158] *See* Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence" (2001) 17 *SAJHR* 34 46-48. The value of dignity is also used in interpreting other South African constitutional rights, such as the right to life and the right not to be punished in a cruel, inhuman or degrading manner. *See id.* (quoting *Dawood v. Minister of Home Affairs; Shalabi v. Minister of Home Affairs; Thomas v. Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35).

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"where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality, or the right not to be subjected to slavery, servitude or forced labour."[159] As a result, the right to dignity "for practical purposes serves as a flexible and residual right."[160]

This reliance on the value of dignity to inform the right to equality has been criticized by some South African commentators.[161] This author, however, is in agreement with the view that equality needs to be informed by another value and that using dignity to inform equality is appropriate.[162] "The substantive view of equality requires focusing on context and patterns of disadvantage, but because it offers essentially an *approach to analysis*, it alone does not explain what it is that we seek to rescue or achieve, nor does it say much about what – instrumentally – is the best way to achieve this."[163] The Constitutional Court, and the Namibian Supreme Court in adopting its analysis, have decided that dignity – essentially, the emphasis on the inherent worth of human beings as deserving of respect – is what is to be protected or achieved.[164] Locating the meaning of equality in the idea of protecting human worth is supported by international human rights law,[165] and serves the purpose of transforming these still seriously unequal societies, in that it seeks the advancement of peoples' material well-being and the creation of social and economic conditions in which people can live meaningful lives.[166]

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[159] *Dawood* para. 35.
[160] Cowen "Dignity" 47.
[161] *See* Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248; Davis "Equality: The Majesty of Legoland Jurisprudence" (1999) 116 *SALJ* 398; Fagan "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" (1998) 14 *SAJHR* 220.
[162] *See generally* Cowen "Dignity" 34. In an extra-judicial speech, Justice Ackermann also has defended the Constitututional Court's use of dignity in the equality analysis, finding dignity to be "an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination." Ackermann "The Role of Dignity" 28-29.
[163] Cowen "Dignity" 40.
[164] *Id.* 41-45.
[165] *Id.* 48-50.
[166] *Id.* 48-55. *See also* Liebenberg & O'Sullivan "South Africa's New Equality Legislation: A Tool for Advancing Women's Socio-Economic Equality?" (paper presented at Conference on Equality: Theory and Practice in South Africa and Elsewhere, Cape Town, 18-20 January 2001) 18 ("[T]he concept of human dignity embraces the socio-economic context of human well-being. As such, its presence in the Constitutional Court's jurisprudence under section 9 advances the jurisprudence of substantive equality.").

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9. The Relationship between Equality and Socio-Economic Rights

As Justice Chaskalson of the South African Constitutional Court has recognized, "no society can promise equality of goods or wealth" and the South African Constitution should not be understood as doing so.[167] As discussed above, however, the South African Constitution includes enforceable socio-economic rights. And, although the Namibian Constitution does not make access to housing, food, health care, etc. judicially-enforceable rights, social or economic status is included as a prohibited ground for discrimination in Article 10(2).

In *Grootboom v. Government of the Republic of South Africa*[168] -- where it held that the government's policies to address homelessness in the Western Cape failed to meet the requirements of the Constitution's guarantee of access to adequate housing -- the South African Constitutional Court made clear that the entrenchment of socio-economic rights in the Constitution seeks to further the constitutional values of equality and dignity. The court stated:

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2 [the South African Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[169]

The *Grootboom* case demonstrates that the socio-economic rights and the right to equality in the South African Constitution are "interrelated, interdependent, and mutually supporting" in that both seek to transform South African society by remedying its deeply entrenched social and economic inequality.[170] Thus,

> it would be difficult to come to grips with the nature of the obligations imposed by social and economic rights without a solid understanding of the way in which the Constitutional Court has developed the concept of

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[167] Chaskalson "Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *SAJHR* 193 202.
[168] 2001 (1) SA 46 (CC).
[169] *Id.* para 44. *See also id.* para 86 ("The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality."); Chaskalson "Third Bram Fischer Lecture" at 204 (explaining that the socio-economic rights are "rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water, or in the case of persons unable to support themselves, without appropriate assistance?").
[170] De Vos "*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) 17 *SAJHR* 258.

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> substantive equality. At the heart of this approach is an understanding that the right to equality—and the concomitant interlinking value of human dignity—and the social and economic rights are two sides of the same coin. Both sets of rights have been included in the Bill of Rights to ensure the achievement of the same objective, namely the creation of a society in which all people can achieve their full potential as human beings, despite apparent differences created by race, gender, disability and sexual orientation, and despite differences in the social and economic status of such individuals.[171]

What this means is that

> [g]iven that the Constitutional Court has interpreted the right to equality to go far beyond a formal guarantee of equal treatment, social and economic rights should be understood as requiring the state to do more than merely advance the social and economic rights of all South Africans without regard to the different social and economic circumstances in which different groups find themselves. What is required is to take into account the *impact* of the state's action or omission on a specific group with reference to the social and economic context within which the group finds itself. State plans aimed at the progressive realisation of any of the social and economic rights guaranteed in the Constitution that fail to take cognisance of the different ways in which the plan will impact on groups within different social and economic contexts will be constitutionally suspect. Some groups would have suffered from 'patterns of disadvantage and harm' in the past due to their race, sex, gender, class or geographical location and will be economically particularly vulnerable. The more economically disadvantaged and vulnerable a group is found to be, the greater the possibility that a court may find that there was a constitutional duty on the state to pay special attention to the needs of such a group.[172]

10. Transitional Issues

Neither the Namibian nor the South African Constitutions did away with all pre-existing law when they came into effect. Doing so would have resulted in chaos. Rather, both provided that existing law would remain in force so long as it did not conflict with the new Constitution.

However, the Namibian Constitution provides that discriminatory or otherwise unconstitutional common law and customary law principles became invalid immediately upon Independence, whereas such statutory principles remain in force until repealed or amended by Parliament or declared unconstitutional by a court. These rules were applied in *Myburgh v. Commercial Bank of Namibia.*[173] There, a bank brought an action against a woman who failed to make payments on a loan. Mrs. Myburg argued in defense that under the common law she lacked capacity to be

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[171] *Id.* 265.
[172] *Id.* 267.
[173] Case No. SA 2/2000 (SC 8 December 2000).

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sued, as she was a woman married in community of property.[174] She failed, however, in her attempt to hide behind this discriminatory rule. The Supreme Court held that the legal disabilities imposed on women married in community of property by the common law violated both Article 10(2) and Article 14(1) of the Constitution.[175] The court also found, based on Article 66(1), which provides that "[b]oth the customary and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution," that the common law disabilities imposed on married women became invalid when the Constitution took effect at Independence. Pursuant to Article 140(1), however, statutory law in force at the time of independence would remain valid until repealed or amended by Parliament or declared unconstitutional by a court.[176]

The statutory law in force in Namibia still includes parts of the Native Administration Proclamation of 1928.[177] As a result, the default property regime applicable to a marriage in Namibia today depends on the race of the couple and where the marriage occurred. Specifically, marriages between "natives" in northern Namibia are deemed to be out of community of property, unless the couple agrees otherwise beforehand, while the reverse is true for all other marriages (they are automatically in community of property unless the couple agrees otherwise in advance). Under the Proclamation, intestate estates are also treated differently depending on the race of the deceased: the estates of "natives" who die without a will are divided according to "native law and custom," whereas the estates of whites or coloured people who likewise die intestate devolve under the general Namibian law of intestacy.

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[174] The Married Persons Equality Act 1 of 1996, discussed in Part C below, did not apply to the case because the contract at issue had been entered into before the Act became effective.

[175] With respect to Article 10(2) and the question of unfair discrimination, the Court found that the differentiation -- which was "based on stereotyping which does not take cognizance of the equal worth of women but reduces them, in the eyes of the law, to minors who cannot act independently, but need the assistance of their husbands" and which "takes no cognizance of the fact that in many marriages in community of property the intelligence, training, qualifications or natural ability or aptitude of the woman may render her a far better administrator of the common estate than the husband" -- impaired the dignity of women as a class and individually. Slip opinion at 17. With respect to Article 14(1), the Court found that subjecting a wife to the guardianship of the husband did not afford the parties equal rights during marriage.

[176] *Myburgh* 8-14. The Namibian Constitution expressly repealed a number of pre-Independence statutes, *see* Nam. Const. Schedule 8, but pursuant to Article 140(1) all other existing statutes remain valid until repealed, amended or found unconstitutional.

[177] No. 15 of 1928.

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These statutory racial differentiations seem inconsistent with Article 10, and they are being challenged as such in two cases currently before the Namibian High Court.[178] In addition, one of the cases also seeks the invalidation, under Article 10, of the common law rule that illegitimate children do not inherit from their father if he dies intestate, as legitimate children do. (With respect to the latter challenge, it is interesting to note that the US Supreme Court found a state law prohibiting illegitimate children from inheriting from their father's intestate estate to be unconstitutional.[179]) Should the court find these provisions to be unconstitutional, in terms of the *Myburgh* case the common law rule will be considered to have become invalid upon Independence,[180] while the aspects of the Native Administration Proclamation would only be invalid from the time they are declared so by the court.

The Namibian courts have not yet addressed the question of the effect of Article 10's guarantee of gender equality or Article 14's guarantee of equal rights between men and women as to marriage on customary law that treats women and men differently, such as the rule that women are perpetual minors. However, in light of *Myburgh* and Article 66(1), aspects of the customary law which have not been given statutory recognition and which violate Article 10 or 14 in theory became invalid upon Independence, although probably still are being applied in areas where customary law is widely followed.

C. Legislation

1. Anti-Discrimination Legislation

The Namibian Parliament has followed Article 23(1)'s command to outlaw and render punishable racial discrimination and apartheid. The 1991 Racial Discrimination Prohibition Act[181] criminalizes racial discrimination or apartheid in public amenities, the provision of goods and services, transactions relating to movable

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[178] *Ashikoto v. the Kwanyama Traditional Authority and Others; Kauapirura v. the Herero Traditional Authority and Others.*

[179] *Trimble v. Gordon* 430 US 762 (1977). In other cases, however, the court found it constitutional to condition inheritance by an illegitimate child on a judicial finding of paternity during the father's lifetime, *Lalli v. Lalli* 439 US 259, and to condition the receipt of Social Security survivor's benefits by an illegitimate child on proof of the wage earner's paternity and the child's dependency, *Mathews v. Lucas* 427 US 495 (1976).

[180] This raises a significant practical question: Does this mean that all of the estates in which this common law rule was applied since Independence could be subject to being reopened by any illegitimate children who were excluded from inheritance by the rule?

[181] Act 26 of 1991.

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property, educational and medical institutions, employment, associations, and religious services. It further prohibits the use or publication of any language which threatens, ridicules or insults any person or group of persons. A violation carries a fine of up to N$80,000 or imprisonment for a period of up to 15 years.

In addition, the Labour Act,[182] enacted in 1992, prohibits unfair discrimination or harassment in the workplace and gives jurisdiction to the Labour Court to take action against the perpetrators. Interestingly, this Act prohibits unfair discrimination on more grounds than Article 10(2) of the Constitution does. Specifically, the Act outlaws discrimination on the grounds of "sex, race, colour, ethnic origin, religion, creed, social or economic status, political opinion or marital status or . . . sexual orientation, family responsibilities, or disability. . . ."[183] Furthermore, although the Labour Act itself does not include HIV status as a prohibited ground, in 1998 the Minister of Labour promulgated regulations (the National Code on HIV/AIDS and Employment) that outlaw discrimination in employment based on HIV status.[184]

The South African Constitution required the enactment of national legislation "to prevent or prohibit unfair discrimination" within three years of the Constitution's commencement.[185] In February 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act[186] was enacted pursuant to this requirement. The Act partially came into effect on September 1, 2000.[187] However, the Act's enforcement provisions did not come into effect at this time; thus, no proceedings have yet been instituted under the Act.

The Act specifies that it binds the state and all persons.[188] The Act prohibits unfair discrimination in general and provides specific examples of unfair

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[182] Act 6 of 1992.
[183] *Id.* Section 107.
[184] *See* Figueira "HIV/AIDS: Human Rights Developments in Namibia since Independence (paper presented at the Ten Years of Namibia's Constitution and Independence Conference, Windhoek, 11-13 September 2001) 3.
[185] RSA Const., Section 9(4) and Schedule 6, Item 23(1).
[186] Act 4 of 2000.
[187] The portions that came into effect are the following sections: 1 (Definitions), 2 (Objects of Act), 3 (Interpretation of Act), 4(2) (Guiding Principles, although not those that apply in adjudications under the Act), 5 (Application of Act), 6 (Prevention and general prohibition of unfair discrimination), 29 (Illustrative list of unfair practices in certain sectors), 32 and 33 (Establishment and Powers, functions and term of Equality Review Committee), and 34(1) (Directive principle on HIV/AIDS, nationality, socio-economic status, and family responsibility and status). The provisions discussed below relating to burden of proof and proceedings in the equality courts did not come into effect at this time.
[188] *Id.* Section 5.

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discrimination on three specific grounds, grounds, race, gender, and disability.[189] For example, unfair discrimination on the ground of gender includes gender-based violence, female genital mutilation, prohibitions against women inheriting family property, limitations on women's access to land rights, and more.[190] It further outlaws hate speech and harassment, and prohibits the dissemination and publication of information that unfairly discriminates.[191] The Act does not, however, apply to claims of discrimination in employment, which are dealt with under the Employment Equity Act.[192]

The Equality Act also addresses the burden of proof in a case alleging unfair discrimination. In this regard the Act provides that the complainant must first make out a a *prima facie* case of discrimination by showing that an act or omission of the respondent directly or indirectly imposed burdens, obligations or disadvantages or withheld benefits, opportunities or advantages on one or more prohibited ground.[193] Like the equality jurisprudence of the Constitutional Court, this reflects a substantive equality approach in that it focuses on impact and outcomes rather than on treatment.[194] Once the *prima facie* case has been made, the burden shifts to the respondent to prove either that the discrimination did not take place as alleged or that the conduct was not based on one or more prohibited grounds.[195] The prohibited grounds under the Act are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth (the same grounds as are listed in Section 9(3) of the Constitution), or any other analogous ground where the discrimination either causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on one of the listed grounds.[196] Like the Constitution, the Act specifies that discrimination on a listed ground is presumed to be unfair unless

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[189] *Id.* Sections 6-9.
[190] *Id.* Section 8.
[191] *Id.* Sections 10-12.
[192] Act 55 of 1998. *See* Act 4 of 2000, Section 5(3). Other statutes in South Africa, such as the Medical Schemes Act and the Rental Housing Act, also contain anti-discrimination clauses. It will be up to the equality courts to decide whether a particular case should be decided under the Equality Act or some other law. *Id.* Sections 20(3) – (9).
[193] *Id.* Sections13(1) & 1(1)(viii).
[194] Liebenberg & O'Sullivan "Equality Legislation" 26.
[195] *Id.* Section 13(1).
[196] *Id.* Section 1(1)(xxii).

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the respondent proves it to be fair.[197] Unlike the Constitution, the Act also presumes that discrimination on an unlisted ground is unfair if the ground either causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on one of the listed grounds.[198]

The Act also specifies how fairness or unfairness is to be determined. It specifically provides that "measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons" (*i.e.,* affirmative action) will not constitute unfair discrimination.[199] It further provides that the fairness or unfairness of a particular instance of discrimination should be determined in light of a number factors: the context, whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria intrinsic to the activity concerned, whether the discrimination impairs or is likely to impair human dignity, the impact or likely impact of the discrimination on the complainant, the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns, the nature and extent of the discrimination, whether the discrimination is systemic in nature, whether it has a legitimate purpose, whether and to what extent it achieves its purpose, whether there are less restrictive and less disadvantageous means to achieve the purpose, and whether and to what extent the respondent has taken reasonable steps under the circumstances to address the disadvantage which arises from or is related to one of the prohibited grounds or to accommodate diversity.[200] These considerations include the *Harksen* factors that are used to determine unfairness under Section 9(3) of the Constitution and the criteria that are used to assess limitations to rights under Section 36 of the Constitution.[201]

These standards, however, do not apply in cases of hate speech and harassment, in which there is no requirement to show unfairness.[202] Under the Act hate speech consists of "words based on one or more of the prohibited grounds . . .

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[197] *Id.* Section 13(2)(a).
[198] *Id.* Section 13(2)(b).
[199] *Id.* Section 14(1).
[200] *Id.* Section 14.
[201] DeWaal, Currie & Erasmus *Handbook* 227.
[202] Equality Act Section 15.

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that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful; [or] (c) promote or propagate hatred."[203] Harassment means "unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation; or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group."[204]

Proceedings under the Act may be instituted by a person acting in his or her own interest, acting on behalf of another person who cannot act in his or her own name, acting as a member or of in the interests of a group or class of persons, or acting in the public interest; by an association acting in the interest of its members; or by the South African Human Rights Commission or Commission for Gender Equality.[205] The Act establishes the magistrates and High Courts as equality courts to hear cases under the Act, and provides for the appointment of a presiding officer and a clerk for each equality court.[206] The Act grants broad enforcement and remedial powers to the equality courts, including the power to grant interdicts, to award damages, to order the implementation of specific measures, to order an apology, to order the respondent to undergo an audit, and/or to order the respondent to make regular progress reports to the court.[207] Appeals from orders of the equality courts are to the High Court or the Supreme Court of Appeal as the case may be.[208]

Finally, the Act recognizes the duty of the state to promote and achieve equality and of all persons to promote equality.[209] It then proceeds to list numerous specific way in which the state and private persons must carry out these duties, including the development of equality plans and codes of practices.

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[203] *Id.* Section 10.
[204] *Id.* Section 1(1)(xiii).
[205] *Id.* Section 20. This section tracks Section 38 of the South African Constitution.
[206] *Id.* Section 16. However, until the Minister of Justice and Constitutional Development determines by notice in the *Government Gazette,* no proceeding under the Act may be instituted in a particular court until a presiding officer with "training, experience, expertise and suitability in the field of human rights" has been designated and one or more trained clerks are available. *Id.* Section 31(1).
[207] *Id.* Section 21(2).
[208] *Id.* Section 23(1).
[209] *Id.* Section 24.

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A number of laws predating the Equality Act also prohibit discrimination in South Africa. For example, the Wage Act,[210] which governs minimum wages, prohibits wage practices that discriminate on the basis of race, colour or sex.[211] *See also* the Acts mentioned in footnote 177, *supra.* In addition, the Labour Relations Act[212] defines prohibited unfair labour practices to include "unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility." Finally, the Employment Equity Act (which is further discussed in the following Chapter) prohibits direct or indirect unfair discrimination "against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."[213]

As previously mentioned, the federal anti-discrimination law in force in the US today consists of sections from various statutes enacted between 1866 and 1875, and from 1957 to the present.[214] Provisions of the Civil Rights Acts of 1866, 1870, 1871, and 1875 that are still in effect guarantee equal contractual, legal, property and voting rights without regard to race, and impose civil and criminal penalties for the deprivation of such rights. Various provisions from the Civil Rights Act of 1957, the Civil Rights Act of 1960, the Civil Rights Act of 1964, and the Voting Rights Act of 1965 prohibit racial discrimination in voting. The Equal Pay Act of 1963, Title VII of the 1964 Civil Rights Act, the Pregnancy Discrimination Act of 1978, the Rehabilition Act of 1973, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990 prohibit discrimination based on race, colour, sex, religion, national origin, age, or handicap in employment. The Civil Rights Act of 1964 also prohibits discrimination based on race, colour, sex, religion or

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[210] Act 5 of 1957 as amended by Act 48 of 1981.
[211] The Wage Act, however, does not apply to farm or domestic workers and thus provides no protection to the many blacks and women who work in these sectors. *See* Sinclair *The Law of Marriage Volume 1* (1996) 80.
[212] Act 66 of 1995.
[213] Act 55 of 1998 Section 6.
[214] Most if not all of the 50 US states also have enacted anti-discrimination statutes, although discussion of all of these statutes is beyond the scope of this dissertation.

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national origin in federally-funded programs, public accommodations, and housing. The Civil Rights Act of 1968 forbids interference with a person's involvement in certain protected activities – such as enrolling in or attending public educational institutions, participating in state programs, serving as a grand or petit juror, and enjoying the goods/services of public accommodations -- because of his or her race, colour, religion, or national origin. Title VIII of the 1968 Act, as amended by the Fair Housing Amendments Act of 1988, prohibits discrimination on the basis or race, colour, religion, national origin, sex, handicap or familial status in housing.

These statutes are very important in that they provide legal recourse against private discrimination, which the US Constitution generally does not. In addition, some of these statutes prohibit discrimination on grounds, such as sex, handicap, and familial status, that do not receive strict scrutiny under constitutional equal protection law. Furthermore, the primary US employment discrimination statute, Title VII of the 1964 Civil Rights Act, prohibits unintentional discrimination, which the Constitution does not. In these areas, therefore, these statutes provide greater protection to victims of discrimination in the US than the US Constitution itself.

2. Legislation on Married Women's Rights

In 1996, the Namibian Parliament enacted the Married Persons Equality Act.[215] This Act eliminated a number of common law rules that discriminated against married women. The Act abolished the rule that the husband possessed the "marital power" over his wife's person and property and the wife was rendered a legal minor.[216] As a result of the Act, married men and women have equal capacity regarding their joint estate, although certain acts require the other spouse's consent, and equal legal capacity to contract, litigate, act as executors, trustees, and sureties, and deal with their separate property.[217] In 1984, South Africa had made similar reforms to its civil marriage laws,[218] although these reforms only applied prospectively (*i.e.,* to marriages celebrated after the commencement of the reforms) to marriages of whites, coloureds and Indians.[219] Black marriages were prospectively covered in 1988, and in 1993, these changes were made retrospective.[220]

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[215] Act 1 of 1996.
[216] *Id.* Sections 2 & 3.
[217] *Id.* Sections 5-8.
[218] There is no equivalent national legislation in the US, where marriage is a matter of state law.
[219] The Matrimonial Property Act 88 of 1984.
[220] Act 132 of 1993.

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The Namibian Married Persons Equality Act further replaced the common law rule that a married woman's domicile was always that of her husband with the rule that her domicile is to be individually determined.[221] In addition, the Act specifies that a child's domicile is to be the place with which the child is most closely connected, rather than automatically that of the father, and grants the father and mother equal powers of guardianship over a child.[222] South Africa made similar reforms in 1992 and 1993.[223]

The Married Persons Equality Act expressly applies only to marriages contracted in terms of Namibian civil law.[224] Currently only civil law marriages are legally recognized in Namibia, although marriages contracted pursuant to customary law are common and are socially accepted. The Namibian Law Reform and Development Commission is working on legislation that would recognize customary marriages, as South Africa did in its Recognition of Customary Marriages Act 120 of 1998. This Act, which came into operation on November 15, 2000, made customary marriages valid in South Africa. The dissolution of such marriages is now subject to civil divorce law and the civil law concerning maintenance. The Act also abolished the marital power in South African customary marriages.

Reportedly, the legislation being considered by the Namibian commission is substantially similar to the South African law, including in abolishing the marital power of the husband in customary law marriages. Meanwhile, under the *Myburgh* decision and Article 66(1), in theory any discriminatory customary law rules similar to the old common law rules on married women's status and rights became invalid upon the independence of Namibia. However, it is likely that many women in customary marriages, most of whom reside in the rural areas, in practice remain subject to such rules.

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[221] Act 1 of 1996 Section 12.
[222] *Id.* Sections 13-14.
[223] Domicile Act 3 of 1992; Guardianship Act 192 of 1993.
[224] Act 1 of 1996 Section 16. The only exception is that the Act's grant of equal powers of guardianship over children extends also to customary marriages.

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IV. Affirmative Action

A. The Concept of Affirmative Action and the US Experience

The origin of the term affirmative action is often traced to a 1965 executive order of US President Lyndon B. Johnson, although the practice of using special measures to help advance members of disadvantaged groups pre-dates President Johnson's use of the term.[1] Executive Order 11246 required companies doing business with the federal government to take unspecified "affirmative action" to provide equal opportunity in employment regardless of race, religion, or national origin.[2] In 1967, the order was amended by Executive Order 11375 to include sex. By 1969, the affirmative action required of federal contractors had come to include the use of goals and timetables toward the achievement of a workforce reflecting the representation of various groups within the relevant labour pool.[3] By the mid-1990s, 162 separate federal affirmative action programs existed in the US,[4] numerous state and local affirmative action laws had been enacted, and voluntary affirmative action programs had been instituted by many private institutions.

In a speech at Howard University on June 4, 1965, President Johnson explained the rationale for affirmative action as follows:

> [F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open

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[1] *See* Jauch *Affirmative Action in Namibia: Redressing the Imbalances of the Past?* (1998) 1-13 (discussing the use of such measures in Sri Lanka, Malaysia and India).

[2] Enforcement of these requirements was given to an office within the US Department of Labour, the Office of Federal Contract Compliance (the "OFCCP").

[3] In 1969, during the Nixon Administration, the federal government began requiring federal contractors to set specific goals for minority hiring. This became known as the "Philadelphia Plan." In 1978, the US Departments of Justice and Labor, the US Equal Employment Opportunity Commission, and the US Civil Rights Commission jointly promulgated "Uniform Guidelines on Employee Selection Procedures." These Guidelines envision affirmative action as a two step process. First, there must be an analysis of the workforce to determine whether the representation of various groups in the employer's job classifications parallel the representation of those groups in the relevant qualified labour pool. Second, if the two do not match, then all phases of the selection process must be examined to determine the reason for the inequality, and affirmative action must be taken to counteract or eliminate that reason. *See* Clayton & Crosby *Justice, Gender and Affirmative Action* (1992) 19.

[4] Lehmann "Taking Affirmative Action Apart" in Beckwith & Jones (eds) *Affirmative Action: Social Justice or Reverse Discrimination?* (1997) 51. As of 1991, the OFCCP was overseeing 225,000 companies that were required to have affirmative action programs. Clayton & Crosby *Justice* at 18.

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> the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the most profound stage of the battle for civil rights. . . .[5]

Despite, or perhaps because of, its prevalence, affirmative action has over the years become more and more controversial in the US,[6] and there have recently been a number of efforts in various arenas to abolish it.[7] Its proponents generally argue that affirmative action is a fair and necessary way to achieve equality, while its opponents assert that it is reverse discrimination. As Steele describes it, "supporters of affirmative action focus on its good intentions while detractors emphasize its negative effects."[8]

Affirmative action encompasses a wide variety of measures, ranging from targeted recruitment methods to requirements that a certain number of positions be reserved for members of certain groups. One commentator has identified five types of affirmative action, based on the affirmative action experience in the US:

(1) "Open- search" affirmative action: "policies designed to advertise all openings as widely as possible and to monitor appointments and promotions in order to ensure that the process is open, nondiscriminatory and promotes excellence;"

(2) "punitive" affirmative action: "any policy, private or public, *ordered by the court* to redress proven cases of individual discrimination," which may include numerical objectives;"[9]

(3) "minority set asides": "rules concerning [government] contracts and involving a specific percentage of contracts to be set aside for minority contractors;"

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[5] Johnson "To Fulfill These Rights" in Beckwith & Jones *Affirmative Action* 57-58.

[6] *See, e.g.*, Lynch "Casualties and More Casualties: Surviving Affirmative Action (More or Less)" in Beckwith & Jones *Affirmative* Action 90-98 (describing the growth of public sentiment against affirmative action in the US in the 1980's); Sowell "From Equal Opportunity to 'Affirmative Action'" in Beckwith & Jones *Affirmative Action* 99 ("Many Americans who supported the initial thrust of civil rights, as represented by the *Brown v. Board of Education* decision and the Civil Rights Act of 1964, later felt betrayed as the concept of equal individual *opportunity* evolved toward the concept of equal group *results*.")

[7] For example, in 1996 voters in California passed a ballot initiative outlawing the use by the state or any of its political subdivisions of "race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting." California Civil Rights Initiative, passed November 5, 1996 (quoted in Beckwith & Jones *Affirmative Action* 9).

[8] Steele "Affirmative Action: the Price of Preference" in Beckwith & Jones *Affirmative Action* 133-34.

[9] For example, Section 706(g) of Title VII of the 1964 Civil Rights Act, the primary federal employment discrimination statute in the US, allows a court to order "such affirmative action as may be appropriate" following a finding of intentional or unintentional discrimination.

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(4) "backward-compensation" affirmative action: "any policy designed to redress alleged cases of discrimination against a group by placing members of the group in the positions they would have allegedly held if the alleged discrimination had not taken place;" and

(5) "forward-preferential" affirmative action: "any policy in social planning, without any causal claim of what would have been, designed to produce a society or institution that reflects some stated goal and invokes *quotas* of group representation.[10]

All race-based affirmative action measures must survive strict scrutiny under US Supreme Court case law.[11] That is, they must be shown to be narrowly tailored to serve a compelling governmental interest. In the US, the first type of affirmative action in the above list has generally not been constitutionally problematic. With respect to the second type (court-ordered remedial affirmative action), strict scrutiny has been met in cases where the affirmative action was remedying specific, severe and pervasive past race discrimination, where it was temporary in duration, and where it did not unnecessarily trammel the interests of white employees.[12] However, the latter three types of affirmative action have often failed strict scrutiny, which is why it has been said that strict scrutiny is "strict in theory and fatal in fact."[13] For example, the US Supreme Court has held that affirmative action is not constitutionally justified merely to remedy the effects of general discrimination in society that has caused the underrepresentation of racial minorities in particular occupations.[14]

The various types of affirmative action measures are also often divided into two categories: weak affirmative action and strong affirmative action. Weak affirmative action "stresses *equal opportunity*, an opportunity to compete without

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[10] Capaldi "Affirmative Action: Con" in Mosley & Capaldi *Affirmative Action: Social Justice or Unfair Prejudice?* (1996) 68 (emphasis in original).
[11] The applicability of this standard was only clearly decided in 1995, in the case of *Adarand Constructors v. Pena*, 515 US 200 (1995). Prior to that time, the question of what standard of review should apply to race-based affirmative action measures was unsettled. *See generally* Spann *The Law of Affirmative Action* (2000).
[12] *United States v. Paradise* 480 US 149 (1987); *Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Commission* 478 US 421 (1986).
[13] *Fullilove v. Klutznick* 448 US 448, 519 (1980) (Marshall, J., concurring in judgment); *but see Adarand*, 515 US at 236 (O'Connor, J., writing for the majority) ("we wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.'").
[14] *City of Richmond v. JA Croson Co.* 488 US 469, 488-89 (1989).

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irrelevant characteristics taken into account, [rather than stressing] equal results."[15] This would include measures like "'the elimination of segregation, widespread advertisement to groups not previously represented in certain privileged positions, special scholarships for disadvantaged classes (e.g., all the poor), using underrepresentation or a history of past discrimination as a tie breaker when candidates are relatively equal, and the like.'"[16] Strong affirmative action, by contrast,

> 'involves more positive steps to eliminate past injustice, such as reverse discrimination, hiring candidates on the basis of race or gender in order to reach equal or near equal results, proportionate representation in each area of society.' This view stresses *equal results* (or at least some goal or pattern which ought to be achieved) by using timetables, goals or quotas as criteria by which to judge whether one has achieved fairness. Rather than stressing fair process, the proponents of this position see fairness as result, which is why they can ignore what their opponents think are ordinary canons of fair play as well as maintain that it is permissible (if not obligatory in some cases) to hire a less though adequately qualified candidate for a position because such a hiring results in equality or fairness."[17]

Not surprisingly, in the US strong affirmative action has been more controversial – and as mentioned above, more often constitutionally suspect -- than weak affirmative action.

One commentator has distilled the debate over affirmative action into seven major arguments in favour of it and seven major arguments against it.[18] The arguments in favour are: (1) the need for role models of various races/ethnicities and of both genders, (2) the need to break stereotypes, (3) the argument that unequal results show discrimination whereas equal results show equality, (4) the argument that persons in groups who have been discriminated against in the past deserve compensation, (5) the argument that those who have innocently benefited from past injustice should be the ones to give compensation, (6) the need for diversity in universities, workplaces, etc., and (7) the "anti-meritocratic desert" argument that because talented people do not earn or deserve their talent, intelligence, education,

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[15] Beckwith & Jones *Affirmative Action* 11.
[16] *Id.*
[17] *Id.* 12.

[18] Pojman "The Moral Status of Affirmative Action" in Beckwith & Jones *Affirmative Action.*

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etc. and therefore have no right to the better positions in society, society can award those positions as it sees fit, for example based on social utility or to compensate for previous wrongs. The arguments against affirmative action are: (1) that it shifts injustice by requiring discrimination against a different group, (2) that it perpetuates victimization, (3) that it encourages mediocrity and incompetence, (4) that it unfairly shifts the burden of proof, presuming discrimination based on underrepresentation, (5) that it goes against the idea that society generally should reward and value merit, (6) that it is a "slippery slope" that is difficult to limit, and (7) that it has not been successful in solving the social problems that it was intended to address.[19]

The various arguments in support of affirmative action are sometimes categorized as either "backward-looking" or "forward-looking." The backward-looking arguments view affirmative action as a matter of corrective justice, providing compensation or restitution because of the harms suffered by members of disadvantaged groups and the corresponding unjust enrichment afforded members of advantaged groups.[20] The forward-looking justifications, on the other hand, see affirmative action as seeking distributive justice, minimizing social subordination, and maximizing social utility.[21]

The fact that affirmative action in the US originated in an obscure executive order contributed to the controvery over the topic. As Lehmann has pointed out:

> Because the end of segregation came in the form of a bill being passed, the country realized it was making a momentous change. The Civil Rights Act of 1964 was furiously debated and examined. Compromises were struck. The result was that by the time the act became law, Americans had consciously made up their minds to take this great step. Executive Order 11246 had exactly the opposite dynamic: it was an invisible milestone in that it was not

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[19] American commentators have come down on both sides of this complicated subject. In Pojman's view, the arguments against affirmative action are more persuasive than those in favour of it. He concludes that, although weak affirmative action can be morally justified, strong affirmative action , "where quotas, 'goals' and equal results are forced into groups, thus promoting mediocrity, inefficiency, and resentment" cannot be. *Id.* 195. Many others have written both in support of and against affirmative action. *Compare, for example,* Wasserstron "A Defense of Programs of Preferential Treatment" in Beckwith & Jones *Affirmative Action* (concluding that affirmative action is justified), Beauchamp "Goals and Quotas in Hiring and Promotion" in Beckwith & Jones *Affirmative Action* (same), Sher "Justifyin Reverse Discrimination in Employment" in Beckwith & Jones *Affirmative Action* (same), *and* Mosley "Affirmative Action: Pro" and "Response to Capaldi" in Mosley & Capaldi *Affirmative Action* (same); *with* Levin "Is Racial Discrimination Special" in Beckwith & Jones (arguing that affirmative action is not justified) *and* Capaldi "Affirmative Action: Con" and "Response to Mosley" in Mosley & Capaldi *Affirmative Action* (same).

[20] Mosley "Affirmative Action: Pro" in Mosley & Capaldi *Affirmative Action* 24-38.

[21] *Id.* 44-53.

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> debated at all (or noticed, even) before the fact. Given its significance, it was inevitable that it would be publicly debated with Civil Rights Act-like intensity at some point after the fact. . . .[22]

In addition, the US Constitution's failure to expressly address affirmative action added to the debate, by rendering its constitutionality an uncertain and much-litigated question.[23]

Of course, the circumstances are different in Namibia and South Africa, where the Constitutions expressly permit affirmative action and where it is being implemented in favour of a majority of the people, through publicly-debated and popularly-supported laws. As a result affirmative action in these countries has not been, and likely will continue not to be, as controversial an issue as it has in the US. Another difference has also been suggested: that affirmative action in the US had only the limited aim of integrating minorities and women into "mainstream" American institutions, rather than, as seems to be intended in Namibia and South Africa, seeking to transform the society as a whole.[24] Whether affirmative action can actually accomplish the latter goal, however, is questionable. Indeed, Jauch has concluded, based on his study of the results of affirmative action in Sri Lanka, India and Malaysia, that affirmative action alone is not able to transform societies. As he explained:

> [A]ffirmative action does not eradicate the root causes of inequality. Existing economic power structures which determine the distribution of wealth and income have not been challenged. Affirmative action is essentially a reformist strategy and not a tool of transformation. It can, however, redress specific imbalances which exist in a society, for example on the basis of caste, race or ethnicity. In the Namibian context, affirmative action can play a significant role in overcoming the entrenched racial and gender inequalities in institutions which were dominated by white males. It is important to explicitly detail the aims of affirmative action and to supplement the policy with other measures if all forms of inequality are to be overcome.[25]

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[22] *Id.* 42. *See also* Curry (ed) *The Affirmative Action Debate* (1996) 2 (characterizing affirmative action in the US as a "political orphan, never clearly codified in federal statutes and owing its shaky existence to the generosity of the executive branch."); Capaldi "Response to Mosley" in Mosley & Capaldi *Affirmative Action* 124-25 (criticizing US affirmative action for being a product of the federal bureaucracy rather than the Congress or Supreme Court).

[23] For an excellent description of the US Supreme Court's long and complicated treatment of this question, *see* Spann *The Law of Affirmative Action* (2000).

[24] Jauch *Affirmative Action* 2 (quoting Maphai "One Phrase Two Distinct Concepts" *Die Suid-Africaan* 44 (1993) 24).

[25] *Id.* 13.

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One of the justices of the South African Constitutional Court has also recognized this. In an academic article, Justice Madala stated:

> South Africa is faced with a fundamental transformation from apartheid colonialism to a non-racial, non-sexist and democratic society. This task is much broader than the scope of affirmative action is generally conceived to be (i.e., as promoting proportionate representation of previously marginalized groups in public and private institutions). I emphasize that one must avoid the danger of oversimplifying the task of affirmative action in this manner. Affirmative action strategies must be located within broader strategies of redress as part of a necessary transformation away from the edifice of apartheid. This means that at a macro level, affirmative action policies should be pursued within the broader strategy of transformation and developmental policies. At the institutional level, affirmative action must be pursued as part of a broader strategy for organizational restructuring and development.[26]

The US experience with affirmative action illustrates this problem as well. A frequent criticism of US affirmative action (argument 7 among the arguments against affirmative action discussed above) is that it has benefited only the more advantaged blacks and women, and not the truly disadvantaged in these groups who need it the most.[27] As Shelby Steele, a middle-class black college professor, has argued,

> I think the unkindest cut is to bestow on children like my own an undeserved advantage while neglecting the development of those disadvantaged children on the East Side of my city who will likely never be in a position to benefit from a preference. Give my children fairness; give disadvantaged children a better shot at development—better elementary and secondary schools, job training, safer neighborhoods, better financial assistance for college, and so on.[28]

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[26] Madala "Affirmative Action—A South African Perspective" 52 *SMU L. Rev.* 1539, 1544 (1999).

[27] *See, e.g.,* Sowell "From Equal Opportunity to 'Affirmative Action'" in Beckwith & Jones *Affirmative Action* 110 ("Those blacks with less education and less job experience—the truly disadvantaged—have been falling farther and farther behind their white counterparts under affirmative action, during the very same years when blacks with more education and more job experience have been advancing economically, both absolutely and relative to their white counterparts."); Loury "Performing without a Net" in Curry *Affirmative Action Debate* 53 ("[T]he principal beneficiaries of affirmative action are relatively well-off blacks. Some programs, like the public works set-aside for 'disadvantaged' businesses or racially preferential admissions policies at elite colleges and professional schools, target their benefits almost exclusively at the richest sector of African-American society.").

[28] Steele "Affirmative Action: The Price of Preference" in Beckwith & Jones *Affirmative Action* 141; *see also* Loury "Performing without a Net" in Curry *Affirmative Action Debate*; Woodson "Personal Responsibility" in Curry *Affirmative Action Debate* 111-112 ("Not all blacks are equally 'disadvantaged.' My own children, like the children of the black writers who contributed to this anthology, may have better prospects for a successful future than many white kids. The premise that underlies current affirmative action policies is the assumption that race is, in itself, a disadvantage. It should come as no surprise that when preferential treatment is offered without regard to economic

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Indeed, even supporters of affirmative action in the US have admitted that the criticism that it does not adequately address socio-economic disadvantage is strong.[29] As Jauch and Justice Madala have suggested, this is something that the people creating and implementing affirmative action policies and programs in Namibia and South Africa must keep in mind.

Thus, despite the differences, the US experience may still provide some useful lessons. Namibia and South Africa are only very early in the process of using affirmative action. The history of affirmative action in the US shows that early support can diminish as time goes on and as the focus of such programs is perceived to have shifted from ensuring equal opportunity to providing racial or gender preferences.[30] Popular opposition to affirmative action may never reach the level in Namibia and South Africa that it has in the US; after all in these two countries affirmative action is to the benefit of the majority of the populations. Nevertheless, it is worthwhile for Namibian and South African policymakers to be aware of the US situation as they consider how to best implement affirmative action in their own countries.

B. Judicial Interpretation

Thus far, the Namibian courts have said little about affirmative action. Indeed, the only case so far in which the topic was discussed was the case of *Kauesa v. Minister of Home Affairs and Others*.[31] There, the Namibian High Court

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circumstances, those who have the most training and resources will be the best equipped to take advantage of any opportunities that are offered.").

[29] Fish "Reverse Racism, or How the Pot got to Call the Kettle Black" in Beckwith & Jones *Affirmative Action* 147; *see also* Wilson "Race Neutral Programs and the Democratic Coalition" in Beckwith & Jones *Affirmative Action* 157 ("[M]inority individuals from the most advantaged families tend to be disproportionately represented among those of their racial group most qualified for preferred status, such as college admissions, higher paying jobs, and promotions. Thus policies of preferential treatment are likely to improve further the socio-economic positions of the more advantaged without adequately remedying the problems of the disadvantaged.").

[30] *See* Wilson "Race Neutral Programs and the Democratic Coalition" in Beckwith & Jones *Affirmative Action* 160 (quoting Joseph A. Califano, an official in the Johnson administration, as stating that affirmative action was originally acceptable to whites "as a temporary expedient to speed blacks' entry into the social and economic mainstream" and that as time passed, many whites "saw continuing such preferences as an unjust insistence by Democrats that they do penance for an era of slavery and discrimination they had nothing to do with.").

[31] 1994 (3) BCLR 1 (NmH), 1994 NR 102 (HC).

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extensively analyzed Article 10, particularly its relationship to the other rights and freedoms provided for in Chapter 3 of the Constitution and to Article 23, the provision concerning affirmative action. That discussion (among others), however, was later found by the Supreme Court to be *obiter dicta* and was not addressed in the Supreme Court's opinion reversing the High Court ruling.[32] The High Court's treatment of Articles 10 and 23 in *Kauesa* therefore is not binding precedent. Nevertheless, given that Judge President Strydom (as he then was), who was a member of the panel that decided the *Kauesa* case, is now the Chief Justice of the Supreme Court, the opinions expressed by the High Court in *Kauesa* could appear in future Supreme Court decisions.

The *Kauesa* case was a challenge to a regulation that forbade members of the police from commenting unfavourably in public upon the administration of the force or any government department. A police officer -- who in a televised panel discussion about affirmative action had accused the white command structure of the police of corruption, seeking to undermine the Government's policy of national reconciliation, and collaborating with "traitors and terrorists" by supplying them with police weapons -- was charged with violating the regulation. He brought an action in the High Court arguing that the regulation conflicted with Article 21 of the Constitution, which guarantees a number of fundamental freedoms including freedom of speech and expression. The High Court rejected the officer's claim, finding that the regulation complied with Article 21(2) and therefore was a permissible limitation on the freedoms set forth in Article 21.[33] It was this holding that the Supreme Court addressed and reversed.

In addition to its holding regarding Article 21, however, the High Court opined that the officer's comments, which it found to be untrue and to constitute criminal defamation and injuria, had violated the fundamental rights to dignity,

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[32] 1995 (11) BCLR 1540 (NmS), 1995 NR 175 (SC). The Supreme Court refused "to consider every opinion addressed in the [High Court's] judgment however unnecessary it was to the decision," but rather decided to "leave such matters well alone until such time as they become necessary to decide and are fully argued." 1995 (11) BCLR 1545.

[33] Article 21(2) provides that "[t]he fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia,

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equality and non-discrimination of the people at whom they were directed.[34] First, the court interpreted the distinctions made in the Constitution between fundamental rights (contained in Articles 6 to 20 and including the Article 10 rights and the Article 8 right to dignity) and fundamental freedoms (contained in Article 21(1), such as freedom of speech) as meaning that the fundamental freedoms are subject to or limited by the fundamental rights, but not the reverse (that is, fundamental rights are not subject to or limited by the fundamental freedoms). Thus, the court was of the view that the right to freedom of speech, for example, cannot be used to violate another person's rights to equality or dignity. The court also noted the close relationship between Article 8's right to dignity and Article 10 that the Supreme Court has since recognized in the *Muller* case, as discussed in the previous chapter.[35]

The High Court also discussed Article 23, the affirmative action provision. It was of the view that Article 23 constitutes an express limitation to Article 10, but believed that "article 23(2) does not authorise a violation of the dignity of a person provided for as an unqualified fundamental right in Article 8(1). Measures for affirmative action and restructuring must therefore be of such a nature and degree, that it does not violate the dignity of persons."[36] Furthermore, the court was of the opinion that "the Namibian Constitution does not elevate *'affirmative action'* and/or *'a balanced structuring of the civil service'*, to the status of *fundamental right* provided for in articles 6 to 20 or even to the status of a *fundamental freedom* provided for in Article 21(1) of the Constitution."[37] The court also expressed the view that given the terms of Article 23, affirmative action should only apply to "'persons within Namibia' who have been disadvantaged by past discriminatory practices and not to aliens or citizens of other countries."[38] The court further opined that the beneficiaries of affirmative action under Article 23 "are not restricted to persons discriminated against on the grounds of race, colour or ethnicity, but also to those discriminated against on the ground of their political beliefs, irrespective of their race, colour or ethnicity."[39]

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national security, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence."

[34] 1994 (3) BCLR 15 F-G.

[35] *Id.* 35D ("Article 8(1) and 10 go hand in hand. Discrimination in most cases also violates dignity.").

[36] *Id.* 37D-E (emphasis in original).

[37] *Id.* 40C (emphasis in original).

[38] *Id.* 40D.

[39] *Id.* 40E-F.

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Finally, the court noted that the 1982 Principles (and by implication the Constitution, which was based on them) "envisaged necessary corrective measures, but not revenge; not discrimination in reverse; not the mere changing of roles of perpetrator and victim."[40]

The South African courts also have not yet had much to say about affirmative action under the South African Constitution. As mentioned in Chapter II, Section 9(2) of the South African Constitution provides that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken." The equivalent section in the Interim Constitution was Section 8(3)(a), which provided that Section 8's guarantees of equality and non-discrimination "shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

In *Public Servants' Association of South Africa v. Minister of Justice,*[41] a South African court held that the use of the word "designed" in Section 8(3)(a) of the Interim Constitution indicated that there must be a causal connection between the affirmative action measures and their objective.[42] In this case, no white males who applied for vacant senior positions in the Department of Justice were interviewed, apparently in line with a policy that white males would not be considered for certain posts because they were already overrepresented in the Department. The court found that the approach of refusing to appoint white males was not "designed to" achieve affirmative action goals, in that it was haphazard, random and overhasty. Presumably this causal connection requirement would still apply under the Final Constitution, which also uses the term "designed."

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[40] *Id.* 42C.
[41] 1997 (5) BCLR 577 (T).
[42] *See also* Davis, Cheadle & Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 60 ("The use of the word 'designed' clearly imports that there must be a rational connection between the means employed and the objects of the measures."); Davis "Equality and Equal Protection" in Van Wyk, Dugard, De Villiers & Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) 210 ("The wording in [Interim Constitution Section 8(3)] invites a court to examine whether there is a rational connection between the means employed in the implementation of the scheme and the object, namely to enable to targeted group to achieve its full and equal enjoyment of all rights and freedoms contained within the Chapter.").

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In addition, in *Motala v. University of Natal*,[43] another court held that affirmative action in South Africa may take into account the fact that different population groups suffered different levels of disadvantage under apartheid. In this case, an Indian student with an excellent academic record challenged the refusal of the University of Natal's medical school to admit her to its program. The rejection was based on the medical school's policy of only accepting 40 Indian students while admitting more black and coloured candidates, who had been previously been underrepresented, as compared to Indians, in the faculty. The court upheld this approach as permissible affirmative action under Section 8(3), stating that

> [t]he contention by counsel for the applicants appears to be based on the premise that there were no degrees of 'disadvantage.' While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the "four tier" system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of [the Interim Constitution.][44]

However, although agreeing with the idea that affirmative action may take into account degrees of disadvantage, DeWaal, Currie and Erasmus have criticized the *Motala* court for failing to analyze whether the University's approach was designed (that is, reasonably and carefully constructed) to achieve equality under the circumstances of the case, instead simply upholding the program because Africans were more disadvantaged than Indians.[45]

In addition to the foregoing cases, one Constitutional Court justice has asserted, albeit extra-judicially, that

> [t]he framers of the Constitution did not envisage affirmative action as a derogation from the right to equality, or as a negative right. Affirmative action should properly be viewed as being interpretative of equality, and as part and parcel of the right to equality.[46]

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[43] 1995 (3) BCLR 374 (D).
[44] *Id.* 383.
[45] DeWaal, Currie & Erasmus *Handbook* at 225. Similarly, Govender, in an unpublished paper cited in Devenish *A Commentary on the South African Bill of Rights* (1999) 64, argues that the court should have examined how the number of Indian students allowed was arrived at, whether this number was a guideline or a rigid figure, the extent to which the socio-economic background of students was taken into account, the demographics of the area where the University was located, and the extent to which society as a whole benefited from the University's policy.
[46] Madala "Affirmative Action" 52 *SMU L. Rev* 1542.

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Likewise, DeWaal, Currie and Erasmus state that, under the South African Constitution, "affirmative action is not an exception to equality, but is a means of achieving equality understood in its substantive or restitutionary sense."[47] This is a different view of affirmative action than the *obiter dicta* comment by the Namibian High Court in *Kauesa* that in the Namibian Constitution affirmative action constitutes a limitation on the equality right.

Currie and DeWaal also have noted that the South African affirmative action provision does not create a "right to be preferred" whereby a previously disadvantaged individual could challenge an employer's decision not to prefer him or her over someone else. Rather, it simply "insulates carefully designed legislative and other affirmative action provisions from constitutional attacks."[48] The same can be said about affirmative action under the Namibian Constitution.

C. Legislation

Article 23 of the Namibian Constitution is an enabling provision: it permits, but does not require, Parliament to provide for affirmative action measures. Since independence, the Namibian Parliament has provided for such measures in several ways. In the early post-independence years, the main statutory provisions on the subject pertained to civil service employment and local government.[49] In addition, the Namibian Parliament recently enacted a comprehensive statute requiring affirmative action in both government and private employment. Finally, the government's land reform program also includes affirmative action aspects.

The South African government also has recently enacted a law requiring affirmative action measures in public and private employment.

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[47] DeWaal, Currie & Erasmus *Handbook* 223; *see also* Currie & DeWaal *New Constitutional Law* 361.
[48] Currie & DeWaal *New Constitutional Law* 361.
[49] In addition, the Sea Fisheries Act 29 of 1992 allows the Ministry of Fisheries and Marine Resources to consider, among other factors, "the advancement of persons in Namibia who have been socially or educationally disadvantaged by discriminatory laws or practices which were enacted or in place before independence" in the allocation of fishing quotas. The executive branch of the government also has put in place various affirmative action programmes in, for example, the areas of education, vocational training, and in-service training. *See* Jauch *Affirmative Action* 102-106.

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1. Affirmative Action in Public and Private Employment

In 1990, the Namibian Parliament enacted the Public Service Commission Act,[50] which created an independent commission to decide on all appointments to and promotions with the Namibian civil service, and the Public Service Amendment Act.[51] These Acts require that civil service appointments and promotions be based on merit. The Amendment Act, however, authorizes the "the appointment or promotion of a person who would otherwise not be eligible for such appointment or promotion. . . , if such appointment or promotion is recommended by the commission to achieve a balanced structuring of the public service."[52] As Article 141 of the Constitution guaranteed the continued employment of civil servants employed at independence, this affirmative action provision in practice has applied only to promotions and to vacancies created by resignations or the creation of new positions. Nevertheless, a 1998 study showed that "considerable progress has been made towards a balanced structuring of the public service. Although white males are still overrepresented in management positions, affirmative action in employment and promotions has broken their complete dominance at the middle and top management level. . . ."[53] However, black males were the main beneficiaries, especially at the management level; black women only benefited proportionately in promotions below the management level.[54]

In addition to the above, in 1998 the Namibian Parliament enacted the Affirmative Action (Employment) Act,[55] although it is too early in its operation to yet see the effects of this Act. The Act requires public and private employers alike to create and implement affirmative action plans.[56] The Act establishes an Employment

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[50] Act 2 of 1990.
[51] Act 24 of 1990. This Act amended the Public Service Act 13 of 1980.
[52] Act 24 of 1990 Section 7(c).
[53] Jauch *Affirmative Action* 129.
[54] *Id.* 128. The author concluded that "at the management level, affirmative action had basically resulted in the replacement of white males with black males. To make the management cadre truly representative, more attention will have to be given to the appointment and promotion of black women. Nevertheless, affirmative action in Namibia's civil service has contributed to a process of creating a more substantive equality of opportunity, to give the sector wider acceptance, to make it more representative of the country's population and to change its institutional culture. The public service would otherwise have continued to be perceived as serving the interests of certain sections of the population only." *Id.* 129.
[55] Act 29 of 1998.
[56] Prior to the enactment of this Act, Article 106(1) of the Labour Act provided that nothing in the Act (i.e. its anti-discrimination provisions) prevents an employer from voluntarily implementing "any employment policies or practices aimed at the advancement of persons who have been disadvantaged in

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Equity Commission,[57] and requires all employers with over 50 employees to conduct a statistical analysis of their workforce and to file with the Commission an initial three-year affirmative action plan, with objectives and a timetable.[58] An affirmative action report detailing the progress on the plan must then be filed every twelve months. Failure to comply with these requirements is punishable by fine and/or imprisonment. The plans for public sector employers were due in August 2000, and those for private sector employers in February 2001.

The Act defines affirmative action as "measures designed to ensure that persons in designated groups enjoy equal employment opportunities at all levels of employment and are equitably represented in the workforce. . . ."[59] The three groups designated as the beneficiaries of affirmative action by the statute are racially disadvantaged persons, women, and the disabled.[60] Racially disadvantaged persons are those who "belong to a racial or ethnic group which was or is, directly or indirectly, disadvantaged in the labour field as a consequence of social, economic or educational imbalances arising out of racially discriminatory laws or practices before the Independence of Namibia."[61]

Such measures include identifying and eliminating employment barriers against designated group members, making reasonable efforts to accommodate persons with disabilities, and taking positive measures to further the employment opportunities of persons in the designated groups.[62] In terms of the positive measures, employers are required to ensure that their existing training programs contribute to furthering the Act's objectives, and to establish new training programs aimed at furthering those objectives.[63] In addition, employers must give "preferential treatment" in filling positions to "suitably qualified persons of designated groups."[64]

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the labour field by discriminatory laws or practices which have been enacted or practiced before the independence of Namibia," but did not require such measures.

[57] The Commission is made up of 14 members, and is required to have members from each of the designated groups.

[58] An employer who is not a relevant employer may, however, voluntarily adopt and implement an affirmative action plan consistent with the Act. *Id.* Section 22.

[59] *Id.* Section 17.

[60] *Id.* Section 18.

[61] *Id.* Section 18(2)(a).

[62] *Id.*

[63] *Id.*

[64] *Id.* Section 19(1).

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If two or more suitably qualified persons from designated groups qualify for a position, the employer must give priority to the one who is a Namibian citizen,[65] or if all are Namibian citizens, to the candidate who belongs to more than one designated group.[66] However, the Act makes clear that it does not require employers to create new positions, to hire or promote an arbitrary or fixed number of persons during any given period, to hire or promote persons who are not suitably qualified, or to take employment decisions that act as an absolute bar on the recruitment or promotion prospects of a person who does not belong to a designated group.[67]

In South Africa, the Employment Equity Act,[68] which as mentioned in the previous Chapter forbids employment discrimination, also requires affirmative action measures. The Act provides that every designated employer "must, in order to achieve employment equity, implement affirmative action measures for people from designated groups. . . ."[69] The designated groups are black people (which is defined to include Africans, Indians, and Coloureds), women, and people with disabilities.[70] Affirmative action measures are "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."[71] Such measures must include:

(1) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(2) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(3) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and

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[65] In addition, employers in most instances must train a Namibian citizen as the understudy of every foreigner that the employer employs. *Id.* Sections 19(3) & (4).
[66] *Id.* Section 19(2).
[67] *Id.* Section 43(1).
[68] Act 55 of 1998.
[69] *Id.* Section 13. "Designated employer" means an employer with 50 or more employees, an employer with less than 50 employees with a total annual turnover equal or above a certain amount, a municipality, most organs of state, and an employer bound by a collective agreement. *Id.* Section 1. An employer that is not a designated employer may voluntarily comply. *Id.* Section 14.
[70] *Id.* Section 1.
[71] *Id.* Section 15(1).

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are equitably represented in the workforce of a designated employer;

(4) measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce (including by preferential treatment and numerical goals, but not by quotas); and

(5) measures to retain and develop people from designated groups and to implement appropriate training measures.[72]

Under the Act an employer must consult with its employees, must conduct an analysis of its employment policies and practices and of the representation of various groups within workforce, must prepare an employment equity plan including numerical goals and timetables for achieving "the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce," and must report to the Director-General of the Department of Labour on its progress implementing that plan.[73] The Act provides that suitable qualifications for a job are based on a person's formal qualifications, prior learning, relevant experience, and/or the capacity to acquire, within a reasonable period of time, the ability to do the job.[74]

An employer must assign one or more senior managers the responsibility of implementing and monitoring the employment equity plan.[75] The employer also has a duty to inform its employees, both about the provisions of the Act and the contents of its employment equity plan and its report to the Director-General.[76] In addition, reports prepared in terms of the Act are public documents and must be summarized in public companies' annual financial reports.[77] If the employer is an organ of state, the report must be tabled in Parliament.[78]

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[72] *Id.* Section 15(2) and (3).
[73] *Id.* Sections 16, 19, 20, 21.
[74] *Id.* Section 20(3).
[75] *Id.* Section 24.
[76] *Id.* Section 25.
[77] *Id.* Sections 21(6), 22(1).
[78] *Id.* Section 22(2).

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2. Affirmative Action in Local Government

The Namibian Local Authorities Act[79] provided for affirmative action for women in the first two Local Authority elections, in 1992 and 1998.[80] These elections were conducted on a party list system, and the Act required that there be a certain minimum number of women (the exact number depending on the size of the relevant Council) on each list. As a result, women comprised 32% and 41% of the Local Authority members elected in the first and second elections, respectively.[81] The Act, however, provides that future Local Authority elections will use a ward system, and no affirmative action provision is applicable to these elections.[82]

Under the Traditional Authorities Act,[83] which applies to traditional leadership structures, traditional authorities in Namibia have a duty to "promote affirmative action amongst the members of [their] community," particularly "by promoting women to positions of leadership." Unlike the Local Authorities Act's provisions discussed above, however, this requirement did not mandate that a particular number of women be part of each traditional authority. Further, the Act provides no means of monitoring or enforcing the affirmative action provision. Rather, it simply provides a basis for encouraging greater participation by women in traditional government.

3. Affirmative Action concerning Land

Unequal land distribution in Namibia remains a serious problem twelve years into independence. Land in Namibia is considered either commercial (privately owned and usually commercially farmed) or communal (owned by the government

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[79] Act 23 of 1992.

[80] Under various other acts, female representation is required on the Social Security Commission, the National Sports Commission, the Vocational Training Board, the Council of the Polytechnic of Namibia, the Namibia Film Commission., and the boards of certain Co-operatives. In addition, the draft Communal Land Reform Bill would require approximately one-third of the seats on each Communal Land Board be held by women. *See* Hubbard "Gender and Law Reform in Namibia: The First Ten Years" (paper presented at the Ten Years of Namibia's Constitution and Independence Conference, Windhoek, 11-13 September 2001) 4-5.

[81] Compared to the 41% statistic for the current Local Authorities, currently the Regional Councils contain only about 3% women and the national Parliament contains 19% women. *See* Hubbard "Gender and Law Reform" 4.

[82] The Namibian Women's Manifesto Network and a number of other non-government organizations in Namibia are advocating for a "50/50 bill," which would require a return to party lists for Local Authority elections and would provide that all party lists used in national, regional or local elections be "zebra lists" which alternate men and women candidates, to provide gender balance. *See* Frank "Where there is a political will there is a way" and "The 50/50 bill explained" 13 (5&6) *Sister Namibia* (September – December 2001) 6-9.

[83] Act 17 of 1995.

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but used, usually for subsistence farming, by the people who live on it). The majority of Namibians live on communal land,[84] while the commercial land is held by a small number of mostly white (and many foreign) owners.[85] The Namibian government's land reform program is a form of affirmative action that seeks to equalize land distribution in the country. Under the 1995 Agricultural (Commercial) Land Reform Act,[86] the Namibian government is authorized to purchase or expropriate, for just compensation, agricultural land for purposes of land reform, and to redistribute it to Namibian citizens "who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices."

The Act provides that the government will buy land instead of confiscating it, and thus far the Namibian government has been purchasing farms for resettlement on a willing buyer-willing seller basis.[87] According to government statistics reported in 2001 in *The Namibian* newspaper,[88] there are 4,045 commercial farms in Namibia. Approximately 30.5 million hectares of this farmland is owned by white farmers, and 2.2 million hectares by black farmers. Each year, the government allocates N$20 million for land purchases, and since independence approximately 35,000 communal farmers have been resettled onto commercial farmland.[89] About 243,000 communal farmers still await resettlement, however. The government will need N$900 million to purchase 9.5 million hectares to resettle this number of people. Not surprisingly, the slow pace of land redistribution has led to speculation that the government may

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[84] *See* Harring "Communal Land Holders" 1996 (3) *SAJHR* 467 n.2 (quoting Prime Minister Hage Geingob that as of 1991 between 65 and 70 percent of the Namibian population lived in the communal areas). Harring believes that it is legally incorrect, however, to say that the Namibian government "owns" communal land, although the government itself is of the view that it does. *See generally id.* (arguing that government ownership is inconsistent with the Namibian Bill of Rights, in particular the Article 10 and 16 rights to equality and property, and, even if government "owns" or even "controls" such lands, it must administer them for the benefit of the people who live there).

[85] Approximately 57 percent of Namibia's usable land is in private hands, and this is the most expensive and most developed land in the country. Communal land amounts to approximately 43 percent, and it is less valuable and has less valuable improvements. *See id.* 484.

[86] Act 6 of 1995.

[87] *See, e.g., The Namibian* 17 July 2001.

[88] *See, e.g., id.*14 September 2001; *id.* 28 August 2001.

[89] Tenure rights on resettlement farms are apparently being given to couples jointly on terms of sexual equality. Hubbard "Gender and Law Reform" 7.

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abandon its willing-buyer willing-seller policy, and/or impose additional measures such as a tax on excess and/or under-utilized land.[90]

A Communal Land Reform Bill, to govern land rights in the communal areas, was passed by the National Assembly in 2000 but its principle was objected to by the National Council. After the Bill's rejection by the National Council, the National Assembly reaffirmed the principle of the Bill and referred it to a joint committee of the two houses to consider the Council's proposed amendments. On April 23, 2002, the National Assembly passed a revised version of the Bill.[91]

The revised Bill preserves several provisions directed at eliminating gender inequality in land rights that were contained in the rejected Bill:[92] First, it makes men and women equally eligible for tenure on communal land. Currently, in many communities, a woman's only access to land is through a male relative. It further requires equal treatment of widows and widowers, in an attempt to change the practice in some areas that a widow is dispossessed of the communal land that she and her husband have been occupying upon her husband's death or is forced to pay an additional occupation fee.[93]

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[90] *See, e.g., The Namibian* 17 August 2001. The willing-buyer willing seller policy has been criticized as not required by the Constitution, too ad hoc to lead to successful land reform, and as probably resulting in prices higher than the just compensation required by Article 16. Harring "Stolen Lands" 32.

[91] *See The Namibian* 24 April 2002.

[92] *See* Hubbard "Gender and Law Reform" 7; *The Namibian* 24 April 2002.

[93] On this, however, the Bill has been criticized as not going far enough, in that it does not address the other sexual inequalities in traditional systems of inheritance law, nor does it ensure that a widow who is able to remain on a piece of land will be able to retain the resources necessary to utilize the land. *See* Hubbard "Gender and Law Reform" 11.

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V. Conclusions

A. General Approach to Interpretation

In their treatment to date of the issues studied in this dissertation, the Namibian courts have tried to strike a balance between following foreign precedent where there is no relevant local authority[1] and ensuring that the Namibian Constitution retains its own unique character suited to the Namibian situation. Thus, we see the Namibian Supreme Court adopting the South African "unfair discrimination" test and general substantive equality approach in the *Muller* case, but rejecting South African case law on homosexual equality as inconsistent with the language of the Namibian Constitution and Namibian values in the *Frank* case.

For example, in the *Muller* case, the court found South African precedent to be more relevant to the interpretation of the Namibian equality clause than Canadian precedent:

> Our culture of non-discrimination is nine years old and not yet out of its infancy. We have a background history of discrimination which was rife and which was based on all of the enumerated grounds set out in Article 10(2). On top of this we still have a legacy of legislation which was inherited on Independence, some of which gave the force of law directly or indirectly to such discrimination or inequality. To apply without more to such a situation a fine-tuned approach which was developed over many years in a developed and sophisticated society which did not have our background history of discrimination may lead to a perpetuation of those inequalities which may still exist rather than to eliminate them. The purpose of article 10 is clearly not only to prevent discrimination and equality but also, in our context and history, to eliminate them and it is in this elimination process, in an attempt to level the playing field, where such legislation may fall foul of the Canadian approach. . . . We, in Namibia, are . . . faced with a history of discrimination against the majority of the people the elimination of which may call for greater tolerance than the definition of discrimination set out in the Canadian cases.
>
> [However, t]he decisions of the South African Courts, and more particularly that of the Constitutional Court, are very relevant and in the past this Court and the High Court of Namibia, have frequently applied these decisions but this must always be done with due recognition of the differences that may exist between our two Constitutions. . . .

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[1] Which is often the case, given the current limited body of Namibian constitutional decisions.

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> Namibia shared with South Africa the years of discrimination based on those very grounds enumerated in article 10(2) of our Constitution which gave rise to invidious distinctions which benefited one group at the expense of another.[2]

This balancing also can be seen in Namibian cases interpreting other provisions of the Constitution and in the Namibian courts' statements regarding the topic of constitutional interpretation in general. For example, in *Ex Parte Attorney General: In re Corporal Punishment by Organs of State*,[3] the Namibian Supreme Court stated that constitutional interpretation (there, the determination of whether Article 8, the dignity clause, prohibits judicial corporal punishment and/or corporal punishment in government schools) involves

> a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and in its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share.[4]

In the *Corporal Punishment* case, the majority opinion relied heavily on international precedents interpreting the European Convention for the Protection of Fundamental Rights and Fundamental Freedom, the German Constitution, the US Constitution, the Constitution of Botswana, and the Constitution of Zimbabwe to find corporal punishment unconstitutional in Namibia. However, then-Chief Justice Berker, concurring in the judgment, felt compelled to point out that

> [w]hilst it is extremely instructive and useful to refer to and analyse, decisions of other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America . . . , the one major and basic consideration in arriving at a decision involves and enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia.
>
> In other words, the decision which this Court will have to make in the present case is based on a value judgment which cannot primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognisance of the social conditions, experiences and perceptions of the people of this country. This is all the more so as with the advent and emergence of an independent sovereign Namibia, freed from the social values, ideologies,

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[2] 2000(6) BCLR 663D-H, 666D.
[3] 1991 NR 176, 1991 (3) SA 76 (NmS).
[4] 1991 NR 188.

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> perceptions and political and general beliefs held by the former colonial power. . . .[5]

Even more pointedly, in discussing the general principles of constitutional interpretation applicable in Namibia, the *Frank* majority remarked that it would be a "travesty of justice" for Namibian courts to "refer to and rely primarily on the alleged contemporary norms in the USA and Europe."[6] Indeed, the *Frank* majority cautioned that failure to give importance to Namibian values in constitutional interpretation

> would strengthen the perception that the Courts are imposing foreign values on the Namibian people. This will bring the Courts as well as the Constitution into disrepute and undermine the positive role it has played in the past and must continue to play in the future in regard to the maintenance and development of democratic values and fundamental human rights.[7]

In this regard, the Namibian courts take a different approach than that required of South African courts. Section 39(1) of the South African Constitution expressly provides that, "[w]hen interpreting the Bill of Rights, a Court, tribunal or forum,

> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.[8]

Under this section, the South African courts' ability to rely on South African values in interpreting their Constitution is expressly limited to those values that "underlie an open and democratic society based on human dignity, equality and freedom." Any current South African norms or values that do not meet this standard are therefore not relevant in interpreting the South African Bill of Rights. No similar clause to South African Section 39(1)(a) exists in the Namibian Constitution. Indeed, if one did, the *Frank* majority would likely not have been able to come to the conclusion that it did regarding homosexual (in)equality. This is because, regardless of whether they in fact reflect the views of a majority of Namibians, it is difficult to contend that the anti-homosexual remarks of the President and Home Affairs minister are consistent

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[5] *Id.* 197 (Berker, CJ, concurring).
[6] *Frank* majority opinion 64.
[7] *Id.* 68-69.
[8] RSA Const. Article 39(1)

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with the values underlying an open and democratic society based on human dignity, equality and freedom.[9]

This is an important distinction between Namibian and South African constitutional law. The situation in Namibia after *Frank* seems to be that, as long as Namibian values are not inconsistent with the express language of a constitutional provision, they will be given primacy in constitutional interpretation. In the view of the *Frank* majority, where a constitutional provision does not "define the fundamental right precisely" the meaning is to be determined by reference to current Namibian values.[10] Thus, capital punishment would be unconstitutional even if a majority of Namibians favoured it, because Article 6, the right to life provision, clearly states that the death penalty is prohibited. But, because Article 10 does not explicitly forbid sexual orientation discrimination or require equality regardless of sexual orientation, current Namibian values allow the court to conclude that the Constitution does not require Namibian immigration law to treat homosexual partners the same as it treats married heterosexual couples. Before *Frank,* by contrast, the Supreme Court seemed to take a more limited view of the interpretive role of current societal values, recognizing that courts need not always follow those values. In *Namunjepo and Others v. Commanding Officer, Windhoek Prison and Another,* the court stated, with respect to Article 8's prohibition on cruel, inhuman or degrading treatment or punishment (a right that the constitutional text does not define precisely[11]), that "present day values cannot possibly change what is utterly cruel or inhuman or degrading into something which is not cruel or inhuman or degrading."[12] Stated

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[9] Although the *Frank* court did not specify the content of these statements, news reports in *The Namibian* newspaper do. The President's comments included threatening that homosexuals trying to enter Namibia would be turned away at the borders and that homosexuals in Namibia would be arrested, imprisoned and deported; stating that homosexuality is not allowed in Namibia and must be kept in Europe; stating that homosexuality is "against God's will," and "is the Devil at work;" and stating that "we in SWAPO have not fought for an independent Namibia that gives rights to botsotsos (criminals), gays and lesbians to do their bad things here." The Home Affairs Minister told new police recruits to "eliminate" homosexuals, whose conduct he equated to "unnatural acts" such as murder, "from the face of Namibia. *See* "President urges 'gay purge'" *The Namibian* 20 March 2001; "Round up gays, urges Nujoma" *The Namibian* 2 April 2001; "Homosexuals 'to be barred from entering Namibia'" *The Namibian* 6 April 2001.

[10] *See Frank* majority opinion 58.

[11] *See The Corporal Punishment Case* 1991 NR 188 ("The question as to whether a particular form of punishment authorized by the law can properly be said to inhuman or degrading involves the exercise of a value judgment by the Court.").

[12] 2000 (6) BCLR 671 (NmS) 680I. In this case the court found the practice of keeping prisoners in leg irons to be unconstitutional.

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another way, the *Namunjepo* view, like the South African approach, envisioned some substantive limitations on the interpretive use of current societal values; the *Frank* view apparently does not.

In South Africa, the only values that are relevant to constitutional interpretation are values that are consistent with the basic premises of the new constitutional dispensation. Thus, whether or not South Africans support the death penalty (which was not clearly excluded by the text of the South African Constitution) is immaterial if the death penalty is not, in the Constitutional Court's view, an appropriate punishment in an open and democratic society based on human dignity, equality and freedom. This approach is consistent with the view of the South African Constitution as an instrument of societal transformation. This view can be seen in the South African Constitution itself as well as in Constitutional Court jurisprudence, as has been recognized by several commentators.[13]

The Namibian courts, on the other hand, view the Constitution as a *reflection* of Namibian society. Thus, in Namibia, societal values – for example, on the issue of homosexual rights -- must change for the meaning of the Constitution to change. The Namibian courts, however, do seem to recognize that these matters can change over time. As the court stated in the *Corporal Punishment* case, constitutional interpretation based on the values of the Namibian people "is not a static exercise" but rather "a continually evolving dynamic:" "What may have been acceptable as a just form of punishment some years ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy."[14] In this respect the Namibian approach is similar to that in the US, where changes in the equal protection analysis have generally occurred in response to changes in the national

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[13] *See, e.g.,* Cowen "Dignity" (2001) 17 *SAJHR* 35 ("The realisation of a transformed society lies at the heart of the constitutional enterprise in South Africa."); de Vos "*Grootboom*" (2001) 17 *SAJHR* 260-63 (arguing that the South African Constitution establishes "a project of transformative constitutionalism" "committed to transforming South Africa's political and social institutions and power relationships in a democratic, participatory and egalitarian direction," and that the Constitutional Court has embraced this vision of the Constitution); Albertyn & Goldblatt "Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248. The extra-judicial comments of Justice Matala quoted above in Chapter IV also reflect this transformative vision.

[14] 1991 NR 188.

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political consensus, and not vice versa. In South Africa, by contrast, the Constitution is seen as having the power to change societal values.

It is interesting that the courts in these two post-apartheid neighbors would take such divergent views on the relationship between the Constitution and society. Perhaps the explanation can be found in the different ways in which the two Constitutions came about. As explained in Chapter I, Namibian independence and the Namibian Constitution were the culmination of an international process mediated by five Western powers. Although the Constituent Assembly that drafted the Constitution itself was made up of Namibians elected by Namibians, the 1982 Principles that formed the basis of their work were created as part of the international process. In South Africa, on the other hand, the entire process, from formulating the Constitutional Principles to drafting the Final Constitution, was done by South Africans. As a result, the Namibian Constitution is sometimes criticized by Namibians as reflecting "foreign" ideas and values – which, as the *Frank* majority recognized, threatens its legitimacy – whereas such comments are not generally leveled against the South African Constitution.[15] The courts in Namibia therefore may feel a greater need to stress the "Namibian-ness" of their Constitution than do their South African colleagues.

B. Equality as a Central Constitutional Value

In a number of cases since the Constitution came into force, the Namibian courts have emphasized that certain values, including equality, non-discrimination, and dignity, are fundamental to the new Namibian constitutional order and should inform all constitutional and legal interpretation. In this respect the Namibian approach is similar to that taken in South Africa. The South African Constitution expressly provides that human dignity, the advancement of equality, non-racialism and non-sexism are among the nation's founding values,[16] that the interpretation of the Bill of Rights must be consistent with the values that underlie an open and democratic society based on freedom and equality,[17] and that any limitations thereof

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[15] *See, e.g.,* Currie & DeWaal *New Constitutional Law* 3 (the South African Constitution "has not been imposed on South African society but has been produced by the people.").
[16] RSA Const., Section 1.
[17] *Id.* Section 39(1).

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must be reasonable and justifiable in such a society.[18] Accordingly, the Constitutional Court has repeatedly emphasized the importance of these values, particularly dignity and equality.[19]

In the Namibian context, however, the courts have often explained the importance of these values as based on a rejection of the racism and apartheid that existed in Namibia before independence. Although the controversial nature of the issue of homosexual rights in Namibia and the fact that the Namibian Constitution does not expressly refer to sexual orientation clearly were important to the decision, this fact may be another reason why the Supreme Court apparently did not find it inconsistent with the values of equality, non-discrimination and dignity to rule as it did in the *Frank* case, which did not involve an issue of race discrimination.

For example, in the *Corporal Punishment* case, the Supreme Court stated:

> The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.
>
> For this reason colonialism as well as "the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long" are fully repudiated.[20]

Similarly, in *State v. Van Wyk,*[21] where the Supreme Court held that a criminal court may take into account the defendant's racist motive in prescribing the punishment for a racially motivated crime, Justice Ackermann explained that the provisions of the Namibian Constitution

> demonstrate 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

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[18] *Id.* Section 36(1).
[19] *See, e.g., Fraser v. Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) para 20 ("the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos on which the Constitution is premised."); *Hugo* para 41 ("the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups."); *Walker* para 73 ("equality is one of the core values of the Constitution.").
[20] 1991 NR 178 (NmS) 179.
[21] 1993 NR 426 (NmS).

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> apartheid and its consequences. These objectives may rightly be said to be fundamental aspects of public policy.[22]

Justice Mahomed concurred, explaining that

> Throughout 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 the wounds which racism has inflicted on the Namibian people "for so long" and a commitment to build a new nation "to cherish and 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. (See the Preamble of the Constitution and arts 10 and 23).
>
> That ethos must "preside and permeate the processes of judicial interpretation and discretion" as much in the area of criminal sentencing as in other areas of law.[23]

Likewise, in *Government of the Republic of Namibia v. Cultura 2000*, where the Supreme Court upheld the Government of Namibia's repudiation of financial benefits that the Representative Authority for Whites had provided, just before Namibian independence, to a group organized to preserve "European" culture, then-Chief Justice Mahomed explained:

> The Constitution of Namibia articulates a jurisprudential philosophy which, in express and ringing tones, repudiates legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia. . . .
>
> It is manifest from [the Preamble, Article 10(2), Article 23(1), and Article 63(2)[24]] and other provisions that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies

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[22] *Id.* 452I–453B; *see also id.* 455–456A (Berker CJ) ("this Court will act in the letter and the spirit of the Constitution as set out above. In doing so it will deal extremely severely with persons in the country who act contrary to the Constitution and public policy.").

[23] *Id.* 456G–I (Mahomed AJA). This case was decided in 1991, several years before the South African Interim Constitution was negotiated and come into effect.

[24] This article requires the Namibian National Assembly "to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies."

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> of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.[25]

However, the Namibian Constitution should not be viewed as only or primarily valuing racial equality and the elimination of race discrimination. If the *Frank* case is an indication that the Namibian Supreme Court is moving towards such a limited view of the Constitution's purposes, that is unfortunate. In the first place, such a view is inconsistent with, among other provisions, Article 10(2) itself, which clearly outlaws discrimination on various grounds other than race, as well as the provisions that stress the importance of gender equality. It also trivializes the other provisions of the Bill of Rights. As the Namibian courts have recognized, Article 10 is not the only important guarantee the Bill of Rights contains. In *State v. Acheson* the Supreme Court characterized "the protection of personal liberty in art 7, the respect for human dignity in art 8, the right of an accused to be brought to trial within a reasonable time in art 12(1)(b) and the presumption of innocence in art 12(1)(d)" as among the values "crucial to th[e] tenor and spirit" of the Namibian Constitution. [26]

Further, such a limited view is inconsistent with language in other Namibian cases, including Justice Mahomed's statement in *Cultural 2000* that the Namibian Constitution reflects "the values of the broad and universalist human rights culture" and the recognition by the High Court in *State v. Minnies* that it expresses "values and ideals which are consonant with the most enlightened view of a democratic society existing under law."[27] In the same vein, in the *Kauesa* case, the Supreme Court explained that, in determining whether a limitation to a right or freedom guaranteed in the Namibian Bill of Rights is constitutional in terms of Article 21(2),[28] a court must

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[25] 1993 NR 328 (NmS) 332H–333I.

[26] 1991 NR 1 (NmS) 9J–10C. This decision involved the prosecution's application for a lengthy adjournment and the defendant's application for bail in the case of an Irish citizen accused of the assassination of prominent SWAPO member Advocate Anton Lubowski. The court granted the prosecution a two-week adjournment, rather than the six weeks requested, and ordered that the defendant, who had already been held in custody for approximately six months, be granted bail subject to stringent conditions to minimize the danger that he might flee or otherwise prejudice the interests of justice.

[27] 1990 NR 177 (NmH) 198E (holding that evidence which is unconstitutionally obtained must be excluded from a criminal trial).

[28] Which provides that the freedoms provided for in Article 21(1) "shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said subarticle, which are necessary in a democratic society and are required

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"be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values."[29]

C. The Equality and Non-Discrimination Analysis

In terms of the legal analysis applicable to Article 10, the Namibian courts have distinguished between simple differentiation, which is subject to rationality review, and differentiation based on the grounds enumerated in Article 10(2), which is subject to the "unfair discrimination" test. Thus, the Namibian government is allowed to make reasonable legislative classifications based on non-enumerated grounds, but classifications based on an enumerated ground are not permitted unless they are "fair" discrimination or affirmative action. In this respect, the Namibian cases have followed closely the South African approach. The Namibian courts also seem to be following the South African courts' early indications that they may look more carefully than mere rationality review at differentiation that is not on an enumerated ground but impacts on other constitutional rights or interests.

The Namibian courts were right to reject the applicability of the relatively lenient rational connection test to distinctions based on the Article 10(2) grounds (sex, race, colour, ethnic origin, religion, creed or social or economic status). Otherwise, as the *Muller* court recognized, the Constitution's express prohibition of discrimination on these grounds could easily be defeated. The courts also are correct, given the circumstances that exist in Namibia and the text of the Namibian Constitution, to make a distinction between benign and unfair discrimination. As previously discussed, the mere application of neutral standards is not enough to achieve equality in the Namibian context, and the Namibian Constitution, in Article 23, expressly recognizes this.

In terms of the "unfair discrimination" test itself, the standard reflects a commitment to the concept of substantive equality.[30] Whether discrimination is

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in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

[29] 1996 (4) SA 965 (NmS) 977B.

[30] *See, e.g., Muller* 2000 (6) BCLR 659 (noting that "the notion of substantive equality (in contrast to formal equality) . . . underpins the constitutional commitment to equality.").

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unfair is determined primarily by considering the impact of the discrimination on the victim or victims in light of their context and circumstances. Thus, the analysis focuses on the actual effects of an allegedly discriminatory law or action rather than its form. Again, this is the proper approach in light of both the Namibian Constitution and Namibian circumstances.

The Namibian equality and non-discrimination cases also reveal a close relationship between these rights and the right to dignity. The right to dignity has played a role in the Article 10 cases in two ways: First, the impact on the affected person's or persons' dignity is an important consideration in determining whether discrimination on an enumerated ground is unfair and therefore in violation of Article 10(2). Second, the Supreme Court has indicated that discrimination on a non-enumerated ground, which cannot constitute "unfair discrimination" in terms of Article 10(2), may nevertheless violate the Constitution's dignity clause (which presumably would require a more exacting review than the rational connection test otherwise applicable under Article 10(1)). However, the Namibian courts have not yet further elaborated on this suggested use of the right to dignity.

The Namibian (and South African) courts' use of the value of dignity to inform the right to equality is appropriate. One of the fundamental questions surrounding the issue of equality, raised at the beginning of Chapter III, is with respect to what is equality measured? These courts have answered this question by saying that what is to be measured is dignity, that is to say the inherent worth of all human beings as deserving of respect. This approach is consistent with the expressed aims of the new Namibian and South African Constitutions, as well as with international human rights law.

The Namibian approach so far seems generally to follow the asymmetrical conception of anti-discrimination law. Under this approach, the primary purpose of a

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guarantee of non-discrimination is protecting groups that have suffered discrimination in the past (unlike the symmetrical approach followed in the US, where the focus has become protecting *all* persons against certain classifications.) Thus, in the *Muller* case it was important to the court, in finding the sex discrimination at issue not to be unfair, that Mr. Muller was a white male (although the *Frank* decision, by contrast, reflects little concern about protecting homosexuals in Namibia). However, in the Namibian context, where the historically disadvantaged constitute a majority of the population, the asymmetrical conception of non-discrimination is in tension with idea that the role of a Bill of Rights in protecting the rights of minorities. Although historically advantaged, whites in Namibia are a vulnerable political minority and as such must not be denied protection by the Bill of Rights.

D. Affirmative Action

Affirmative action is an important but insufficient element for achieving substantive equality in Namibia. As the Prime Minister, who before Independence led the drafting of the Constitution as Chairman of the Constituent Assembly, has recognized, affirmative action is needed, but it alone will not solve Namibia's problems:

> Historical deprivation of rights makes mere formal equality of opportunity inadequate for creating real equality. . . . The writers of the Constitution correctly perceived the need for affirmative action as a necessary condition, but not the only condition for bringing about change in a society that was ravaged by a century of discrimination and deprivation.[31]

Affirmative action thus must not be viewed as a panacea for all of apartheid's lingering effects. It can be, and already has been, useful to remedy racial or gender imbalances in specific institutions (mostly to the benefit of the best-off of the historically disadvantaged, however), but it cannot transform Namibian society as a whole. Further, it is important that these limitations not only be kept in mind by policymakers, but that they be conveyed to average Namibians, to avoid creating unrealistic expectations among the Namibian public of what affirmative action

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[31] Geingob "Affirmative Action" (speech to the National Assembly on 7 June 1991) in *Namibian Views: Affirmative Action* (1992) 7 (Namibian Institute for Democracy & Konrad Adenauer Stiftung, Windhoek.

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actually can accomplish. To this end, affirmative action should be portrayed by the government as a part of its broader policy of development, rather than a stand-alone solution to inequality.

In addition, affirmative action in Namibia must be kept within the parameters set by the Namibian Constitution. The Constitution envisages affirmative action as a means of remedying the disadvantages and inequalities that exist within Namibia society as the result of past discriminatory laws or practices. This seems to contemplate a "historically limited technique": "[o]nce the legacy of the past has been successfully repaired, the process has been brought to its natural conclusion."[32] Affirmative action that is limited in time and limited to correcting the results of past discriminatory policies is less apt to be perceived as unfair preference or reverse discrimination. Such measures will likely receive more popular support and, in the view of the *Kauesa* court, are what the 1982 Principles and the Constitution had in mind. In addition, affirmative action measures will have to be limited if the *Kauesa* view that affirmative action cannot violate the right to dignity is adopted by the courts.

Thus far, Namibian affirmative action measures have not generally been temporally limited.[33] However, these measures do contain provisions that appear to be intended to ensure that they work as limited corrective measures rather than reverse discrimination. This can be seen particularly in the new, comprehensive Affirmative Action (Employment) Act. For example, the Act requires that affirmative action be "*designed to* ensure that persons in designated groups enjoy equal employment opportunity at all levels of employment and are equitably represented in the workplace." As in South Africa, the use of the words "designed to" should require a reasonable causal connection between the measures and the objectives (equal opportunity and equitable representation) sought to be achieved. Further, persons in designated groups may receive preferential treatment only if they are "suitably qualified" for the position at issue, and employers do not have to create new positions, hire or promote an arbitrary or fixed number of persons, or hire or promote

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[32] Staby "Affirmative Action in Namibia: Observations on its Implementation" in *Namibian Views: Affirmative Action* at 16.

[33] With the exception of affirmative action for women under the Local Authorities Act, which applied only in the first two Local Authorities elections.

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persons that are not suitably qualified, nor are they barred from hiring or promoting persons who are not members of designated groups. In addition, in terms of the designated groups, the Act makes clear that racial disadvantage is judged in terms of the results of the laws and practices of pre-Independence Namibia, and gives preference to Namibian citizens over foreigners (seemingly in agreement with the *Kauesa* court's statement that affirmative action should be targeted toward Namibians rather than non-citizens).

In the interests of protecting affirmative action's legitimacy in Namibia, it would be preferable that the *Kauesa* court's *dicta* that affirmative action constitutes an exception to the right to equality not be adopted. Instead, it would be better to take the approach of the South African commentators that affirmative action is not a derogation from the equality right, but rather a means of achieving substantive equality that is necessary in light of these countries' current circumstances. In this way, affirmative action is seen as part and parcel of the constitutional equality guarantee, rather than as inconsistent with it. Indeed, this seems to be the view of the Prime Minister in the statement quoted above.

E. Issues for the Future

While it is impossible to know the precise nature of the cases in which they mightl arise, one can predict some of the issues concerning equality, non-discrimination and affirmative action that are likely to face the Namibian courts in the future. For example, a major issue remaining to be decided is the extent of the horizontal applicability, to private persons and entities, of Article 10. (Of course, as discussed in Chapter III, private persons and entities in Namibia are already bound by several statutes forbidding discrimination.) By providing that the rights in the Bill of Rights will bind natural and legal persons "where applicable to them," the Constitution has left this question to the courts. It seems likely that, given the nature of the Article 10 rights and their importance in the overall Constitutional scheme in Namibia, the courts will find them to be applicable to private persons and entities just as they are applicable to the government. However, a case presenting this question has not yet arisen.

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The Namibian courts also have not yet faced a question of indirect discrimination; that is, a law or action that is neutral on its face but discriminatory in effect. Unlike the South African one, the Namibian non-discrimination clause does not include the words "directly or indirectly." However, it is hard to imagine that the Namibian courts would not find indirect discrimination to be constitutionally prohibited. To do otherwise would severely limit Article 10(2)'s reach, since, in this day and age, more discrimination is likely to be indirect than direct. It also seems likely that the courts in Namibia, like South Africa and unlike the US, will not require proof of intent in cases of indirect discrimination, as this is more consistent with a substantive equality approach.

The Namibian courts have not yet expressly addressed the question of the effect of Article 10's guarantee of gender equality (or Article 14's guarantee of equal rights between men and women as to marriage) on the many rules of customary law that treats women and men differently, such as the rule that women are perpetual minors. Although in theory aspects of the customary law which have not been given statutory recognition and which violate Article 10 or 14 became invalid upon Namibia's independence, they likely still are being applied, twelve years later, in areas where customary law is widely followed. This is a significant obstacle to the achievement of real equality for women, particularly rural women, in Namibia.

Finally, the exact relationship between Article 10 and the affirmative action provision, Article 23, remains unclear. In *Muller*, the court stated that if discrimination is found to be unfair, it will be unconstitutional unless it is covered by Article 23. The court did not, however, reach the question of what factors must be present for the affirmative action article to "save" unfair discrimination. It also remains to be seen whether the High Court's *dicta* in *Kauesa* that affirmative action must not violate the right to dignity will prevail. The recently-implemented Affirmative Action (Employment) Act, discussed in Chapter IV above, could well be the vehicle that brings some of these issues before the courts.

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