A Bill of Rights is on the table... but where’s the food?

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Abstract
The Namibian Constitution has been hailed as one of the most progressive in the world. Namibia has acceded to all the major international human rights conventions and in a monist system such conventions can have real effect without any further action. The basis for respecting all human rights is in place, but the reality does not align with this basis. Namibia has one of the highest levels of income inequality in the world. In particular, socio-economic rights are inadequately protected and although the legal framework exists to claim such rights, a lack of access to justice impedes their realisation. It is the duty of Government to make the promises of the constitution reality for the Namibian people. A number of government spending decisions taken at a time when people are starving and have no standardised access to housing, education or healthcare have raised concerns over priorities. An independent judiciary must play its part, and civil society must also take up the challenge and assist Government in establishing the structure of a healthy democracy, both through advocacy and by educating the populace to understand what their rights are and how to exercise them. All must work together to realise these aims and not suspect the other of ulterior motives. The change must come from within and must be a result of action by Namibians for Namibians, with the support of the international community when necessary.

Introduction
A few weeks ago, I had the privilege to view a documentary by the director Thorsten Schütte.1 The film sought to document the challenges faced by the many Namibians who struggle to access services in any real manner. The hero was a farm worker who had lost his fingers and, as a result, had also lost his home, his children’s places at school and health care services for his family. In Namibia, many of these benefits form part of a

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1 Thorsten Schütte, Dwaal Net Rond – The Forgotten, 60 min, Namibia, 2015.

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farm worker’s employment package. There is no security of tenure, so when a job is lost, everything else essentially goes with it. The film was called *Dwaal net rond – the Forgotten*. Loosely translated, this means “Just wandering around – the Forgotten.” A more appropriate title could not have been chosen. The farm worker now resides on a resettlement farm but has been informed by Government that he will have to vacate the premises. When he asks why, he is told to write a letter, but he cannot read or write. They tell him to visit the head office some 160 km away, but he has no income or transport. How shall he get there? He is then told that he should be grateful for having received a place to stay in the first place. Does he really expect that the government should come to him? In the words of the government official: “It doesn’t work that way.” Without the assistance received from the film-makers to assert his rights, the farm worker would have retreated into the background, to be ‘forgotten’ again, along with his children’s schooling and his wife’s healthcare.

I left the venue deeply saddened. Is this where we are in Namibia, 25 years after independence? In a country where we can afford to build a palatial state house, purchase a presidential jet and provide Mercedes Benz cars for our ministers, why is there not enough to ensure that each child has a warm place to sleep each night? Why was one of the first discussions in the recently constituted parliament about a ‘parliamentary village’ to house visiting MPs when in that same month a basic wage guarantee for domestic workers came into force that is so low one wonders how such workers can afford to live. In a country that has been defined as upper middle income by the World Bank, why do so many of our people live in abject poverty? It is clear that the situation on the ground is very far from the World Bank classification: in fact, Namibia has one of the highest levels of income inequality in the world, with a reported Gini coefficient of approximately 0.60.

Hailed at the time of Independence as one of the most progressive Constitutions in the world, one must consider the practical impact of this document on the majority of citizens who struggle to survive on a daily basis. If one put such a question to one of Namibia’s many shack-dwellers, asking them what impact the Constitution has on their basic daily needs, would the response be positive? In order to make an impact, the Constitution needs to be a document that translates into real benefits for all Namibians, not only those who can go to court to enforce their rights.

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Namibia – background

Let us step back and consider the past. Namibia’s constitution was expected to bring about change after so many years of colonialism and apartheid, and the systemic inequalities that these generated over generations. When will we be able to declare that Namibia has been cleansed of the effects of apartheid?

At this stage, this question is almost impossible to answer. Today, a quarter century after the fall of the former colonial regime, resources continue to be distributed unevenly, the only difference now being that the divide is no longer based simply on race. Thus as an instrument of change the Constitution has mammoth issues to address, and we must recognize that the essential promises of the Constitution must be brought to life by the government, the Namibian administration and corporate structures in the country. It is fair to state that government has embraced international human rights conventions and that many of these conventions have been translated into legislation within Namibia. Legislation does not suffice, however, since implementation is the key to effective change. I would argue that this is where government has fallen short. And have the interventions that have been implemented, been well-planned and effective? Bearing in mind the inequality in our society, the primary question is whether or not the most has been made of the Constitution as an instrument of and for change.

Protection of fundamental human rights and freedoms

The Namibian Constitution contains an entrenched Bill of Rights. In the main, the Bill of Rights protects civil and political rights, and admirably so. It is not unusual in a new democracy for these rights to be given precedence. Coming from a past where the majority were disenfranchised and where intimidation and violence by those in power were not uncommon, it stands to reason that civil and political rights must be addressed first. As a democracy grows, however, the focus must change to bread and butter issues, to socio-economic rights. After all, the right to vote means very little when you are unemployed and cannot provide for your children. The right to vote is meant to give you the power to control your own life, offering individuals the opportunity to affect positive change. It is unfortunate, however, that the Namibian electorate has, for the most part, voted along traditional and cultural lines rather than in line with what political parties should, can and will deliver. The underlying reasons are complicated and are outside the scope of this article (see Melber, this volume).

In terms of the constitutional protection of socio-economic rights, it is only the right to education that has been afforded the privilege of being included in the Bill of Rights. All other second generation rights are covered by ‘Principles of State Policy’ and are dependent on available resources and the political priorities of the incumbent ruling party. Sadly, even the more privileged position of education as an entrenched right has not translated into significant improvements on the ground, with education consistently being flagged as a problem area despite the fact that a major portion of the national
budget is allocated to it. In 2015, over 15 billion NAD was earmarked for basic and higher education.

To conclude this short summary of the human rights legal framework, it should be noted that international instruments acceded to by Namibia also form part of Namibian law and can be cited in domestic courts when the interpretation of a human right is in question. In addition, in some instances it may even be possible to address an international body for redress. However, this last avenue may prove difficult to benefit from since rulings made by international bodies must be implemented by the member state; and if this has not happened there is very little that can be done. An example would be the case of Müller v the Government of the Republic of Namibia in which the Human Rights Committee under the International Convention on Civil and Political Rights was asked to consider whether Müller had suffered discrimination on the basis of sex in the application of certain administrative procedures. The Human Rights Committee responded in the positive and requested Namibia to remedy this. Despite this recommendation, Namibia did not change its legislation and no further action was taken.

The Constitution is expected to be a document of change. This document, however, has to be enforced in the courts if the current administration does not live up to the requirements of a rights-based democracy. And herein lies the crux of the matter: the average Namibian cannot afford the services of a legal practitioner, as the fees are simply too high. As for pro bono services, they are still in their infancy, and there is currently only one donor-funded public interest law firm that concentrates of necessity on collective, not individual legal issues. The reality on the ground is that the vast majority of Namibians cannot access the courts in order to claim their rights.

The stark realities

Before I consider how access to rights may be facilitated, let us take a look at how things have changed for our people. I note that these are personal opinions based on having lived in Namibia for the last 40 years and having witnessed the transition of Namibia into a constitutional democracy. In a sample of human rights issues, I will assess whether access to these rights are at the level they should be in a functioning human rights-based democracy, 25 years on.

Healthcare

Great strides have been made in terms of ensuring greater access and coverage for all Namibians. However, there is much that remains to be done. Distance to a hospital or clinic is often too great for many people, and the hospitals and clinics are often insufficiently staffed and/or ill-equipped. Public hospitals are generally in a poor state of

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5 Human Rights Committee under the international Covenant for Civil and Political Rights.
upkeep with the majority being dilapidated with, amongst other things, broken ablution facilities and ceilings in disrepair.7 Shelter for expectant mothers is also a concern. It was reported recently in a local newspaper that women were forced to walk long distances to reach one hospital in the North to have their babies. There were no facilities available for them there and countless women spent their days living under trees until their babies were delivered.8 This is not acceptable 25 years after independence.

Gender based violence

Every Namibian is entitled to live without fear and to be assured of personal security. It must be said that Namibia has made great strides in the fight against gender based violence, at least from the point of view of having enacted the required laws and providing centres where women can go for holistic support. What has been lacking though is the practical implementation of these laws: the Legal Assistance Centre’s own research found something as basic as paper to be a problem. Protection orders were sometimes not made available to the general public at a specific Magistrate’s Office because the office lacked the paper on which to print or photocopy the application forms. This is not acceptable 25 years after independence.

Education

In the newspaper The Namibian of 22 June 2015, it was reported that a number of schools have resorted to holding classes in tents due to lack of classroom space.9 The School Development Fund was a legislative provision that allowed schools to request parents to contribute towards running costs, something often utilized to provide additional activities not covered by government subsidies, for example sports or computer studies. This fund was abolished some two years ago and whilst the government has purportedly budgeted to cover the shortfall to the schools, in practice it has led to a situation where schools are still under-funded and therefore unable to cope without the willing support of parents. There are often reports in the newspapers of school materials not reaching schools until half way through the term. Photographs in newspapers of dilapidated hostels where children are expected to be educated are not uncommon. Our own Michelle McLean-Bailey, Miss Universe of 1995, states in an advert for a tertiary institution in Namibia that ‘education is the great equalizer’. I am not sure if this is currently the case in Namibia. It is once again those who are less privileged who suffer

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most as a result of this lack of resources. Any parents who can afford it send their children to private schools and those children reap the benefits. Pupils at private schools consistently do better on the higher subject levels. And so the cycle continues. Such pupils are better placed to offer their children an acceptable quality of education while the converse also applies. This is systemic inequality 101, and is not acceptable 25 years after Independence.

**Housing**

Finally, there is the very topical issue of access to housing, particularly in the urban context. A recently constituted movement has adopted the title ‘Affirmative Repositioning’, which does not sound like ‘land grabbing’ but is in essence the very same thing. While I do not condone taking the law into one’s own hands, it is the lack of palpable progress on the housing front that has people riled. It was recently reported that the National Housing Enterprise has managed to build an average of 250 houses per year since 2005\textsuperscript{10}, this with a budget of 320 million Namibian Dollars in 2013–2014.\textsuperscript{11} This rather hefty budget is not utilized to its full potential however, resulting in approximately a third of the monies being returned to the state coffers as a result of poor planning and underperformance.\textsuperscript{12} It is unfortunate that it took the threat of unlawful action to bring renewed movement in the provision of housing, one of the most basic of human rights. This is not acceptable 25 years after independence.

**Enforcing human rights obligations**

What then do the Namibian Constitution and the international human rights frameworks agreed to by Namibia actually mean for people like the farm worker referred to in the opening paragraph? What impact do these legal structures have on his life and his aspirations?

Namibia does not have a Human Rights Commission and until now the government has made it clear that this is not an option for the future. Instead, the Ombudsman has, in addition to the usual maladministration mandate, a directive to investigate human rights violations and to report on them to government with the necessary recommendations. However, insufficient funding is allocated for these purposes and has resulted in the Ombudsman having to source external funding in order to implement this additional mandate. On Human Rights Day in 2014, the government launched Namibia’s very first

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National Human Rights Plan. This came about partly as a result of international pressure and it remains to be seen whether its recommendations will be implemented.

The role of the courts

But all is not lost. Namibia has a number of very important advantages when it comes to realizing democracy based on human rights. I will mention two in particular. Firstly, the Namibian judiciary has remained independent and is largely believed to have the ability to make pronouncements without fear or favour.

Secondly, Namibia is fortunate to possess a monist system when it comes to the protection of human rights. Article 144 of the Namibian Constitution confirms that international agreements automatically become part of the law of Namibia and that no enabling legislation is necessary. Some may argue that this is not necessarily an ideal situation, since a lack of dedicated legislation very often results in a lack of proper protection (I am thinking here of the international crime of torture against which a charge of grievous bodily harm does not offer adequate protection). Personally, I am happy that I can refer to international instruments and norms in legal argument, and that the court has to take cognizance of international human rights standards. In that sense, legal action can trump legislative reform which often involves a very long process. Legal action must go hand in hand with lobbying for changes at ground level to facilitate maximum progress. As an example, the Child Care and Protection Act which came into force in 2015 was the result of a lengthy process which included much lobbying, but still took longer than 20 years to come to fruition. In the meantime, it would have been possible theoretically to litigate at least on those matters protected by international human rights law.

Changes must be made

Let us now consider some of the problems that hamper the process of making human rights universal for all Namibians, 25 years on:

- An unacceptably large number of Namibians do not know their most basic rights. The average Namibian does not even properly know the contents of our own constitution, let alone the regional or international instruments that can be used to protect their rights. On discussing the prohibition against torture with a number of police officers who were on a detective training course, one member was obviously quite frustrated with my constant ministrations against the practice, and rather irately asked when it would be acceptable to torture someone!

- Namibia remains in need of concerted voter education which must focus on the rights and duties of the electorate in a true democracy. There is a lack of appreciation of the idea that once politicians are voted into power, they should be held accountable for their promises. In a country where abject poverty is unacceptably high, the electorate has not translated their despair into utilizing...
their ability to make a change through voting, partly due to the issues men-
tioned above, but also due to the lack of a credible or strong opposition party.

- There is still an underlying perception that the influences of the West are at the
  root of the current human rights activism in Namibia. This can arguably be
  translated into scepticism as to the validity of international conventions in an
  African context. The recent remonstration by the Namibian president that the
  International Criminal Court should not interfere in African politics is one such
  example.13

- There is a limited amount of expertise in the legal profession insofar as human
  rights interventions are concerned. There is only one public interest law firm in
  Namibia. Pro bono work is not the norm at this time, although the Law Society
  of Namibia has initiated an attempt to change this.

- Due to the prohibitive costs, litigation in the public interest is severely cur-
tailed, although new court rules have allowed for applications to be made for a
  protective costs order in human rights cases. In terms of this order, if the
  matter is of public interest, it is possible that the applicant will be freed from
  having to pay any legal costs.

- Civil society struggles to find a unified voice on individual issues and is often
  pre-occupied with its own focal issues and the need to ensure that sufficient
  donor funding is available for its work. This has led to a situation where human
  rights programmes may ostensibly be structured around the issues that
  donors are prepared to fund. To combat this, it is important to consider first
  whether a case will benefit the human rights situation in Namibia, and only
  then consider which donor will agree with such a stance and provide funding.
  Civil society must take extreme care to not allow donors to dictate their
  activities, even if such activities fall within the broader definition of the
  protection of rights.

Some suggestions

The bottom line is that, currently, far too many Namibians do not experience social
justice. Access to economic and social rights for all may be guaranteed on paper, but
exercising those rights is problematic. Innovative ways may be required to place their
context within the Bill of Rights should legislative redress be sought. This, in fact, took
place in the Supreme Court appeal of the Government of the Republic of Namibia and
Two Others v GK Mwilima and All Other Accused in the Caprivi Treason Trial where legal
representation was sought not under legal aid within the principles of state policy, but
rather under the right to a fair trial in the Bill of Rights.14 Here, the argument was that

14 Government of Namibia vs Mwilima and Others 2002 NR 235 (SC).
the accused in a treason case could not be assured a fair trial without having access to legal counsel. This strategy proved successful and may be one which could be considered in the future.

On an international level, it has been painful to witness the demise of the SADC Tribunal which had its seat in Namibia. Its location provided an advantage for accessing regional intervention, although redress does not necessarily follow. In fact, it is an open secret that the demise of the Tribunal can be directly linked to judgments which did not find favour among those who had the power to make decisions on the future of the Tribunal itself. As a continent, we just do not seem to be able to hold one another accountable and enforce compliance.

Here, I can also refer to the Müller case mentioned above: the lesson there is that even though our government has acceded to these inspirational international instruments, it may very well be cold comfort for a litigant who actually challenges government to act on its undertaking. Therefore, when I consider the actual impact of regional and international interventions, I am inclined to believe that change and enforcement will have to be promoted from within Namibia, rather than relying on external influence.

Do I believe that much has changed in the 15 years that I have been involved in human rights interventions in Namibia? Certainly. From the outside, we have everything in place to support a life of dignity for all our people, and certainly there have been dramatic changes for the better. Yet, on the constitutional front there have been some worrying developments. Last year, for instance, the Electoral Act (Act No. 5 of 2014) had a profound impact on the electoral process, while the Namibian Constitution Third Amendment Act (Act 8 of 2014) created the post of Vice-President and affected the parliamentary structure by raising the number of members of the National Assembly from 72 to 96. In addition, eight persons can now be appointed as Special Advisors to the President, up from the previous six. It stands to reason that these changes will have significant effects on the State’s finances. It was not just the new legislation itself, but especially the way it was pushed through parliament — without the necessary broad consultation — which gives cause for alarm. Civil society viewed these changes with great concern: after all, the power to change the lives of our people begins with the Namibian Constitution. If its premises are not assured, if it can be amended so easily, quickly and quietly, it may not bode well for the future.

Moreover, if legislation in Namibia is not translated into real rights, we must then look to the promise of international instruments. We are in a position in Namibia to hold the government accountable for the promises made through such instruments, without any further enabling legislation required under article 144 of the Namibian Constitution, as mentioned above. This is a challenging process since it requires the judiciary to engage with Namibia’s obligations under international conventions. Such questions are not lightly answered and require in-depth research and advocacy.
Thereafter, there is still, in some instances, the option to address international bodies such as the Human Rights Committee\(^{15}\) in circumstances where Namibian courts have turned down an alleged legitimate request. As discussed already, this may not actually result in any real action. I am not convinced, though, that there is a real commitment to international human rights standards at all levels of government. Often, international treaties are recognized in times where approval is necessary and when accession to them places the country in good stead in the international arena. Later, however, they often become prone to inaction or delay, rather than being made usable in the national context.

And finally...

Until our government consistently recognizes and carries out its duties as laid out in the constitution and until our people properly understand what the Namibian constitution means in terms of its promise to realize a human rights culture in Namibia, our constitution is not living up to its potential. Until those in power fully internalize their commitments to international conventions, until our people properly understand the process and impact that international approval can have, and until they demand the required standards of adherence from their leaders, any progress made in ensuring full socio-economic rights for all will not gain the impetus required to swiftly address the current conditions of poverty.

Although change is incremental, it should not take place at a snail’s pace; the failure to address poverty with the necessary urgency may prove disastrous in the future. The first real indication of disillusionment has been noted in the Affirmative Repositioning movement. What will be next? We see in neighbouring South Africa many signs of violent discontent. We do not want this to spread to Namibia. The challenge remains for us to not become despondent, but to continue to do what is right and to speak out for those who cannot speak for themselves. As was heard during the struggle for independence in countries all over Africa... *A luta continua.* The struggle continues.

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