

Beyond values – is Namibia moving away from the legal positivism of parliamentary sovereignty?

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Stefan Schulz © August 2001

Abstract

How to make sense of fundamental rights and freedoms in light of constitutional conceptions deriving from political philosophy, namely justice and human dignity? The author addresses the recent judgement of the Namibian Supreme Court *Chairperson of the Immigration Selection Board v Frank and Another* and asks whether the court's conception of values is compatible with Constitutional Supremacy. Borrowing from Alexy's *Theory of Fundamental Rights*, the term value is given another meaning: Values are understood as optimization directives, as principles posited by the constituent assembly, purposively and functionally related to Kant's supreme moral principle; the categorical imperative. Justice is then understood as a feature of society, which is the natural environment of man, it shall signify a society where the individual is taken seriously. Special Fundamental Rights and Freedoms are viewed, as subjective rights emanating from a general freedom right. It is suggested, that the construction of their meanings has to consider that in the negotiation process towards (generic) constitutional provisions for *authorizing law citizens live by*, truth and justice could only be revealed approximately. The maxim '*in dubio pro libertate*', therefore has to be observed when balancing colliding principles - to an extent which is tenable in light of the social order challenge.

Theses:

1. The Namibian Constitution, said to be a value-laden document, does not refer to objective values.
2. What appears to be an objective value is either a principle (optimization-directive), or the result of balancing opposite principles (rule); rules express context-dependent preference relations between opposite principles.
3. The only a-priori is Kant's supreme moral principle (categorical imperative), which has been posited through the incorporation of its derivative conceptions such as 'justice', 'human dignity', 'personal liberty' and 'equality' into the Namibian Constitution.
4. The general freedom right (personal liberty, Art. 7 NC) reflects the subjective freedom which has to be ensured as security of supreme moral principle and human dignity.
5. (Most of the) Special rights and freedoms can be understood as an emanation from the general freedom right: they have been posited by the pouvoir constituant in order to safeguard thematic freedoms otherwise only covered by the general freedom right against undue encroachment by majority decisions. The list of special rights and freedoms of Chapter 3 of the Namibian Constitution is neither exhaustive or complete, nor is the list closed. The selection of special rights and freedoms posited by the pouvoir constituant must be understood in the socio-historic/political context of Namibian constitutionalism.
6. The general freedom right is protected against infringements by majority decisions through the principle of proportionality; encroachments of liberties not specifically protected under Chapter 3 of the Namibian Constitution shall only be permissible on balance of colliding principles:

'The higher the degree of non-compliance or impairment of one principle, the more important the realization of the other principle must be'

7. The balance law (see # 6 above) anchors the majority rule in Rousseau's '*volontee generale*', which remains essentially the legitimating basis for the 'dictatorship of the majority.'
8. Morality (a set of specific morals), or a specific conception of the common good, can only be the

object of public interest, justifying the encroachment on the general freedom right by legislation, if its (morality's) non-enforcement would otherwise lead to social disorder/unrest; mere disturbances have to be accepted and shall not be sufficient to justify any restriction.

9. Justice and order are colliding principles in historically unjust societies. Adjudication towards justice needs to observe and respect the societal margin for 'transcendental action,' with the aim to maintain social order.
10. This margin (transcendental action) is determined against the capacity of a society to act contrary to ethnocentric justice/truth claims, without losing the challenge of social order: it shall depend on citizens' aggregate capacity to act voluntarily but contrary to one's egocentric desires in accordance with the norm not to treat persons as means only.