

In dubio pro libertate – the General Freedom Right (GFR)¹

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Abstract

The constitutional protection of actual, intended or only desired behaviour of a person outside the ambit of a special Fundamental Right or Freedom, requires the recognition of a residual (negative) freedom, also called General Freedom Right (GFR). The non-recognition of the GFR, results in the possibility that the legislator, and in its wake the executive may arbitrarily infringe, restrict and violate the life-spheres of individuals without any legal remedy for the affected individual. Such treatment does not recognise the individual as a recipient of rights but as an object, subjected to statutory mechanisms without a say in the matter. If *Ronald Dworkin's* claim that democracy is about governments '*treating all members of the community as individuals, with equal concern and respect*' holds any appeal, legal scholars better look out for this residual freedom right in their Constitutions. The paper deals with the merits of the GFR and the question where to locate this right in the norm text of the Namibian Constitution.

Key words:

Freedom – liberty – human dignity – democracy – General Freedom Right (GFR) – legal positivism – natural law – constitutional interpretation – intention – purpose

'To be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human'

Isaiah Berlin, *Four Essays on Liberty*, p. LX

Introduction

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. The Preamble recalls that the '*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*'. Since then UN member states² subscribed to principles and axioms which – at least textually – appear akin to those precepts which can be found in international covenants. However, even constitutions which remain textually close to the UN declaration gain different meaning, not only from jurisdiction to jurisdiction, but also over time and this difference may be the result of a variance in factors contributing to social order in each of the different jurisdictions. An example in point is the death

¹ The text is a continuous presentation of a scholarly position, without the constant intrusion of such observations as 'Dworkin says this', 'Ackermann J says in... that' etc. That the position put forth in this paper has not sprung up *ex nihilo* should be obvious throughout the text, but the text should be judged on its own merits against the intention to engender a discourse on the topic. However, it shall be mentioned upfront that I have been greatly inspired by Robert Alexy, who explicated the normative dimension of negative freedom (liberty) exhaustively in his book *Theorie der Grundrechte*, 1996, 3rd edition, Frankfurt, pp. 309 - 356. This explication has been accepted here, and to the extent that the discussion bears on this residual rights position, the paper owes its structure and content Alexy.

² Compare: The Economist Intelligence Unit's Index of Democracy 2008, accessed on 15 January 2010 at <http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>

penalty.³ Although not abolished by the constitution, in the USA the judiciary found it to be either in line with the constitution or not at different times.⁴

The above gives rise to the question about the relationship between specific constitutional concepts – in particular its limits – and overarching concepts like justice and human dignity, which although deriving from political philosophy, have been introduced in many constitutions as positive constitutional law.⁵ This relationship may be characterised by strong tensions which inform the intricate relation between constitutional/political philosophy and theory on the one hand and constitutional interpretation, on the other hand. These tensions surface *inter alia* when citizens intend to enact behaviour which in the absence of a specific right or freedom remains unprotected against public censure and prohibition. The problem will be discussed in the following in view of the concept of a General Freedom Right.

Freedom and Liberty

Freedom is a fundamental though ambiguous practical concept. A classical formulation stems from *Thomas Hobbes*: “*Liberty, or Freedom, signifieth, properly, the absence of opposition.*”⁶ The term has a constant positive emotive component, which can be easily coupled with varying descriptive categories. Thus, it is not really surprising that *Isaiah Berlin* refers to “*more than two hundred senses of this protean word recorded by historians of ideas*”;⁷ *Hobbes* notes that “*it is an easy thing for men to be deceived, by the specious name of liberty.*”⁸ Taking *Hobbes*’ formulation as a point of departure, and for the purposes of this paper, freedom in a juristic sense shall mean an action alternative. The object of juristic freedom is not just one specific action, this would denote a positive freedom, but an alternative for action. In this sense a person is ‘free’ to

³ Capital punishment was suspended in the United States from 1972 through 1976 primarily as a result of the Supreme Court’s decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Another example in point hinges on the different policy approaches with regard to sexual orientation. In South Africa ‘sexual orientation’ forms part of the grounds listed in Section 9 (3) South African Constitution, which result in the presumption that differentiation on the basis of one or more of the grounds is unfair discrimination. Art. 10 of the Namibian Constitution does not give sexual orientation such protection.

⁴ Abolished in Namibia by virtue of Art. 6 Namibian Constitution, there is no such clause to be found in the South African Constitution. The South African Constitutional Court in *S v Makwanyane 1995 (3) SA (391)* found nevertheless that the death penalty was unconstitutional which however does not mean that the Court could not reverse this decision (albeit with difficulties) at another time.

⁵ So for instance in Namibia, where Article 1 (1) NC reads: “*The Republic of Namibia is...founded upon the principles of democracy, the rule of law, and justice for all.*”

⁶ *Hobbes*, Th. (1960) *Leviathan*, Oxford, 136

⁷ *Berlin*, I. (1969) *Two Concepts of Liberty*, in: *Berlin*, I. (ed.) *Four Concepts of Liberty*, London, Oxford, New York, 121

⁸ *Hobbes*, Th. (1960) *Leviathan*, Oxford, 140

the extent that her alternatives for action remain unencumbered. We want to term this freedom negative freedom.⁹

Fundamental Rights and Freedoms under the Namibian Constitution

The Namibian Constitution, being a product of a struggle ostensibly not only fought for sovereignty but also human rights, contains a Bill of Rights that outlines fundamental rights and freedoms, which are protected and entrenched under relevant special and general provisions. The difference between rights and freedoms has not been explicitly defined, but it may be argued that the difference lies in the extent to which the Constitution allows derogation.

In respect of freedoms Article 21 (2), which provides for the freedom of speech and expression, thought, religion, association, etc, states that they

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

Thus, as far as the enumerated *freedoms* are concerned, the Constitution allows infringements by virtue of sub-constitutional law within defined limits. This leaves the legislator with a wide margin of discretion. The Constitution however, does not provide such a general limitation clause in respect of *fundamental rights*, which are enumerated in Art. 6 – 20. Restrictions on *rights* may therefore only be limited to the extent that this is expressly permitted.¹⁰

General Freedom Right (GFR)

The proposition that the lists of both *rights* and *freedoms* are ‘enumerations’, and therefore thematically closed, might provoke a feeling of unease. The question whether we are indeed dealing with an enumeration of rights and freedoms is important, because it entails that social behaviour which cannot be subsumed thematically under one or more *rights* or *freedoms*, lacks constitutional protection. It may be argued that this is a rather unlikely situation, and if it occurs

⁹ Freedom can be explicated in various ways, in terms of the ‘man on the street’, philosophy, economy and law. Whoever intends to answer the question regarding the nature of freedom will get entangled in a demanding philosophical project. A venture of simpler dimensions lies in looking at the structure of freedom. But a comprehensive presentation thereof would likewise go beyond the boundaries of this paper, and we will therefore content ourselves with a rudimentary approximation, which is the juristic notion of freedom as action alternative. In this sense freedom refers to the absence of obstacles, hindrances or opposition; compare Alexy, R. (1996, 3rd edition) *Theorie der Grundrechte*, Frankfurt, 194ff.

¹⁰ Art. 19 places the right to one’s culture for instance under the limitation of: “... the terms of this Constitution and further to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest”

it will concern probably issues which are by no means fundamental. Yet, a number of individual decisions and their behavioural expressions, like self-infliction of somatic and psychic harm (i.e. consumption of licit and illicit drugs and alcohol, smoking tobacco, eating specific food, for instance butter for its assumed negative impact on cholesterol levels), but also suicide and, as the case may be one's sexual orientation, could be affected. Whereas the examples are emotionally and morally loaded,¹¹ there is a plethora of more mundane issues, which appear however only at the surface negligible or even ridiculous,¹² e.g. keeping goldfish in an aquarium in one's home (or any pet), feeding pigeons, squirrels etc. within municipal boundaries (or any animal for other than commercial purposes anywhere); wearing body ornaments (piercing), or wearing a particular colour, for instance red on Sundays (or at all); sleeping with windows open at nights (or opening windows at all), and the list could go on endlessly.¹³ This is the ambit of the General Freedom Right, in short: GFR.

Conceptually, the GFR is undetermined, thematically unspecific and it affords citizens the constitutionally protected prerogative to choose, think and act for themselves and unhindered within the remits of the constitutional order. On the other hand, it provides *prima facie* a (subjective) right *vis-à-vis* the state not to hinder, obstruct or otherwise interfere with this prerogative. The GFR, finally encompasses the protection of (legal) states of affairs and entitlements. In this respect, it provides the individual also with an important *locus standi*,¹⁴ buttressing legitimate expectations to the constitutionality of the entire legal order.¹⁵ This right is a residual right in relation to those rights and freedoms which have been thematically enumerated in the Bill of Rights. It becomes technically only operational where the domain of no other

¹¹ For homosexuality, see for instance: <http://www.hrw.org/en/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders>; this paper is however not primarily concerned with any actually (homosexuality) or potentially (suicide, alcohol consumption, pigeon feeding in municipal areas) affected category of behaviour; examples from these categories will be used in the following – if at all – only as a projection foil for unfolding the idea of a general freedom right and its significance for policy making in a state which wills itself democratic.

¹² The subjective importance of an act of behaviour may be irrelevant as compared with other individual or collective constitutional positions. Yet, for some people those or similar acts may be more important than any entrenched positive freedom like association or practising a profession. One might therefore concur with Dworkin (Dworkin, R. (1977) *Taking rights seriously*, London) who posits that democracy points to a government treating all members of the community as individuals, 'with equal concern and respect'. A similar formulation, though with regard to the concept of human dignity was used by O'Reagan J in *S v Makwanyane* 1995 (3) SA 391 (CC) paragraph 328: "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights]."

¹³ It should be borne in mind that the proposition of a GFR does not at all put forth the idea that any of the examples is a particular important expression of personal freedom or that it could not be regulated or restricted by competent organs of the state.

¹⁴ See: *Ferreira v Levin* NO 1996 (1) SA 984 (CC)

¹⁵ This is the position of the German Constitutional Court (Bundesverfassungsgericht [BVerfG]), which posits in BVerfGE 29, 402 (408) the "Grundrecht des Bürgers, nur aufgrund solcher Vorschriften mit einem Nachteil belastet zu werden, die formell und materiell der Verfassung gemäß sind".

specific right or freedom is invoked; thus it provides a subsidiary rights position.¹⁶ The relation between the GFR and other specific Rights and Freedoms is a relation of logical inclusion. The protective reach of the GFR comprehends anything which is covered by the norm texts of specific rights and freedoms; with exception of the right to equality. From the *prima facie* position to be free to do or not to do anything which does not harm others follows logically that it is permissible to assemble and demonstrate peacefully, to petition, to join a trade union or to freely express (one's opinion, belief, religion etc). It is hence clear that the concept of the GFR lies at the root of specific Fundamental Rights and Freedoms. Specific Rights and Freedoms constitute thematic sections of the general undetermined permission, which is referred to as the GFR.

GFR and the Namibian Constitution

The quest for the GFR in any constitution requires a more concrete notion of what to look for in terms of semantic structure and content. Against the backdrop of the above one should expect a norm-text which reflects the 'negative' openness of the protected entitlement, for instance '*everyone is free to do anything which does not harm others*'. This is missing and it is therefore fair to say that the Constitution does not contain a stipulation which expressly grants an undetermined, thematically unspecified subjective right.

However, the fact that the Constitution makes no express textual reference to the GFR does not preclude a construction, which presupposes its existence. The material or substantive foundation of the Constitution, i.e. in particular the Bill of Rights, is largely characterised by the openness of its concepts. Constitutional interpretation has often to deal with the *lacunae* which emanate from this openness of the authoritative material. In this context we take note of the fact that the Namibian Constitution makes use of the term liberty in Art. 7, it reads:

No persons shall be deprived of personal liberty except according with procedures established by law.

Liberty is a term which also serves as a synonym for freedom, and the tandem liberty/freedom denotes then the absence of obstacles, restrictions and hindrances.¹⁷ From this perspective, Art. 7

¹⁶ Interestingly, the Namibian Constitution affords its citizens a right to Administrative Justice (Art. 18 NC), which covers virtually the whole spectrum of the executive beyond the ambit of any specific Fundamental Right and Freedom. Nevertheless, Art. 18 NC cannot be seen as a 'mini'-GFR, because to the extent that the executive acts on the basis of legislation, the infringement on liberty outside the scope of specific Fundamental Rights and Freedoms remains without protection. Accordingly, only for the time being, i.e. in the absence of a law prohibiting male persons wearing earrings, individuals enjoy constitutional protection against incidents as reported in 2001 (see <http://www.hrw.org/en/node/12326/section/4>) where Special Field Force (SFF) members reportedly began rounding up men in Windhoek (Namibia) wearing earrings, claiming that it was an order from the President to take earrings off any male person.

¹⁷ *Supra* fn 7

NC might very well be constructed as the textual anchor for the GFR. But it is important to point out here that many will hold that under the title ‘Protection of Liberty’, Art. 7 NC refers only to the right or privilege of access to a particular place, undoubtedly encompassing also the physical integrity of the individual.¹⁸

A number of corollaries discounted, constitutional law is always what the judiciary by virtue of interpretation and construction of the constitutional text reveals as binding to the state, its organs and the citizenry. Constitutional interpretation refers thus to the authoritative construction of the supreme Constitution by the judiciary during judicial review of the constitutionality of legislation and government action. It is thus prudent to take a glance at the practice of constitutional interpretation by the Namibian judiciary.

In a country where extreme legal positivism had previously buttressed parliamentary sovereignty, the advent of a supreme Constitution meant a fundamental paradigm shift. Under the Namibian Constitution, constitutional interpretation vests in the highest courts of Namibia, namely the Supreme Court and the High Court.¹⁹ Since the coming into force of the Constitution on 21 March 1990, the Supreme Constitution had tangible effects on the understanding of the permissible boundaries of Government action, and the relationship between citizens and the organs of the State. A number of landmark decisions by the Supreme Court have readjusted the normative landscape of Namibia, e.g. *S v Acheson* 1991 (2) SA 805 (Nm) 813A-C; *Namundjepo & Others v Commanding Officer, Windhoek Prison & Another* 2000 (6) BCLR 671 (NmS); *Ex Parte Attorney General, Namibia: in re Corporal Punishment by Organs of the State* 1991 NR 178 (SC) to name but a few. With the seminal Mahomed J on the bench, the Namibian Supreme Court commenced an epoch which turned away from literalism and ‘*plain meaning rule*’ and embraced substantive constitutionalism. In *S v Acheson* Mahomed J left a legacy for constitutional interpretation as it was about to unfold:

(T)he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a “mirror reflecting the national soul”, the identification to the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

Namibian courts since then were called upon to interpret all legislation in light of the fundamental rights and freedoms in the Bill of Rights, and as a consequence become involved in constitutional interpretation to some degree.²⁰ The Namibian courts greeted the new order

¹⁸ Chaskalson P in: *Ferreira v Levin* NO 1996 (1) SA 984 (CC) at paragraph 170.

¹⁹ Amoo, S (2008), *An Introduction to Namibian Law*, Windhoek: 177ff. and 180ff

²⁰ Compare: Strydom CJ, (2002) *Namibia’s constitutional jurisprudence – The first twelve years* (Address to official officers at the first retreat of the Office of the Attorney-General at Swakopmund, 20 – 22 November 2002)

positively, although implementing it to varying degrees.²¹ In respect of the Bill of Rights, our courts showed in general a moderately courageous approach, which Amoo termed “*a natural law cum realist or a purposive approach*”.²² In pursuing this approach, it may be argued, the courts understood the selection of special rights and freedoms posited by the *constituent assembly* from the socio-historical and political context of this country, reflecting the historical experience of the Namibian people since early colonial times. The Preamble of the Constitution epitomises this perspective by referring to Chapter 3 as follows:

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

Constitutional interpretation against the background of the classical adage of legal interpretation that ‘respect must be paid to the language employed’, the consideration of the historical factors that led to the adoption of the Constitution in general, and the Fundamental Rights and Freedoms in particular, may indicate that the Bill of Rights is perceived as thematically exhaustive by the Namibian courts. The Supreme Court keeps to the principle that constitutional interpretation, whether historical, contextual or comparative, can never reflect a purpose that is not supported by the constitutional text as a legal instrument.

Neither Supreme Court nor High Court has so far ventured into considerations whether the Namibian Constitution contains a general freedom right. An example in point may be the majority judgement in *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another* (also referred to hereinafter as the Frank case)²³. Judge O’Linn states under the heading ‘The significance of the wording’:

In my respectful view, the starting point in interpreting and applying a constitution, and establishing the meaning, content and ambit of a particular fundamental right, or freedom, must be sought in the words used and their plain meaning.

O’Linn continues a few paragraphs later by quoting from the decision in *Government of Namibia v Cultura 2000*:²⁴

It (the Constitution, SS) must be broadly, liberally and purposively interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.

He finally emphasises that this does not imply the freedom to

²¹ Schulz, S. [n.d.] *Legal interpretation and the Namibian Constitution (a paradigm shift: through reason towards justice)*. In: Hinz, M., S. Amoo & D. Van Wyk (Eds.) *The Constitution at Work: 10 years of Namibian Nationhood*. Pretoria, 210ff.

²² *Supra* fn 19 at p. 41.

²³ Supreme Court Case No. SA 8/99.

²⁴ 1994 (1) SA 407 (NmSC) at paragraph 418.

The court in the Frank case did not consider the existence of a GFR. This could be explained by the fact that such a rights position was not invoked by the applicants. O'Linn, with regard to the burden of proof in regard to fundamental rights and freedoms:

...the applicant will have the burden to allege and prove that a specific fundamental right or freedom has been infringed. This will necessitate that the applicant *must also satisfy the Court in regard to meaning, content and ambit of the particular right or freedom.*²⁶

According to this logic, and since the applicants did not presuppose the GFR, the court deemed to have no reason to enter a presumably irrelevant discourse.²⁷ However, from the argumentative architecture and phrasing of the judgement it may be inferred that by then the GFR had not even appeared on the conceptual horizon of the court. The court concretised the meaning of rights and freedoms in a somewhat awkward isolation, without presupposing a conceptual interrelation of all precepts contained in the provisions of the Bill of Rights.²⁸ It is against this background that one may confidently say that the Supreme Court has not made space yet for the GFR in the Namibian Constitution.

There may be however, apart from the conceptual chores (*supra*) which come with its recognition, theoretical/epistemological grounds on which to construct the GFR. Those grounds may in fact have already been integrated in the shared jurisprudential and scholarly understanding of the Constitution, the presuppositions for its construction and its further development. On the basis of the dictum in *S v Acheson*²⁹ that during the interpretation of the Constitution, the spirit and tenor must be adhered to, i.e. that the values and moral standards

²⁵ Compare: Kentridge AJ in *S v Zuma* 1995 (2) SA 642 (CC) paragraph 17; also: *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 9.

²⁶ The approach followed by O'Linn is problematic, because the explication of the law, i.e. the Namibian Constitution, through the cases is extremely thin, and certainly not comprehensive. It amounts to placing the onus for delivering a convincing legal argument squarely into the applicant's camp. The venturous burden of making scholarly propositions for the conceptualisation of uncharted constitutional ground cannot be squarely placed on the applicant, albeit represented by a senior legal practitioner. Constitutional law is by and large embedded in the domain of an ever evolving constitutional dogmatic, practice and political philosophy. This is different from the domain of the learned jurist otherwise, where the issue is rather the skilful application of received principles and concepts of the positive law. Where the onus of doing constitutional fieldwork is placed on the applicant, this would expect him or her to shoulder a burden, which results not only in prohibitive costs, but should rest on the formed society, i.e. the state, or more precisely the judiciary and the academe. It is held, therefore, that the court's duty is to ascertain whether any freedom or rights position of an applicant has been infringed, provided only that the applicant provides the facts in which to find a hindrance, viz. a restriction of liberty; see also Ackermann J in *Ferreira v Levin NO* 1996 (1) SA 984 at paragraph 44; De Waal, J. I. Currie, Gerhard Erasmus (2001, 4th edition) *Bill of Rights Handbook*, Landsdowne, 140; but see, contra, the approach of Chaskalson P in *Sobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at paragraph 16.

²⁷ In fact, the discourse about the GFR would have only been relevant with regard to the second respondent (Khaxas) to the extent that her sexual orientation and choice to live with first respondent (Frank) in a lesbian relationship would have been negatively affected if the motivation of the Immigration Board had been not to give permanent residence status to the applicant because of her sexual orientation (lesbian). In exercising its discretion, the GFR would have required the Immigration Board to consider the impact on the second respondent.

²⁸ *Supra* fn 20 at p. 212 (Fn 80)

²⁹ 1991 (2) SA 805 (NmHC).

underpinning the Constitution must be taken into account throughout the entire interpretation process, it is held that the GFR can and should be read into the Constitution without ‘stretching’ or ‘perverting’ the language of the enactment. The logical relation between specific Fundamental Rights and Freedoms and the GFR, and as will be shown later, the express recognition of the inviolable dignity of the person, paired with an initial understanding of democracy serves as the basis of a rational discourse towards this result. In the following however, we will first address the GFR in historical perspective, and thereafter compare the approach taken so far by the South African and the German Constitutional Court.

GFR in Historical Perspective

Some might argue that the development of subjective rights, including constitutional rights and freedoms, can only be described empirically, in terms of concrete traditional lineage. The implicit objection against the recognition of a GFR presupposes that human rights and freedoms evolved historically against the backdrop of specific threats and the need for specific protection (*supra*). Under this perspective human rights and freedoms are understood exclusively as punctual normative assurances, a position which cannot be easily reconciled with the concept of a GFR.³⁰ But this perspective may be too narrow, since the heuristic interest it serves is limited to the historical perspective of constitutional positivism. At this point it is important to note that history provides very well another, a more abstract lineage regarding the concept of freedom. Art. 4 of the Declaration des droits de l’homme et du citoyen (1789) pointedly posits the primacy of the GFR: “*La liberte consiste a pouvoir faire tout ce, qui ne nuit pas a autrui: ainsi l’ existence des droits naturels de chaque home n’a de bornes que celles, qui assurent aux autres members de la societe la jouissance de ces mes droits*”.³¹ It is in this line of thought that Kant posited: “*Freiheit (Unabhaengigkeit von eines Anderen noethigender Willkuer), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, urspruengliche, jedem Menschen kraft seiner Menschheit zustehende Recht.*”³²

GFR in comparative perspective: South Africa and Germany

³⁰ The extreme empirical historical perspective recognises fundamental rights and freedoms only to the extent to which the constitutional text determines specifically protected categories of action. This leads inherently to crude constitutional positivism, and may be criticized from a variety of angles.

³¹ English (translation, SS): ‘*Freedom consists of the power to do anything which does not harm alter: thus the existence of the natural rights of every man has no other limits than those which ensure other members of the society the enjoyment of the same rights*’

³² Kant, I. (1797) *Metaphysik der Sitten*, Königsberg, 237; English (translation accessed 15 January 2010 at <http://praxeology.net/kant7.htm>): ‘*Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.*’

The Constitutional Courts of South Africa and Germany differ in their approach to the question of the GFR. It may be said that the Constitutional Court of South Africa without being dismissive, takes a more hesitant approach³³ than the German Constitutional Court. The GFR has been acknowledged by the German Constitutional Court since the court's first opportunity to express itself on the issue,³⁴ and the German Constitutional Court has strongly held to this position ever since.³⁵ At face value, the reason for this difference can be easily explained. In the words of *Chaskalson*, then President of the Constitutional Court of South Africa, who formulated the majority decision in *Ferreira v Levin NO*: “[T]hese Constitutions are formulated in different terms.”³⁶

The German Constitution, the Basic Law³⁷ stipulates in Article 2 [Rights of Liberty] two freedom positions.³⁸ Art. 2 (1) grants the right to free development of the personality:

“Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmässige Ordnung oder das Sittengesetz verstösst”

whereas Art. 2 (2) commands *inter alia*:

“... Die Freiheit der Person ist unverletzlich...”

Textually, the interpretation of Art. 2 (1) Basic Law in the sense of a GFR relied on the one hand on the separate specification of the protection of physical liberty and security in Art. 2 (2) Basic Law. On the other hand, due to the context providing structure of Chapter I (Grundrechte),³⁹ the acknowledgement of the GFR could be based conceptually on the functional integration of the principle of human dignity (Art. 1 (1) Basic Law),⁴⁰ and the acknowledgement of human rights stipulated in Art. 2 ff. Basic Law. The construction in turn that Art. 2 (2) Basic Law protects the

³³ De Waal, J. I. Currie, G. Erasmus (2001, 4th edition) *Bill of Rights Handbook*, Landsdowne, 247; Currie, I. and J. de Waal (2005, 5th edition) *Bill of Rights Handbook*, Wetton, 292.

³⁴ In its decision of 16 January 1957 (BVerfGE 6, 32) the German Constitutional Court had to decide on the denial of granting a passport to the applicant, one Mr. Wilhelm Elfes. The Constitutional Court decided that no specific Right had been violated, but resorted to the GFR as a residual subjective right.

³⁵ See for instance the more recent decision of the German Constitutional Court in BVerfGE 59, 275 (278).

³⁶ *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 175. A consultation of the website of the Southern African Legal Information Institute at <http://www.saflii.org/>, accessed on 24 January 2010, revealed that *Ferreira v Levin NO* remained so far the only judgement on Fundamental Rights and Freedoms with an explicit bearing on liberty in the sense of the residual freedom discussed here under the GFR.

³⁷ German: Grundgesetz

³⁸ ”Article 2 [Rights of liberty]

(1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.

(2) ...The freedom of the individual is inviolable. ...”

³⁹ Basic Rights.

⁴⁰ Article 1 (Protection of human dignity)

(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

physical domain of liberty remained always undisputed.⁴¹ Since the decision in *Elfes*, it became accepted that the GFR must be construed conceptually as a necessary, though not sufficient condition of human dignity.⁴²

Whereas the construction of the GFR under the German Basic Law is textually, contextually and systematically supported, the situation is different in South Africa. Neither the 1994 Interim Constitution, nor the 1996 Constitution contains any reference to a '*right to free development of the personality*'.

The South African Constitutional Court was nevertheless urged to consider the matter when Ackermann J sought the opportunity in *Ferreira v Levin NO*⁴³ to propose a '*broad and generous*' reading of Section 11 (1) Interim Constitution.⁴⁴ Ackermann J held that this subsection should be read disjunctively, separating a right to freedom from a right to security of the person. Citing *Isaiah Berlin*⁴⁵ he argued, that the right to freedom was a constitutional protection of a sphere of individual liberty, a bulwark against the imposition of restrictions on the individual by the state without sufficient reason.⁴⁶ However, this proposition had to be problematic, where it was suggested that this right was to be developed from the norm text of section 11 (1) Interim Constitution, now to be found in Section 12 (1) Constitution, which reads:

Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) ...*

⁴¹ See exposition in Pieroth, B. and B. Schlink (2003, 19th edition) *Grundrechte / Staatsrecht II*, Heidelberg, pp. 97ff

⁴² BVerfGE, 34, 238 (245); 32, 373 (379).

⁴³ *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 45ff; the case cannot be presented here in full, the essential facts on the case are however as follows: The South African Constitutional Court received the issue as a referral from the Witwatersrand Local Division of the Supreme Court by Van Schalkwyk J. The matter at hand was essentially the constitutionality of Section 417 (2)(b) of the South African Companies Act (Act 61 of 1973), which compels a person summoned to an enquiry to testify, even though such person seeks to invoke the privilege against self-incrimination. In his minority judgement, Ackermann J held that the applicants had no standing on the grounds of Section 25 (3) Interim Constitution, which embodies the fair trial principles. The reasons for his approach do not matter here, but given his analysis of the issue of standing, Ackermann J was driven to scan the Constitution for other subjective rights of the applicant, which could have been infringed. Whereas there was no such right to be found among the enumerated rights and freedoms of Chapter 3, Ackermann J resorted to the concept of the GFR, which he textually anchored in Section 11 (1) Interim Constitution. Chaskalson P, for the majority judgement, rejected Ackermann J's analysis of the issue of standing with regard to Section 25 (3) Interim Constitution, and granted relief on the ground of a violation of the fair trial principle. In passing the majority decision gave a brief exposition of its position with regard to a residual freedom right for the time being.

⁴⁴ The text of Section 11 of the Interim Constitution (1994) has been virtually taken over into Section 12 of the current South African Constitution (1996), although the text of Section 12 (1) (a) to (e) is now more specific in its formulation. .

⁴⁵ *Supra* fn 7.

⁴⁶ *Ferreira v Levin NO* 1996 (1) SA 984 (CC), at paragraph 54.

Absent specific textual and contextual clues, the Constitutional Court by majority decision, rejected Ackermann's views and embraced the dictum proposed by *Chaskalson P*,⁴⁷ that the primary purpose of section 11 (1) Interim Constitution is to ensure that the physical integrity of every person is protected. *Chaskalson P* then referred to the meaning of "freedom and security of the person" in public international law:

[170] ... *The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and People's Rights, all use the phrase "liberty and security of the person" in a context which shows that it relates to detention or other physical constraints Sieghart notes that although "...all the instruments protect these two rights jointly in virtually identical terms, they have been interpreted as being separate and independent rights", and that the European Commission of Human Rights and The European Court of Human Rights have found that what is protected is "physical liberty" and "physical security". There is nothing to suggest that the primary purpose of section 11(1) of our Constitution is different. It finds its place alongside prohibitions of "detention without trial", and of "torture" and "cruel, inhuman or degrading treatment or punishment" - all matters concerned primarily with physical integrity. This does not mean that we must construe section 11(1) as dealing only with physical integrity. Whether "freedom" has a broader meaning in section 11(1), and if so, how broad it should be, does not depend on the construction of the section in isolation but on its construction in the context of Chapter 3 of the Constitution. [171] Chapter 3 is an extensive charter of freedoms. It guarantees and gives protection in specific terms to equality, life, human dignity, privacy, religion, belief, opinion (including academic freedom in institutes of higher learning), freedom of expression, freedom of assembly, freedom of demonstration and petition, freedom of association, freedom of movement, freedom of residence, freedom to enter, remain in and leave the Republic of South Africa, political rights, access to court, access to information, and administrative justice. Chapter 3 also provides guarantees and protection in respect of fair arrest, detention and trial procedures, economic activity, labour relations, property, the environment, language and culture, education and the rights of children.*

This Court has adopted a purposive interpretation of the Constitution, and as Ackermann J points out, it has also held that section 11:

must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way which secures for "individuals the full measure" of its protection.

These considerations must be borne in mind in construing section 11(1). I agree with Ackermann J that the mechanical application of the expressio unius principle is not appropriate to an interpretation of Chapter 3. This does not mean, however, that the structure of Chapter 3, the detailed formulation of the different rights, and the language of section 11 can be ignored."

⁴⁷ *Ferreira v Levin NO 1996 (1) SA 984 (CC)*, at paragraph 158ff.

This finding is then buttressed with systematic arguments regarding the various thresholds for limitations of fundamental freedoms as set out in Section 33 Interim Constitution.⁴⁸ Further absent the necessity to expound the very substance and delineation of then Section 11 (1) Interim Constitution,⁴⁹ *Chaskalson P* rendered a clean sweep of the substance of *Ackermann J's* judgement, albeit not at all excluding the future emergence of sufficient reasons to acknowledge the residual right:

...I can see no objection to accepting provisionally that section 11 (1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under Chapter 3.

GFR: an axiological presupposition

The excursion into the history of ideas and into the comparative approach of two selected jurisdictions to the GFR has shown that the concept holds heuristic, intellectual and practical appeal. In the absence of a specific textual reference to the GFR in the Namibian Constitution it remains a question of logical reasoning to establish whether or not the GFR forms part of its normativity.

Today, there is little doubt among legal scholars that the application of legal rules is more than a logical subsumption of facts under a conceptually/semantically framed juristic principle. With the abdication of a perverted Westminster parliamentary model and the acknowledgement of constitutional supremacy over parliamentary sovereignty, countries in transition like Namibia or South Africa have also abandoned crude legal positivism, which was then and there epitomised by the orthodox text-based (literal) approach to juristic interpretation.⁵⁰ If legal positivism can be described as a conceptual theory putting forth the conventional nature of law drawing attention to the idea that law is *posited* as opposed to being *derived* from natural law or morality, the problem with legal positivism in the form of the literal approach to interpretation was not only that judges

⁴⁸ *Ferreira v Levin NO* 1996 (1) SA 984 (CC), at paragraph 173ff.

⁴⁹ Technically, and with regard to section 11 (1) Interim Constitution the majority judgement in *Ferreira v Levin NO* is an obiter. The question whether a residual constitutional right to negative freedom should be read into Section 11 (1) Interim Constitution was not the basis for the majority decision. In fact, against the backdrop of the nature of the GFR as a residual rights position (*supra*), and the fact that the majority decision referred to Art 25 (3) Interim Constitution, i.e. the specific principle of fair trial as the principal anchor of its decision to invalidate section 417 (2) (b) of the South African Companies Act, there was no urgency nor need to delineate the boundaries of Art. 11 (1) Interim Constitution. It is therefore submitted that the view expressed by the concurring majority in this regard is not binding. See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 185, where Chaskalson P posits that “*the rule against self incrimination is adequately protected*” and so “*it is not necessary to consider ... whether the “residual right” claimed is of a character appropriate for protection under section 11 (1).*”

⁵⁰ Botha C. (2005, 4th edition) *Statutory Interpretation*, Cape Town, pp 47 ff.

often invoked legal principles that do not derive their authority from an official act of promulgation. The fundamental flaw may be seen in the axiomatic ignorance towards the conceptual significance of the discrepancy between norm and norm-text, which is always imminent. Accordingly legal norms were only such norms which are directly expressed through the norm text. This is however contra-factual. In the broader perspective, the difficulties with legal positivism have engendered a lengthy discourse which is by far not over, on how to preserve the concept of legal positivism.⁵¹

However, in Namibia and South Africa the perversion of the literal approach has been, and by virtue of the supreme Constitution, widely substituted by the so-called purposive approach, which departs from the assumption that the purpose or object of the legislation is the prevailing factor in interpretation. *Botha* writes:⁵²

The interpretation process cannot be complete until the object and scope of the legislation (ie its contextual environment) are taken into account. In this way the flexibilities and peculiarities of language, and all the internal and external factors, are accommodated in the continuing time-frame within which legislation operates.

Whereas the Constitution is now the frame of reference within which everything must function, the prism through which everything and everybody must be viewed, the question arises, where to find the prism through which to view the Constitution. This question which relates to the normative theoretical question of the foundation of validity, cannot be ignored, especially not with regard to topics, which (e.g. the GFR) are not addressed explicitly by the constitutional norm text. While making efforts to answer the question, the interpreter encounters however the problem that in the context of positive constitutional law there are no other sources which share the same normative quality as the Constitution.⁵³ The Constitution (Kelsen's *grundnorm*, Hart's *rule of recognition*) shares thus the solitude which characterises the normativity of a norm-text, which is not derived from any other, superior norm. Confronted with this situation Mahomed J stated dogmatically:⁵⁴

All Constitutions seek to articulate, with different degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people ... and the moral and ethical direction which that nation has identified for its future.

From here flows naturally that the interpretation of the Constitution always requires ascertaining the foundational values inherent in the Constitution, underpinning the listed fundamental rights and freedoms, and to proceed from there to an interpretation, which best supports and protects

⁵¹ See Meyerson, D. (2006) *Essential Jurisprudence*, Oxon, pp. 33ff.

⁵² *Supra* fn 49 at p. 51; see already Schreiner JA in *Jaga v Dönges* 1950 (4) SA, at paragraph 653 (A).

⁵³ *Supra* fn 32 at p. 138.

⁵⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 262.

those values. Technically, what is required is the logic-rational interconnection of material aspects of political philosophy,⁵⁵ to the extent that they can be recognised as being received into the Constitution by virtue of a linguistic anchor. This approach is supported by the fact that (the) law is always the expression of a reasonable logical and rational enterprise, i.e. the establishment of the rule of law.⁵⁶ The idea of the rule of law connotes a limitation on government; it is the

⁵⁵ This does not mean resorting to natural law, which in essence holds that the dictates of law are universal, unchanging and discoverable by human reason. Natural law shares epistemological problems with other theories of (objective) values, i.e. intuitionism. The fundamental problem with such theories is that the proclaimed a-priori 'values' have to be established individually by means of intuitive, evidentiary processes. In the absence of criteria for true or authentic evidences, intuitive processes amount to nothing else than subjective positions. The same problematic affects the substance of the natural law. It is therefore prudent to determine the relation between the Constitution and natural law with caution: Natural law concepts are reflected in the Constitution and form part of the constitutional law to the extent that they have been textually anchored in form of politico-philosophical concepts like human dignity, liberty, equality, democracy and the like.

⁵⁶ It requires inevitably a judgement to be made about which purposes are important and protected by the constitution and which not. This (value) judgement is, however, not a value judgement to be made on the basis of the judges' personal values. Some time before the judgement in *S v Makwanyane*, Mahomed J, has set out (the) requirements for constitutional interpretation in *Ex parte Attorney General, Namibia: In Re Corporal Punishment by Organs of the State* 1991 (3) SA 76 NmSC 91 D – F: "It is... a value judgement 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 its Constitution, and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic.... Yesterday's orthodoxy might appear to be today's heresy." This judgment contributed to some degree of confusion, not only among scholars. In the judgement *The Chairperson of the Immigration Selection Board v Erna Frank & Elizabeth Khaxas*, the court identified some of these institutions and gave guidelines as to how the norms and values are to be identified with reference to the dictionary meaning of the "institutions". This led Amoo (Amoo, S. (2008) *The constitutional development in Namibia since 1985*. In: Horn, N. and Anton Bösl (Eds.) *Human Rights and the Rule of Law in Namibia*, Windhoek, p. 51) to conclude that: "The Namibian Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian Churches and other relevant community based organisations can be regarded as institutions ...". The judgement in the Frank case suggests a direction of constitutional interpretation which goes against the tenets of constitutionalism. This is presumably not what Mohamed J had in mind or better, what his position entails. The evolutionary step from parliamentary sovereignty to constitutional supremacy must be seen in the abdication of the dictatorship of the majority, while at the same time, through the establishment of a representative democracy the legislator became liberated from the volatile day-to-day opinion of the electorate (as to the difficulties, see Cassidy [n.d.], *Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future*. In: Hinz, M., S. Amoo & D. Van Wyk (Eds.) *The Constitution at Work: 10 years of Namibian Nationhood*. Pretoria, p. 186). Constitutionalism and representative democracy facilitate the development of a consistent logic-rational legal order (rule of law), which evolves notwithstanding changing daily shifts in the public opinion, the momentary whims and caprices of the electorate, against the backdrop of such principles and precepts as have been agreed upon by the members of the constitutional assembly in a presumably sober state, rationally distanced from the vagaries of emotions and irrational states of mind. In fact, the text by Mohamed J's is closer to Dworkin's legal theory, which posits law as integrity (1986, *Law's Empire*, Cambridge MA, p. 225), requiring a judge to identify the purpose, content, and command of the law on the assumption that the legal rules at hand were all created by a single author – the community personified – expressing a coherent conception of justice and fairness, an undertaking which instructs the interpreter 'to test his interpretation of any part of the great network of political structures and decision of his community by asking whether it could form part of a coherent theory justifying the network as a whole' (Dworkin, *ibid.*, p. 245). Taking Dworkin seriously requires the integration of overarching concepts, not topical public opinion on an issue considered in isolation. It means also conjuring the capacity of the (average) citizen to accept a social reality which is not squarely in line with ethnocentric and egocentric desires. This capacity grows on those societal shifts, which Henry Sumner Maine (*infra*) described with the development from status law to contract law, it is always presupposed by the rule of law, which hinges on the separation of laws and moralities. From here follows: If the first virtue of the legal system is to facilitate social order in developed societies, and the second virtue to promote 'freedom, justice and peace' (Preamble of the Namibian Constitution), the public opinion, whether directly or indirectly through the 'institutions'

antithesis of arbitrary rule.⁵⁷ Whilst the norm text of the Constitution constitutes the outer limit, which is pledged not to be transgressed by the state and its organs, it remains the repository from which the purpose has to be taken.

Interestingly, the very Namibian Constitution may be understood as to embrace the ‘principles of integrity’ in the above sense in its preamble:

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

The preamble suggests a functional integration of dignity/rights on the one hand and freedom, justice and peace on the other hand. For the purposes of this paper, we may thus assume that the normative-analytical approach is compatible with the Constitution. For lack of space, the discussion hereafter will focus on the residual right as necessary to give substance to the right to human dignity; and the conceptual correspondence between the GFR and the ‘*volonté générale*’ (Rousseau), which describes the ideal-type (Weber) of democracy, informing virtually all contemporary conceptions of democracy.

State of Nature, Society, Individual, Autonomy, Democracy and GFR

The recognition of the GFR obviously, carries a moment or element of liberty, which is always presupposed in the *natural state*, into the state of freedom, which the Preamble of the Namibian Constitution envisages (supra).⁵⁸ The term *natural state* pertains to the political philosophy of the modern era, in particular to be found in the writings of *Thomas Hobbes* and *Jean Jacques Rousseau*. The *natural state* (of personal freedom) is the axiological presupposition which leads to Rousseau’s ‘*volonté générale*’ (it may be argued that to the extent that the Namibian society shall be built upon the principles of democracy (Art. 1 (1) NC), the axiological position has been made part of our constitutional ambit). Admittedly, all contract models, from *Hobbes* to *Rawls*

may only become relevant in limiting Fundamental Rights and Freedoms if the social order is threatened; i.e. to an extent that civil unrest and the violation of other human rights are not just a far possibility on the horizon.

⁵⁷ *Supra* fn 18 at p. 313, quoting Nwabueze: “...; *it is the antithesis of arbitrary rule; ...*”; one of the first norm texts in this tradition was the Magna Charta (1215), which King John the Baptist (1167 - 1216) had to concede to the Barons.

⁵⁸ The utility of theoretical considerations derived from the politico-philosophical discourse on democracy (and other constitutional precepts) in the context of constitutional interpretation cannot be ignored. Whereas theoretical aspects may be of purely academic importance at the level of sub-constitutional law (Terblanche (2007, 2nd edition) *Guide to Sentencing in South Africa*, Durban, p. 172), the theoretical discourse gains crucial relevance for construction, where the normativity (purpose and scope) of concepts represented in the norm text has to be ascertained. It is difficult if not impossible to conceive of any other or preferable method of interpretation where the norm text makes by and large use of concepts, because concepts are cognitive units of *meaning* (abstract ideas), usually built from other units which act as a concept’s characteristics, and typically associated with a corresponding linguistic representation such as a word. It is therefore held, that the purpose of the constitution, or just any selected constitutional concept, must thus be sought under observance of the theoretical discourse which engendered the very concepts in the first place. It is this discourse which provides the ‘concept characteristics’ which are otherwise absent from the text of the constitution.

face the problem that they presume something which is, however, only emergent in the social process; they posit the contra-factual existence of a pre-social individual. But this is not the problem of the GFR. The postulation of the GFR is perfectly compatible with *Berger and Luckmann's* contention that '*to be in society is to participate in its dialectic process*' (*The Social Construction of Reality*, 1966), which represents the background for the ontogenesis of the person as a member of society.

In order to understand this concept of freedom, it is necessary to take a closer look. A state of freedom does not at all denote the idea of a pre-social individual. To conjure the image of the isolated individual is not at all justified, since like any subjective entitlement, whether specific right or freedom, the GFR is, through the balancing law, which requires weighing in accordance with the proportionality principle, deeply embedded in the social. Although the GFR remains contentually undefined, which could be equated with borderless, it is factually equally limited as any other (specific) Fundamental Right or Freedom. This comes logically as a result of the assumption that the GFR would have to be placed under a general limitation clause comparable to Art. 21 (2) NC. Decisive is eventually only what is definitely placed under protection, which is not at all without boundaries, and certainly not arbitrary. The practical ambit of the negative freedom remains always the result of the balancing act⁵⁹ which is to be made between the actual or intended use of liberty and other contrary (legal) positions, individual or collective.⁶⁰ Within the thematic ambit of the special Fundamental Rights and Freedoms the constituent assembly has to some degree, and for a number of probable cases anticipated the balancing/weighting results. Whereas the interpreter has been insofar relieved from establishing the most basic preference relations in the domain of Fundamental Rights and Freedoms, this is still outstanding whenever the GFR applies.

However, in all cases, irrespective of the rights position in question, the balancing of different freedoms (of different subjects) becomes necessary. The balancing result constitutes what is definitively protected, it contributes to the comprehensive state of freedom, which has been referred to in the Preamble of the Namibian Constitution. It follows naturally from the above that bringing about and sustaining a (comprehensive) state of freedom comes always with opportunity costs, which always have to be measured in the currency of freedom or liberty. From a historical perspective, freedom in a legal and constitutional sense means the provisional endpoint of a tandem of social and legal developments from the middle ages to modernity. This

⁵⁹ Fundamental Rights and Freedoms are not absolute; even if rights, like the Right to Dignity (Art. 8 (1) NC), do not carry an express limitation provision, they have immanent boundaries, which are elucidated in relation to rights of others and collective interests of society.

⁶⁰ The GFR as a normative concept is certainly commensurate with preference relations with an emphasis on collective goods/interests at the cost of personal freedom; in this case the margin of definitive negative freedom becomes very small.

development is epitomised by the emancipation of the law, and implicitly so the status of the individual, from morality.⁶¹ At the end of this development the legal status of a person had become independent from her social status in a specific hierarchical social system, and we observe the emergence of a status of formal equality of all citizens. This development, which afforded the individuals the possibility to shape their life-spheres according to their own preferences and inclinations, can very well be described as a social-evolutionary phenomenon, since it brought about a type of society, which further on proved to be highly flexible and adaptable, better suited to withstand the challenges and vagaries of changes in the system environment,⁶² and the idea of the GFR may be seen as a culmination point. The recognition of the GFR preserves the ever evolving status quo of individual freedom, since it buttresses the autonomy of the person (vis-à-vis morality). It is thus only under the conditions of the GFR, the residual negative freedom, that the person is ‘*free to choose, and not to be chosen for*’ (Berlin).

Human Dignity is a term used to signify that a being has an innate right to respect and ethical treatment. But it is also closely related to concepts like autonomy, human rights, and enlightened reason, and used to critique the treatment of oppressed and vulnerable groups and peoples. But while dignity is a term with a long philosophical history, it is rarely defined outright in political, legal, and scientific discussions, the inseparable link between negative freedom and dignity is less than obvious.⁶³ This link emerges however immediately if one considers the conceptual core of human dignity as developed over time.

⁶¹ Compare: Maine, H. Sumner. (1861) *Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas*, London accessed on 18 January 2010 at http://en.wikisource.org/wiki/Ancient_Law

⁶² To posit as much may invite critique for it is a deconstruction based on ethnocentric perceptions having emerged in the context of European *Enlightenment*. Yet, in the wake of *Enlightenment*, science, technology and human development thrived, because the emancipation of the law as its concurrent expression unlocked thinking unencumbered by moral conventions, and created new unprecedented alternatives for action. Advances in science were followed by an agricultural revolution, which stabilised food security enormously. Whether the Enlightenment era was such a blessing overall may be doubtful, in particular if one considers the current world economic and social order. The specific anthropocentric world view of modern era, with its instrumental logic, which is especially associated with liberalism, is largely incapable to conceive of ‘others’ who define themselves by means of a non-instrumental, ecological relation with nature, as persons, i.e. *auto-nomous* subjects (see: Benhabib, Seyla (1992) *Situating the Self*, New York). But the question about viable alternatives lingers. There is certainly more to it than can be discussed in a footnote. However, we also recall that all human cognition begins with a value position. Values are integral part of social life: no group’s values are wrong, they are only different. This epistemological position applies equally to any one specific conception of democracy. Against this background proponents of the position taken in this paper maintain two things. First, to accept the position as binding on the political system presupposes a separation of law as much as the emergent self/identity from morality. Second, whether and when any society can be found so situated is historically contingent, and escapes precise prediction and or assessment.

⁶³ Ackermann J posits in *Ferreira v Levin NO* at paragraph 49, that without freedom, human dignity is little more than an abstraction: “*Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights*

Although not the first to elaborate on structure, nature and meaning of the concept⁶⁴ Kant's discourse on human dignity had arguably the most profound influence. He held that there were things that should not be discussed in terms of value, and that these things could be said to have dignity. 'Value' is necessarily relative, because the value of something depends on a particular observer's judgment of that thing. Things that are *not* relative (that are "*ends in themselves*", in Kant's terminology), are by extension beyond all value, and a thing is an *end in itself* only if it has a moral dimension. In Kant words this 'thing' could only be humans.⁶⁵ Kant continued his elaboration of human dignity and put forth the three formulae of will. From formula to formula, and increasingly so, human dignity focuses on self-determination, and *auto-nomy*. The emergence of human dignity takes place at the pace of self-determination/autonomy of the person; it is this autonomy which brings about the person as specifically human. The person has the dignity to choose its own ways, to develop the self, the dignity of autonomy; in Berlin's words: '*to choose and not to be chosen*'. Kant, like Pico de Mirandola, posits a structural relation between dignity and liberty: The (human) person has the dignity to be free. Humanity has the dignity to be free in the wider sense of *auto-nomy*. Against this background it is without force to say that freedom/autonomy are the necessary prerequisite for human dignity to unfold; in this sense the subjective right becomes the most intensive form of autonomy.

This perspective has become virtually without exception the focal point for oppressed and vulnerable groups and peoples. It can be found also in the Preamble of the Namibian Constitution, which expresses the desire to promote amongst all of us the dignity of the individual, followed by the reminder that the people of Namibia finally emerged victorious in the struggle against colonialism, racism and apartheid.⁶⁶

that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others."

Chaskalson P's contrary position: "*In the context of the multiplicity of rights with which it is associated in Chapter 3, human dignity can and will flourish without such an extensive interpretation being given to section 11(1)*" (*Ferreira v Levin NO*, paragraph 173), is surprising, because it can in my view only be reconciled with a more positivist-material understanding of human dignity, which reduces the right to dignity to just another subjective entitlement. This formal approach places human dignity at the same level as any other subjective right or freedom, without consideration of the functional interrelation and interdependence of these constitutional precepts. The latter consideration however, does not go well with Chaskalson P's standpoint in *S v Makwanyane* (fn 53, paragraph 144): "*The right to life and dignity are the most important of all human rights and the source of all other personal rights in the Bill of Rights...*"

⁶⁴ About two hundred years before Kant, in 1486 at the beginning of the modern era, Pico della Mirandola (1469 - 1493) presented his *Oration on the Dignity of Man* (Latin: *Oratio de hominis dignitate*), in which he revealed the central problem of dignity and freedom. This oration is commonly seen as one of the central texts of the Renaissance, intimately tied with the growth of humanist philosophies; see: Baruzzi, A. (1983) *Einführung in die politische Philosophie der Neuzeit*, Darmstadt, p.111.

⁶⁵ "*Morality, and humanity as capable of it, is that which alone has dignity*"

⁶⁶ This view is echoed in *State v Acheson* 1991 (2) SA 805 (Nm), where Mahomed J considered that "*Mr Lubowski ...was during his lifetime perceived to be vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are so eloquently formalised inter alia in the preamble of the Namibian Constitution and arts 10 and 13.*"

Eventually, it is the foundational concept of democracy itself, which suggests the recognition of the GFR. In respect of democracy as a form of government, the GFR is (at individual level) the complement of the formal aspects of democracy. It is the structural-logical extension of the substantial-material limitations imposed on the majority rule by virtue of the specific rights and freedoms, which already textually form part of the positive constitutional law. Most often democracy is seen as a specific principle applied in decision making, be it at political level or elsewhere, i.e. the majority rule. Yet, a functional analysis of the constitutional nexus between the majority rule and freedom, against the backdrop of the discourse on democracy in political philosophy reveals, that the establishment of the democratic government is not aimed merely at installing the majority rule as an end in itself. First and foremost it has been accepted that democracy means that legitimate government rests on the consent of citizens, whereby the consent of the governed is the defining characteristic of the relationship the state and its subjects; in other words, government must be based on the will of the people; in Rousseau's words the *volonté générale*. For the lingering question *What constitutes the will of the people?* in the context of our discourse, a short excursus to the history of ideas may be instructive:

In political philosophy since antiquity, the emphasis lies on liberty as democracy's underpinning principle; and *Aristotle* argues in essence, that liberty is what every democracy should make its aim. More than two thousand years later, the foundational principle of liberty has been elaborated by Rousseau in his perhaps most important work *The Social Contract*.⁶⁷ The treatise which importantly so carries the sub-title *Or Principles of Political Right*, begins with the dramatic opening lines, *'Man was born free, and he is everywhere in chains. One man thinks himself the master of others, but remains more of a slave than they.'* Rousseau, like Aristotle before, makes liberty or personal freedom the pivotal point of his theoretical construct. Rousseau's concept of democracy takes its bearings from personal freedom/liberty as an axiological *a priori*. But if we were to take this *a priori* seriously, democratic decision-making would always require unanimity. Rousseau concedes however realistically, that this is not only impracticable but impossible:

Were there a people of gods, their government would be democratic. So perfect a government is not for men. Were there a people of gods, their government would be democratic. So perfect a government is not for men.

If we take the term in the strict sense, there never has been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed. It is

⁶⁷ Published in 1762, it became one of the most influential works of political philosophy in the Western tradition. It developed some of the ideas mentioned in an earlier work, the article *Economie Politique* (Discourse on Political Economy), featured in Diderot's *Encyclopédie*. The version of *The Social Contract* herein referred to has been accessed at http://www.constitution.org/jjr/socon_03.htm#004 on 13 January 2009

unimaginable that the people should remain continually assembled to devote their time to public affairs, and it is clear that they cannot set up commissions⁶⁸ for that purpose without the form of administration being changed.

From there emanates the recognition that democracy is not a suitable form of government for human societies, as well as the practical necessity to deviate from unanimity as the democratic ideal-type of *volonté générale*. Whereas as a matter of consequence any form of human government, even democracy, poses a continuous threat to liberty, Rousseau does not suggest the abandonment of the democratic aim, viz. liberty. Instead, he suggests the relaxation of the unanimity requirement in favour of qualified majorities in relation to the comparative importance of an issue at hand, and the urgency of decision-making:

There are two general rules that may serve to regulate this relation. First, the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity. Secondly, the more the matter in hand calls for speed, the smaller the prescribed difference in the numbers of votes may be allowed to become: where an instant decision has to be reached, a majority of one vote should be enough. The first of these two rules seems more in harmony with the laws, and the second with practical affairs. In any case, it is the combination of them that gives the best proportions for determining the majority necessary.

In the wake of the Social Contract, Rousseau's ideas became dialectic weapons for all liberation movements since the French revolution. The principles which have been pinned down by Rousseau in the "two general rules" can be found today in about all democratic societies. It is thus not surprising that most definitions of democracy include equality and freedom. These principles are reflected by all citizens being equal before the law, and having equal access to power, and freedom is secured by legitimized rights and liberties, which are generally protected by a constitution. Namibia does not make an exception in this regard:

The Namibian Constitution, the fundamental law, consists of all regulatory material, which has been considered functionally, structurally, procedurally, formally and materially as '*more grave*'. The specific majority requirements which have to be met for repeal and amendment of the constitutional text have been laid down in Art. 131 NC. Accordingly, repeals and amendments of general constitutional norm text require a two third majority of votes. But even within the Constitution a difference is made, and rights and freedoms resorting under Chapter 3 (Bill of Rights) have been placed under special and absolute protection by virtue of Art. 132 NC.⁶⁹ With regard to any other issue, i.e. those matters which do not require repeal or amendment of the

⁶⁸ Rousseau did obviously not support the idea of a representative democracy.

⁶⁹ See also Art. 22 NC (Limitations upon Fundamental Rights and Freedoms).

constitutional text, a simple majority of votes cast shall be sufficient for resolutions (compare Art. 54, 67 and 77 NC).⁷⁰

Against this background the postulation of a normative tandem of human dignity, viz. autonomy, and negative freedom appears as a consequence, flowing naturally from the very text of the Namibian Constitution. It can be seen as buttressed by the constitutional concept of democracy, which bootstrapping from an initial understanding of Rousseau's '*volonté générale*', de-emphasises the decision making principle, which democracy also denotes, and reminds us that even the objective of the principle as the ideal-type of democracy is not so much the formal aspect of decision making (majority rules) but the underpinning primordial liberty of the individual.

Intention of the constituent assembly

If one accepts that the conceptual consequences of the political philosophical discourse on democracy are carried over from theoretical level to the normative constitutional level, many would hold that one disturbing question remains: *Why did the constitutional assembly only stipulate expressly and textually the specific Fundamental Rights and Freedoms(?)*,⁷¹ or more extreme: *What if the constituent assembly excluded the GFR deliberately, wilfully and consciously from the constitutional text?* These questions point towards the normative theoretical question of the significance of the intention of the historical legislator, the constituent assembly. With the abdication of the literal approach the answer should however be straightforward, i.e. the intention of the constituent assembly cannot be decisive. The quest for the intention of the constitutional assembly would open the same Pandora-box of problems encountered before the advent of the supreme Constitution. This quest had always been assumptive, and amounted most of the time to no more than divination. This does of course not mean that the 'intention' has no significance at all. But to the extent that an intention has been reconstructed, this intention

⁷⁰ The usual democratic requirements for decision-making have been also relaxed under the impression of urgency in Chapter 4 NC 'Public Emergency, State of National Defence and Martial Law'.

⁷¹ The split up of constitutionally protected entitlements into Fundamental Right and Freedoms provides two independent arguments: The selection of special rights and freedoms posited by the constituent assembly from the socio-historical and political context of this country, reflecting the historical experience of the Namibian people since early colonial times. In addition we note that Fundamental Rights, for instance the right to privacy, which has been placed under a qualified limitation clause, and the right to family, which has been textually guaranteed without limitation, enjoy a higher degree of protection as compared with the (hypothetical) exclusive protection by the GFR, which presumably would have been placed under a limitation clause comparable to Art. 21 (2) NC. The latter requires *inter alia* that any restriction of fundamental freedoms referred to in sub-article (1) shall be *reasonable and necessary* in a democratic society. This encompasses the principle of proportionality with its principal requirement that desired end and intended means have to be constitutional. In respect of the desired ends Art. 21 (2) NC then enumerates as follows: '*(required) 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.*'

becomes at best a set of arguments among others during the logical rational process of purposive construction and determination of the purpose sought to be advanced by the Constitution.

Art. 7 NC and GFR

Notwithstanding the abandonment of the literal approach of legal interpretation, accepting the legitimacy of law as a convention, it is imperative for the constitutional norm text to serve as the outer normative boundary. It is thus necessary to identify a textual anchor for the GFR. As has been set out earlier, Art. 7 NC is suitable in this regard.

Although Art. 7 NC has been discussed in relation to the arrest of a person,⁷² structure and context of Art. 7 NC do not suggest that the meaning of liberty is limited to deprivation of physical freedom. In terms of its constitutional context, liberty (Art. 7 NC) is placed in the middle of a sequence consisting otherwise of life (Art. 6 NC) and human dignity (Art.8 NC), two fundamental and in respect of human dignity generic concepts. Against the background of the discourse about the relation between human dignity and negative freedom, this positioning suggests the GFR over the much narrower concept of physical freedom.

One might want to draw support for a counter argument from the ordinary understanding of ‘freedom (liberty) and security of the person’ and lean on the argument by Chaskalson P in *Ferreira v Levin NO*, who in turn relies on the sense in which the phrase ‘freedom and security of the person’ is used in public international law.⁷³ The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and People's Rights, indeed all use the phrase "liberty and security of the person" in a context which shows that it relates to detention or other physical constraints.⁷⁴ And the European Commission of Human Rights and The European Court of Human Rights have found that what is protected is "physical liberty" and "physical security".

But following this route would ignore that the structure of Section 12 South African Constitution is different from Art. 7 NC. The South African Constitution combines in Section 12 (1) a right to freedom and security, whereas Art. 7 NC deals exclusively, with liberty. Whereas the ‘*right to freedom and the security of the person*’ in Section 12 (1) South African Constitution has been placed alongside prohibitions of *inter alia* ‘*detention without trial*’, ‘*torture*’ and ‘*cruel, inhuman or degrading treatment or punishment*’, matters which are all concerned primarily with physical

⁷² *Namibian Police Human Rights Manual* (2000) Windhoek, pp. 61ff; *S v Boois, S v Thomas* 1991 NR 455 HC at paragraphs 455I – 456B

⁷³ *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 170.

⁷⁴ *Guzzardi v Italy* 3 EHRR 333 at 362, at paragraph 92 (with respect to that wording in Article 5 of the European Convention).

integrity, such topics are not dealt with in Art. 7 NC. The Namibian Constitution deals with arrest and detention, and fair trial guaranties in Arts. 11 and 12. If one agrees with Chaskalson P that the mechanical application of the *expressio unius* principle is not appropriate to an interpretation of Chapter 3, and that hence the structure of Chapter 3, the detailed formulation of the different rights, and the language of Art. 7 NC cannot be ignored, there is no compelling reason to construct the purpose of Art. 7 NC as concerned primarily with physical integrity.⁷⁵

Conclusion

It is a towering question how to deal with an infringement of liberty, where the actual, intended or only desired behaviour does not fall in the ambit of any special Fundamental Right or Freedom. The non-recognition of a residual (negative) freedom, here called General Freedom Right (GFR) results in the possibility that the legislator, and more importantly so the executive may unlawfully and under wilful ignorance of the rule of law, infringe, restrict and violate the life-spheres of individuals. The discourse about the GFR takes place at a time where constitutional interpretation has become guided by the notion of purpose as opposed to intention. The purpose of the constitution at large and specific constitutional precepts in particular takes into account the relevant context which includes social factors and political policy directions. Since the constitutional text stands at the apex of the hierarchy of laws, it remains largely its own context, and the question lingers, how to proceed from there. However, given the fallacies of the literal approach, the interpreter cannot fall back on the notion of the intention of the *pouvoir constituant*. Accepting the conventional nature of law, the interpreter must find answers, which can be fettered to the norm text of the constitution, which is a linguistic expression of an overarching agreement. Inside the Namibian Constitution the primordial foundational values are human dignity, liberty, and equality. These values have been put forth during the historical process towards the self-determination of the Namibian people. A (preliminary) logical-rational analysis of the functional interrelation of the foundational values suggests that specific Fundamental Rights and Freedoms presuppose an *a-priori* residual freedom, which encompasses

⁷⁵ Although largely in form of an obiter, in *Ferreira v Levin NO* the South African Constitutional Court speaks with the authority of a custodian of the law. Yet, the court as has been pointed out above, did not exclude categorically the potential for the construction of the residual freedom right in the South African Constitution. The court's approach thus keeps a door open for the construction of the notion of freedom in Section 12 (1) in the lights of the needs of a changing society. The fact that the court took a cautious approach to the question can also be explained with reference to the function of the judiciary, which is to give dogmatic answers to legal questions placed before it. In *Ferreira v Levin NO* there was, according to the majority judgment, no justification to fully engage with the question whether and how to develop the GFR as a conception under the South African Constitution. The academic discourse does not find itself under such limitations, and may venture into logical-rational reasoning with the objective to delineate the normative boundaries of the constitution, propose definitions of the intricate relationship among the foundational precepts captured by the norm text of the constitution, and so shelve knowledge for judicial reference whenever the need arises.

the thematic guaranties offered by them. Based on the consideration that Art. 7 NC is phrased in a way which already semantically points to a negative freedom, and the fact that ‘freedom’ in the sense of a state of affairs has been posited as an objective, it is here held that the Namibian Constitution comprises of the GFR. A state of freedom presupposes that infringements on the liberty of a person, always including the situated (legal) status quo, may only take place, if reasonable arguments can justify such infringement. This is the normative effect, which flows from the acknowledgement of the GFR. The GFR is therefore a necessary component of a democratic society, and by extension a necessary component of the Namibian democracy. Where the normative reach of the GFR is dogmatically ignored, the loss of freedom may be minor, and therefore negligible. But even if this were the case, certainty can only be gained once the balancing of values and principles has taken place. Without the value judgment considering the actual invocation of the negative freedom, quantum and quality of liberty sacrificed must remain unknown; any justification becomes futile.

The discourse which has been started with this contribution is first and foremost a discourse which centres on the Namibian Constitution. Benefits, challenges (and solutions) of the concept of a GFR in general have been recognised elsewhere. But the challenge remains to engender a meaningful discourse within the Namibian context. It seems more than probable that the positions taken herein do not remain unchallenged. A number of counter arguments will certainly be fuelled by the routines and habituations, the received techniques of interpretation, which often come with their own bias.⁷⁶ One of the contentious positions has been pointed out by Ackermann J and Chaskalson P⁷⁷ in *Ferreira v Levin NO*. The consequential challenge may be how deal with the fact that with the GFR any tenuous restriction placed on an individual would constitute an infringement of liberty, thus compelling the judiciary to scrutinize every infringement of freedom in this broad sense as meeting the requirements of proportionality. However, answers and constructive suggestions will certainly be provided along the discourse.

⁷⁶ Compare Kentridge AJ in the very first judgement of the South African Constitutional Court, *S v Zuma* 1995 (2) SA 642 (CC) at paragraph 17 (emphasis added): “..., it is nevertheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a singular meaning ‘objective meaning’. **Nor is it easy to avoid the influence of one’s personal and intellectual and moral preconceptions**” (emphasis added, SS).

⁷⁷ *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 179.