

The Constituent Assembly
a discussion with Paul Szasz

Part 1 - 3

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After a brief recess in December the Constituent Assembly reconvened on 8 January and submitted a draft constitution for an independent Namibia. However, for some Namibians the terms of reference, discussion and difference are still not very clear, and we asked LINTAG's Legal Director in the Office of the Special Representative, Mr Paul Szasz, to explain these. He elaborated as follows on the powers of the Constituent Assembly:

CUT 1 The functions and powers of the Constituent Assembly are derived from the Settlement Plan, the Plan that is being implemented under the name of Security Council Resolution 435, and as set forth explicitly in the Constituent Assembly Proclamation. Basically there are three: first of all to formulate, to adopt and to bring into force the Constitution for an independent Namibia. Secondly, to set the date for, and to declare independence; and thirdly to establish a government that will rule Namibia upon independence.

These functions of the Constituent Assembly are closely inter-related. The Constitution cannot come into force prior to the date set for the independence of Namibia, nor can there be independence without a constitution. Furthermore, there cannot be independence unless there is a government to rule the country, and the formation of the government must be consistent with the requirements of the constitution. We asked Mr Szasz why the country had to have a constitution:

JT 2 A constitution is the basic law for a country. It defines the relationship between the principle organs of government: the Executive, the Legislature and the Judiciary, and it makes rules for how ordinary laws are adopted, how they are to be executed and how they are to be interpreted.

One of the questions asked is whether a Constitution is in any way guaranteed once it has been accepted by the Constituent Assembly:

CUT 3 The government can of course from time to time change the constitution. It can't abolish the constitution without putting a new one in its place. The constitution is protected by rules which are built into the constitution itself about how it is to be amended, or how it can be replaced.

And these rules usually require that the legislature act by an especially high majority, usually the same high majority required to adopt the constitution - in the present case 48 votes out of 72, or sometimes that an amendment can only be adopted by popular referendum which permits the entire country to vote on it. So, a constitution only gets changed when it is necessary and generally when there is an almost complete agreement among the parties that there is indeed a need to change that instrument.

In the case of Namibia the Western Contact Group, consisting of the United States, the United Kingdom, France, Canada and the Federal Republic of Germany, developed the 1978 Settlement Plan that is now being implemented, and they negotiated as early as 1982 a set of basic principles that would have to be embodied in the constitution of an independent Namibia with the interested parties. These principles were aimed at satisfying the world community that an independent Namibia would be a free and democratic state. These principles were then incorporated into the Settlement Plan.

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What these principles do is they state that Namibia would be a unitary, sovereign and democratic state; it will have a government consisting of three branches: an executive (elected), the legislature (also elected) and an independent judiciary to interpret the constitution. And also that the constitution will contain a catalogue of fundamental rights, and some of these rights are spelt out in these principles.

That was Mr. Paul Szasz, Legal Director in the Office of the Special Representative. Join us again tomorrow for another contribution on the terms of reference pertaining to the constitution for an independent Namibia.

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We continue today with a contribution clarifying the terms of reference, discussion and difference pertaining to a constitution for an independent Namibia. One of the issues on which there had been a difference of opinion between the parties, was whether the system of proportional representation, or the so-called single member constituency, should be introduced for Namibia. Mr Paul Szasz, UNTAG Legal Director in the Office of the Special Representative, explains the difference:

CUT 1

Proportional representation is one method of running elections. The principal alternative is the single member constituency. Now under the proportional representation system, which is the one that was used in the election for a Constituent Assembly, each party gets the number of seats that are directly proportional to the number of votes that it receives in an election. The voters vote for parties, and the party that receives one-third of the votes will get exactly one-third of the seats in the body to which the election is being held. Under the single member constituency system the entire country is divided up into as many electoral districts as there are seats to be filled in the legislature, and in each district one particular person is elected, and all the persons who are elected then constitute that assembly.

There are advantages and disadvantages to both systems, as there are in another issue on which extensive debate in the Constituent Assembly had focussed, namely a single chamber parliament as opposed to a bi-cameral parliament, the latter which consists of a 'lower house' which is generally popularly elected; and an 'upper house' where members could be partially or wholly appointed, or elected on a different basis. If there are two chambers, laws have to be approved by both chambers, as Paul Szasz explains:

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If there is a bi-cameral legislature then laws receive really two reviews before they are changed or adopted, and there is some advantage to having two different points of view and a longer period of time in the legislative process. On the other hand it does delay legislation in some instances and it may be another source of deadlock in the legislative process. There is not only the possibility of a deadlock within a particular legislative chamber, but also between the two.

- And then there has been the question concerning the status of the future Namibian head of state, in other words whether or not the country should have an executive president:

CUT 3

Every country has a head of state which represents the country internally and externally - that is to other countries. That is a sort of formal function. In addition, however the country has to be governed, somebody has to execute the laws, somebody has to run the civil service, the police and the military service. If the same person who is the head of state also runs the government, then he is an executive president. The alternative is to have two persons: one a head of state who is merely representational, like for instance the Queen of England; and on the other hand a person like a Prime Minister, who runs the government. That prime minister is then responsible both vis-a-vis the head of state and vis-a-vis the legislature. Probably the best-known executive presidency is that of the United States, where one person combines the functions of head of state, head of government, commander-in-chief and head of his party.

Mr Paul Szasz, UNTAG Legal Director in the Office of the Special Representative. In tomorrow's contribution we will look at a declaration of fundamental rights, which has been incorporated into the draft constitution for Namibia.

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In this last contribution concerning a constitution for an independent Namibia we focus on a declaration of fundamental human rights, which will be incorporated in the constitution. Mr Paul Szasz, UNTAG Legal Director in the Office of the Special Representative, explains as follows what the declaration of fundamental rights is based upon:

CUT 1 As I have said before, the Constitutional Principles - 1982 principles - do have a requirement that the Namibian constitution should contain a catalogue of fundamental rights. And, indeed, most modern constitutions contain such a listing. The purpose is to guarantee that the basic rights of citizens will not be easily changed by laws, and that neither the Executive nor the Judiciary should be able to offend against the principled rights of citizens.

Most constitutions contain a list stipulating those rights of which citizens may not be deprived - either by the adoption of laws, or by the powers of the ~~Executive~~ ^{Executive}, or the courts of law. As Mr Szasz points out, an independent Judiciary has a special function in protecting such rights.

CUT 2 Indeed it is one of the purposes of the Judiciary to protect, on the basis of a catalogue of rights, the rights of citizens against both the Legislature and the Executive. Now, the catalogue of rights that is set out in the 1982 principles is a quite long, but basically conventional, one. It contains the right to life, to freedom of movement, to freedom of conscience, to freedom of speech, to freedom of assembly and association, and to protection against discrimination, against retro-active legislation and against other governmental offences against individuals.

The rights which were defined in the 1982 Constitution Principles, and are to be incorporated in a constitution for Namibia, are largely based upon the 1948 Universal Declaration of Human Rights adopted by the United Nations General Assembly, and which has since then been perceived to be the most generally accepted instrument in the world for the definition of human rights.

Since there are issues on which the parties to the Constituent Assembly have not yet fully reached agreement on, the final question with regard to a constitution for an independent Namibia is, what would happen if there is failure amongst the parties to the Constituent Assembly to reach agreement:

CUT 3

Well, if they become deadlocked, that is if they cannot agree on a solution to a particular problem, they just have to keep on negotiating until all of them - or at least a sufficient number - can agree to a particular solution. Normally such a process of negotiation will result in an improvement in the constitution. That is, the solution that will be found will on the one hand be an objectively better one, having received longer consideration, and on the other hand it will also be a more acceptable one, one that enjoys greater acceptance among all the parties concerned.

And how would prolonged negotiations influence the declaration of independence for Namibia:

CUT 4

The process of negotiation can go on for as long as necessary. There is no absolute deadline for the Constituent Assembly. It is of course generally hoped and expected that the process will not take longer than past March. And it is indeed hoped that the process may be somewhat shorter than that. The parties will be under pressure not to seem unco-operative and to prolong the process unnecessarily. If one of the parties is perceived to be unreasonable and not to accept solutions that appear useful to the public at large and acceptable to the other parties, that party will be under considerable pressure to give in or to compromise in such a way that a solution can be found. So, it should not be expected that there will be any indefinite deadlocks in the Constituent Assembly and to the extent that there are deadlocks - or periods in which decisions cannot immediately be reached - that should be to the advantage of the instrument that is to be adopted.

Mr Paul Szasz is UNTAG Legal Director in the Office of the Special Representative.

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