



PUBLIC HEARINGS ON RACISM, RACIAL DISCRIMINATION, DISCRIMINATION IN GENERAL, TRIBALISM AND RELATED INTOLERANCES



Concept Note

The Namibian Constitution is highly idealistic and generous. It promises a land of fulfilment and plenitude. Its preamble proclaims the equal and inalienable right of all members of the human family; the establishment of a democratic society where the government is responsible to the people; the unity and integrity of the nation; national reconciliation; and a determination to cherish and protect the gains of the long struggle against colonialization, racism and apartheid. Chapter 3 contains an impressive catalogue of entrenched fundamental rights and freedoms, and special provision is made for their enforcement¹.

But our Constitution is not self-executing or a self-acting agent; it cannot prevent, eliminate or combat racism, racial discrimination or tribalism. It is government's task. To give expression to the promise of protecting the gains of the long struggle against colonisation, racism, apartheid and the right to non-discrimination², government enacted the **Racial Discrimination Prohibition Act, 26 of 1991** in order to "*render criminally punishable certain acts and practices of racial discrimination and apartheid*".

Although the Act criminalizes certain acts and practices of racial discrimination, only a few cases came to court. For the past three years, the Prosecutor General received 19 police dockets relating to racial discrimination for decision to prosecute or not. Only six cases are before court for trial.

Human rights law assumes the obligation of the state as the political actor that has undertaken to ensure, protect and promote basic rights and freedoms in the civil, economic, social and cultural fields and to carry out policies outlawing discrimination. With its capacity to legislate and enforce, with its institutions to monitor and control, with its responsibilities in the areas of teaching, education, culture and information, with its task to promote social welfare and political justices, the state has a crucial role to play in combating racial discrimination and promoting racial equality³.

¹Wiechers, M. "The Namibian Constitution: Reconciling legality and legitimacy in Constitutional Democracy in Namibia: a critical analysis after two decades. 2010 at p.54

²Article 10 of the Constitution

³Van Boven, T. "The Experiences of the Committee on the Elimination of Racial Discrimination" in *Discrimination and Tolerance: New Perspectives*, 2000 at 167-8.

Namibia acceded to and ratified the **International Convention on the Elimination of All Forms of Racial Discrimination (CERD)**. In this Convention, the term ‘**racial discrimination**’ shall mean:

“any distinction, exclusion, restriction, preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect or nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social and cultural or any other fields of public life”.

The Committee on the Elimination of Racial Discrimination has repeatedly made it clear in its dialogue with State Parties that no country can rightly claim that it does not face within its own borders actual or potential problems or racial discrimination.

After considering Namibia’s state report, the Committee on the Elimination of Racial Discrimination on 12 August 2012:

- notes its concern that the 1998 Racial Discrimination Prohibition Amendment Act (Act no 26 of 1998) restricts the scope of the original law regarding the prohibition of hate speech by limiting the possibility to prosecute such acts only as *crimen injuria*, and the Committee recommends that the state party review its laws in order to prevent, combat and punish hate speech with a view to uphold the provisions of Article 4 of the Convention⁴;
- recommends that the state party ensures that its domestic legislation conforms to the Convention;
- urges that the state party includes in its next report specific information on action plans and other measures taken to implement the Durban Declaration and Programme of Action (DDPA) at national level.

⁴Article 4:

State Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organize and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organisations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination

In 2001 at the **World Conference Against Racism**, the international community adopted the Durban Declaration and Programme of Action – a comprehensive and unequivocal statement against racism, racial discrimination, xenophobia and related intolerance. The nations approved a “programme of action”, calling on the governments to draw up their own plans of action to implement the recommendations of the World Conference. These recommendations are addressed to governments as obligations under international law. These obligations which Namibia accepted, are unfortunately not implemented yet.

Can it be said that the Racial Discrimination Prohibition Act as amended is the bridge to take a racist society from apartheid-based values and morals to a new democratic, constitutional era where people are respected, irrespective of race or ethnic origin? It appears that people who were insulted and humiliated on grounds of their race or belonging to a specific group lost the remedy of Section 11 of the Racial Discrimination Prohibition Amendment Act. It further appears that the amendment of the Act almost closed the door on prosecutions in cases of hate speech and cases of racial or group ridicule or humiliation. The Prosecutor General had to go back to the common law crime of *crimen injuria* to be able to prosecute these cases⁵.

Is this what we want for ourselves; should we accept the status quo or try to build a nation where racial tolerance is widespread and “race” is indeed declining in social significance. The following suggestions are made to stimulate the discourse:

Access to Justice:

- Can it be said that the current legal framework provides sufficient protection of a person’s right to equality and dignity and equal access to our courts?
- How should we address the problem of dissemination of hate speech and racial material via social media?
- Is criminalisation of racism, racial discrimination, hate speech, etc., the only option?
- Does the formal adversarial and potentially intimidating court proceedings which often result in long delays, discourage victims to seek justice in our courts?

⁵Horn, N: State v Smith and Others, A Defeat for Hate Speech Legislation in Namibia (unpublished article)

- Would amendments to the current legislation provide easier access to our courts and provide better protection?
- Should we not look into the possibility of creating an informal, inexpensive, and user friendly tribunal where the emphasis is on participation and the speedy processing of the matter? A tribunal where legal practitioners preside over the proceedings, giving the victim and perpetrator space to tell their story and where *“simple justice between man and man or woman and woman”* prevails?
- Has the Act contributed to meaningful societal transformation which the Constitution envisages and which could form the basis of new patterns to guide interaction between individuals?
- Does referring to another person as an animal (monkey, baboon) or racial slurs such as *“kaffer”, “kaffermeid”, “hotnot”, “boer”* amount to hate speech or do they constitute *crimen injuria*?
- Is prevention not better than cure? Legal rights validate the entitlements of the victims, but *without public education and sensitisation about the importance of equality, dignity and the value of non-discrimination on all grounds, the court battles will remain but skirmishes in a never ending war*⁶.

Public education and awareness raising

Education:

- Education is the most effective way of preventing racism, racial discrimination, tribalism and intolerance.
- Should we then not introduce and, as applicable, reinforce anti-discrimination and anti-racism components in school curricula, to develop and improve relevant educational material; and to ensure that all teachers are effectively trained and adequately motivated to shape attitudes and behaviour patterns, based on the principles of non-discrimination, mutual respect and tolerance?⁷

Labour and employment:

- Does the private sector create artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures?

⁶Kruger, R: Combating racism and restoring dignity? A review of the work of the Durban Equality Court, Faculty of Law, Rhodes University, R.S.A.

⁷DDPA: Paragraph 129.

- Failing to respect the principle of equal pay for equal work?
- Should we not encourage the private sector *“to support the creation of workplaces free of discrimination through a multifaceted strategy that includes civil rights enforcement, public education and communication within the workplace and to promote and protect the rights of workers who are subject to discrimination, racism and racial discrimination?”*⁸

Disability:

- Disability is not listed as one of the prohibited grounds of discrimination in Article 10 of our Constitution. Namibia has ratified the Convention on the Rights of Persons with Disabilities (CRPD) and in the preamble of the Convention state parties expressed concern about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination. On paper they enjoy the same rights as others; in real life they are denied the opportunities that others take for granted.

Sport:

- The relationship-building and cooperation generated by team sport, in particular, can be conducive to positive racial attitudes and behaviour.
- Does sport make positive contributions for the fight against racism, racial discrimination and intolerance?
- Is sport still punctuated by episodes of racism, racial discrimination and intolerance?
- Does sport act as a catalyst for the expression of racist and discriminatory behaviours and language?
- Is there a failure among the sport fraternity to promote diversity in selection in representative teams?

The Media:

In Namibia, like in many other countries, the media are the most important vehicle for expressing ideas and forming opinions. Therefore the media should develop policies and practices aimed at:

- Combating racism, racial discrimination, xenophobia and related intolerance;

⁸DDPA: Paragraph 104(a)

- Promoting the fair, balanced and equitable representation of the diversity of their societies, as well as ensuring that this diversity is reflected among their staff;
- Combating the proliferation of ideas of racial superiority, justification of racial hatred and discrimination in any form;
- Promoting respect, tolerance and understanding among all individuals, peoples, nations and civilizations, for example through assistance in public awareness-raising campaigns⁹.

Indigenous Peoples:

- Indigenous peoples are free and equal in dignity and rights and should not suffer any discrimination, particularly on the basis of their indigenous origin and identity. Therefore the full realization by indigenous people of their human rights and fundamental freedoms is indispensable for elimination of racism, racial discrimination and intolerance. In order for indigenous people to freely express their own identity and exercise their rights, they should be free from all forms of discrimination¹⁰.
- Indigenous peoples do not have separate rights; they are entitled to the same rights guaranteed in our Constitution and in international human rights law.
- Should we develop legislation to protect the rights of indigenous peoples, particular to ensure adequate consultation, participation and representation of indigenous peoples?

⁹DDPA: Paragraph 144

¹⁰DDPA: Paragraphs 39, 41, 42.