

Remembering February 9:  
A Reflection of the Adoption of the Namibian Constitution  
By  
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As we celebrate the 19<sup>th</sup> anniversary of the adoption of the Constitution of Namibia, we should as we ought to, remind ourselves of the dedication and commitment to peace our founding fathers and mothers had. And it should hardly escape anyone's attention that I have something to write about only because they (our founding fathers and mothers) drafted a constitution that all of us are proud of. Whatever the faults and shortcomings of our constitution, it is clear to me that Namibia is what she is because of the deliberations at the Windhoek Constituent Assembly in late 1989 and early 1990. In this, the debt I owe the framers of our constitution is a debt owed them by all Namibians who care about the great civil society conversations that define what is best in our democracy.

We must also remind ourselves that Namibia has a long history of colonial rule spanning more than hundreds of years. After 75 years of South African colonial, Namibia attained its independence on 21 March 1990. The final transition to self-rule took place within the framework of the United Nations Security Council Resolution 435 of 1978 to determine the decolonisation process. The implementation of this Resolution was made possible by the signing of tripartite accords in December 1988 between South Africa, Cuba and Angola under the auspices of the United States and the Soviet Union. Such a pact established basic guidelines within which the country's political leaders had to determine the exact nature of the constitution and decide on the democratic institutions to be established. In addition, the spirit of the pact carried over to the drafting of the constitution during the many sessions of the Constituent Assembly. During those sessions, SWAPO and the opposition parties perceived that the forces pulling them together toward democratic constitutionalism were greater than the centrifugal forces which often tear apart racially or ethnically divided societies. A spirit of accommodation prevailed which reflected the participants' determination to create a workable system of government in which all participants had a stake in the system's success.

The Windhoek Constituent Assembly was particularly important in that not only was it concerned with determining truth or falsity of events that took place in the past, but was also concerned with determining whether or not particular actions should or should not be taken in the future as it was concerned with how values were going to be dealt with in the present given the divergent views of the political parties at the time. A 72-member Constituent Assembly, chaired by Hage Geingob, consisting of members of several political parties, drafted a Constitution for the Republic of Namibia following elections held on a proportional basis. The actual drafting of the principles were done by the Standing Committee on Standing Rules and Orders and Internal Arrangements, also chaired by Geingob, representing all the parties in the constituent assembly and delegated the task of perfecting it to a team of South African legal experts. The report of the standing committee was then tabled to the whole Constituent Assembly for debate. On 9 February 1990, the Constitution of Namibia was adopted without anyone opposing it. In many ways, the contents of the Namibian Constitution reflect the uniquely international character of the role of law, and organisations and decisions in the process that led to independence in a far more significant way than in any other state in the world.

Every constitution combines into one body a declaration of political intent, a commitment to an ideology and an assertion of national purpose combined with a blueprint for political action expressed in legal terms. As such it reflects, in a capsule form, the national elite's view of the nation and the world. Like all national documents written by mere human beings, every constitution may be expected to contain a dose of erroneous interpretation of past experiences and of existing national and international realities. However much extra-political forces may influence particular constitution-making situations, ultimately both involve directly political expressions, involvements and choices. In that sense, the dynamics of constitution-making have to do with questions of constitutional choice. If conventions from other parts of the world are anything to go by, drafting a constitution is a complex, often controversial and highly consequential political process. Charged with drafting a constitution, constitutional assemblies or conventions follow a set of rules to reach agreement over controversial issues. For example, the Namibian drafting committee agreed that decision-making should be "talk-centric" rather than "voting-centric". That is, outcomes should be determined by reasons rather than numbers.

Like the American debates, the Namibian Standing Committee took place behind closed doors and the proceedings were kept secret. The secrecy could be kept because the group of delegates was small at only 21 members and the Assembly itself lasted for only 80 days. On the other hand, the French debates were intensely public; there were more than a thousand delegates and the proceedings stretched out for more than two years. With very few exceptions, most of the debates of the Windhoek Assembly were initially built on argument and many of them were solved through practical reasoning. This can be explained in part by the attitude of the members and in part by the constraint of the process. On the one hand, many members were sincerely seeking to reach integrative solutions. Most of them agreed that the very *raison d'être* of the body of which they were members was to bypass the shortcomings of the past and they were inclined to try and overcome divisions based on misunderstandings, prejudice, ideologies or interests. On the other hand, the process put them under pressure. The variety of their views and the unpredictable nature of many issues, made a logical approach very difficult in most instances. For one thing, the informative role of deliberation helped the framers of the Namibian constitution to form a more complete set of preferences than they originally had or even forced them to change positions when they were exposed to the full consequences or incoherence of their original proposals. For another, when political actors needed to justify their proposals, they found that impartial arguments were not available or, if they were, they were too obviously tied to a particular interest to be convincing. In this situation, framers of the Namibian constitution had no other alternatives than to change the original proposal for another that took into account the views and interests of others. Such a use of impartial argumentation yielded more equitable outcomes than pure bargaining and increased the overall legitimacy of the process among political actors.

When only one policy dimension is bargained, deadlocks can only be broken if the reluctant political parties obtain side deals that buy their consent. The no-voting rule enhanced the bargaining power of each party. This feature explained why the costs of reaching agreement under no-vote rule can be extremely high. This finding illustrates that there are some ways in which the unanimity or joint-decision trap can be overcome, although unanimity requirements in multiparty negotiating situations do present many obvious difficulties. While there were tendencies at the Windhoek Assembly to focus on parties' preferences, the delegates showed that rhetoric in

bargaining situations is critical. Consequently, the impact the type of bargaining situation have on outcomes should not underestimated. It follows, then, that the concept of compromise was the basis for the Windhoek Constituent Assembly's understanding of the process by which political disputes were settled. Delegates believed that given sufficient discussion, the right solution to a dispute could be discovered. From the point of view of a party to the dispute, compromise involved compromising one's beliefs without being convinced of their erroneousness. First, the integrative bargaining situation showed that when the preferences of delegates are strongly polarised and two or more constitutional proposals are negotiated and issue-linkages are the negotiating tools used to reach an agreement. Second, the distributive bargaining situation demonstrated that when only one constitutional proposal is bargained, deadlocks can only be broken if the reluctant political party or parties obtain side deals that buy their consent. In spite of these constraints, delegates often adopted a deliberative approach. The social norm of impartiality, combined with a sincere willingness of many members to reach an integrative agreement, led them to resort, in many instances, to a 'practical' style of problem solving. Delegates often tried to reduce dissonance by mutual explanation. They also proposed *ad hoc* solutions too many issues and based their arguments on pragmatic grounds that could be understood by the other delegates. Several important questions raised by the delegates could be solved, in large part, by such an approach.

It remains very difficult to establish a clear typology of the approaches adopted by political parties to reach agreements. In most cases, the agreement was reached through a mix of practical and logical arguing, threats and mutual concessions. It should be recalled how many times Moses Katjiuongua threatened to go public when deliberations became hot, or when Pendukeni Ithana threatened a vote when consensus could not be reached. It cannot be denied that, in many instances, the norms governing the conventional process favoured argumentative approaches which counter-balanced the weight of classic bargains: a pure strategic approach could not explain why SWAPO, still facing a strongly opposition opinion, accepted to make important concessions it had always refused in the past and which might prove very important in the future. It suffice that SWAPO did not want a bicameral parliament. It only accepted the creation of the National Council as a compromise with opposition parties. Likewise, opposition parties disliked the idea of an executive presidency favoured by SWAPO. The examples are many.

The outcome of constitution-making in Namibia was also influenced by the exchange of arguments and counter-arguments among the framers. The participants of the Windhoek Assembly engaged in this process were motivated by moral reasons rather than by strategic purposes. On the one hand, depending on the intensity of the conflicts at stake, political deliberation actually sharpened rather than resolved existing disagreement among the participants. On the other hand, political deliberation was often affected by strategic purposes as when political actors argued from principle to legitimate a partisan position. Thus, the framers of the Namibian constitution used political deliberation to resolve their disagreements.

The outcome of the Windhoek Assembly debates teaches two essential elements: For constitutionalism to be legitimate, it must have the support of the people. Without this legitimacy, there is less assurance that either the constitution or rule of law generally, will be willingly accepted and internalised. The Windhoek Assembly also teaches us that by allowing opposing sides to come and work together in creating their shared new constitution and by assuring that all sides have

ownership in the process, challenges of the future can be mitigated in the same way we resolved our differences at the Titenpalast.

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