

**DOES SECTION 35 OF THE STATISTICS BILL INFRINGE
ON FREEDOM OF EXPRESSION AND ACADEMIC
FREEDOM?**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT
OF REQUIREMENTS FOR DEGREE OF BACHELOR OF
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Declaration

I Petrine Mwadhina Hango hereby declare that this dissertation entitled “Does Section 35 of the Statistics Bill infringe on academic Freedom and freedom of expression” is my own original work and has not previously been submitted to any other institution of higher learning.

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Signature

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Date

I, Fritz Nghiishililwa hereby certify that the research and writing of this dissertation was carried out under my supervision.

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Signature

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Date

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Abbreviations

AU – African Union.

CESCR- Covenant on Economic, Social and Cultural Rights.

ICCPR – International Covenant on Civil and political Rights.

SADC- Southern African Development Community.

UN – United Nations.

UDHR- Universal Declaration of Human Rights.

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Abstract

The Namibian parliament proposed a bill on statistics. If passed, section 35¹ the latter infringes on freedom of expression and academic freedom. As a democratic state it is of crucial important to uphold and maintain the values and principles underpinned in the Namibian constitution. Introducing a bill that prohibits publication of statistics, is a gross violation of the academic freedom. Furthermore, several provisions of the bill undermine and have a negative impact on the development of our democracy. This dissertation is divided into five chapters. The first is that which gives the history of statistics, the freedom of expression as well as academic freedom.

The first chapter includes the research methodology, literature review as well as the hypothesis. Furthermore it also outlines the aims and objectives of this dessertaion, not leaving out the limitations. Moving on to the second chapter, it is one that talks of freedom of expression, basically defining it and expounding on the importants of freedom expression. Emphasizing the fact that Namibia is a democratic country and thus the sharing of ideas amongst the citizens is vital for the development of our constitution. Furthermore the latter chapter also answers the subheading of whether or not citizens have the right to know.

The third chapter of this dissertation is specifically assigned to the meaning of academic freedom. It seeks to explore academic freedom as guaranteed by the Namibian constitution. While researching on this topic it was clearly noticeable that not much has been written on academic freedom. Most authors have focused mainly on freedom of expression and writing short pieces on academic freedom. So this dissertation aims to fix that latter gap by way of encorporating chapter three, which solely deals with Academic Freedom.

Freedom of expression and academic freedom under international law is the fourth chapter in this dissertation. It seeks to explore academic and expression freedom

¹ Section 35 of the proposed bill, prohibits government institutions and any other person from collecting statistical data. Among other provisions the latter provision also prohibits international organizations from collecting statistics, unless its market related research.

from an international perspective. As guaranteed under International Instruments such as the United Nations declaration of 1948 as well as the ICCPR².

Finally the last chapter of my dissertation shall be a list of several recommendations and last but not list it will be a conclusion of this piece of writing.

² International Covenant on Cultural and Political Rights (ICCPR), 1966

CHAPTER 1

1. INTRODUCTORY CHAPTER

INTRODUCTION

In 1990, Namibia became an independent state, free from colonial oppression. The abolishment of parliamentary sovereignty made way for a democratic, independent, sovereign state³. The statistics bill clamps down on academic freedom. Dismantling the very core of democracy, this could lead to an imbalance of separation of powers. Section 35 (2) (a), (b)⁴ of the statistics bill prohibits the commencement of any statistical correction. It prohibits both individuals and government bodies from collecting information. Namibia, a developing country dreams of Vision 2030⁵. By then it should be an industrialized nation. Now if there is such a goal, how can parliament propose a bill which prohibits statistical collection? How will students and academics conduct their researches? In order for the country to improve in the socio-economic sector it is of vital importance that citizens are equipped with knowledge. Then they can assess and make conclusions for themselves. Furthermore, this also helps government to know which areas need utmost focus and then they can improve. A bill which prohibits research is inconsistent with the provisions of academic freedom and as well freedom of expression. When parliament makes laws, should it not be guided by the Supreme law of the land?

1.1 Hypothesis

The hypothesis of this research or rather the core of this research is to enquire on the Statistics bill that was recently tabled before parliament. The research involves conducting extensive research on the constitutionality of the latter bill. Should it be passed without any amendments, what are the consequences? How does it affect

³ Horn N, A. Bösl. (2008). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia, p 13.

⁴ The Statistics bill was proposed in the National Assembly, which still has to go to the national council.

⁵ Office of the President (President Sam Nujoma).(2004). *Namibia, Vision 2030*. Windhoek: John Meinert Printing, p 47.

academic freedom as well as Freedom of expression in the country? Given the fact that those two are crucial fundamental freedoms guaranteed in the Namibian Constitution.

The passing of such a law could have a huge negative impact on academic freedom of various institution and citizens alike. Thus it is in the interest of the Namibian population that the latter Section be amended. As it could lead to serious violations of Fundamental freedoms as well as back drop in our constitutional development. Therefore, the hypothesis of this dissertation is basically that, Section 35 of the Statistics Bill infringes on freedom of expression as well as on Academic Freedom.

1.2 Research Methodology

- **Legal research**

Before anything else, this research is legal research. The research mainly focuses on constitutional law. With great impetus on the fundamental freedom of expression and academic freedom. The research focuses section 35 of the proposed statistics bill.

- **Qualitative research**

The research methodology that will be employed by this paper is basically qualitative research. This type of research usually focuses on the quality of a particular fact or object that is observed in society. Thus it will be an analysis of academic freedom and freedom of expression in Namibia, in the context of article 35 of the proposed statistics bill.

- **Desk/ library research**

Majority of this research will be library research. So the materials that will be conducted will be cases, legislation, and not to forget the relevant provisions in the Namibian Constitution. Furthermore prominent authors and commentators on this

area of law will also be interviewed in order to have a detailed and well captured research.

- **Field research**

Another part of this research will consist of Field research, whereby interviews are conducted with various stake holders and academic institutions. Institutions such as the Legal Assistance Center, which mostly deals with human rights and is actively involved in the development of Human Rights, spoke out vigorously against Section 35 of the Statistics bill. Labeling the latter provision as unconstitutional.

It will also be for the benefit of this research to have an interview with the law reform and development commission as they play a major role in the development of Namibian Laws.

1.3 Literature review

The departure in this research would be the *Namibian Constitution*⁶. Article 21 of the Namibian Constitutions deals with the fundamental freedoms. However as stipulated earlier, the main focus of this research is article 21 (1) (a) & (b). Subsection b of the latter article guarantees the freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning.

The author of *Information, Ethics & Law*⁷, points out that the right to express one is the cornerstone of any democracy and biggest threat to it will always be present if there remains governments that retrain such a freedom. Thus in order for democracy to work, there should be criticism.

In the famous American case of *Newyork Times v Sullivan*⁸, stipulated that the constitution's first amendment provides that government may make no law abridging the freedom of speech, or of the press. Freedom of speech is very important not because people have any intrinsic moral right to say what they wish, but because

⁶ Act 1 of 1990

⁷ Britz, H, M Ackerman. (2006). *Information, ethics and law*. Pretoria: Van Schaik Publisher p 23.

⁸ New York Times v Sullivan 376 US 254 (1964)

allowing them to do so will produce good effects on the rest of the citizens. Free speech is also important because politics is more likely to discover truth and eliminate error or to produce good rather than bad policy.

It has also been stipulated that, freedom of speech helps to protect the power of the people to govern them. Thus the government is less likely to become corrupt if it lacks the power to punish criticize. Our capacity as human beings to acquire, use and store information is essential for our survival.⁹

The case of *Kauesa v Minister of Home Affairs*¹⁰ one which deals with freedom of expression in Namibia is of great reference to this research. In the latter case the Supreme court held that: "In order to live and maintain a democratic state the citizens must be free to speak, criticize and praise where praise is due. Muted silence is not an Ingredient of a democracy because the exchange of ideas is essential to the development of democracy". Another case that dealt with freedom of expression is that of *S v smith*¹¹. It was held that who never featured in the pre-independence of this country and were never part of or party to the social pressure amongst the different people making up the population that was occasioned by the erstwhile racist policies, will not feel the impact of taking away such a freedom.

According to *Naldi*¹² the concept of democratic society tolerance, criticism, a variety of ideas is needed in order to progress. In addition, the freedom of expression encompasses the freedom to receive and impart information and ideas. This is the only book that exclusively deals with Constitutional rights in Namibia. Published in 1995, it is a very important reference to this dissertation. However, there has been vast development in the law which the book does not cover.

⁹ Birkinshaw, P. (2001). *Freedom of Information*. Hampshire: Butterworths p 17

¹⁰ *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (SC).

¹¹ *S v Smith* 1996 NR 376 (HC)

¹² Naldi, G.J. (1995). *Constitutional Rights in Namibia: A comparative Analysis with International Human Rights*. Cape Town: Juta, p 86.

Various international instruments protect freedom of expression and academic freedom. The Universal Declaration of Human rights protects freedom of expression in terms of Article 19. Furthermore, Article 19(1) of the ICCPR requires protection of the right to hold opinions without exception or restriction. Article 10 of the African Charter on Human Rights (ECHR), Article 13 ACHR and Article 9 of the Banjul charter also require the protection of freedom of speech.

Ronald Dworkin's work on Freedom of expression and academic freedom has been published in his book entitled *Freedoms Law*¹³. Chapter eight of his book, he explains why free speech must be free. Furthermore, the latter author also Explains the reasons why academic freedom is important and he expounds this in his book in a chapter entitled, "why academic Freedom".

Another literature that is vigorously conducted in this dissertation is that by Yvonne Burns¹⁴. This is a South African author who writes her work based on the South African Constitution which is almost similar to the Namibian Constitution. The latter author is up to date with current developments of the South African Communications law, which includes the right to Freedom of expression, is of importance to this dissertation especially in the chapter wich deals with Comparative Study.

It would not be a complete dissertation on freedom of expression and academic freedom if the writings of Iaan Currie and Hohan De waal's work are not conducted for the purpose of this research. Over the years the two authors have written several publications on Fundamental Bill of Rights.

1.4 Aims and objectives

The aims and objectives of this research is to enquire on the role and power of the legislature in Namibia. Another aim is also to expound on academic freedom and freedom of expression in Namibia. This research also aims to compare Namibia with

¹³ Dworkin, R. (1996). *Freedoms Law: The moral reading of the American Constitution*. New York: Oxford University Press, p. 55.

¹⁴ Burns, Y . (2009). *Communications Law*. Durban: Lexis Nexis, p.46.

other countries and analyze the findings. Furthermore, it is of utmost important that one looks at international Human Rights instruments that Namibia has ratified. Specifically conventions that deal with the various freedoms discussed in this proposal.

1.5 Limitations

The research that I will be conducting will only be limited to section 35 of the statistics bill. Furthermore the research is also limited only to freedom of expression and academic freedom as guaranteed in the Namibian constitution by virtue of Section 21(1) (a) & (b).

CHAPTER TWO

2. FREEDOM OF EXPRESSION

INTRODUCTION

This chapter deals mainly with the main part of this dissertation. It attempts to explain the various concepts about freedom of expression. It is a well known fact that freedom of expression is one of the fundamental freedoms guaranteed in the Namibian constitution. Furthermore, it is also one of the rights that have long been denied to the majority of the Namibian people by the apartheid regime. With the constitutional dispensation, came about the freedom of expression and the academic freedom entrenched in the chapter three of the bill of rights. However, the statistics bill was recently tabled before parliament and currently it is being reviewed by the national council.

This chapter shall start with the historical background of the statistics in Namibia. This shall include, the previous law or the current law still regulating statistics *vis-a-vi* the proposed law on statistics. It will then move on to discuss the right of freedom of expression as well as academic freedom.

One of the main topics that will be of great focus in this thesis is the question of whether or not citizens have the right to know. The latter puts great emphasis on the fact that Namibia is a democratic state and thus one of the values of such is freedom of expression.

In addition to that, this chapter shall also focus on the values of academic freedom, especially freedom of expression. Such a right is also included in the bill of right. It will look at mainly the great infringement that will be made to the latter freedom.

2.1 Historical background of the statistics law in Namibia.

The current law that regulates statistics in Namibia is the Statistics Act¹⁵. The main purpose of the latter legislation is to regulate the laws relating to the collection,

¹⁵ Act, 66 of 1976

compilation, processing and publication of statistics. This also includes taking the census of the Namibian population. According to the Statistics Act¹⁶, the word statistics is defined as particulars and information, including financial particulars and information. Moreover, the Statistics bill defines “statistics” as aggregated numerical information relating to demographic, economic, financial, environmental, social or similar matters, at national, regional or local level, which is compiled and analyzed according to relevant scientific and statistical methodology, and includes statistics on spatial data, available in digital or other applicable format; From the wording of the Statistics Act, one can clearly notice that, it is very simple compared to the comprehensive statistics bill that has been tabled before parliament. First of all the Statistics bill has in a way expanded the Statistics Act, 2011¹⁷. While writing this dissertation the Statistics Act was passed into law on the 28 August 2011.

2.2 What is freedom of expression?

Freedom of expression in its widest context includes freedom of speech, this includes the right to receive and impart ideas.¹⁸ Furthermore, it has been stipulated that “the free exchange of ideas and public criticism of government plays a role in ensuring that a government functions within the rule of law. Freedom of expression is not confined to this role only. It plays a major role in upholding the dignity of the citizens of the state”¹⁹.

Furthermore, freedom has been opined to mean an opportunity to exercise different options. It is described as a quality or a state of being free from circumstances under which the choice is exercised may vary, the absence of coercion or constraint is an inherent characteristic of freedom. This includes the protection of third parties in today’s modern society of democracy²⁰.

¹⁶ Statistics Act 66 of 1976

¹⁷ Act 11 of 2011

¹⁸ Burns, Y (2009) *Communications law*. Durban: lexis nexis . p. 44

¹⁹ Ibid.

²⁰ Ibid.

In the case of *S v Mamabolo*²¹ it was held that, “having regard to our recent past of thought control, censorship and enforced conformity to governmental theories freedom of expression, the free and open exchange of ideas is no less important than it is in the united states of America. It could actually be contended with much force that that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed”

It is very important to note that, freedom of expression is one of the most important ingredients in a democratic state, if not the basic ingredient. De Waal is of the opinion that, freedom of expression is important, not because people have any intrinsic moral right to say what they wish, but because allowing them will have a good effect on the rest of us²².

2.3 The values of Freedom of expression

Burns²³ identifies ways why freedom of expression is important. First of all, freedom of expression is important, because it is one of the core components of an individual’s development. The latter concept keeps relationships together, be it among family, work place and outside family. In the case of *Khumalo v Holomisa*²⁴, it was stipulated that, freedom of expression is constitutive of the dignity and autonomy of human beings. Moreover, without, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled. The second importance that the latter author focuses on is that “ freedom of expression is fundamental to democracy, because it facilitates open discussion debate. This reason is perhaps one of the most important, because without the flow of ideas among different politicians the country would come to a halt. The whole notion of freedom of expression is being able to express oneself without fear. This point was

²¹ S v Mamalabolo 2001 (3) SA 409

²² De Waal (2005:20)

²³ Burns (2009:63)

²⁴ Khumalo v Holomisa 2002 (5) SA 401 (CC).

supported in a number of cases namely in the case of, *Government of the Republic of South Africa v Sunday Times Newspaper*²⁵.

Furthermore, one of the leading commentators on freedom of expression on the First Amendment is Thomas Emerson. He outlined several values that underlie in First Amendment of the United States of America constitution²⁶. The first one is that freedom of expression is essential as a means of assuring individual self-fulfillment. Thus, suppression of belief, opinion or other expression is an affront to the dignity of human beings. Moreover, each person as a member of society has a right to share in the common decisions that affect him or her. To cut off the search for truth is to elevate society and the state to a despotic command over individual members of society and to place each under the arbitrary control of others.

The second value of freedom of expression that he outlines is that the latter is an essential process for advancing knowledge and discovering truth. Knowledge and the search for the truth are promoted by a consideration of all alternatives. Discussion must be kept open no matter how true an accepted opinion may seem to be many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious an opinion appears to be. Because such an opinion could be true or false, however the open discussion compel a rethinking and retesting of the accepted opinion. The third value that Emerson identifies is that freedom of expression provides for participation in decision making by all members of society.

This is particularly significant for political decisions. It promotes the establishment of a deliberative democracy. Finally the learned author asserts that freedom of expression is a method for achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy disputes and necessary consensus. Suppression of discussion makes a rational judgement impossible, substituting force for reason and the exercise of power for justification. The process of open discussion promotes greater cohesion in a society, because

²⁵ *Government of the Republic of South Africa v Sunday Times Newspaper* 1995 (2) SA 221 (T).

²⁶ Davis, D, H. Cheadle, N. Haysom.(1997). *Fundamental rights in the Constitution: commentary and cases*. Kenwyn: Juta, p 112.

people are more ready to accept decisions even where they disagree, if they follow upon a rational open decision-making process.

2.4 Constitutional right of freedom of expression in Namibia

The constitutional right of freedom of expression is guaranteed by the Namibian constitution in terms of Article 21 of the Namibian constitution²⁷. In the case of *Retail, Wholesale and department Store Union, local 580 et al v Dolphin Delivery Ltd*²⁸, it was stipulated that “ freedom of expression is not, however a creature of the Charter. It is one of the fundamental concepts that has formed the basis of the historical development of the political and, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance.

2.5 The Kauesa case

In the case of *Kauesa v Minister of Home affairs*²⁹ it happened that the appellant, who claims to have been elected in 1991 chairman of the Namibian Police Promotions Committee whose function was to look into the conditions of employment of the Police with a view to redressing the racial and gender imbalances in the composition and structure of the Police Force, was charged with misconduct in terms of Regulation 58(32) of the Police Force. The respondents deny that the appellant was elected chairman of the Namibian Police Promotions Committee and deny the existence of the Committee. However, the appellant said his Committee was formed to promote affirmative action enshrined in Article 23 of the Namibian Constitution. Whether the Committee exists was not material to the appeal. Affirmative action is enshrined in Article 23 of the Constitution.

²⁷ Article 21 (a) states that “All persons shall have the right to freedom of speech which shall include freedom of the media.

²⁸ *Retail, Wholesale and department Store Union, local 580 et al v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174

²⁹ *Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 Nms 154C

The respondents denied that the appellant was elected chairman of the Namibian Police Promotions Committee and deny the existence of the Committee. However, the appellant said his Committee was formed to promote affirmative action enshrined in Article 23³⁰ of the Namibian Constitution (the Constitution). whether the Committee exists or not is not material to this appeal. Affirmative action is enshrined in Article 23 of the Constitution.

The appellant was on 22 December 1991 a member of a panel under the aegis of the Namibian Broadcasting Corporation. The subject of the discussion was affirmative action and the restructuring of the Police Force, The Public Service and other such institutions. As a result of what the appellant said during the panel discussions he was charged with contravening Regulation 58(32) published under Government Notice 719 dated 14 February 1964 as amended. "In that at Windhoek, on 22 December 1991 he wrongfully and unlawfully commented unfavourably in public upon the administration of the Force by saying the following on a TV programme 'Spotlight' broadcast(ed) by the NBC."

"The command structure of the Namibian Police force is determined to undermine the Government's policy of national reconciliation and if possible to cripple the government through corruptions and other irregularities. We have only one group of people, the whites, who are occupying the positions of command and this seniority and the seniority facilitate corruption and abuse of power. If I may recall the high treason case of KLEYNHANS and his group of white terrorists, then I mean police sort of supplied them with weapons and ammunition, because no-one of the commanding officers or the commanders of the unit that suffered the loss or armoury were held responsible or at least charged with acts of negligence or collaboration. The circumstances surrounding the case were very suspicious and that is the hangover of the Namibian Police executive I referred to. We are sitting with wrong people in wrong positions.

The court of appeal, which is the Supreme Court of Namibia, made some very important comments with regards to the freedom of expression as enshrined in the

³⁰ Article 23 of the Namibian Constitution Clearly stipulates that

Namibian Constitution³¹. The Court mentioned that, the latter sections are to be restrictively interpreted so as not to suppress freedom of expression. By coming to a conclusion the Court looked at the interpretation of freedom of expression by various Jurisdictions. This includes the Canadian laws which are almost similar to those of the Namibian Constitution.

In the case of *Regina v Oaks*³² it was stipulated that It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, secondly, it states explicitly the exclusive justificatory criteria (outside of s. 3 3 of the Charter) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms rights and freedoms which are part of the supreme law of Canada.

Taking the above mentioned, it is very important that the fundamental freedoms enshrined in the constitution be upheld. This is the duty of all Namibian citizens but especially the three branches of government³³.

2.6 Limitations of freedom of Expression

Though there are certain limitations that the law imposes on the Fundamental freedoms under the Namibian Constitution, it is very crucial that the Court, in assessing the extent of the limitations to rights and freedoms, must be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values. The underlying values and principles of a free

³¹ Freedom of expression is guaranteed under the Namibian Constitution in terms of Article 21(a)

³² *Regina v Oaks* 1986 26 DLR

³³ Article 5 of the Namibian Constitution clearly calls upon the protection of Fundamental Rights and Freedoms. It stipulates that " the fundamental Rights and Freedoms enshrined in chapter three shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the government and its Agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed.

and democratic society are the genesis of the rights and freedoms guaranteed by the Constitution and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Limitations of Freedom of expression are embodied under Article 22 of the Namibian Constitution³⁴. Thus, though the right to freedom of expression is guaranteed it is not absolute. Like all other limitation clauses, specific limitation clauses contain one or more of the elements usually included in limitation clauses. They may contain particulars on the organ of state which may limit a particular right, the procedure to be followed, the purpose for which limitations may be imposed, or the conditions and circumstances in which the right or rights concerned may be limited³⁵.

Conclusion

To sum up, it is clear that the Statistics Act is in contravention with fundamental rights guaranteed in the constitution. This is basically the freedom of expression. Section 35 of the Statistics Act, violates freedom of expression in a number of ways. For instance, the fact that private bodies and government bodies require approval for any statistical collection, jeopardises one's right to freedom of expression. The freedom of expression includes the right to receive and impart ideas. Furthermore, it is clearly noticeable that, not a lot of citizens are aware of such a law. There has been no input from the public. Though there has been a lot of criticism it is sad to note that, upon its release nothing much has been amended as the civil society suggested to the bill.

³⁴ Article 22 of the Namibian Constitution clearly provides that " whenever or wherever in terms of the constitution the limitation of any fundamental rights and freedoms contemplated by Chapter three is authorised, any law providing for such limitation shall:

- a) Be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual.
- b) Specify the ascertainable extent of such limitation and identify the Article or articles hereof on which authority to enact such limitation is claimed to rest.

³⁵ Rautenbach I.M. (1995). *General provisions of the South African constitution*. Durban: Butterworths, p 105.

CHAPTER 3

3. ACADEMIC FREEDOM

INTRODUCTION

This chapter aims to guide the reader on the meaning of academic freedom as guaranteed under the Namibian Constitution. Furthermore, it also seeks to expound on the significance of academic freedom in such a young democracy. Various authors that are familiar with the right to academic freedom will be consulted. Furthermore, this chapter also seeks to dissect Section 35 of the Statistics Bill. What distinguishes this chapter from chapter 2 is the fact that, this chapter looks deeper into academic freedom, because it is the freedom that is infringed upon by the Statistics Bill. In addition to that, it is also the aim of this dissertation to explore to what extent the Namibian Constitution protects academic freedom.

3.1 What is Academic freedom?

The Lima Declaration describes academic freedom as “the freedom of members of the academic community, individually or collectively, in the pursuit, development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing³⁶. The right to academic freedom is derived from the right to education and related to the rights to freedom of thought and freedom of Expression.

It has been mentioned that, the right no longer applies only to institutions of higher learning, but this right also protects any academic enterprise. At the core of the right to academic freedom is the right of an individual to do research, to publish and to disseminate learning through teaching, without government interference³⁷.

Respect for academic freedom and University autonomy is not only essential to ensure a healthy educational system but also the necessary conditions for the

³⁶ The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education.

³⁷ Currie I, J. De Waal. (2005). *The Bill of Rights Handbook*. Kenwyn: Juta & Co, p 370.

safeguarding of other freedoms and efforts towards development and the maintenance of democracy³⁸.

It has also been argued that academic freedom imposes two levels of insulation³⁹. It is often defended on the ground that scholars must be free, if they are to discover objective truth. But the very possibility of objective truth is now itself under challenge under certain truth anti-squads⁴⁰.

3.2 Critical Analysis of Academic Freedom in light of Section 35

Academic freedom is at the core of this dissertation. In terms of the statistics Bill, section 35 it is clearly stipulated that:

(1) Subject to this Act, only the Statistician-General may commence a statistical collection or vary or discontinue any statistical collection.

(2) Despite anything to the contrary in any other law –

(a) a person may not authorise the commencement of a statistical collection and

(b) a government body may not commence a statistical collection, without the approval of the Minister acting after consultation with the Statistician- General.

(3) The Minister, by notice in the Gazette, subject to such conditions as he or she specifies, may determine that subsection (2) does not apply to a government body in any specific instance or class of instances.

The departure in dissecting this section is first of all defining what statistical collection is. According to the Statistics Act⁴¹ 11 of 2011 statistical collection is defined as the process of undertaking any census, other than a census of population or housing census. This also includes a survey in respect of several matters such as general statistics, demographic and social statistics, labour statistics, education and training statistics, culture statistics, agriculture statistics etc. The list for on matters which statistics may be collected is endless. Thus the latter Act prohibits almost any sort of statistics one can think of. Upon the introduction of the bill to the public,

³⁸ D, John, F. De Vlaming, N. Hartley, M. Nowak (1993). *Academic Freedom 2: A human Rights Report*. London: Zed Books p 1.

³⁹ Dworkin (1998: 246)

⁴⁰ Ibid.

⁴¹ Act, 11 of 2011.

several civil societies came out against the proposed Bill, citing that it infringes freedom of expression⁴².

Apart from those who proposed a change to the bill there are those who are clearly for the bill. A group of Parliamentarians have advocated for the bill that has been heavily criticised by Non-Governmental Organisations (NGO)⁴³. This includes the likes of Professor Katjavivi, a member of parliament who has clearly stipulated that, “statistics in a democratic country such as ours are increasingly a governance issues”. The professor further argued that monitoring and evaluation of government’s programs has not been effective due to a lack of reliable statistics⁴⁴.

In an interview with the Chief Statistian in Namibia, and the Deputy Director For economic statistics Mr. Hangula and Mrs. Ndamona Kali⁴⁵ revealed of in depth factors on the main purpose of the bill. Mr. Hangula maintained that alot of civil organisations lack understanding of the spirit of the Bill. He maintained that it is important for any democratic state to have an independence of the Statistics agency; he further stated that professional independence is very important as decisions of statically operations should be exclusively decided by a statistical agency.

Some of the best examples of statistical of information countries are Australia, Canada. Therefore there was a need for a new legislation which regulates statistics in our country, as the 1967 Act is very much outdated and it does not cater for today’s needs. Therefore the new legislation was proposed for a number of reasons. The most important one would be for our legislation to be in compliance with the

⁴² For instance the Legal Assistance center (LAC), mentioned that said it is possible that permission to do research could be conditioned on an agreement that requires a private body wishing to make statistical collection to work in partnership with Government or some other body identified by the Statistician General.

⁴³ Catherine Sasman. *The Namibian: New statistics Bill introduced*. 10 March 2011, p 1.

⁴⁴ Ibid.

⁴⁵ This interview was conducted on the 15 August 2011 at three O’clock at the National Planning commission at the department of Statistics bureau.

Resolution on the fundamental principles of official statistics adopted by the United Nations Commission for Statistics in April 1994⁴⁶.

3.3 The principles of official statistics

Namibia is under pressure to have a new legislation as the African Union (AU) needs to foster economic growth and this can only be achieved with reliable statistics. Furthermore, it is important to have a Statistics Agency in order to enhance, harmonise the organisation with international instruments and protocols. A statistics Agency would also mean compliance with international standards and ethics. This will also ensure professional technicality as well as good governance that will contribute greatly to the development of our democracy.

The following statistics principles are set out in the draft African charter of statistics⁴⁷. The first principle is that of professional independence⁴⁸. The latter principle stipulates that Statistics authorities must be able to carry out their activities according to the principle of scientific independence, particularly vis-a-vis the political authorities or any interest group; this means that the methods, concepts and nomenclatures used in statistical operation shall be selected only by the statistics authorities without any interference whatsoever and in accordance with the rules of ethics and good practice. This is perhaps the most important principle amongst the rest, as it outlines professional independence a very key aspect to any profession.

The second principle deals with the quality of the statistics⁴⁹. This principle outlines the importance of having sustainable statistics, as well as accurate and reliable data sources. It also put emphasis on awareness-building, thus state parties are required to sensitize the public, particularly statistical data providers, on the importance of

⁴⁶ This was done by the United Nations department of Economic and Social council economic commission for Africa.

⁴⁷ Draft African Charter on Statistics, 31 March 2008 at the First Joint Annual Meetings of the AU Conference of Ministers of Economy and Finance and ECA Conference of African Ministers of Finance, Planning and Economic Development in Partnership with United Nations Economic and Social council economic commission for Africa.

⁴⁸ Chapter 3, Article 3 of the Draft African Charter on statistics.

⁴⁹ Ibid.

statistics. The third principle deals with the mandate for data collection and resources⁵⁰. It requires that statistics authorities are endowed with unambiguous legal mandate empowering them to collect data for production of African statistics. At the request of statistics authorities, public administrations, business establishments, households and the general public may be compelled by law to allow access to the data in their possession or provide data for the purpose of compilation of statistics.

Another principle that is of cardinal importance is that of dissemination. The latter principle basically entails that African statistics shall not be retained in any way or whatsoever. It calls for concomitant right of access for all users. It stresses out clarity and understanding of statistics. The protection of individual data, information sources and respondents forms part of principle five⁵¹. As the title suggests, protection must be guaranteed to those granting information. Last but not least, coordination and cooperation forms the sixth principle, which basically calls for coordination and collaboration amongst statistics authorities in a given country are essential in ensuring quality and harmonious statistical information. Thus coordination and dialogue amongst all members of the African statistical system are vital for harmonization, production and use of African statistics.

Conclusion

There are very different views with regard to the proposed law of Statistics. However what remains to be evaluated is the wording of the statistics Act, basically section 35. The latter clearly does hamper on freedom of expression and thus it should be changed. It conflicts with the Namibian constitution provisions of the right to academic freedom. Though certain officials maintain that the confusion and the cry from civil society emanates from misunderstanding the wording of the bill. Upon inspection any lay person reading the bill can denote that it merely prohibits academic freedom. There is no need of interpretation or what so ever.

⁵⁰ Ibid.

⁵¹ Chapter 3, Article 3 of the Draft African Charter on statistics

CHAPTER 4

4. INTERNATIONAL LAW

INTRODUCTION

Namibia is a unitary state. International law applies horizontally. This is in terms of Article 144 of the Namibian constitution⁵². Therefore it would not be a complete dissertation if it does not contain a compelling look at international law in light of Freedom of expression and Academic freedom. This chapter seeks to look into the various international legal instruments that Namibia has related to the topic of discussion. Firstly it will be a discussion of freedom of expression in light of the Universal declaration of Human Rights (UDHR) as well as the International Covenant on Civil and Political Rights (ICCPR). The second topic of discussion will be international instruments in relation to academic freedom.

4.1 Freedom of Expression under International law

Freedom of expression is a cornerstone of democratic rights and freedoms. In its very first session in 1946, before any human rights declarations or treaties had been adopted, the UN General Assembly adopted resolution 59(I) stating "Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated⁵³."

Freedom of expression is essential in enabling democracy to work and public participation in decision-making⁵⁴. Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely. Freedom of expression is thus not only important for individual dignity but also to participation,

⁵² Article 144 of the Namibian constitution clearly provides that "unless otherwise provided by this constitution or Act of parliament, the general rules of public International agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

⁵³A. Arthur. (2011). *Freedom of Information*. <http://www.article19.org/pages/en/freedom-of-information-more.html> retrieved on 23 August.

⁵⁴ *ibid*

accountability and democracy⁵⁵. Violations of freedom of expression often go hand in hand with other violations, in particular the right to freedom of association and assembly.

Progress has been made in recent years in terms of securing respect for the right to freedom of expression. Efforts have been made to implement this right through specially constructed regional mechanisms. New opportunities are emerging for greater freedom of expression with the internet and worldwide satellite broadcasting⁵⁶. New threats are emerging too, for example with global media monopolies and pressures on independent media outlets.

In Australia, the High court held that a judicially enforceable right to freedom right to freedom of political communication.⁵⁷ For instance, the African charter on human and people's rights main mission is to promote the free flow of information and ideas and greater respect for freedom of expression.

According to the declaration of principles on freedom of expression in Africa⁵⁸, its preamble reaffirms the fundamental importance of freedom of expression as individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.

Furthermore, African commission on Human and People's Rights in recognising the need to ensure the right to freedom of expression in Africa, has declared several principles or guidelines which include the following⁵⁹.

- The guarantee of freedom of expression: this is the freedom of expression and information, including the right to seek, receive and impart information and ideas either orally, in writing or in print, in the form of art or through any other form of communication, including across the frontiers, is a fundamental

⁵⁵ *ibid*

⁵⁶ Zelezny J.D. (1997). *Communications law*. California: Wadworths publishing company, p 29.

⁵⁷ Australian Capital Television and Ors v the Commonwealth 1992 66 ALJR 695

⁵⁸ This was adopted by various heads of state in 2002.

⁵⁹ Heyns, C, M, Killander(2007). *Compendium of Key Human Rights documents of the African Union*. Pretoria: Pretoria University city press, p 280.

and inalienable human right and an indispensable component of democracy. This also includes the right to receive information without discrimination.

- Interference with Freedom of expression: this clause prohibits arbitrary interference with his or her freedom of expression. Therefore, any restrictions on freedom of expression shall serve a legitimate interest and be necessary in a democratic society.
- Diversity: freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which includes among other things: availability and promotion of a range of information.
- Freedom of information: public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject to laws laid down by the law. This principle is perhaps the most important one as it reiterates the fact that everyone has the right to access information held by public bodies and held by private bodies which is necessary in the exercise or protection of any right.

The above principles clearly illustrate that Section 35 of the Statistics Act is in contravention with the wordings of the commission. This is mainly because of the fact that the statistics act prohibits the commencement of any statistical collection by a government body or private body. This places all statistics enquiry on the newly established agency.

In the case of *Phato v Attorney-General, Eastern Cape*⁶⁰ it was stipulated that the purpose of section 23 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society of which the constitution strives.

In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression set out in detail the standards to which freedom of information legislation

⁶⁰ *Phato v Attorney-General, Eastern Cape* 1995 (1) SA 799

should conform (UN Standards)⁶¹. The 2002 Recommendation of the is even more detailed, providing, for example, a list of the legitimate aims which might justify exceptions to the right of access. These standards find some support in the various freedoms of information laws and policies around the world. Although these vary considerably as to their content and approach, the more progressive laws do have a number of common features which reflect these international standards.

ARTICLE 19⁶² has published a set of principles, The Public's Right To Know: Principles on Freedom of Information Legislation (the ARTICLE 19 Principles), setting out best practice standards on freedom of information legislation.

These Principles are based on international and regional law and standards, and evolving state practice. They therefore provide a useful framework in which to discuss the features of access to information legislation.

4.2 Academic Freedom under International law

There are various instruments which have always advocated for academic freedom internationally. Among others this includes international instruments by the United Nations (UN), the African Union, as well as the Southern African development community (SADC)⁶³. Thus the right to academic freedom is derived from international recognised right to education, which is enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights which Namibia has ratified (ICESCR). Academic freedom also encompasses both rights for individuals and the university community at large⁶⁴. These rights include freedom of expression, association, assembly and autonomy for institutions which must be free from interference from the state⁶⁵.

⁶¹A. Arthur.(2011). *Freedom of Information*. <http://www.article19.org/pages/en/freedom-of-information-more.html> retrieved on 23 of August 2011

⁶² Supra

⁶³ SADC Protocol on Culture, Information and Sport, 2001

⁶⁴ Ibid.

⁶⁵ Ibid.

Furthermore, academic freedom gives members of the academic community the right to conduct and participate in educational without arbitrarily interference. Under international law, it is a broad principle that aims to protect professors and students and a variety of academic pursuits⁶⁶. International law requires states to respect and uphold the right to academic freedom, a right based on series of basic human rights⁶⁷.

The CESCR, article 13 has been expounded to mean that, members of the academic community, individually or collectively are free to transmit, persue and develop knowledge through research, teaching, study, discussion or writing⁶⁸. Thus academic freedom includes the rights of individuals to fulfil their tasks without fear of discrimination, but merely to participate in professional academic bodies and to enjoy all the internationally recognised human rights applicable in their jurisdiction. Therefore it is important to note that academic freedom is an internationally recognised right and thus it requires protection from the state and not attack.

Under the SADC protocol on culture, information and sports, Article 17 of the latter calls for corporation for the growth of the region. Furthermore, one of the objectives, as indicated in the protocol is to strengthen public institutions for effective gathering and dissemination of information. On the other hand, Article 18 of the latter protocol solely deals with information policies. The first policy is perhaps the most important and thus equally relevant to this piece of writing. It stipulates that, “states parties shall harmonise information policies through consultations involving appropriate stakeholders and civil society”. Such a principle clearly shows both public and government opinion must be included when formulating policies.

Lately, in Namibia that has not been the case, often what happens is that civil society is called to give their opinions when laws are table before parliament. However their opinions are never put into consideration⁶⁹. The reason for the latter is that, there was a huge outcry from civil society, however, according to my observations and assessment the government did very little to listen attentively. The result of this

⁶⁶Ibid.

⁶⁷ Article 13 of Covenant of Economic, Social and Cultural rights.

⁶⁸ SADC protocol on Culture, Information and Sports, 2001

⁶⁹ Ibid.

would be the passing of the proposed bill into an Act of parliament without any changes⁷⁰.

Conclusion

International law forms part of the Namibian laws, therefore it is vital that Namibia adheres to the rules and standards set by the International community. Furthermore, by introducing such laws, it negatively impacts the development of our democracy that so many have fought for. It is in this conclusion that emphasise that Namibia is a state party to several International Human Rights instruments that deal with the right to academic freedom. This includes the Universal Declaration for human rights, the Covenant of Economic, and Social and Cultural rights. Even regionally, Namibia is a state party to the SADC Protocol on Culture, information and Sports. Thus it is bound by the latter law to uphold, protect and promote the right to academic freedom rather than constraining it. Namibia is only 21 years of age still has a long way to go in terms of constitutional development. Therefore any law which contravenes fundamental freedoms should be amended. Though Article 25 of the Namibian Constitution gives the power to courts to declare a law that is inconsistent with the constitution, it is evident that it will take a while before such a law is challenged. This is mainly because Namibian citizens are dormant when it comes to their basic human rights and only a small portion of the citizens are aware of the rights.

⁷⁰ In August of this year, 2011 the Statistics bill was passed into law, as the Statistics Act 11 of 2011. There were no amendments to the Act, the only change that was implemented was the use of words and the deleting of certain words that appeared to be derogating.

CHAPTER 5

5. RECOMMENDATIONS AND CONCLUSION

INTRODUCTION

This chapter seeks to make recommendations that the writer of this dissertation deems to be necessary and very crucial to the development of our law. It is important to keep in mind that our democracy is still at its tender age and therefore there is a need to embrace it, all the time. Namibia has a long history of bitterness, especially when it comes to issues of fundamental human rights. Thus enacting a law that prohibits citizens from collecting their own data violates freedom of expression. Consequently, it undermines the values and principles embodied in the constitution. Therefore these recommendations are based on the flaws that were discovered while compiling this research.

First Recommendation

Instead of having legislation that prohibits people from commencing statistical collection, it would be advisable to rather have an agreement put in place between anybody that seeks to do private research or statistical collection to work together with the government or any institution that the government appoints.

The reason for this is that, in order for permission to be granted it will take a considerable amount of time therefore it could delay the research of any individual given the fact that people usually have their plans already.

Second Recommendation

In order to be in line with some international instruments instead of having an Act that violates freedom of expression it would be advisable to rather have an Act on the promotion of access to information. This will enhance the growth of our democracy and it will be very beneficial to each and every citizen. Furthermore, this will also ensure that government is according to law and not according to whims of individuals.

Third Recommendation

Furthermore, it is stated that where access to official information is denied to any researcher engaged in a bona fide statistical collection, the person responsible for granting or denying such access should state in writing within an acceptable timeframe why the data cannot be made available, in the event of refusal. This is clearly a violation of the right to privacy. Thus the recommendation that I ought to articulate is that the Agency must give reasonable grounds why it should access, such records.

Fourth Recommendation

The fourth recommendation that perhaps could clear the air on this very crucial matter is for more public awareness. As it currently stands not a lot of people are aware of the conditions that the bill imposes on people. Therefore it is very important that the public at large, not just civil society but most if not all citizens are informed about this bill. The general public also need to be made aware of their rights under the new legislation, and how to exercise them. Public education campaigns are needed, including through the media. Another useful tool, provided for in many laws, is the publication of a simple, accessible guide on how to lodge an information request.

Conclusion

It is not the first time that the Namibian parliament has passed law that infringes on the rights of citizens. The Communications Act is one of the examples. Prior the promulgation of the latter act it was stipulated that there would be an amendment to several sections, however that did not materialise despite a public outcry. With the Statistics bill, it came to light that even though there were several recommendations with regards to the Act, parliament passed the same bill. Though there were some changes with regards to the outline of the bill, the wording of it remained the same. The values underpinned in the Namibian constitution are slowly being derogated. Freedom of expression is one of the most important ingredients when it comes to democracy. Academic freedom opens a number of doors for individuals, therefore if the government shuts the doors Namibia will not grow intellectually. It is important

that there is an exchange of ideas. As long as they respect and uphold the values of the constitution and their ideas do not harm anyone then they must be respected and not clamped. Vision 2030 can only be achieved if both individuals and the state work together and not the opposite. Therefore academic freedom is a basic human right that must be respected and protected by all organs of state. On the other hand, freedom of expression is a basic necessity for each individual upon which humanity survives.

6. ANNEXURES

INTERVIEW QUESTIONS

Does Section 35 of the statistics bill infringe on freedom of expression and academic freedom?

Interview with the following stakeholders:

- Law reform and development commission Ministry of Justice
- National statistics bureau – National Planning Commission
- Legal Assistance centre
- Central Communications Authority
- Parliament

Questions

1. What was the main purpose of introducing the statistics Bill?
2. When laws are implemented shouldn't legislators abide to the provisions of the constitution?
3. Given the fact that, our country is aiming to achieve vision 2030, wouldn't it be helpful, if other stakeholders help with data collection?
4. Namibia, is a developing country and in most cases lack of recourses, would you agree with me that, two hands are better than one, thus the collecting of statistics cannot only be the obligation of one institution. Therefore the responsibility must be shared among several bodies
- 5.
6. Wouldn't section 35 be in contravention with freedom of expression and academic freedom?
7. What is the main reason behind asking permission when one wants to collect data?
8. In your opinion do, you think citizens have the right to know?
9. Don't you think that requesting permission to conduct statistical research could have a huge impact on academic freedom? Given the fact that some institutions, have to conduct research on a regular basis?

10. What do you think is the overall effect of this law to the citizens, should there be no amendments, What are your recommendations, if any to the latter Section?

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