Case Commentary

IJDL

International Journal of Discrimination and the Law
2023, Vol. 23(4) 321–337

DOI: 10.1177/13582291231199370
journals.sagepub.com/home/jdi
Sage

Equality before the law and the recognition of same-sex foreign marriages in Namibia: *Digashu and another v GRN and others; Seiler-Lilles and another v GRN and others* [2023] NASC 14

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Abstract

Article 10(1) of the Constitution of Namibian provides for the right to equality before the law. Article 10(2) prohibits discrimination on several grounds. The Constitution of Namibia, unlike that of South Africa (1996), does not prohibit discrimination on the ground of sexual orientation. However, unlike the Constitutions of some African countries such as Uganda, Seychelles, Kenya and Zimbabwe, the Constitution of Namibia does not prohibit same-sex marriages. Namibian law does not expressly prohibit same-sex marriages. However, in *Immigration Selection Board v Frank* (2001), the Namibian Supreme Court held that same-sex marriages were not allowed in Namibia. In *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others,* dated 16 May 2023, the Supreme Court, by majority, invoked Article 10(1) and common law to overrule its decision in *Immigration Selection Board v Frank* and to hold that Namibian law should recognise same-sex marriages entered into abroad. However, the court declined to express its opinion on whether discrimination on the ground of sexual-orientation is prohibited in Namibia. In this note, the author argues, inter alia, that the list of grounds under Article 10(2) is closed and that explains why the court did not rule that the appellants had been discriminated against based on their sexual orientation; it was unlikely for the government to succeed had it relied on the argument of public policy as the basis for its refusal to recognise foreign same-sex marriages; and that the court unconsciously developed common law on the issue of foreign marriages.

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Keywords
Equality before the law, *immigration selection board v frank*, *Digashu*, sexual-orientation, Namibia, foreign same-sex marriages

Introduction

Article 10(1) of the Constitution of Namibian provides that '[a]ll persons shall be equal before the law.' Article 10(2) states that '[n]o persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.' The Constitution of Namibia, unlike that of South Africa (1996), does not prohibit discrimination on the ground of sexual orientation.[1] The Constitution of Namibia, unlike the constitutions of some African countries such as Uganda,[2] Seychelles,[3] Kenya,[4] Zimbabwe[5] and South Sudan,[6] does not prohibit same-sex marriages. Namibian marriage law does not expressly prohibit same-sex marriages. Article 14 of the Constitution of Namibia protects the right to a family and states that:

1. Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

In *Chairperson of the Immigration Selection Board v Frank and Another* (2001),[7] where a Namibian and a foreign national were in a same-sex relationship although not married, the Namibian Supreme Court held that a 'homosexual relationship, whether between men and men and women and women, clearly fall [sic] outside the scope and intent of Article 14.'[8] The Court supported its decision by referring to, inter alia, the relevant provisions of the African Charter on Human and Peoples' Rights on the right to a family.[9] In *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others*[10] the Supreme Court, by majority, invoked Article 10(1) and common law to overrule its decision in *Immigration Selection Board v Frank* and to hold that Namibian law should recognise same-sex marriages celebrated abroad. The court declined to express its opinion on whether Namibian law should be interpreted as prohibiting discrimination on the ground of sexual orientation. In this article, I discuss the issues emerging from the court's decision.

The case

Factual background

Section 2 of the Immigration Control Act,[11] provides, inter alia, that the Act, as a general rule, does not apply to a 'spouse' of a Namibian citizen. This means, inter alia, that such a spouse can apply for permission to live in Namibia on the ground that his/her 'spouse' is a Namibian citizen. In other words, even if he/she does not qualify for other categories of visas (such as permanent resident, study and work), he/she can stay in Namibian as a spouse of a Namibian citizen. However, the Immigration Control Act does not define the term 'spouse.' The appellants were Namibian and foreign nationals in same-sex marriages celebrated outside Namibia – in South Africa and Germany respectively. The South African national attempted to apply for permanent residence on the basis that he was married to the Namibian (the marriage having taken place in South Africa) but he was informed by the Namibian ministry responsible for immigration that Namibia did not recognise same-sex marriages and that his application will not be allowed. He was advised to apply for a work visa. Although he applied for it, his application was unsuccessful.[12] The German applied for permanent residence for the purpose of retiring in Namibia (self-supporting with sufficient means) and in her application she also disclosed her marriage to the Namibian citizen. Her application for permanent residence was also rejected.[13]

The appellants approached the High Court and challenged the Minister's decision to the effect that they were not recognised as 'spouses' within the meaning of section 2 of the Act. The High Court held that it was bound by the Supreme Court decision in *Chairperson of the Immigration Selection Board v Frank and Another* (2001) and could not grant them the remedy in question. In their appeal to the Supreme Court:

> They both sought a declaratory order to the effect that the Ministry recognise their respective marriages. They also sought an order declaring that the respective appellants are spouses as envisaged by s 2(1)(c) of the Immigration Control Act…and in the event that the term 'spouse' could not be so interpreted, they sought an order that s 2(1)(c) be declared unconstitutional and that this conflict with the Constitution be rectified by reading into it the words 'including persons lawfully married in another country'.[14]

The Court referred to several provisions of the Immigration Control Act[15] and observed that '[t]he spouse of a Namibian citizen is…entitled to reside in and to work in Namibia without the need to obtain the permits otherwise required for non-citizens…'[16] Against that background, it observed that '[t]he central issue for determination…[was] whether the refusal of the respondents to recognise lawful same-sex marriages of foreign jurisdictions…between a Namibian and a non-citizen is compatible with the Constitution.'[17]

Submissions

The appellants argued that the Court's decision in *Chairperson of the Immigration Selection Board v Frank and Another* (2001) was distinguishable from the facts before

court because in the former, the parties were not married.[18] They also argued that in *Chairperson of the Immigration Selection Board v Frank and Another* (2001), the constitutionality of section 2 of the Immigration Control Act was not challenged[19] and that the Court's decision in that case that Article 14 excluded same-sex marriages in the definition of a family was *obiter* and wrong.[20] They also argued that the refusal by the Ministry to recognise their same-sex marriages infringed their rights to dignity and equality under Articles 8 and 10 of the Constitution respectively.[21]

The respondent argued, inter alia, that *Chairperson of the Immigration Selection Board v Frank and Another* (2001) was rightly decided and that a family under Article 14 of the Constitution does not include same-sex relationships and that marriage 'is a union between a man and a woman and excludes same-sex relationships and that the term 'spouse' in the [Immigration Control] Act does not include those in a same-sex relationship.'[22] He added that the appellants cannot claim to have been discriminated against under Article 10(2) of the Constitution because 'unlike as in the South African Constitution, sexual orientation is not a listed ground of proscribed discrimination in Art 10(2).'[23] He also added that the Supreme Court was correct in *Chairperson of the Immigration Selection Board v Frank and Another* (2001) 'with regard to the approach to Art 10(1) in stating that equality before the law does not mean equality before the law for each person's sexual relationships.'[24]

Judgment

The majority (Shivute CJ, Smuts JA, Damaseb DCJ and Hoff JA) held that the Court's decision in *Chairperson of the Immigration Selection Board v Frank and Another* (2001) on Article 14 (that same-sex relationships are not recognised as families) was *obiter* as the parties in that case did not raise that issue. This meant that neither the High Court nor the Supreme Court was bound to follow it.[25] On the issue of the status of the appellants' marriages, the Court referred to the 1917 case of *Seedat's Executors v The Master (Natal)* and held that:

> According to the well-established general principle of common law, if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia. That principle finds application to these matters.[26]

The Court added that

> The term 'spouse' is not defined in the Act. Its ordinary meaning connotes 'a married person; a wife; a husband'. The use of the term in s 2(1)(c) would not contemplate a wider meaning than this, being a person who has entered a marriage. The term marriage is likewise not defined in the Act and would contemplate valid marriages duly concluded and ordinarily recognised, including those validly contracted outside Namibia in accordance with the law applicable where the marriage is concluded in accordance with the general principle of common law, already referred to. That is the interpretation to be given to the term 'spouse' in s 2(1)(c).[27]

The Court added that the Ministry did not raise 'any reason relating to public policy as to why the appellants' marriages should not be recognised in accordance with this general principle of common law. Nor did the Ministry question the validity of the appellants' respective marriages.'[28] The Court held that based on common law 'alone', the appellants' marriages should have been recognised.[29]

The Court held that the issue of the rights to dignity and equality had to be resolved together because these rights 'are closely related.'[30] The Court explained the meaning of the right to dignity.[31] It held that although it is an independent right, the right to dignity 'relates to the protection of other rights and in particular, the right to equality.'[32] Against that background, the court explained how the Ministry's refusal to recognise the appellants' marriages violated their right to dignity and how Parliament cannot invoke public opinion against same-sex marriages and the principle of separation of powers to justify its refusal to recognise same-sex marriages validly contracted abroad.[33]

On the issue of equality and freedom from discrimination under Article 10, the Court referred to its earlier case law and held that 'the tests to be applied in determining whether there is discrimination under the two sub-articles differ.'[34] It emphasised that under Article 10(1) '[t]he questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose.'[35] On the other hand, under Article 10(2):

> The steps to be taken in regard to this sub-article are to determine – (i) whether there exists a differentiation between people or categories of people; (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article; (iii) whether such differentiation amounts to discrimination against such people or categories of people; and (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution.[36]

The Court observed that the appellants argued that the treatment to which they were subjected amounted to discrimination on the grounds of 'social status' or 'sex' within the meaning of Article 10(2). It held that the appellants 'could refer to no authority in support of the proposition that sexual orientation amounts to a social status. Nor could we find any.'[37] Against that background, it held that: '[i]n the absence of authority or evidence, we decline the invitation to find that sexual orientation constitutes social status for the purpose of Art 10(2) and thus leave that question open.'[38] The Court added that the appellant relied on the jurisprudence of the Human Rights Committee to argue 'that "sex" as a proscribed ground of discrimination in Art 10(2) includes sexual orientation.'[39] However, the Court held that in the light of its decision under Article 10(1), it was 'not necessary' to express itself on that submission.[40]

Referring to earlier case law, the court held that for an applicant to succeed in a claim under Article 10(1), he/she has two tasks: firstly, he/she has the onus 'to establish a differentiation provided for in a statutory provision (or…in the application of a statutory provision)'; and second, he/she must also show that 'the differentiation in question is not reasonable in the sense of not being rationally connected to a legitimate statutory object.' The Court held that on the facts before it, 'a differentiation has been established in the way

in which the Ministry treats non-citizen spouses in a heterosexual marriage as opposed to those in a same-sex marriage for the purpose of s 2(1) of the Act.'[41] The Court also referred to its case law for the criteria to determine whether a differentiation 'amounted to unfair discrimination' within the meaning of Article 10(2).[42] It held that:

> The unfairness of discrimination is thus to be determined with reference to the impact upon the victim(s) discriminated against, the purpose sought to be achieved by the discrimination, the position of the victim(s) in society, the extent to which their rights and interests have been affected and their dignity impaired.[43]

Against that background, the Court demonstrated '[t]he impact of the differentiation' on the appellants' inability to cohabit as spouses.[44] It referred to it as 'form of discrimination.'[45] It held further that '[t]he purpose of prohibiting discrimination in Art 10 is after all the emphatic recognition in the Constitution that all human beings are to be accorded equal dignity which is impaired when a person is unfairly discriminated against.'[46] The Court also referred to Canadian and South African case law on the importance of the right to equality and how it is closely related to the right to human dignity.[47] It concluded that the appellants were entitled to the declaratory orders sought.[48] Relying on jurisprudence from Canadian and South African courts, it emphasised that its decision in *Chairperson of the Immigration Selection Board v Frank and Another* (2001) that family is meant for procreation was erroneous.[49] It clarified that its judgement 'only addresses the recognition of spouses for the purpose of s 2(1) (c) of the Act and is to be confined to that issue. The precise contours of constitutional protection which may or may not arise in other aspects or incidents of marriage must await determination when those issues are raised.'[50]

The minority (dissenting) judgement was written by Mainga JA. He started his judgement by referring to three recent newspaper articles to demonstrate how contentious the issue of same-sex relationships was in Namibia. The first article, by a Namibian citizen, decried the fact the same-sex relationships have not been recognised in Namibia.[51] The second article covered an interview with the British High Commissioner in Namibia who reportedly said, inter alia, that in Namibia there was no evidence that people in same-sex relationships were being persecuted.[52] The third article quoted the Attorney-General of Namibia explaining why it was still necessary for Namibia to criminalise sodomy.[53] He held that the case of *Chairperson of the Immigration Selection Board v Frank and Another* (2001) was rightly decided and the High Court was bound to follow it.[54] He added that neither the Constitution nor any statute in Namibia recognises same-sex relationships or marriages.[55] He gave examples of pieces of legislation (all enacted after the commencement of the Immigration Control Act) which specifically referred to marriage as a union between man and woman.[56] He held that all these laws were enacted 'long' after the adoption of the Constitution and were therefore in line with the Constitution.[57] He held that although the South African constitution prohibits discrimination on the ground of sexual orientation, legislation had to be enacted to provide for the right of people in same-sex relationships to get married.[58] He demonstrated that before same-sex marriage were recognised in South Africa, the South African High Court held that foreign

same-sex marriages could only be recognised in South Africa if they were not against public policy.[59] He also held that the majority 'conveniently overlooks' the fact in the 1917 case of *Seedat's Executors v The Master (Natal)*, the court held that South African courts do not recognise polygamous foreign marriages because they were opposed to South African principles and institutions.[60] He also demonstrated that English courts refused to recognise foreign same-sex marriages on the basis of common law.[61] He added that the majority's reliance on common law was 'clearly fundamentally wrong' and 'trashes the historical, social and religious convictions of the Namibian people.'[62] He added that the common law rule invoked by the majority was not absolute and the Ministry was justified in refusing to recognise foreign same-sex marriages.[63] He also demonstrated that many European countries recognised same-sex marriages recently after legislative intervention.[64] He emphasised that Article 14 of the Constitution did not protect same-sex marriages and that international law does not obligate states to recognise same-sex marriages.[65] He held further that the Ministry was not required to 'raise any reason relating to public policy' for refusing to recognise the appellants' marriages.[66] He added that:

> Marriage or traditional marriage as defined in common law, other statutes of the Republic and the historic understanding of marriage as enshrined in the Constitution is as old as creation itself and the protection of family in the traditional sense is in principle a weighty and legitimate reason which might justify a difference in treatment.[67]

He reasoned that courts were ill-suited to handle the issue of same-sex marriages and should rather leave it in the hands of the legislature.[68] He concluded that the Ministry just implemented the law and 'did not discriminate against the appellants.'[69] He 'readily conced[ed] that the laws of Namibia and not the Ministry discriminate against same-sex relationships, but that fight should start with the Constitution.'[70] Although he made the above observation, he concluded that he found 'no reason to enter into the argument raised on dignity, discrimination and equality.'[71]

The analysis

Discrimination under Article 10(2)

The first issue that arises from the above decision is whether the appellants had been discriminated against. Both the majority and the minority held that the appellants had been discriminated against. As mentioned above, Article 10(2) provides for the prohibited grounds of discrimination. As the majority observed, for the argument that one has been discriminated against to succeed, one of the questions for the court to answer is 'whether such differentiation is based on one of the enumerated grounds set out in the sub-article.'[72] This means that the appellants were required to demonstrate that they had been discriminated against on one of the grounds under Article 10(2). They tried to do so by arguing that the grounds of 'sex' and 'social status' should be interpreted broadly to prohibit discrimination on the ground of sexual orientation. However, the Court declined

to express its opinion on this issue. Which means that the court did not find that Article 10(2) prohibits discrimination on the ground of sexual orientation. However, relying on its case law on Article 10(1), it held that the appellants had been discriminated against because the differential treatment violated their right to dignity in a serious manner. This shows that under Article 10(1), a court can find that a person was discriminated against without relying on any of the grounds under Article 10(2) provided that the differential treatment impaired their dignity.

This raises another issue of whether the mere fact that international human rights law prohibits discrimination on the ground of sexual orientation, Namibian law should also prohibit discrimination on such a ground. Article 144 of the Constitution of Namibia provides that '[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.' A close examination of Article 144 shows that the general rules of public international law and international agreements binding on Namibia form part of Namibian law. There is no general rule of public international law prohibiting discrimination on the ground of sexual orientation[73] and Namibia has not ratified any international agreement/treaty which prohibits discrimination on the ground of sexual orientation.[74] However, even if there was such a general principle of public international law or agreement, Namibia can object to such a ground in its constitution or Act of Parliament or by entering a reservation or declarative interpretation at the time of ratifying the treaty. This is evidenced by the opening part of Article 144 which implies that for such general principle of public international law or agreement to form part of Namibian law, it should not be contrary to the Constitution or an Act of Parliament. As the Canadian Supreme Court held, there are circumstances in which a state can create an exception to the general rule of public international law.[75] At the international level, practice shows that Namibia is not yet committed to stopping discrimination on the ground of sexual orientation. For example, it is one of the countries which abstained from voting on the UN General Assembly Resolution on 'human rights, sexual orientation and gender identity.'[76]

Related to the above is the issue of whether the list of grounds under Article 10(2) is exhaustive. This is an issue that the Court does not address in this case. However, its earlier case law appears to answer this question in the affirmative. In *Muller v President of the Republic of Namibia*[77] the Court held that 'any discrimination based on other grounds than those mentioned in Article 10(2) will have to be dealt with and will have to be brought in under Article 10(1) and/or Article 8(1), which provides that the dignity of all persons shall be inviolable.'[78] The Court added that unlike in the case of Canada or South Africa where a rationale test is applied to enumerated grounds of discrimination,[79] in Namibia such a test is not applicable and that '[o]nce it is determined that a differentiation amounts to discrimination based on one of these grounds [under Article 10(2)], a finding of unconstitutionality must follow.'[80] When dealing with Article 10(2), courts should not entertain the 'doctrine of reasonable classification.'[81] The Court also held that 'Article 10(2) of the Namibian constitution is not open ended regarding discrimination on other grounds than those enumerated in the sub-article.'[82] The Court held further that

> [T]he words "discriminate against" in Article 10(2) were intended to refer to the pejorative meaning of the word "discriminate", and not to its benign meaning. This stems from the fact that the grounds enumerated in Article 10(2) are all grounds which in the past were singled out for discrimination and which were based on personal traits where the equal worth of all human beings and their dignity was negated.[83]

The fact that the list of the grounds in Article 10(2) is exhaustive could explain why the applicants in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023) attempted, albeit unsuccessfully, to argue that the court should interpret the grounds of 'sex' and 'social status' broadly to accommodate sexual orientation. This was not the first time the court declined to interpret Article 10(2) broadly. It also did the same when asked to interpret Article 10(2) broadly to prohibit discrimination on the ground of disability. In *Visser v Minister of Finance and Others* (2014)[84] the High Court dealt with, inter alia, the question of whether the phrase 'social status' under Article 10(2) could be interpreted broadly to prohibit discrimination on the ground of disability. The Court urged the plaintiff's lawyer to 'cite any authority to support the contention that being disabled amounted to a social status.'[85] However, the lawyer was unable to do so although he insisted with this submission that 'being disabled did amount to a social status as contemplated by art 10(2).'[86] Since the plaintiff's lawyer failed to cite any authority to substantiate his argument, the Court held that Article 10(2) did not prohibit discrimination on the ground of disability. On Appeal to the Supreme Court in *Visser v Minister of Finance and Others,*[87] the appellants reiterated their submission before the High Court that 'social status' should be interpreted to include disability.[88] However, the Supreme Court found it unnecessary to address that issue since it could decide the case on other grounds.[89] It should be noted that in some African countries courts have interpreted 'social status' to include 'a person's standing in society'[90] and a person's profession.[91] Since Article 10(2) was not applicable to the appellants' case in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023), the court had to invoke Article 10(1). It is to this issue that we turn.

Equality before the law under Article 10(1)

As mentioned above, the Court in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023) held that in terms of Article 10(1), 'the questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose.' Since Article 10(1) has to be read with Article 8, for an applicant to succeed on the basis of Article 10(1), he/she must demonstrate that he/she has been subjected to differentiation. The differentiation must violate his/her right to dignity. Once he/she has discharged that burden, the respondent has a duty to prove that the differentiation is 'based on a rational connection to a legitimate purpose.' The Supreme Court held that Article 10(1) does not 'mean absolute equality but equality between persons equally placed.'[92] In the case of *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023) the state had to prove, according to the majority,

that the refusal to recognise the appellants' same-sex marriage is meant to achieve 'any reason relating to public policy.' This implies that the 'legitimate purpose' which the Court referred to in *Muller* should relate to public policy. This raises two issues. Firstly, whether, as the majority held, the state had to 'raise any reason relating to public policy' or, as the minority held, the state did not have that duty. If the state did not have a duty to do so, can a court do so *mero motu*? Secondly, and related to the above, what amounts to public policy? In other words, what criteria should be used to determine that a differentiation serves 'public policy' or otherwise?

I will start with the second question. In *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023) the Court does not define or describe what amounts to 'public policy.' This is the case although it was the first time that it invoked this criterion when applying Article 10(1) of the Constitution. There are cases in which the court has invoked the concept 'public policy' but they relate to issues such as the enforceability of a contract. However, since the Court has not defined what amounts to 'public policy' in the context of Article 10 of the Constitution, there is room for the argument that the same criteria (or descriptions) laid down when dealing with other branches of law apply with equal force (with the necessary modifications) to 'public policy' in the context of Article 10. In *Moolman and Another v Jeandre Development*,[93] the Court was dealing with the question of the enforceability of a contract which was against public policy. Before determining whether the contract was enforceable on the ground of public policy, the Court relied on South African case law for the description of public policy as follows:

> The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.[94]

The Court added that:

> Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.[95]

The Court held that the first description as 'refined' by the second one above 'also reflects the common law in Namibia, subject to the values embodied in the Namibian Constitution informing public policy for the purpose of the common law in Namibia.'[96] This means that the decision of whether the enforcement of a law is contrary to public policy has to be determined, not only by the interests of the community, but also by the

values that underpin the Bill of Rights. This implies that if there a conflict between the interests of community and the values that underpin the Bill of Rights, the later take precedence. This could explain why in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* court held that:

> Whilst public opinion expressed by the elected representatives in Parliament through legislation can be relevant in manifesting the views and aspirations of the Namibian people, the doctrine of the separation of powers upon which our Constitution is based means that it is ultimately for the court to determine the content and impact of constitutional values in fulfilling its constitutional mandate to protect fundamental rights entrenched in the Constitution. That is the very essence of constitutional adjudication which is at the core of our Constitution.[97]

In *Sibonga v Chaka and Another*,[98] the Court held that public policy is informed by common law and 'by our constitutional values and the changing nature of the prevailing norms of society.'[99] These constitutional values include 'equality in marriage, human dignity and privacy'[100] and the right to be heard.[101] In other words, 'public policy is now embedded in the values enshrined in the Constitution.'[102] It was also held that equality before the law and non-discrimination 'may rightly be said to be fundamental aspects of Namibian public policy.'[103]

It can therefore be inferred from this jurisprudence that a decision taken in the interests of public policy should be informed by constitutional values as explained by the Supreme Court in the cases above. Applying the above understanding to the facts in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023), one can argue that it would have been very difficult for the state to convince the court that its decision not to recognise same-sex foreign marriages was in the interest of public policy. Another issue is whether the court can raise the issue of public policy *mero motu*. In *Moolman and Another v Jeandre Development*,[104] the Court held that 'courts may *mero motu* decline to enforce an agreement which is against public policy or is illegal.'[105] This means that even in the context of Article 10(1), a court can declare legislation unconstitutional even if the applicant or the state does not raise the issue of public policy.[106] However, the issue may also be raised by one of the parties to the proceedings.[107]

Perhaps of great implications is the court's reliance on common law (*Seedat's* case) as the basis to conclude that Namibia should recognise foreign marriages even if they are contrary to Namibian marriage laws. As correctly pointed out by the minority decision, in *Seedat's* case, the court held that the principle it established was not applicable to polygamous marriages because such marriages were contrary to South African law. This means that it was limited to marriages with the same 'features' as those recognised in South African law at the time – monogamous marriages. However, the Court *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (2023) does not provide such exception. Had it retained that exception, there is a very high possibility that it would not have faulted the Ministry for refusing to recognise the appellants' marriages (at least on the basis of common law). It would appear that the Court, unconsciously, developed the common law.[108] As the Court held in *Trustco Group International Ltd and*

Others v Shikongo[109] Namibia is a common law system and '[a] common-law legal system is based upon the principle that the courts will develop the common law on an incremental basis. Common law is judge-made law and from time to time it needs to be developed to take account of changing circumstances.'[110] The Court also held that 'it may be necessary in appropriate cases to develop the common law to bring it in line with the values espoused in our constitution.'[111] However, this indirect development of the common law is likely to have unintended consequences and serious policy implications. It means, inter alia, that any marriage celebrated abroad can be recognised in Namibia for the purposes of immigration. What is unlawful in Namibian law has become lawful simply because it was done outside Namibia and 'imported' into Namibia.

Concluding remarks

The court's decision has serious implications and it has been criticised by several members of Parliament.[112] Some people, especially human rights activists, are likely to argue that there is a need for Namibia to legalise same-sex marriages conducted 'locally.' This is because recognising foreign same-sex marriages is likely to create the impression that those who have the means to conduct foreign same-sex marriages are able to get married and Namibians who cannot travel abroad to conduct their marriages cannot enter into same-sex marriages. There is a possibility that some people will approach court and argue that this differential treatment violates Article 10 of the Constitution. There are different ways, short-term and long term, in which the government of Namibia is likely to respond to the court's ruling. In the short-term, the government will recognise the marriages of the appellants in the case and issue them the relevant visas as spouses. Otherwise, the relevant government officials will be held in contempt of court.[113] In the long term, Parliament may amend the Immigration Act to define the term 'spouse' to mean those in heterosexual marriages. As demonstrated in the minority judgement, there are pieces of legislation in Namibia which adopt this approach. This is possible on the basis of Article 81 of the Constitution which provides that '[a] decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.' For an Act to be lawfully enacted within the meaning of Article 81, it should comply with at least two requirements – procedurally and substantively. Procedurally, the enactment process must comply with the Constitution. This means, inter alia, that Parliament should follow all the necessary legislative steps, including, for example, public participation in the process and the President must assent to the Bill in accordance with Article 56 of the Constitution. Substantively, the Act must not be inconsistent with any constitutional provision. Should the Act fail to meet both requirements, courts will declare it unconstitutional. It is also possible, on the basis of Article 81, for the Supreme Court to reverse its decision.[114] However, in this case this is very unlikely as an overwhelming number of judges were in the majority. The court can only reverse its decision when it is convinced that it was wrong.[115] There is precedent in which the Supreme Court reversed its decision.[116] Another option would be to amend the constitution to expressly prohibit same-sex marriages. However, any of the above attempts made to reverse the Court's decision is

likely to meet stiff resistance from human rights activists and organisations/bodies. It has been illustrated above that case law from the Supreme Court shows that the list of the prohibited grounds of discrimination under Article 10(2) is exhaustive. This raises the question of whether there are other grounds against which a person may not be discriminated against apart from those enumerated Article 10(2) of the Constitution. Article 144 of the Constitution of Namibia provides that international treaties ratified by Namibia form part of Namibian law. This means, inter alia, that if an international treaty ratified by Namibia prohibits discrimination on a ground which is not mentioned in Article 10(2), discrimination on such a ground is also prohibited under Namibian law. For example, although the Constitution does not prohibit discrimination on the ground of disability, Namibia ratified the International Convention on the Rights of Persons with Disabilities (2006) which expressly prohibits discrimination on the ground of disability (Articles 2–4). Therefore, it is against Namibian law to discriminate against any person on the ground of disability. Likewise, although the Constitution does not prohibit discrimination on the grounds of political or other opinion and birth, these grounds are expressly prohibited under Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) (1966) which Namibia ratified in 1994. As a result, Namibian law prohibits discrimination on these grounds. Namibia also ratified the ILO Convention on Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which, amongst other grounds, prohibits discrimination on the ground of age (Article 5). Apart from international instruments, some pieces of legislation also prohibit discrimination on grounds which are not mentioned in Article 10(2) of the Constitution. For example, section 2(1)(h) of the Child Care and Protection Act (2015) prohibits discrimination against a child on the basis of his/her parents' marital status. Likewise, 26(1) of the Employment Services Act (2011) prohibits discrimination on grounds such as marital status or family responsibilities, degree of physical or mental disability, AIDS or HIV status and pregnancy. In 2016, the Namibian government informed the Committee on the Elimination of Racial Discrimination that it had enacted legislation which prohibits discrimination on many grounds including age and disability.[117] This discussion shows that in Namibia, the prohibited ground(s) of discrimination could be constitutional (based on one of the grounds under Article 10(2)), conventional (based on one of the treaties ratified by Namibia) or statutory (based on legislation enacted by Parliament).[118]

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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Notes

1. Section 9(3) of the Constitution of South Africa (1996).
2. Article 31(2a) of the Constitution of Uganda (1995).
3. Article 32(2) of the Constitution of Seychelles (1993).
4. Article 45(2) of the Constitution of Kenya (2010).
5. Article 78(3) of the Constitution of Zimbabwe (2013).
6. Article 15 of the Constitution of South Sudan (2011).
7. *Chairperson of the Immigration Selection Board v Frank and Another* [2001] NASC 1 (hereafter *Frank*).
8. Ibid, [119].
9. Ibid, [120].
10. *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* [2023] NASC 14 (hereafter *Digashu*).
11. Act 7 of 1993.
12. Ibid, [6].
13. Ibid, [8].
14. Ibid, [10].
15. Ibid, [13–15].
16. Ibid, [16].
17. Ibid, [20] & [96].
18. Ibid, [50].
19. Ibid, [51].
20. Ibid, [52–53].
21. Ibid, [56].
22. Ibid, [58].
23. Ibid, [58].
24. Ibid, [58].
25. Ibid, [60–81].
26. Ibid, [82].
27. Ibid, [83] (the court referred to a dictionary for the interpretation of the meaning of the word 'spouse').
28. Ibid, [84].
29. Ibid, [85].
30. Ibid, [96].
31. Ibid, [97].
32. Ibid, [98].
33. Ibid, [99–109].
34. Ibid, [111].
35. Ibid, [111].
36. Ibid, [111].
37. Ibid, [114].
38. Ibid, [115].
39. Ibid, [116].

40. Ibid, [117].
41. Ibid, [119].
42. Ibid, [121].
43. Ibid, [122].
44. Ibid, [123].
45. Ibid, [124].
46. Ibid, [126].
47. Ibid, [126–127].
48. Ibid, [128–130].
49. Ibid, [131–133].
50. Ibid, [134].
51. Ibid, [137].
52. Ibid, [138–139].
53. Ibid, [140–141].
54. Ibid, [142–145].
55. Ibid, [146].
56. Ibid, [146].
57. Ibid, [147].
58. Ibid, [153].
59. Ibid, [155–161].
60. Ibid, [162].
61. Ibid, [163–168].
62. Ibid, [169].
63. Ibid, [170].
64. Ibid, [171–173].
65. Ibid, [174].
66. Ibid, [176].
67. Ibid, [176]
68. Ibid, [179–181].
69. Ibid, [182].
70. Ibid, [182].
71. Ibid, [183].
72. Ibid, [111].
73. It has been argued that 'General rules of public international law are rules of universally applicable customary international law that are complemented by general legal principles derived from national legal systems.' See Igor SPIROVSKI, 'The Competence of the Constitutional Court to Control the Conformity of Laws with International Treaties: New Trends in Constitutional Justice' (17 November 2009) 5. Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2009)036-e
74. An international treaty becomes part of Namibian law once Namibia has ratified it or acceded to it. See for example, *IJT v AIE* [2012] NASC 19 at [16]; *S v Henock and Others* [2019] NAHCMD 466 at [11]; *S v Mushwena and Others* [2004] NASC 2.

75. *R v Cook* 1998 CanLII 802 (SCC), [1998] 2 SCR 597 at [53] (in this case the court created an exception to the general rule of public international law 'that a state cannot enforce its laws beyond its territory.')
76. General Assembly Resolution 27/32, Human rights, sexual orientation and gender identity, A/HRC/RES/27/32 (2 October 2014).
77. *Muller v President of the Republic of Namibia* [1999] NASC 2.
78. Ibid, [12].
79. Ibid, [13].
80. Ibid, [14].
81. Ibid, [14].
82. Ibid, [17].
83. Ibid, [18].
84. *Visser v Minister of Finance and Others* [2014] NAHCMD 321.
85. Ibid, [67].
86. Ibid, [67].
87. *Visser v Minister of Finance and Others* [2017] NASC 10.
88. Ibid, [25].
89. Ibid, [28].
90. Chileshe v Zambia Consolidated Copper Mines Limited [1996] ZMSC 18 p. 3 (Zambia).
91. Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others [2012] LSHC 8 [59] (Lesotho).
92. *Government of the Republic of Namibia and Others v Mwilima and Others* [2002] NASC 8 p. 33.
93. *Moolman and Another v Jeandre Development CC* [2015] NASC 32.
94. Ibid, [62] (relying on the South African case of Sasfin (Pty) Ltd v Beukes 1989(1) SA 1 (A)).
95. Ibid, [63] (relying on the South African case of Barkhuizen v Napier 2007 (5) SA 323 (CC)).
96. Ibid, [65].
97. *Digashu* (n 10) [103].
98. *Sibonga v Chaka and Another* [2016] NASC 16 (hereafter *Sibonga*).
99. Ibid, [34].
100. Ibid, [39].
101. *Brink N.O, and Another v Erongo All Sure Insurance CC and Others* [2018] NASC 393 at [37].
102. *In Re: Kazekondjo and Others v Minister of Safety and Security and Others* [2021] NASC 43 at [19].
103. *S v Van Wyk (1)* [1991] NASC 6 at [4] (decision by Berker, CJ).
104. *Moolman and Another v Jeandre Development CC* [2015] NASC 32.
105. Ibid, [28].
106. See also *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another* [2016] NASC 15, in which the court raised the issue of public policy *mero motu*.
107. *Woker Freight Services (Pty) Ltd v Commissioner for Customs and Excise and Others* [2016] NASC 7 at [59]; *Prosecutor-General v Namoloh and Others* [2020] NASC 18.
108. The Court has explained that it has the power to develop the common law. See *Sinonga* (n 89).
109. *Trustco Group International Ltd and Others v Shikongo* [2010] NASC 6.

110. Ibid, [34].
111. *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa* [2019] NASC 2 at [59].
112. See S Petersen, E Ndeyanale and A Thomas, 'Katjavivi cautions MPs on LGBTQI+ hate speech' 24 May 2023. Available at https://www.namibian.com.na/katjavivi-cautions-mps-on-lgbtqi-hate-speech/
113. For the law on contempt of court in Namibia, see for example, Government of the Republic of Namibia v Sikunda [2002] NASC 1.
114. For the interpretation of Article 81 (on the power of the court to reverse its decision), see *Kamwi v Law Society of Namibia (1)* [2010] NASC 16.
115. *Schroeder and Another v Solomon and Others* [2010] NASC 11 at [18–19].
116. *Likanyi v S* [2017] NASC 10.
117. Committee on the Elimination of Racial Discrimination examines the report of Namibia (06 May 2016). Available at https://www.ohchr.org/en/press-releases/2016/05/committee-elimination-racial-discrimination-examines-report-namibia. However, the combined report which Namibia submitted to the Committee on the Elimination of Racial Discrimination is silent on which legislation which prohibits discrimination on the ground of age, see Namibia's 13th to 15th periodic reports, CERD/C/NAM/13-15 (6 March 2015).
118. For the differences between common law, statutory and constitutional rights, see *Swakop Uranium v Employees of Swakopm Uranium as Per Schedule Annexure 'POC1' and Others* [2022] NASC 36. For the difference between constitutional and conventional rights, see *S v Gaingob and Others* [2018] NASC 4.