

Protecting the right to personal liberty in Namibia: Constitutional, delictual and comparative perspectives

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Summary

Although the recent Supreme Court of Namibia cases of Alexander v Minister of Home Affairs & Others and Gawanas v Government of the Republic of Namibia were not merely decided under the Criminal Procedure Act 1977 (Namibia), but in terms of special statutes, namely, the Extradition Act 11 of 1996 and the Mental Health Act 18 of 1973 respectively, they nonetheless involved the determination by the Court of the individual right to personal liberty in terms of article 7 of the Constitution of Namibia of 1990, thus bringing the Court face to face with balancing the right to personal liberty against the public interest in the enforcement of the law. Alexander could properly be described as consisting of two parts: the trial judge's treatment of the limitation clause in the Namibian Constitution, which survived on appeal, and the Supreme Court judgment which turned on the problem of granting bail in the circumstances of extradition proceedings. While Gawanas is a classic illustration of bureaucratic negligence, both cases involve the protection of personal liberty of the individual as against legislative interference and infringement by the agents of state. The lesson emerging therefrom is that the protection of personal liberty under the Namibian Constitution extends to persons, to citizens, foreigners within Namibia and to someone with some form of disability. The other lesson emanating from this study is that a person whose right to personal liberty or dignity has been infringed can ventilate that breach by way of judicial review, contesting the legality of the law or under the principles of administrative justice in the Constitution or the law of delict, alleging wrongfulness, fault and damage.

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1 Introduction

Right from the advent of Namibia's independence 24 years ago, the courts appreciated their role as the interpreter and guardian of the Constitution. They understood their interpretive role as one which must be exercised against the backdrop of the values enshrined in the Constitution – the supreme law¹ – which was founded upon the principles of democracy, the rule of law and justice for all.² They had embraced that function with a liberal and purposive spirit such that the words of the Constitution, especially its fundamental rights provisions, should be given the widest possible meaning in order to protect the greatest number of those rights.³ In particular, the courts were quick to discern the insistence of the founders of the Constitution upon the protection of personal liberty in article 7;⁴ respect for human dignity in article 8;⁵ the right of an accused person to be brought to trial within a reasonable time in article 12(1)(b);⁶ and the presumption of innocence in article 12(1)(d).⁷

The two recent judgments of the Supreme Court of Namibia focused on in this article do not only maintain that liberal spirit in the interpretation of the provisions relating to fundamental rights and freedoms entrenched in the Constitution, but they also uphold in that same spirit the personal liberty rights of the individuals involved. In *Alexander v Minister of Home Affairs & Others*,⁸ the plaintiff sought to enforce his right to liberty through a declaration of the unconstitutionality of section 21 of the Extradition Act 11 of 1996. *Gawanas v Government of the Republic of Namibia*,⁹ as well, was contested on the basis of an action in delict to enforce the plaintiff's

1 Art 1(6) Constitution of Namibia 1990.

2 Art 1(1) Constitution of Namibia 1990.

3 *Namunjepo v Commanding Officer, Windhoek Prison* 2000 (6) BCLR 671 (NmS).

4 *S v Timotheus* 1995 NR 109; *Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 (HC).

5 *Ex Parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC); *S v Sipula* 1994 NR 41 (HC); *S v Vries* 1998 NR 244 (HC); *Namunjepo* (n 3 above).

6 *S v Amujekela* 1991 NR 303 (HC); *S v Heidenreich* 1995 NR 234 (HC); 1998 NR 229 (HC); *S v Uahanga* 1998 NR 160 (HC); *Van As v Prosecutor-General* 2000 NR 271 (HC); *Malama-Kean v Magistrate for District of Oshakati* NO 2001 NR 268 (HC); 2002 NR 413 (SC).

7 *Per Mahomed AJ, S v Acheson* 1991 NR 1 (HC) 10B-C. See also *S v Pineiro* 1991 NR 424 (HC); *S v Van der Berg* 1995 NR 23 (HC); *AG of Namibia v Minister of Justice* 2013 (3) NR 806 (SC).

8 2010 (1) NR 328 (SC).

9 2012 (2) NR 401 (SC).

rights to personal liberty and dignity, thus bringing to this discussion the delictual dimension to the thriving personal liberties jurisprudence in the Namibian jurisdiction. This investigation is, therefore, structured around these two broad but overlapping divides: the constitutional and the delictual perspectives of a personal liberties¹⁰ debate. The universal nature of the problem of the interference by organs of state with the rights to personal liberty and their protection by law compels the introduction of international and comparative dimensions to the discussion. Meanwhile, none of the two cases chosen for analysis involved the more familiar issues of arrest with¹¹ or without a warrant¹² under the Criminal Procedure Act 51 of 1977; rather, they concern issues arising from special legislative measures where public officials, not necessarily the police, are empowered to exercise powers of arrest or detention capable of impinging upon the liberty of the individual, such as arrest for the purposes of extradition in *Alexander*, and detention in a mental hospital of a mental patient as in *Gawanas*.

2 Constitutional guarantees

The Constitution stipulates, prescribes and protects the individual's rights to personal liberty and security of the person, while statute confers the power of law enforcement, crime prevention, suppression and investigation on the police force, or other relevant agents of the national executive. By their nature, the powers so conferred inherently impinge upon the very rights guaranteed. In the face of the delicate balance and apparent difficult situation, the Constitution tends to provide the way forward by indicating how a court should approach the matter of interpretation and the manner of reconciling or balancing the conflict, having regard to the public interest, public objective, public safety and public morality.¹³ Suffice it to state at this stage, first, that both the Constitution and statute are important

10 'Liberty', when used in its broad sense, tends to encompass what is commonly and generally referred to as 'civil and political rights'. But, when qualified with 'personal', it somewhat narrows its scope and involves concerns primarily physical liberty. In this context, it 'consists of in the power of locomotion without imprisonment or restraint unless by due course of law, except those restraints imposed to prevent commission of threatened crime or in punishment of crime committed, those in punishment of contempt of courts or legislative bodies or to render their jurisdiction effectual, and those necessary to enforce the duty citizens owe in defence of the state to protect community against acts of those who by reason of mental infirmity are incapable of self-control'. *Ex parte Hudgins* 86 W Va 526, 103 SE 327 329.

11 Secs 43 & 44 Criminal Procedure Act 51 of 1977.

12 Secs 40(1)(a) & (b) Criminal Procedure Act 51 of 1977: *De Jager v Government of the Republic of Namibia* 2006 (1) NR 198 (HC) (arrest on reasonable suspicion).

13 Take the Constitution of the Republic of Trinidad and Tobago 1976, which is worded somewhat differently from most of the typical Westminster-model constitutions of the 1960s (except sec 4 of the Lesotho Constitution 1993, which is similarly closely worded). Sec 4 of that Constitution provides: 'It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion

sources of individual protection in addition to the delict cause of action. Secondly, there is a considerable overlap between the constitutional guarantees of individual liberties and security of the person, on the one hand, and the common law cause of action, on the other, since the underlying constitutional infringement forms the basis for the wrongfulness and fault requirements for proving delictual liability in this era of constitutional-delict.¹⁴ In the absence of a constitutional or statutory bill of rights in a given jurisdiction, the litigants' recourse to legal remedies is ostensibly confined to the common law claim for wrongful arrest, false imprisonment and malicious prosecution, and the action will be brought under the law of tort under the English common law¹⁵ or delict in a Roman-Dutch legal system. However, where constitutional guarantees exist or a bill of rights statute operates, actions can be brought under the constitutional cause of action or the common law and relevant statutory instrument(s). Quite apart from bringing the action under the relevant constitutional or statutory instrument, the complainant can plead a breach of the entrenched or statutory right(s), even where the primary cause of action is the common law. Experience shows that litigants allege breaches of constitutional or statutory rights as the

or sex, the following fundamental human rights and freedoms, namely:- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law; (c) the right of the individual to respect for his private and family life.' Sec 5 then proceeds: '(1) Except as is otherwise expressly provided in this chapter and in s 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedom hereinbefore recognised and declared. (2) Without prejudice to subsection (1), but subject to this chapter and to s 54, Parliament may not ... (a) authorise or effect the arbitrary detention, imprisonment or exile of any person; (b) impose or authorise the imposition of cruel and unusual treatment or punishment; (8) deprive a person who has been arrested or detained (i) of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention; (ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him ...; (iii) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.'

14 See eg C Okpaluba 'State liability for acts and omissions of police and prison officers: Recent developments in Namibia' (2013) 46 *Comparative and International Law Journal of Southern Africa* 184 197.

15 The action in *Lumba v Secretary of State for the Home Department* [2011] 4 All ER 1 (SC) was filed purely on the tort of false imprisonment without reference to the Human Rights Act 1998 (UK). It was a case where the Secretary of State was empowered by the 1971 Immigration Act to detain foreign national prisoners after serving their sentence for the purposes of deportation. The majority of their Lordships held that the policy under which the applicants were held did not only lack transparency, but was unlawful; hence, they were unlawfully detained and their claims for false imprisonment succeeded. See also *Langley v Liverpool City Council* [2006] 2 All ER 202; *Roberts v CC of Cheshire Constabulary* [1999] 2 All ER 326; *Holgate-Mohammed v Duke* [1984] 1 All ER 1054; *Christie v Leachinsky* [1947] 1 All ER 567.

basis for launching the action at common law.¹⁶ In any case, where the bill of rights exists as an entrenched constitutional provision or is enacted in a statutory form, the individual's rights and freedoms are thereby incorporated. What remains of the common law in such a situation is the cause of action, since the substantive rights have been duly guaranteed or enacted.

Whereas the validity of an arrest, detention or search and seizure can successfully be challenged at common law,¹⁷ or on the ground that it contravenes the statutory authority upon which power rests, as in Australia,¹⁸ it is even stronger that the legality of the actions of the executive in the administration of criminal justice under a bill of rights regime must constantly be tested against the supreme law under which the source of both executive and legislative authorities emanates. It is this same supreme instrument that guarantees the aggrieved individual the civil or political right in the first place. The Constitution of Namibia, like most written constitutions, except the Australian,¹⁹ enshrines the right to freedom and security of the person, encapsulated in the right not to be deprived of personal liberty other than in accordance with procedures established by law.²⁰ In particular, the 1990 Constitution of Namibia provides that the right

16 See eg *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC); *Minister of Safety and Security v De Lima* 2005 (5) SA 575 (SCA); *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA). See also C Okpaluba 'The tension between constitutional and delictual damages in ventilating breaches of fundamental rights' (forthcoming).

17 *Money v Leach* [1746] 96 ER 320, *Wilkes v Wood* [1763] 98 ER 489, *Entick v Carrington* [1765] EWHC J98, 95 ER 807.

18 *New South Wales v Corbett* (2007) 81 ALJR 1368 (HCA). McHugh J spoke in *Al-Kateb v Godwin* (2004) 219 CLR 562 para 73 of the absence of a bill of rights in Australia. See also G Williams *The case for an Australian bill of rights* (2004).

19 The absence of a bill of rights in the 114 year-old Constitution of the Commonwealth of Australia does not appear to inhibit activist judges such as Kirby J in interpreting Australian statutes bearing in mind constitutional values such as the protection of personal liberties, even if it entails attributing the origin of the protection to the common law and international instruments. Eg, in *Al-Kateb v Godwin* (2004) 219 CLR 562 para 150 he held: 'The common law has a strong presumption in favour of liberty, and against indefinite detention. That presumption informs the way provisions of an Australian statute, such as ss 196 and 198 of the Act, are to be construed by an Australian court. It also informs this Court's approach to elucidating the meaning of the Constitution necessary to support the validity of such provisions.' Citing eg *Whittaker v The King* (1928) 41 CLR 230 248; *Trobridge v Hardy* (1955) 94 CLR 147 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 632; *Williams v The Queen* (1986) 161 CLR 278 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 532; *McGarry v The Queen* (2001) 207 CLR 121 paras 59-61. See *Lawrence v Texas* 539 US 558 562, 567 (2003) per Kennedy J. See the analysis of Michael Kirby in 'Protecting human rights in Australia without a charter' (2011) 37 *Commonwealth Law Bulletin* 255-280.

20 Art 7 Constitution of the Republic of Namibia; sec 12(1) Constitution of the Republic of South Africa, 1996. It was held in the South African case of *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W) 661H-I that a detained person had an absolute right not to be deprived of his liberty for one second longer than necessary by an official who could not justify the detention. This is because the

to life shall be respected and, following the prevailing international trends,²¹ it abolished the death sentence.²² In affirmation of a vital aspect of its Preamble, article 8 of the Constitution entrenches the inviolability of human dignity, which must be respected in any judicial or other proceedings before any organ of state.²³ Essentially, no person shall be subjected to 'torture or to cruel, inhuman or

importance of the right to personal liberty 'can never be overstated'; *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 36. That is why enactments purporting to interfere with this elementary right of the common law are always restrictively construed; *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) para 10; *R v Sachs* 1953 (1) SA 392 (A); *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 352; *Johnson v Minister of Home Affairs* 1997 (2) SA 432 (C) 434]-435A. A boost to the common law interpretative approach of an attempt by any enactment to restrict this right, as Malan J pointed out in *Arse* para 10, is that sec 39(2) of the Constitution requires courts, when interpreting a statute that is reasonably capable of two interpretations, to avoid an interpretation that would render the statute unconstitutional and to adopt the interpretation that would better promote the spirit, purport and objects of the Bill of Rights, even if neither interpretation would render the statute unconstitutional; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) v Smit* NO 2001 (1) SA 545 (CC) paras 22-26; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) par 107; *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) para 47. Accordingly, the Supreme Court of Appeal held in *Arse* para 10 that the safeguards and limitations on the deportation and detention of illegal foreigners in sec 34(1) of the Immigration Act 13 of 2002 justify its limitation of the right to freedom and the right not to be detained without trial (see also *Lawyers for Human Rights* para 43). It was further held that the detention of the appellant in that case was clearly in breach of the express provisions of sec 34(1)(d) of the Immigration Act and therefore unlawful.

- 21 See HJ Steiner *et al* *International human rights in context: Law, politics and morals* (2008) 18-41.
- 22 Art 6 Namibian 1990 Constitution. The Supreme Court held in *S v Tcoeb* 1996 (7) BCLR 996 (NmS) that a sentence of life imprisonment did not constitute a sentence of death and that the Namibian Constitution had distinguished between the protection of life in art 6 and liberty in art 7. However, life imprisonment could not be constitutionally sustainable if it meant effectively locking away a prisoner for the rest of his or her natural life as though the prisoner were a 'thing' instead of a person without any continuing duty to respect the prisoner's dignity, which would include a recognition of his or her right not to live in despair and helplessness without any hope of release, regardless of circumstances. In South Africa, the death penalty was abolished by dint of judicial activism in the interpretation of the Constitution by which the new Constitutional Court ushered in a progressive constitutional jurisprudence heralding the emergence of the era of constitutional democracy; *S v Makwanyane* 1995 (3) SA 391 (CC).
- 23 The Supreme Court of Namibia held in *Ex parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) that the imposition of any sentence by any judicial or quasi-judicial authority, or directing any corporal punishment upon any person, is unlawful and in conflict with art 8 of the Constitution of Namibia. The infliction of corporal punishment in government schools pursuant to the existing code formulated by the Ministry of Education, Culture and Sport or any other direction by the said Ministry or any other organ of government is likewise unconstitutional and unlawful and in conflict with the respect for human dignity in art 8. See also *S v Sipula* 1994 NR 41 (HC); *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 (2) SA 702 (SZ); *S v A Juvenile* 1990 (4) SA 151 (ZS); *Tyrer v UK* [1978] 2 EHRR 1.

degrading treatment or punishment'.²⁴

In further affirmation of the well-known common law principle that any interference with physical liberty is *prima facie* unlawful,²⁵ the 1990 Constitution does not only prohibit 'arbitrary arrest and detention',²⁶ but it goes further to provide, in article 11, fundamental safeguards for the arrested, detained and accused person. Incidentally, none of the articles in chapter 3 of the Constitution, dealing with fundamental rights and freedoms, stipulates in any detail as to how, why and when an arrest should be made. All that is left principally to the Criminal Procedure Act 51 of 1977. However, article 11 specifies the rights of a person upon arrest and, if detained, what his or her remedies are. For instance, in terms of article 11(3), an arrested and detained person must be brought before the nearest magistrate or other judicial officer within 48 hours of his or her arrest. Not only has this provision been held to be peremptory, but it has also been emphasised that its object is to ensure the prompt exhibition of the arrested person before a magistrate or other judicial officer 'so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights'.²⁷ Further, that²⁸

the 48 hour rule is ... one of the most important reassuring avenues for the practical realisation of the protection and promotion of the basic human

24 Art 8(2)(b) 1990 Constitution. See also secs 7(1), 10 & 12(1)(d) & (e) of the South African Constitution. The question before the Supreme Court of Namibia in *Namunjepo* (n 3 above) 683D-J was whether the Constitution of Namibia could sanction the use of irons and chains in regard to prisoners under any circumstances. In answering that question in the negative for, whatever the circumstances, the use of leg irons and chains on human beings was a humiliating experience which reduced the person subjected to it to the level of a 'hobbled animal whose mobility is limited so that it cannot stray'. It was held that the practice, for whatever reason, was an impermissible invasion of art 8(1) and contrary to art 8(2)(b) as it, at least, constitutes degrading treatment and is thus unconstitutional. Strydom CJ had earlier observed (680D): 'To imprison a person would in many respects invade his or her right and also the right to dignity but these inroads are the necessary result of the incarceration and are sanctioned by the Constitution, article 7. That does not mean that a prisoner can be regarded as a person without dignity.' So, when Manyarara J was faced with similar facts in *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (HC), where the plaintiff, an awaiting-trial prisoner, was placed in chains for 16 days, he held that he was bound by the Supreme Court judgment in *Namunjepo*, hence the issue for determination turned on the assessment of *quantum* of damages to be awarded the plaintiff.

25 *Per* Langa CJ, *Zealand v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC) 468 para 25. See also *Bentley & Another v McPherson* 1999 (3) SA 854 (E) 857; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 (4) SA 168 (T) 172, *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) 520; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 153; *Masawi v Chabata* 1991 (4) SA 764 (ZH) 771-772; *During NO v Boesak & Another* 1990 (3) SA 661 (A) 673-674.

26 Art 11(1) 1990 Constitution.

27 *Per* Parker AJ, *Sheehama v Minister of Safety and Security* 2011 (1) NR 294 (HC) para 5.

28 As above.

right to freedom of movement guaranteed to individuals by the Namibian Constitution.

Shivute CJ endorsed the foregoing views of Parker AJ and held in *Minister of Safety and Security v Kabotana*²⁹ that article 11(3) is an aspect of the fundamental right to liberty guaranteed by article 7 and that the 48-hour requirement³⁰

is undoubtedly an important constitutional right accorded to arrested persons which, in the light of our pre-independence history of detention without trial and other related injustices, should be guarded jealously.

This article finds its place in the Constitution 'solely for the benefit of arrested persons and not for the benefit of the state'.³¹ The Chief Justice emphasised that³²

[t]he 48-hour requirement must act as a flashing red light in the minds of the officers processing suspects for onward transmission to court. This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested unless it is not reasonably practicable to do so.

The state was therefore held liable for its failure to have brought the respondent to court within 48 hours, whereas it was reasonably possible to do so in the circumstances of the case. As much as the plaintiff was awarded damages for wrongful arrest and detention beyond the 48-hour period in *Iyambo v Minister of Safety and Security*,³³ no such award was made for further detention which was ordered by the magistrate after the plaintiff had been brought to court.³⁴

In addition to the foregoing rights, the Constitution of Namibia guarantees the individual the right to equality before the law and freedom from discrimination,³⁵ the right to privacy,³⁶ and the prohibition of slavery, servitude and forced labour.³⁷ While the different guarantees highlighted above are of equal relevance in a constitutional state, it is important to bear in mind that the scenario postulated for our present purposes is the protection against arbitrary

29 2014 (2) NR 305 (SC).

30 *Kabotana* (n 29 above) para 16.

31 *Per Shivute CJ in Kabotana* (n 29 above) para 18.

32 *Kabotana* (n 29 above) para 31.

33 2013 (2) NR 562 (HC).

34 *Iyambo* (n 33 above) paras 4-7.

35 Art 10 1990 Constitution; sec 9 South African Constitution. See *Council of the Municipality of Windhoek v Petersen* 1998 NR 8 (HC); *Muller v President, Republic of Namibia* 1999 NR 190 (SC); *Nanditume v Minister of Defence* 2000 NR 103 (LC); *Frans v Paschke* 2007 (2) NR 520 (HC).

36 Art 13 1990 Constitution; sec 14 South African Constitution. See eg *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC); *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC); *NM & Others v Smith & Others (Freedom of Expression Institute as amicus curiae)* 2007 (5) SA 250 (CC).

37 Art 9 1990 Constitution; sec 13 South African Constitution.

arrest and detention and, to an extent, the inhuman and degrading treatment flowing therefrom and impinging upon the individual's right to human dignity. The next section attempts to provide a statement of the general principles of the law of arbitrary arrest and detention in some common law countries, while in section 3 I deal specifically with the application of these principles in the interpretation of the constitutional and statutory provisions relating to the subject in Namibian law.

2.1 Protection against arbitrary arrest and detention

The term 'arbitrary',³⁸ qualifying arrest or detention, appears in most human rights instruments: international,³⁹ regional⁴⁰ and domestic

38 According to *Black's law dictionary* (1990) 104, 'arbitrary' means acting 'in an unreasonable manner, as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; *Cornell v Swisher County* Tex.Civ.App 78 SW2d 1072 1074; without fair, solid and substantial cause; that is, without cause based upon the law, *US v Lotempio*, DC NY, 58 F2d 358, 359; not governed by any fixed rules or standard'. It is a wilful and unreasoned action without consideration and regard for facts and circumstances presented; *In re West Laramie*, Wyo, 457 P2d 498, 502. 'Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be performed without adequate determination of principle and one not founded in nature of things.' See *Huey v Davis* Tex.Civ.App 556 SW2d 860 865.

39 Art 9(1) International Covenant on Civil and Political Rights (ICCPR). General Comment 8 (30 June 1982) concerning art 9(1) of ICCPR clarifies that it 'is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc'. In the same para 1, the Comment describes the right of access in art 9(4) to relate to 'the right to control by a court of the legality of the detention, [which] applies to all persons deprived of their liberty by arrest and or detention'. The UN Human Rights Committee, commenting on art 9(1) in *Van Alphen v The Netherlands* Communication 305/1988 (UN Doc CCPR/C/39/D/305/1988 (23 July 1990) para 5.8, observed: 'The drafting history of article 9, para 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remanding in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The state party has not shown that these factors were present in the instant case ... The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.'

40 Article 5(1), European Convention on Human Rights (European Convention). The European Court of Human Rights in *Engel v The Netherlands (No 1)* [1976] ECHR 3 held that the right to personal liberty in art 5(1) contemplates 'individual liberty in its classic sense'; it does not concern 'mere restrictions upon liberty of movement'. In other words, it contemplates the physical liberty of the person. 'Its aim', held the European Court in *Guzzardi v Italy* [1980] ECHR 5 paras 92-93 and 95, 'is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion ... the paragraph is not concerned with mere restrictions on liberty of movement ... In order to determine whether someone has been "deprived of his liberty" within the meaning of article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.' See the

alike.⁴¹ In handing down judgment on the interpretation and application of section 22 of the New Zealand Bill of Rights Act 1990 in *Neilsen v Attorney-General*,⁴² Richardson J considered that the question whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. To that extent, 'an arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures'.⁴³

In effect, the touchstones of arbitrariness are 'inappropriateness, injustice and lack of predictability'.⁴⁴ Or, as Hammond J put it in an earlier case, 'lawful detentions may also be arbitrary if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.⁴⁵ Thus, detention under Part 4A of the New Zealand Immigration Act 1987, where national security is involved, 'would be both arbitrary and unlawful ... if the purpose of detention could not be fulfilled and the detention was therefore otherwise indefinite or permanent'.⁴⁶ This conforms to the approach adopted by Gummow J

following English cases: *Secretary of State for the Home Department v Mental Health Review Tribunal and 'PH'* [2002] EWCA Civ 1868; *R(H) v Secretary of State for the Home Department* [2004] 2 AC 253 (HL); *Johnson v UK* [1997] ECHR 88; *R v (Gillian) v Commissioner of Police for the Metropolis* [2006] 2 AC 307 (HL); *Secretary of State for the Home Department v JJ* [2008] 1AC 385 (HL); *Austin v Commissioner of Police for the Metropolis* [2009] 2 WLR 372 (HL).

41 See art 11(1) of the 1990 Constitution of Namibia; sec 9 Canadian Charter of Rights and Freedoms 1982; *McCorkell v Director of Riverview Hospital Review Panel* (1993) 104 DLR (4th) 391 paras 38-40; *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 at 643. See also sec 21(2) of the Charter of Human Rights and Responsibilities Act 2006 (Victoria); *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009); sec 22 New Zealand Bill of Rights Act 1990.

42 [2001] 3 NZLR 433 (NZCA) (*Neilsen*).

43 *Neilsen* (n 42 above) para 34.

44 Per McGrath J in *Zaoui v Attorney-General & Others* [2004] NZCA 228 para 85. See also *Van Alphen v The Netherlands* [1990-1992] 3 NZBOR R326 para 5.8; *Fok Lai Ying v Governor in Council* [1997] 3 LRC 101.

45 *Manga v Attorney-General* [2002] NZLR 65 para 44.

46 Per McGrath J in *Zaoui v Attorney-General & Others* [2004] NZCA 228 para 88. The majority held in this case that there was no basis for challenging the validity of the arrest of the immigrant on national security grounds. In any event, whether detention will be permitted is for the executive and not for the courts to decide. Thus, the detention in prison of the immigrant on grounds of national security pending deportation was valid. Hammond J, dissenting, held (paras 201-202 and 221) that there was a systemic failure in the entire process which caused the delay in this case. The prolonged periods of detention would only be justified by the need to conduct a careful investigation of what are usually complex and competing claims. *Chahal & Others v United Kingdom* (1996) 1 BHRC 405. It was never the intention of parliament that the Part 4A process would take as long as it did in this case. This was an appropriate case to grant the immigrant bail. The judge was therefore prepared to issue a declaration that the detention in prison was arbitrary and in contravention of his rights under sec 22 of NZBORA 1990.

of the High Court of Australia in *Al-Kateb v Godwin*,⁴⁷ to the following effect:

If the stage has been reached that the appellant cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of s 198. In such a case, s 198 no longer retains a present purpose of facilitating removal from Australia which is reasonably in prospect and to that extent the operation of s 198 is spent. If that be the situation respecting s 198, then the temporal imperative imposed by the word 'until' in s 196(1) loses a necessary assumption for its continued operation. That assumption is that s 198 still operates to provide for removal *under* that section.

In any consideration of the question of the constitutionality of a breach of these rights, the first thing to ascertain is whether the complainant has been deprived of his or her liberty. The second stage of the enquiry is to determine whether the deprivation was arbitrary or without just cause. In this regard, the court recognises that the right of the individual not to be deprived of his or her liberty arbitrarily or without just cause has both substantive and procedural protective angles.⁴⁸

2.2 Detention beyond the constitutional limit

The appellant in *Zealand v Minister of Justice and Constitutional Development and Another*⁴⁹ was treated as a sentenced prisoner when he was in fact an awaiting-trial prisoner. Yet, he was remanded in maximum security when he had no conviction of any serious criminal wrongdoing. The only possible legal basis on which to justify any deprivation of the applicant's freedom at all was the fact that he was awaiting trial in the first case, having been acquitted in the second. That, however, was insufficient to justify treating the appellant as if he were convicted and sentenced. This additional encroachment on the appellant's liberty was undoubtedly greater than was necessary to secure his attendance at trial. Moreover, other prisoners of his class – those awaiting trial in detention at the same prison – were not

47 (2004) 219 CLR 562 para 122. The High Court was construing secs 196 and 198 of the Migration Act 1958 (Cth). The majority led by Gleeson CJ held (para 74) that, under the aliens power, parliament was entitled to protect the nation against unwanted entrants by detaining them in custody. As long as the detention was for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by parliament was not examinable in any domestic court. It was not for the courts, exercising federal jurisdiction, to determine whether the course taken by parliament was unjust or contrary to basic human rights. 'The function of the courts in this context is simply to determine whether the law of the parliament is within the powers conferred on it by the Constitution. The doctrine of separation of powers does more than prohibit the parliament and the executive from exercising the judicial power of the Commonwealth. It prohibits the ch III courts from amending the Constitution under the guise of interpretation.'

48 *S v Coetzee & Others* 1997 (3) SA 527 (CC) para 158 per O'Regan J.

49 2008 (4) SA 458 (CC).

subjected to the same treatment. This harsher, differential treatment may therefore properly be described as a form of 'punishment'.⁵⁰

The Constitutional Court, affirming the Supreme Court of Appeal, held that the appellant's detention as a sentenced offender in maximum security, after his successful appeal until his further charge was withdrawn, was unlawful. It followed that the state thereby failed to comply with the substantive component of the section 12(1)(a) right by depriving the appellant of his freedom 'without just cause'.⁵¹ Furthermore, the fact that the deprivation was in no way rationally connected to an objectively-determinable purpose⁵² must mean that it was also 'arbitrary' within the meaning of that provision.⁵³ Given this jurisprudence and the facts before the Constitutional Court, Langa CJ held that in detaining the appellant as a sentenced prisoner in maximum security, the state failed to comply with the substantive component of the section 12(1)(a) right. Accordingly, the breach of section 12(1)(a) was held to be sufficient in the circumstances of this case to render the applicant's detention unlawful for the purposes of a delictual claim for damages.⁵⁴

A typical example of the police trampling upon the liberty of a citizen is illustrated by the case of *Nyamhoka and Others v Officer Commanding, Zimbabwe Republic Police and Others*.⁵⁵ The four applicants were arrested and detained in excess of the statutory 48-hour limit. Soon after the arrest, the first applicant was subjected to torture, beatings and other abuses. He was interrogated for long hours without any rest or break. He was induced to sign a prepared affidavit implicating the fourth applicant on the pretext that he would be released on bail. The applicants were subsequently brought to court and charged with offences under the Public Order Act chapter 11:17.⁵⁶ The applicants sought urgent relief to have the detention declared wrongful and unlawful. Under section 13(1) of the Constitution of Zimbabwe of 1980, no person shall be deprived of his or her liberty except as may be authorised by the law. Subsection (2) then lists nine instances where the law would authorise deprivations of liberty and, in a pattern consistent with constitutional guarantees of

50 *Whittaker v Roos and Bateman, Morant v Roos and Bateman* 1912 AD 92 121 *per* Innes JA.

51 *Zealand v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC) para 34. In terms of this subsection, '[e]veryone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause'. The courts in South Africa have since held that the right not to be detained without trial guaranteed in sec 12(1)(b) of the South African Constitution belongs to both citizens and foreigners; *Lawyers for Human Rights* para 27; *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 26; *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

52 See *De Lange v Smuts NO & Others* 1998 (7) BCLR 779 (CC) para 23.

53 *Per* Langa CJ, *Zealand* (n 52 above) para 34.

54 *Zealand* (n 52 above) paras 52 & 53.

55 2007 (2) SACR 16 (ZHC) (*Nyamhoka*).

56 Acts 1/2002 & 6/2005.

fair process upon arrest, detention and trial,⁵⁷ section 13(3) provides that any person arrested or detained shall be informed as soon as reasonably practicable, in a language he or she understands, of the reasons for his or her arrest or detention. Further, the arrested or detained person must be permitted access to a legal representative of his or her choice and to hold communication with such a legal representative.

Hungwe J held that it was a violation of the applicants' constitutional right to personal liberty, first, by holding the applicants for over 48 hours without bringing them before a court of law, and subjecting them to varying periods of detention before they were brought to court, rendering their detentions illegal. Second, it was a serious violation of the applicants' constitutional rights to deny them access to counsel of their choice. This is a well-recognised constitutional right in Zimbabwe as established in earlier constitutional decisions.⁵⁸ The trial judge granted the orders sought and held that the behaviour of the police could bring the administration of justice into disrepute and would simply not be condoned. It deserved 'the highest possible censure' and 'cannot be justified in a democratic society'.⁵⁹

In addition to the cases of *Sheehama*, *Kabotana* and *Iyambo* already mentioned,⁶⁰ it is also important to consider the Supreme Court of Namibia's judgment in *Ayoub v Minister of Justice*,⁶¹ where the question was whether the exercise of the minister's discretion to issue an authority to proceed pursuant to section 10(1) of the Extradition Act 11 of 1996 was subject to judicial review. The appellant had challenged his arrest and detention pending deportation on the basis that his detention was – and any extradition that might follow would be – contrary to the provisions of sections 5(1)(e) and (2)(a) of the Extradition Act, on contended grounds that the offence for which extradition was being sought had become prescribed through the lapse of time and, because the appellant's conviction had been obtained in his absence, his extradition was precluded by the Act. If the answer to the question posed were in the affirmative, the further issue was whether the Minister was required to have regard to the restrictions for extradition in section 5 of the Act and, if so, whether the restriction in section 5(2)(a) precluded the Minister from authorising the magistrate to proceed with the extradition enquiry in terms of section 12 of the Act.

The Supreme Court held that, if the respondents were correct in their contention that the restrictions on extradition in part II of the

57 Sec 35 South African Constitution.

58 See eg *S v Wood* 1993 (2) ZLR 258 (S); *S v Sibanda* 1989 (2) ZLR 329 (S); *Minister of Home Affairs & Others v Dabengwa & Another* 1982 (1) ZLR 236 (S).

59 *Nyamhoka* (n 45 above) 22g-h.

60 See nn 28-35 above.

61 2013 (2) NR 301 (SC).

Act, which should have informed the Minister's decision, could only be enquired into once the hearing before the Magistrate had started or, worse, only be decided 'after hearing the evidence tendered at such enquiry', it would mean that the person whose extradition was being sought would have to remain in custody until then – unless he or she was released earlier on bail – even in the circumstances where the detention was in violation of the person's constitutional right to personal liberty. Such an interpretation of the Act was not supported by the language used and would be against the letter and spirit of the provisions of article 7 of the Namibian Constitution which, as the Supreme Court held in *Alexander*,⁶² contained a substantive right to personal liberty. Accordingly, the appellant was entitled to challenge the decision of the Minister at this stage and did not have to wait for the enquiry proceedings to commence before he or she could raise the issues that adversely affect his or her liberty. Further, the issuing and execution of a warrant of arrest made severe inroads on the liberty of an individual and was only constitutionally permissible if it was both substantively and procedurally in accordance with the law. If an authority to proceed which, in turn, had triggered the endorsement of the external warrant and ultimately the arrest of the person whose extradition was being sought, was not considered and issued in accordance with the law, it violated the person's constitutional right to personal liberty and he or she should be entitled to challenge the validity of the Minister's decision and conduct in a competent court.⁶³

3 Declarator in *Alexander*

It is important to point out that 'liberty ends where the power of arrest begins'.⁶⁴ Thus, when Parker J of the High Court of Namibia commented on the necessary intendments of article 7 of the Constitution of the Republic of Namibia 1990, the judge was making a statement of universal application. Parker J was correct when he held that article 7 did not pronounce that a person could not be deprived of his liberty. Rather, it provides that a person can be deprived of his or her liberty in terms of the Constitution, that is, insofar as the deprivation is done 'according to procedures established by law'.⁶⁵ The fact that the right to liberty 'is one of the most important fundamental rights of an individual'⁶⁶ does not detract from the view that this human right is not absolute; it has never been

62 Discussed in para 3.1 below.

63 *Ayoub* (n 62 above) para 40.

64 Per Brennan J in *Webster v McIntosh* (1980) 32 ALR 603 (FCAFC) 607.

65 *Alexander v Minister of Justice & Others* 2008 (2) NR 712 (HC) paras 62 & 63.

66 *Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 223J.

expressed in absolute terms; it is a derogable right.⁶⁷ By parity of that reasoning, the trial judge held in *Alexander v Minister of Justice and Others*⁶⁸ that the applicant's right to freedom from arbitrary arrest or detention was also derogable; it was not absolute. Again, like article 7,⁶⁹ article 11(1)⁷⁰ of the Namibian Constitution does not say that no person shall be subjected to arrest or detention, but that, like article 9(1) of the International Covenant on Civil and Political Rights

67 In some constitutions, the right to personal liberty may be derogated from in given circumstances on the grounds of public order, public safety or public health. See eg art 12 of ICCPR; art 5(1)(e) of the European Convention on Human Rights 1950. In the South African Constitution, sec 36, the limitation clause, does not specifically mention public order, health or safety, but it does exempt limitations that are in terms of a law of general application to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The question which Griesel and Yekiso JJ was faced with in *Minister of Health, Western Cape v Goliath & Others* 2009 (2) SA 248 (CPD) paras 19 & 21 was whether the confinement at a hospital of drug-resistant tuberculosis patients pursuant to sec 7 of the National Health Act 61 of 2003 was inconsistent with their right to freedom in sec 12 of the South African Constitution. The court had no doubt that compulsory isolation in a hospital was a deprivation of freedom, but that it was not without just cause nor was it arbitrary. Isolation of patients with infectious diseases was universally recognised in open and democratic societies as justifiable to protect and preserve the health of citizens. Accordingly, sec 7 of the Act was wide enough to encompass the involuntary isolation of patients with infectious diseases. See, to the same effect, the Ontario Health Protection and Promotion Act 1990 on the basis of which *Toronto (City Medical Office of Health) v Deakin* [2002] OJ 2777 (Ont Ct Just) was decided.

68 *Alexander* (n 65 above).

69 In terms of this article, it is provided that '[n]o persons shall be deprived of personal liberty except according to procedures established by law'. See to the same effect art 21 of the Constitution of India as interpreted and applied in *Maneka Gandhi v India* AIR 1978 SC 597 674 (overruling the earlier case of *AK Gopalan v Madras* 1950 SCR 88), to the effect that '[t]he passage of reasonableness which, legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades article 14 (the equality clause) like a brooding omnipresence and the procedure contemplated by article 21 must answer the best of reasonableness in order to be in conformity with article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of article 21 would not be satisfied.' See further *Jolly George Verghese & Another v Bank of Cochin* [1980] INSC 19, 1980 SCR (2) 913. See also art 40.4.1 of the Irish Constitution; *King v Attorney-General* (1981) IR 233; *McCann v Judges of Monahan District Court & Others* [2009] EHC 276.

70 Art 11(1) of the Constitution of Namibia 1990 provides: '(1) No persons shall be subject to arbitrary arrest or detention. (2) No persons who are arrested shall be detained in custody without being informed promptly in language they understand of the grounds of such arrest.' Parker J explained these provisions in *Lielezo v Minister of Home Affairs & Another* [2010] NAHC 1 para 10: 'According to article 11 of the Namibian Constitution arrest is unlawful if it is arbitrary (sub-article (1)); and detention is unlawful if the arrestee who is detained in custody is not informed promptly in a language the arrestee understands the grounds for such arrest (sub-article (2)). The requirements in sub-article (1) and (2) of article 11 converge on one single onus (as Mr Coleman submitted) that the arrester must discharge; that is to say, the arrester must show that he or she had a good reason to arrest and detain the arrestee and he or she promptly informed the arrestee in a language the arrestee understood of the grounds for the arrest.'

(ICCPR)⁷¹ and article 6 of the African Charter on Human and Peoples' Rights (African Charter),⁷² it outlaws 'arbitrary'⁷³ arrest or detention 'per se and simpliciter'. The correct statement of the law emanating from this case and other judgments from Commonwealth jurisdictions is that to arrest or detain an individual arbitrarily means that the arrest or detention has been carried out without lawful excuse, that is, a derogatory authority based on statutory mandate.⁷⁴

At the other end of the spectrum, an arrest or detention can be lawful within the meaning of the derogation clause under the Constitution, such as that of Namibia and the aforementioned international instruments, if the arrest or detention is carried out with 'due process of law', which simply means within the framework of a law made by the due process of making law in a polity.⁷⁵ Simply put, a detention is arbitrary if it is not authorised by law.⁷⁶ Parker J's judgment in *Alexander* is sufficiently explicit:⁷⁷

71 Art 9(1) of ICCPR provides that '[e]veryone has the right to liberty of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' It was held in *Van Alphen v The Netherlands*, Human Rights Committee Communication 305/1988, 23 July 1990 para 5.8, where the Committee found that the facts as alleged disclosed a violation of art 9 of the Covenant and went further to hold that the drafting history of art 9 para 1 confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remanding in custody must be necessary in all the circumstances, eg to prevent flight, interference with evidence or the recurrence of crime. The state party has not shown that these factors were present in the instant case. See also *Mukong v Cameroon* Human Rights Committee Communication 458/1991, 21 July 1994 para 9.8; *Kracke v Mental Health Review Board & Others (General)* [2009] VCAT 646 paras 621-666, where the Victorian Civil and Administrative Tribunal was dealing with equivalent provisions in the Charter of Human Rights and Responsibilities Act 2006 of the State of Victoria.

72 Art 6 of the African Charter provides: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

73 'Arbitrary', as Tindall J once described it, means 'capricious or proceeding merely from the will and not based on reason or principle'. *Beckengham v Bopksbury Licensing Board* 1931 TPD 280 282. Again, as Muller AJ said in *Djama v Government of Namibia & Others* 1993 (1) SA 387 (NmH) 394H: 'It will be arbitrary to detain a person if such detention is not authorised by law.' Thus, finding no arbitrariness in the arrest of the plaintiff by the agents of the state in *Lielezo v Minister of Home Affairs & Another* [2010] NAHC 1 para 9, Parker J held that they had a good reason for the arrest of the plaintiff. Furthermore, the arresting officer informed the plaintiff promptly in the language he understands the grounds for the arrest within the meaning of arts 11(1) and (2) of the Constitution of Namibia 1990.

74 L Baxter *Administrative law* (1984) 521-522.

75 W Wade & C Forsyth *Administrative Law* (2014) 22.

76 Per Muller AJ *Djama v Government of the Republic of Namibia & Others* 1993 (1) SA 387 (NmH).

77 *Alexander* (n 65 above) para 69.

In terms of Namibia's constitutional jurisprudence as regards article 7 of the Constitution, an individual may be deprived of his or her right to liberty, including his or her freedom of movement, which is relevant in the present matter, but it must be done according to procedures established by law, eg the Criminal Procedure Act 1977,⁷⁸ the Extradition Act 1996,⁷⁹ and the Immigration Control Act 1993.⁸⁰ Such a law, for example, the Criminal Procedure Act or the Immigration Control Act, decides on what grounds and in what manner the deprivation under the particular Act may take place. On that score, I accept Mr Chaskalson's submission that articles 7 and 11(1) rights have both substantive and procedural elements in their contents.⁸¹

The principles outlined in the foregoing trial judgment were not interfered with on appeal to the Supreme Court of Namibia in *Alexander v Minister of Justice and Others*,⁸² except that the latter judgment dealt with the question whether the constitutional right to liberty of a person arrested and detained under section 21 of the Extradition Act 1996⁸³ was threatened by the lack of a right to apply for bail, which was an issue which the trial judge did not decide because it was not ripe for adjudication. The Supreme Court, therefore, had to decide whether article 7 of the Constitution of Namibia provided substantive protection to the right of liberty of an individual, and whether the provisions of section 21 of the Extradition Act infringed or abridged that right. Strydom AJA entertained no doubt that⁸⁴

the right to liberty is one of the cornerstones on which a democratic society is built. Without such right there is no protection for the individual against arbitrary arrest and detention.⁸⁵ The importance of the right to liberty was acknowledged in decisions in Namibia and also in decisions prior to independence.⁸⁶

The Supreme Court⁸⁷ took cognisance of the fact that the right to liberty was at stake in extradition matters such as in the present case. The reason is that, once a request for extradition made by one state to another is acted upon, the individual involved is arrested and, if not granted bail, is kept in detention until he or she is surrendered to the requesting state. If bail is granted at an earlier stage, arrest and

78 Act 51 of 1977.

79 Act 11 of 1996.

80 Act 7 of 1993.

81 *Per Langa CJ in Zealand* (n 52 above) para 33; *S v Coetzee & Others* 1997 (3) SA 527 (CC) para 158 *per O'Regan J*; *De Lange v Smuts NO & Others* 1998 (3) SA 787 (CC) para 18 *per Ackermann J*.

82 *Alexander* (n 8 above).

83 Act 11 of 1996.

84 *Maritz JA and Damaseb AJA concurring*.

85 *S v Acheson* 1991 NR 1 (HC) 10A-C; *Djama v Government of the Republic of Namibia* 1992 NR 37 (HC) 44F-J; *Julius & Another v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC).

86 *Alexander* (n 8 above) para 118. See eg *Katofa v Administrator-General for SWA & Others* 1985 (4) SA 211 (SWA) 220I-221D.

87 *Alexander* (n 8 above) para 117. See also *per Lord Hope In re Hilali* [2008] UKHL 3 para 30.

detention will follow once a committal is made. In practical terms, such detention was of an indeterminate period and could continue for years.⁸⁸

It was held that, where an act of parliament encroaches upon a fundamental right, the question whether such encroachment was at all permissible must be answered as to whether such limitation was authorised by the particular article and on article 22 of the Constitution. Where the article does not permit any limitation, it is said that the protection is absolute. Unlike the protection for human dignity in article 8, which the Supreme Court has held imposed an obligation on the state which was 'absolute and unqualified',⁸⁹ article 7 is, as Parker J rightly held, not absolute. This is because it authorises the deprivation of liberty 'according to procedures established by law'. However, where such limitation is authorized, it should not go further than what is necessary to achieve the object for which it was enacted. This conclusion can easily be garnered from the wording of article 22, which prohibits a limitation which negates the essential content of the right.⁹⁰

Strydom AJA further held that the test whether such limitation is permissible in terms of the Constitution is whether it constitutes a disproportionate interference, in this instance, with the right to liberty, as guaranteed by article 7.⁹¹ Although its application as to what must be considered was not always similarly worded, the effect of what is to be considered is clear. In *Heaney v Ireland*,⁹² an Irish court referred to and approved the test as applied in *Canada*⁹³ and the European Court of Human Rights,⁹⁴ and held:

The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test.

In order to pass the proportionality test, the provisions must:

- be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- impair the right as little as possible; and
- be such that their effects on rights are proportional to the objective.

88 See eg *S v Koch* 2006 (2) NR 513 (SC).

89 Eg in *Ex Parte Attorney-General: In re Corporal Punishment* 1991 (3) SA 76 (NmS), 1991 NR 178 (SC) 1871-188B.

90 *Alexander* (n 8 above) para 121.

91 *Alexander* (n 8 above) para 120. See also *S v Vries* 1998 NR 316 (HC); *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* 2009 (2) NR 596 (SC).

92 [1994] 3 IR 593 607 per Costello J. See also *McCann v The Judge of Managhan District Court* [2009] IEHC 276.

93 See eg *Re BC Motor Vehicle Act* [1985] 2 SCR 486; *R v Hess* [1990] 2 SCR 906; *R v Brown* [2002] 2 SCR 185; *Levis v Tetrault* [2006] 1 SCR 420.

94 *Alexander* (n 8 above) para 121. See eg *Winterwerp v The Netherlands* [1979] 2 EHRR 387; *Bozano v France* (1986) 9 297; *Conka v Belgium* (2002) 34 EHRR 54.

Again, speaking of the proportionality test under the UK Human Rights Act 1998, Lord Hope stated in *AS (Somalia) (FC) and Another v Secretary of State for the Home Department*⁹⁵ that three principles must be borne in mind:

- whether the objective which is sought to be achieved is sufficiently important to justify limiting the fundamental right;
- whether the means chosen to limit that right are rational, fair and not arbitrary; and
- whether the means used impair the right as minimally as is reasonably possible.

In this regard, held Strydom AJA, the onus rests on the person complaining to prove that his or her constitutional freedom has been breached or threatened with breach. Once this onus is discharged, it is for the party relying on a permissible limitation to prove that the limitation falls within the scope of what is permitted in terms of the Constitution.⁹⁷ It is clear that the right of a person to be extradited to apply for bail extends to the time when he or she is surrendered to the requesting state. In terms of the Namibian Extradition Act, the person whose extradition is requested is entitled to apply for bail at all stages of the proceedings up and until a committal order is made. It follows also as a matter of logic that the deprivation of that right impacts on the right to liberty of the person committed who, as far as section 21 goes, is now deprived of liberty until he or she is surrendered to the requesting state. The appellant in this case has established that section 21 of the Extradition Act constitutes a breach of his constitutional right to liberty and that he is an aggrieved person within the contemplation of article 25 of the Constitution.⁹⁸

Where the Constitution allows a limitation of a constitutional right, as is the case in this instance, such limitation must be proportional. The state's duty to surrender a person to a requesting state, after his or her committal, is sufficiently important for the state to take measures which will enable it to fulfil that duty. This duty operates on the international plain and is an undertaking to surrender a requested

95 *Alexander* (n 8 above) paras 120-121.

96 [2009] UKHL 32 paras 16-18. It was also held in this context by Lord Hope that there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with the fundamental right is proportionate. These matters were identified in the Privy Council case of *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He offered the above-mentioned three-stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] LRC 64, where the Chief Justice drew on the jurisprudence from South Africa and Canada. See further *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 547B per Lord Steyn. In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 para 26, Lord Bingham summed the matter up succinctly when he said that 'the limitational interference must be directed to a legitimate purpose and must be proportionate in scope and effect'.

97 *Alexander* (n 8 above) para 122. See also *African Personnel Services* (n 92 above) para 65.

98 *Alexander* (n 8 above) para 123.

person to the requesting state once a committal has been achieved. One such measure to ensure compliance with the government's duty is, in appropriate instances, to deprive the person of his or her liberty. Therefore, it also follows that such a measure would serve a legitimate objective which is rationally connected to the purpose of the limitation.⁹⁹

However, in order to pass the proportionality test, the limitation of the constitutional right must also be fair and not arbitrary and the means used must impair the right as minimally as is reasonably possible. It is in this regard that the absolute prohibition on the application and granting of bail after committal of a person, provided for in section 21, falls short and cannot be said to be constitutional. The provision is unfair and arbitrary because it does not distinguish between instances where there is little or no fear that the person to be extradited may flee and so will be unavailable for the state to comply with its duty to surrender him or her, and instances where there is a legitimate fear that this may happen and where the only way to secure his or her presence would be to deprive him or her of the right to personal liberty. The denial of a right to apply for bail would be particularly harsh on Namibian citizens. This denial of the right to apply for bail, and to be granted bail in appropriate circumstances, must further be seen against the fact that detention after committal may be for an indefinite period and may, in certain circumstances, continue for years rather than weeks or months. This delay may be caused by administrative problems and is inevitable where the person to be extradited avails himself or herself of the right to appeal to the High Court and further to the Supreme Court. Section 3(1) of the Extradition Act prescribes that an extraditable offence is one which constitutes, under the laws of the requesting country, an offence which is punishable with imprisonment for a period of 12 months or more. It is not far-fetched to see that an unconvicted person may, as a result of the provisions of section 21, be held in prison for periods far longer than the actual imprisonment he or she may receive if convicted in the requesting country.¹⁰⁰ In the light of these reasons, the Supreme Court held that section 21 of the Extradition Act was unconstitutional and must be struck down.

An analogy can be taken of the case of *Kracke v Mental Health Review Board*¹⁰¹ where, although the facts were different, the court had to grapple with the proportionality analysis. The question was whether the limitations on the liberty of the applicant by the Mental Health Act 1986 of the State of Victoria were 'under law' in terms of the limitation provision in section 7(2) of the Victoria Charter. Justice Kevin Bell, the President of the Appeal Tribunal, undertook an exhaustive proportionality analysis involving the nature of the rights;

99 *Alexander* para 124.

100 *Alexander* para 125.

101 [2009] VCAT 646 (23 April 2009) paras 748-784.

the importance and purpose of the right; the nature and extent of the limitation; the relationship between the limitation and its purpose; the less-restrictive means reasonably available; and the overall proportionality assessment. He held that the limitations on the applicant's human rights imposed by the operation of the provisions of the Mental Health Act for making, maintaining and reviewing involuntary and community treatment orders and made under law, were reasonably and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Therefore, the provisions satisfy the general limitations of section 7(2) of the Charter. Unreviewed orders were not incompatible with human rights because the system contains a range of safeguards and checks and balances of which reviews, although of considerable importance, were only one part. Thus, the proportionality of the limitations in treatment orders did not depend on board review alone.

4 Some European case law on detention of mentally-ill patients

This brief discussion of some European case law is intended to introduce the deliberations upon the Namibian case involving the negligence of the hospital authorities in detaining a mental patient literally arbitrarily. It has been observed that in both the United Nations (UN) Covenant and the European Convention, the confinement of a person of 'unsound mind' is permissible insofar as it is in accordance with procedure prescribed by law. Thus, in *Ashingdane v United Kingdom*,¹⁰² the European Court stated three minimum standards for determining whether detention was warranted in terms of article 5(1)(e) of the European Convention, namely:

- Except in emergency cases, a true mental disorder must be established before a competent authority on the basis of objective medical evidence.
- The mental disorder must be of a kind or degree warranting compulsory confinement.
- The validity or continued confinement depends upon the persistence of such a disorder.

The Court had no reason to doubt the objectivity and reliability of the unanimous¹⁰³ opinions of the medical authorities in this case.¹⁰⁴ The argument that, by keeping the applicant at different institutions instead of one that was liberal, not strict, the authorities were making arbitrary choices, that he was not lawfully detained, the Court answered, having regard to well-established principles of the court in

102 (1985) 7 EHRR 528.

103 *Ashingdane* (n 103 above) para 37, following *Winterwerp* (n 95 above) 4.

104 (1985) 7 EHRR 528 para 38.

Guzzardi v Italy,¹⁰⁵ the applicant was not detained.¹⁰⁶ Again, in *Megyeri v Germany*,¹⁰⁷ the applicant was placed in criminal detention in a psychiatric hospital in terms of the mental health legislation in Germany. He challenged the detention in court but was not allocated a public lawyer. He claimed a breach of the right to access a court in article 5(4) of the Convention. The court held that the domestic scheme would be compatible with that right if it had four attributes:

- Detained persons must be entitled to take proceedings at reasonable intervals before a court to test the continuing lawfulness of their detention, at least where this does not happen automatically.
- The procedure in the court must be of a judicial character, with guarantees appropriate to the kind of deprivation of liberty, and particular circumstances, in question.
- The detained person must have a right to be heard in person or, where necessary, by some form of representation, and a special procedure may be called for to protect the interests of people with mental disabilities who cannot fully represent themselves.
- Persons detained for being of unsound mind should not have to take the initiative to obtain legal representation.

In addition to the foregoing, there are further instances where the European Court found no deprivation of liberty.¹⁰⁸ For instance:

- It was held in *Neilsen v Denmark*¹⁰⁹ that restrictions on the child applicant's freedom of movement and contacts were no different from restrictions which might be imposed on a child 'in ordinary hospital', the conditions being 'as similar as possible to a real home'.
- In *HM v Switzerland*,¹¹⁰ it was relevant that, though 'not able to go home', the applicant had freedom of movement, was able to maintain social contact with the outside world and hardly felt the effects of her stay.
- In *Haidn v Germany*,¹¹¹ following his release from detention on probation, the applicant was required by the court to live in an old people's home, which he could not leave without his custodian's permission. The court expressed 'serious doubts' as to whether there was a deprivation of liberty, although it did not decide the point.

There is the Grand Chamber decision in *Stanev v Bulgaria*,¹¹² where the applicant spent several years in a social care institution where conditions were very unfavourable. He needed permission to go out to the nearest village and leave of absence to visit his home. All these were entirely at the discretion of the home's management which kept his identity papers and finances. It was held that the objective requirements of deprivation of liberty as well as the subjective element were met because he could understand his situation and had

105 [1980] ECHR 5.

106 See also *HM v Switzerland* [2003] ECHR 196; *Nielsen v Denmark* [1988] ECHR 23; *Secretary of State for the Home Department v Mental Health Review Tribunal and PH* [2002] EWCA Civ 1868.

107 [1992] ECHR 49 paras 22 & 27.

108 See the summary in *P v Cheshire and Chester Council* [2014] UKSC 19 para 97.

109 (1988) 11 EHRR 175 para 70.

110 (2002) 38 EHRR 314 paras 32, 45-46 & 48.

111 (2011) ECHR 39 para 82.

112 (2012) 55 EHRR 696.

expressed his wish to leave, as against the circumstances of *HM v Switzerland*,¹¹³ where the applicant had agreed to stay.¹¹⁴ It was held that the fact that a person lacks capacity does not necessarily mean that he is unable to comprehend his situation. Prior to *Stanev*, the court has held that there was a deprivation of liberty in the following circumstances: (i) where the applicant who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital;¹¹⁵ (ii) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape;¹¹⁶ and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave.¹¹⁷ The case of *HM* was distinguished on the grounds that the nursing home in that case was an 'open institution which allowed freedom of movement and encouraged contact with the outside world' and offered a regime 'entirely different' from that in *HL*.¹¹⁸

5 Delictual angle to personal liberty deprivation

5.1 Delictual elements

The consideration of liability in the law of delict in Namibia commences as in South African law,¹¹⁹ with the element of wrongfulness, a recognition that a person's omission to prevent harm to another is not unlawful unless the former is under a legal duty to act positively to prevent the harm and fails to do so.¹²⁰ Whether a legal duty to act exists falls to be objectively assessed in the circumstances of each case, with reference to the contemporaneous legal convictions of the community concerned including, but not limited to, the expression they find in prevailing legal principles, instruments, pronouncements and policies.¹²¹ Indeed, Brand JA held

113 n 107 above.

114 (2012) 55 EHRR 696 paras 128 & 131.

115 *Shtukaturov v Russia* (2008) 54 EHRR 962 para 108.

116 *Storck v Germany* (2005) 43 EHRR 96 para 76.

117 *HL v United Kingdom* (2004) 40 EHRR 761.

118 Paras 89-94.

119 See eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 (1) SA 389 (SCA).

120 See eg *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC). See, generally, Okpaluba (n 14 above) 184.

121 *Minister of Basic Education, Sport and Culture v Vivier NO* 2012 (2) NR 613 (SC) para 10.

in *Hawekwa Youth Camp v Byrne*¹²² that:¹²³

The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is *prima facie* wrongful. By contrast, negligent conduct in the form of omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.

Again, Namibian courts similarly adopt the test for negligence, as formulated by Holmes JA in *Kruger v Coetzee*,¹²⁴ to the effect that liability will only arise if a *diligens paterfamilias* in the position of the defendant (a) would have foreseen the reasonable possibility of his or her conduct causing injury to the plaintiff; and (b) should have taken reasonable steps to guard against such an occurrence. Foresight as to the exact nature and extent of the damage was not required and it would suffice if the general manner of its occurrence was reasonably foreseeable.¹²⁵

The courts also consider both the factual and legal aspects of causation,¹²⁶ the theories of adequate causation and reasonable foreseeability developed to define the ambit of ensuing legal liability and the more recent flexible approach to the limitation of liability informed by policy considerations, and the notions of reasonableness, fairness and justice.¹²⁷ Thus, in applying the above factors to the facts of the *Minister of Basic Education* case, where a vulnerable mentally-retarded child who needed special care but which the superintendent

122 2010 (6) SA 83 (SCA) para 22, cited with approval in *Minister of Basic Education* (n 122 above) para 10 n 5.

123 See also *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA) para 14; *LTC of Delmas v Boshoff* 2005 (5) SA 514 (SCA) paras 19-20; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12.

124 1966 (2) SA 428 (A) 430E-G.

125 *Minister of Basic Education* (n 122 above) para 11.

126 See also *Shaanika v Ministry of Safety and Security* [2009] NASC 11 (23 July 2009) where, applying both tests, Strydom AJA held that the admissions by the defendants constituted negligence on their part and that such negligence materially contributed to the deceased's death, which gave rise to the claim by the dependants. Taking into consideration the whole tenor of the admissions made, it was intended to be a complete admission that the harm caused wrongfully by the custody officer was causally linked to the damages suffered by the dependants.

127 *Minister of Basic Education* (n 122 above) para 12; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 764; *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA) 39; *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) 215-217; *Ebrahim v Minister of Law and Order* 1993 (2) SA 559 (T) 564-566; *Gibson v Berkovitz* 1996 (4) SA 1029 (W) 1040-1041.

of the hostel where she was failed to exercise, it was held that the superintendent was negligent to have allowed her to be taken away to an environment the superintendent did not know. The court concluded that on the application of either the reasonable foreseeability test or the adequate causation test, it remained inescapable that the damages suffered by the child and her guardian were causally linked to the superintendent's decision to permit 'a mentally-retarded child to accompany an unauthorised adult to stay in an unknown environment where the child might come into contact with unknown characters'.¹²⁸

5.2 Undue delay in releasing a President's patient

The appellant in *Gawanas v Government of the Republic of Namibia*¹²⁹ had been detained as a President's patient in terms of section 77(6) of the Criminal Procedure Act 51 of 1977, read with chapter 3 of the Mental Health Act 18 of 1973. In 2002, the hospital board where she was detained recommended that she be released on leave for three months in order to see if she would be able to cope on her own. She was temporarily released. On her return from leave, her condition had deteriorated from what it was when she left the hospital. Later during 2002, she was again temporarily released. She returned in January 2003 and the resident psychiatrist recommended her release. The hospital board made a recommendation which eventually reached the Minister of Justice on 24 June 2003. The Minister averred that it was only the President who could order the release of the appellant, since that power had not been delegated to the Minister. The appellant's release was eventually ordered in December 2003. In her action for damages, the appellant alleged that she had been wrongfully and unlawfully detained in the Mental Health Centre, Windhoek Central Hospital, for the period 13 January 2003 to 15 December 2003. Her claim was based on the *lex Aquilia*, as well as certain provisions of the Constitution: the right to liberty, human dignity and fair administrative justice.

Her claim was dismissed at the High Court, ostensibly because the protection afforded by articles 7 and 8 was not designed to include unlawful detention in terms of the Mental Health Act. They were framed and meant to deal with unlawful arrests of a particular type. The Supreme Court rejected this 'too narrow an interpretation' of such important provisions of the Constitution,¹³⁰ whereas¹³¹

our case law suggests that, in the absence of other considerations, the provisions contained in chapter 3 of our Constitution should be interpreted

128 *Minister of Basic Education* (n 122 above) para 12.

129 n 9 above.

130 *Gawanas* (n 9 above) para 27.

131 Per Lord Wilberforce, *Minister of Home Affairs v Fisher* [1980] AC 319 (HL) 329. See also *Minister of Defence v Mwandighi* 1993 NR 63 (SC) 70G.

widely so as to give to individuals the full measure of the fundamental rights and freedoms referred to.

It is not the legality of the detention order that was in question here, but the non-release of the patient in accordance with the doctors' recommendations about her fitness to be released. It was held that a person compulsorily detained in a mental institution was physically restrained and his or her right to freedom and movement had been taken away. He or she was subject to certain discipline enforced by the institution.¹³² Accordingly, compulsory incarceration in a mental institution when a person was mentally fit did impair the liberty and dignity of that person, hence article 7, which protected individual liberty, had to be broadly interpreted.¹³³ Again, there was a statutory duty upon the board and its personnel and the Minister of Justice and the personnel of the Ministry to act reasonably. In determining what is 'reasonable' in the circumstances, a court would take into consideration the provisions of articles 7 and 8 and, in particular, bear in mind that the compulsory detention of a person in a mental institution where a person was mentally fit, would be a limitation of that person's liberty and dignity.¹³⁴ As Strydom AJA further explained:¹³⁵

Detention seems to be in a niche of its own as far as foreseeability is concerned. Where a person is unlawfully detained the person causing that can hardly be heard to say that harm was not foreseeable. The liberty of an individual and protection against arbitrary arrest and detention form the cornerstones of any constitution based on human rights and respect for the individual. In regard to Namibia, this Court has found¹³⁶ that the right to liberty, set out in article 7, gives rise to a substantive right which guarantees personal liberty.

The court rejected as incorrect the state's defence that, insofar as the appellant's detention was in terms of a court order, it was lawful. That argument failed because it meant that a person could be detained for as long as the order subsisted. It also meant that the order authorised the institutions of the state to interfere with the rights of a person so certified, but that was not a *carte blanche* to such institutions to act as they pleased.¹³⁷ The fact was that the Mental Health Act provided in detail the steps to be taken to obtain the release of a person detained in terms of an order by a magistrate and, once a person so detained was fit for release, a decision left to the health authorities and the court, the steps prescribed by the Mental Health Act had to be complied with reasonably. Those authorities that were mandated to

132 *Gawanas* (n 9 above) para 19. See also *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

133 *Gawanas* (n 9 above) para 19.

134 *Gawanas* para 26.

135 *Gawanas per Strydom AJA*, para 43.

136 *Alexander* (n 8 above).

137 *Gawanas* (n 9 above) paras 23-24. See also *Simon's Town Municipality v Dew* 1993 (1) SA 191 (A).

obtain the release of a patient were under a duty to act cautiously and reasonably in order to minimise or avoid further injury to such a patient and, where this was not done, they would have overstepped their authority¹³⁸ and a valid court order would not assist them.¹³⁹

The absence of any reasonable explanation for the delay to act in order to discharge the appellant, which was a necessary step in the process before a judge could order her release, clearly showed that the state was negligent. A *diligens paterfamilias* would have, in these circumstances, foreseen the possibility of his conduct causing loss to another person and would have taken reasonable steps to avoid such possibility.¹⁴⁰ It was thus held that the respondents owed a legal duty to take reasonable steps to secure the appellant's release once her medical condition improved to the point that her doctors considered her continued detention in an institution unnecessary.¹⁴¹ The respondent was held liable to compensate the appellant for damages under the *lex Aquilia*.¹⁴²

Gawanas can be likened to the UK Supreme Court judgment in *R (Kambadzi) v Secretary of State for the Home Department*¹⁴³ which, however, differed on the facts because it was concerned with detention pending deportation after the immigrant had completed a term of imprisonment consequent upon a criminal conviction, and had the common denominator of detention beyond the permissible limit. The Department had a policy which involved review at regular, specified intervals. The question was whether compliance with the procedural requirement to hold those reviews was essential to the legality of the appellant's continued detention. Previously, the Supreme Court had held in *Lumba*¹⁴⁴ that the question was whether each relevant breach of the review requirement was material in public law terms in that it bore on, and was relevant to, the decision to detain. The majority of the Supreme Court held in *Kambadzi* that the Secretary of State was under a public law duty to comply with his own published policy. So, it was an abuse of power for the detainee to remain in detention in the absence of regular reviews at intervals which were fundamental to the propriety of continued detention. It was no defence for the Secretary of State to say that there were good grounds for detaining the appellant anyway. Unless the authority to detain was renewed under the powers conferred by the statute, the

138 *Gawanas* (n 9 above) para 21, citing *per* Corbett CJ, *Simon's Town Municipality* 196; JC van der Walt in WA Joubert (ed) *Law of South Africa* vol 8 para 30; J Neethling *et al* *The law of delict* (2010) 112-113; PQR Boberg *The law of delict* (1984) 771-773.

139 *Per* Strydom AJA, *Gawanas* (n 130 above) para 24.

140 *Gawanas* (n 9 above) para 42. See also *Kruger v Coetzee* 1996 (2) SA 428 (A) 430E-F.

141 *Gawanas* (n 9 above) para 44.

142 *Gawanas* paras 33 & 44.

143 [2011] 4 All ER 975 (SC).

144 n 15 above.

appellant was entitled to his liberty and to the common law damages he sought.¹⁴⁵

6 Conclusion

As much as *Alexander* came to court as a judicial review matter and *Gawanas* was a delictual action, both cases revolved around the protection of the personal liberties of a foreigner in Namibia, on the one hand, and a mentally-ill person, on the other. In *Alexander*, the High Court upheld the constitutional right to personal liberty of the foreigner because the limitation placed on the right by section 21 of the Extradition Act was an unwarranted limitation of such a right in terms of section 22 of the Constitution. Parker J acknowledged the three universally-recognised understandings of the right to liberty, namely, (a) that it is one of the most important rights of the individual; (b) that that fact notwithstanding, the right to liberty is never expressed in absolute terms in the Constitution; and (c) that an arrest or detention is arbitrary if not carried out according to law, or it is not authorised by law. Upholding these aphorisms, and emphasising that the right to liberty 'is one of the cornerstones on which a democratic society is built',¹⁴⁶ the Supreme Court held that, although the right to liberty under article 7 may be derogable, unlike article 8 (human dignity), which is absolute because it permits of no limitation,¹⁴⁷ 'the test whether such limitation is permissible in terms of the Constitution is whether the limitation constitutes a disproportionate interference'¹⁴⁸ with the right in question. The onus is on the person who alleges a breach of his or her right to liberty.

In *Gawanas*, the Supreme Court held that compulsory incarceration in a mental institution where a person is mentally fit does impair the liberty and dignity of that person.¹⁴⁹ In light of the fact that all the ingredients of an action in delict were successfully established, the respondents were held to have owed the appellant a legal duty to take reasonable steps to secure her release soon after the doctors had certified that she was fit to be released. Her further detention in the institution became unnecessary. The matter was remitted to the High Court to determine the *quantum* of damages due to her. It is clear from these cases that in personal liberty adjudication, the courts find

145 See also *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1996] 4 All ER 256; *Roberts v Chief Constable of Cheshire Constabulary* [1999] 2 All ER 326; *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2000] 4 All ER 15; *R (on application of Saadi) v Secretary of State for the Home Department* [2001] 4 All ER 961; *Nadarajah v Secretary of State for the Home Department* [2004] INLR 139.

146 *Alexander* (n 8 above) para 116.

147 *Alexander* para 117. See also *Ex parte Attorney-General: In re Corporal Punishment by Organs of the State* 1991 NR 178 (SC) 1871-188B.

148 *Alexander* (n 8 above) para 120.

149 *Gawanas* (n 9 above) para 19.

themselves in the middle of a dilemma: balancing the rights of the individual as against those of the public in whose favour the constitutional, statutory and common law powers of law enforcement are exercised by the police and other agents of the state. All in all, both *Alexander* and *Gawanas* were decided on the side of the protection of individual liberty. They were correctly decided in line with existing Namibian constitutional jurisprudence and prevailing international standards and common law norms whose favour the constitutional, statutory and common law powers of law enforcement are exercised by the police and other agents of the state. All in all, both *Alexander* and *Gawanas* were decided on the side of the protection of individual liberty. They were correctly decided in line with existing Namibian constitutional jurisprudence and prevailing international standards and common law norms.