INVESTIGATING THE POWERS OF THE SUPREME COURT OF NAMIBIA TO REVERSE ITS OWN DECISIONS: A CASE FOR BALANCING THE INTEREST OF JUSTICE AND THE DOCTRINES OF JUDICIAL PRECEDENT AND *RES JUDICATA*

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DEDICATION

This thesis is dedicated to my mother Mrs Hermine Ambunda, my husband Mr Aquilinus Nashilundo and my daughter Azania Ndatoola-ewe Nashilundo.

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ABSTRACT

The rule of law informs acts and decisions according to prescribed rules and procedures to promote certainty, uniformity and consistency in the application of the law. This is expanded by the demands of the interest of justice and the well-entrenched common law doctrines of *stare decisis* (stand by the decided) and *res judicata,* which dictates that a competent court cannot revisit issues already determined. Article 81 of the Namibian Constitution, read with section 17 of the Supreme Court Act 15 of 1990, provides that all decisions of the Supreme Court are binding on all other courts of the land, unless set aside or reversed by the Supreme Court itself or is contradicted by an Act of Parliament lawfully enacted. The *prima farcie* view is that there is conflict between the exercise of the court's power in terms of Article 81 and the rule of law as well as the application of the common law doctrines. The research investigates the extent and magnitude of the powers of the Supreme Court of Namibia to reverse its own decisions and to what extend the reversal affects the demands of the rule of law and common law doctrines. The research includes a comparative study from various common law jurisdictions to indicate the legal basis and extent to which an apex court reverses its own judgments. The comparative study reveals that there is a plethora of grounds justifying a reversal of an apex court's decision, as an exception to the rule of law and the common law doctrines of *stare decisis* and *res judicata* in order to do justice. The thesis embraces these new additional grounds on which the Namibian Court may exercise its powers in terms of Article 81 and highly recommends that the process and procedure in terms of which the litigants may approach the Supreme Court, on the basis of Article 81, be part of the clearly defined court rules of process and procedure.

CHAPTER ONE

1. Introduction

1.1 Background of the study

The Namibian Constitution, as the supreme law of the land, [1] establishes an independent Judiciary in terms of Article 78 to administer justice. In terms of Article 79(2), the Supreme Court is the apex court of the land with exclusive and appellate inherent jurisdiction to hear and adjudicate upon appeals from the High Court or on matters referred to it by the Attorney-General and with such other matters as may be authorized by Act of Parliament. [2]

Article 81,[3] read with section 17 of the Supreme Court Act 15 of 1990,[4] provides that the decisions of the Supreme Court shall be final and binding on all other courts of Namibia and all persons in Namibia unless reversed by the Supreme Court itself or is contradicted by an Act of Parliament lawfully enacted. These two provisions cumulatively confirm the locality of the Supreme Court as the apex court of judicial authority in the country and the

[1] Article 1(6) reads: '(6) This Constitution shall be the Supreme Law of Namibia.'

[2] Article 79(2) reads:

> '(2) The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constituiton, and with such other matters as may be authorised by Act of Parliament.'

[3] Article 81 reads: '**Binding Nature of Decisions of the Supreme Court**

> A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'

[4] Section 17 reads: '**Finality of decisions of Supreme Court**

> (1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.
> (2) The Supreme Court shall not be bound by any judgment, ruling or order of any court which exercised jurisdiction in Namibia prior to or after Independence.'

operation of precedence within the hierarchy of the court structure. [5] It is thus settled that decisions of the Supreme Court, right or wrong, are binding on all other courts unless reversed, abandoned or departed from by the Supreme Court itself or contradicted by an Act of Parliament lawfully enacted.[6]

The Namibian Legal system is largely founded on Roman Dutch law as the common law of the land. In terms of the Constitution, the common law[7] in force on the date of independence remains valid so long as it has not fallen foul of the Constitution or any other statutory law.[8] The doctrine of *stare decisis* et *non quieta movere* (ie stand by the decisions and do not disturb settled law) is embedded in our legal system.[9] Mainga JA recognizes and confirms in *Schroeder and Another v Solomon and 48 Others* the importance of the *stare decisis* principle in our law and encourages that it should be more rigidly applied, especially in the highest court in the land than in all others.*[10]* Another common law principle is the principle of *res judicata vel litis finitae* (judged thing). *Res judicata* upholds finality to court decisions and dictates that an issue that has already been decided by a competent court should not be revisited, thus rendering a court of law *functus officio* and disempowering the latter to revisit any decided issue.[11] The application of these principles is the basis on which the Namibian court strictly adhere and comply with

[5] *Schroeder and Another v Solomon and 48 Others* 2011 (1) NR 20 (SC) at 29G-H.
[6] *Schroeder,* at 30A.
[7] Article 66(1) reads: '66(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'
[8] In *Myburg v Commercial Bank of Namibia* 2000 NR 255 (SC) at 261A-C.
[9] *Schroeder* , at 30A-C
[10] 2011 (1) NR 20 (SC) at 29A-C.The court relies on the decision of *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.
[11] Van der Walt, S.J. (1941). *Law Examinations Catechism* (Vol.1). Pretoria: J.H de Bussy, p 203.

established legal principles and not disturb finalized proceedings, however right or wrong. It is this binding effect that echoes through the provisions of Article 81 and section 17.

Article 81 contains an exception to the binding effect of the decisions of the Supreme Court. It provides that the judgments are binding unless it is reversed by the Supreme Court itself or is contradicted by an Act of parliament lawfully enacted. Since independence, the exception provided for under article 81 has never been successfully invoked to have the Supreme Court revisit and reverse its own decisions. For example, in the decisions of *Schroeder And Another v Solomon And 48 Others*[12]cited and approved in *Kamwi v Law Society of Namibia,* [13] the Supreme Court confirmed that Article 81 regulates the doctrine of precedent in Namibia and that Article 81, by interpretation, could not be interpreted to permit a dissatisfied litigant to have a decision of this court reversed on the basis that the litigant did not accept the decision made by the court. In another judgment of *Teek v President of the Republic of Namibia and Others*[14], the court interprets that Article 81 confirms the superiority of the court and the binding effects of its judgments and as reflected in section 17, no appeal or review of a judgment of Supreme Court aimed at setting it aside may be entertained. In both these decisions, the Supreme Court confirmed the common law principles of *stare decisis* and *res judicata* on finality of Supreme Court decisions.

[12] 2011 (1) NR 20 (SC).
[13] 2011 (1) NR 196 (SC).
[14] 2015 (1) NR 58 (SC).

Recently in *S v Likanyi* [15] the Supreme Court justified a reversal of its previous decision of *S v Munuma and Others*[16] on the basis of equality in terms of Article 10. Subsequently, in a *post-facto* application for the recusal of a judge of the Supreme Court on grounds of 'apprehension of bias', the Supreme Court set aside its earlier decision refusing to grant leave to appeal in *Minister of Finance and Another v Hollard Insurance Company of Namibia Ltd and others*[17] in order to uphold the principles of fair trial. The significant principle emerging from both these cases is that, despite the well-entrenched common law principles of *stare decisis* and *res judicata*, in exceptional circumstances and when justice demands, the Supreme Court may depart from its previous decision.[18] The effect of such a reversal is however evident, justifying a prima farcie view that it is contrary to the rule of law and the binding common law dictates of adhering to settled and finalised legal principles.

The constitutional basis and justifiable grounds on which Article 81 may be successfully invoked has not been explored in Namibia until recently. Apart from the grounds as accepted in *Likanyi* and *Minister of Finance and Another*, there is little or no jurisprudence within our jurisdiction on any other grounds to justify a reversal of a decision of an apex court. A comparative analysis of various common law jurisdictions is aimed at explaining the relativeness of an apex courts' power to reverse settled law and the dictates of the rule of law and will further identify a plethora of exceptional circumstances as well as the procedures under which an apex court may exercise the power to reverse its own decisions.

[15] 2017 (3) NR 771 (SC).
[16] 2016 (4) NR 954 (SC).
[17] (P 8/2018) [2019] NASC (28 May 2019), para 97.
[18] *S v Likanyi*, at 788C-G, *Minister of Finance*, para 96.

1.2 Statement of the problem

The Namibian jurisdiction is founded upon principles of democracy, the rule of law and justice for all.[19] The concept of constitutionalism, under which Namibian operates, affirms the principle of rule of law, both resting on the absence of arbitrary power,[20] on equality before the law and judicial decisions confirming the common law.[21] These principles in turn confirms the essentials of a government based on rule of law where the law is applied consistently and not abruptly subject to change.[22]

Article 81 is the constitutional basis for the Supreme Court to exercise its powers, as the apex court, to reverse its own prior decisions. *Prima farcie*, this is contrary to the dictates of the rule of law and common law doctrines of *stare decisis* and *res judicata* doctrines. This clearly is a departure from attributes of generality, equality and certainty in the application of the law which are essential for a democratic State in order to protect the human rights through an independent and impartial Judiciary.[23] It has long been established that there is inherent conflict in the judicial process between the need for certainty and the need for change to prevent rules becoming fossilized.[24] From the above, it can be inferred that a reversal of decisions by an apex court threatens the rule of law and democracy.

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[19] Article 1(1) reads: (1) The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.
[20] Molteno D. (1966). The rules behind the Rule of Law. In Beinart et al (eds). *Acta Juridica*. Cape Town: AA Balkema, p. 135-148.
[21] Molteno D, p 26.
[22] Molteno D, p. 135-148.
[23] Molteno D, p. 136-137.
[24] Lord Diplock, 'The Courts as Legislators' in BW Harvey (ed), The Lawyer and Justice (London, Sweet and Maxwell, 1978), 280. Lord Diplock's Address was given on 26 March 1965. Cited in Lee J.(n.d). The Doctrine of Precedent and the Supreme Court. Retrieved from: https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture_james_lee.pdf

In addition to this *prima farcie* problem, the context within which the Supreme Court may exercise its discretion is not ascertainable, either from Article 81 or in terms of any statutory or subordinate legislation. The main purpose of the research is therefore to highlight the scope and effect of Article 81 on the commands of the rule of law and the administration of justice.

1.3 Objectives of the study

The objectives of the study are:

i) To understand the basis and the legal foundation for an apex court to reverse its own decisions;

ii) To examine the scope and extent, as well as to explore the circumstances under which the Supreme Court may reverse its own decisions.

iii) To identify the effect of the reversal of an apex court decision on the common law principles of *stare decisis* and *res judicata* which militate against the reversal of final decisions.

1.4 Hypothesis of the study

The rule of law demands that the administration of justice be done according to rules of law that are of general application and equal treatment, easily ascertainable so as to maintain consistency and uniformity in the application of the law. The doctrines of *stare decisis* and *res judicata* ensures that this is done. A court's power to reverse settled law clearly undermines the demands of the rule of law. Disturbing settled law undermines the long standing principles of judicial precedent and *res judicata*; affects stability in the

application of the law, questions judicial competence and undermines the public confidence in the integrity of the Judiciary.

1.5 Significance of the study

The subject at hand, in addressing the *prima farcie* view, has been recently examined by the Supreme Court.[25] There are no academic writings on the scope of the Court's powers under Article 81 of the Namibian Constitution. This study will therefore be the first of its kind aimed at significantly contributing to the development of the legal jurisprudence on the subject. The study identifies important legal considerations in the exercise of the courts' discretion which will be a guiding tool to judicial officers and the legal fraternity at large. The comparative analysis identifies commendable procedural solutions that may be incorporated into the Namibian court process and procedure. It is notable that the study will inform potential future litigation of possible grounds and processes for invoking Article 81.

1.6 Limitations of the study

The research is squarely based on an examination of the few court decisions and academic writings on the discourse and collateral topics in Namibia. The topic on the successful invocation of Article 81 has not been canvassed before in Namibia until the decisions of *S v Likanyi* and *Minister of Finance and Another v Hollard Insurance Company of Namibia Ltd and others.* Therefore, great reliance is placed on the comparative study of

[25] S v Likanyi 2017 (3) NR 771 (SC) and *Minister of Finance and Another v Hollard Insurance Company of Namibia Ltd and others* (P 8/2018) [2019] NASC (28 May 2019).

the selected common law jurisdictions to provide a foundation to inform the final conclusions and recommendations of the thesis.

1.7 Literature review

Diescho confirms that the Constitution clothes the judiciary with the primary function to marinate the rule of law by exercising checks and balances on the other branches of government. [26] This is what Beinard [27] means when he states that the rule of law requires that rights and powers be governed by detailed known principles of law as opposed to discretion, to ensure the protection of rights. Amoo [28] recognized these sets of detailed known principles to emanate from decisions of the Supreme Court, which is the highest court in Namibia, and whose decisions are final and binding on all courts in Namibia. Accordingly, the judgments remain binding until reversed by the Supreme Court itself or by an act of parliament lawfully enacted.[29] According to Bangamwabo, [30] Article 81 is the codification of the rule that decisions of a higher court are absolutely final and binding on all lower courts until and unless the higher court contradicts such a decision.

Rosenburg opined that the demands of rule of law is supported by the common law principle of judicial precedent or the *stare decisis* which preserves a jurisprudential system

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[26] Diescho, J.B. (2008). The Paradigm of an independent judiciary. In N. Horn & B. Anton (Eds), *The Independence of the Judiciary* (p. 22). Windhoek: Macmillan Education Namibia.
[27] Beinard, B. (1964). Rule of Law. In Beinard B *et al*, *Acta Juridica* (pp 104-105). Cape Town: A.A.Balkema.
[28] Amoo, S. (2008). The Structure of the Namibian judicial system and its relevance for an independent judiciary. In N. Horn & B. Anton (Eds), *The Independence of the Judiciary*. Windhoek: Macmillan Education Namibia, p.69.
[29] Amoo, p. 74.
[30] Bangamwabo, F. (2010). Constitutional Supremacy or Parliamentary Sovereignty through back doors: Understanding Article 81 of the Namibian Constitution. In Bosl A, Horn N & Du Pisani A (eds). *Constitutional Democracy in Namibia.* Windhoek: Macmillan Education Namibia, p 253- 525.

that is not based upon 'an arbitrary discretion'.[31] He justified his opinion by stating that the practice maintains consistency, certainty and predictability in the law and therefore ensures that the 'law will not merely change erratically'. Zander also connected the *stare decisis* principle to the rule on generality and equality by stating that the doctrine not only affects the parties to the dispute but everybody else as it concerns the impact of the decision on the future for others in the community and especially on lower courts.[32]

Amoo, therefore justified the maintenance of the doctrine of precedence as it achieves equal treatment for all litigants through courts conforming their decisions to those of the past.[33]

Van der Walt identified the principle of *res judicata* to also preserve finality to court decisions by barring parties from revisiting proceedings between the same parties where there has already been a final determination on the same questions of law or fact by a competent court.[34] He supports the notion of certainty in legal principles as Polyviou did, connoting that a common system of law, whatever its content, would as a result be easily ascertainable, accessible and applicable to all.[35]

MacCormick observed that a democratic State founded on the commitment to the rule of law promises uniformity, consistency, impartiality and coherency in judicial decision

[31] Rosenberg et al. (1990). *Elements of Civil Procedure: Cases and Materials* (5th ed). New York: The Foundation Press, p. 956.
[32] Zander M. (1989). *The Law-Making Process* (3rd ed). London: Weidenfeld and Nicolson, p. 179-180.
[33] Amoo SK. (2008). *An Introduction to Namibian Law: Materials and Cases.* Windhoek: Macmillan Education Namibia Publishers, p. 73.
[34] Van der Walt, p. 203-204.
[35] Polyviou.PG. (n.d) *The Equal protection of the Law.* London: Ducksworth, p. 2.

making, [36] with Beinard[37] adding another feature of generality and guaranteed protection against the errors of individual judgment.

Beinard[38] however criticised rigidity brought by the formalistic application of the law which may not bring substantive justice in all situations. He states that, however desirable and important justice according to law may be in every legal system, it is not an absolute principle[39] and that a degree of discretion should be allowed to the courts, especially in criminal matters which directly touches on life and liberty of accused persons, to be able to administer criminal justice. This position was supported by Van Winsen who added that a superior court would not necessarily be bound by past decisions and would, in the exercise of its inherent jurisdiction, depart from a previous decision when it is clear that the previous court erred or that the reasoning upon which the decision rested is unsound.[40]

Pistorius described this inherent jurisdiction as a 'reservoir of powers' which allows the court, in exceptional circumstances and only when justice requires, to make any effective order to control its' own process and to harmonise various interests where no specific law provides directly for a given situation.[41] Accordingly, by exercising its inherent jurisdiction, a court may give any order which at common law would be entitled to give.[42]

[36] MacCormick, M. (1998). The significance of precedent. In Brandfield *et al*.1998. *Acta Juridica*,Cape Town: AA Balkema, p 175.
[37] Beinard, p 105.
[38] Ibid.
[39] Ibid, p. 107.
[40] Van Wisen L, *et al*.(1997). *The Civil Practice of the Supreme Court of South Africa* (4th ed). Western Cape: Juta & Co, pp. 82-83.
[41] Pistorius, D.(1993). *Pollak on Jurisdiction* (2nd ed.). Cape Town: JUTA & Co, pp. 26-28.
[42] Pistorius, p. 27.

Taitz [43] cautioned that the exercise of the inherent powers of the court is discretionary in nature, and exists for the proper fulfilment of the function of the court and does not exist merely to supply a remedy to meet a remediless right or to provide equitable relief to an aggrieved party.[44] Amoo thus settled that in circumstances where there is no existing authoritative rule of law which is applicable to the facts, the court exercises its inherent jurisdiction to decide the rights of the parties not arbitrarily, but in accordance with fundamental principles of justice.[45] Chaskalson affirmed Amoo's position that lack of statutory remedy or precedent should not prevent a person from approaching the courts to uphold or protect his or her constitutional rights as an apex court would resort to its inherent jurisdiction in prescribing a remedy.[46]

MacCormick[47] concluded that if reasons have been brought forward to show that the earlier decision was itself seriously mistaken, a court may do better to overrule it openly and honestly than go through a pretence at distinguishing. Accordingly, acknowledging of fallibility suggests that respect for precedents, though important, ought not to be conceived as an absolute value.[48] This is what Hahlo and Kahn referred to when they indicated that constant development of unprecedented problems requires a legal system capable of fluidity and pliancy.[49]

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[43] Taitz J,.(1985). *The Inherent jurisdiction of the Supreme Court*. Cape Town: JUTA & Co., p. 1.
[44] Taitz, p. 96.
[45] Amoo, p 286.
[46] Chaskalson M *et al*. (1999). *Constitutional Law of South Africa* (revised service 5). Western Cape: JUTA & Co., pp. 6-35.
[47] MacCormick M, p 175.
[48] Ibid.
[49] Hahlo, H.R and Kahn., E. (1968). *The South African Legal System and its background.* Cape Town: Juta, p. 36.

Despite the above and until recently, Amoo and Skeffers[50] jointly maintained the general position that the constitutional order adopted since the Namibian Constitution came into force is a strong commitment to the maintenance of the rule of law and the promotion and maintenance of human rights.

1.8 Theoretical framework

Natural law has been seen and understood as an ideal system of law founded in the nature of the universe and inscribed in the conscience of all rational beings.[51] It has been described as the body of law that encompasses the element of morality, present in every human being, and which comes to the aid of the courts when there is a conflict with the formally or procedurally valid positive law of a specific country.[52]

Natural law has been characterised of a superior good law, unwritten internal law that governs the entire world, prescribes respect for elementary human rights and against which all positive law is measured as understood by the sophists[5354] who emerged in the fifth and fourth centuries.[55] It was during the same time that the Antigone Trial revealed the understanding of natural law to mean that a higher duty is owed towards what justice demands in the circumstances [56] and that any law which aims at limiting the full and

[50] Amoo, S.K., & Skeffers, I. (2009) The Rule of Law in Namibia. In N. Horn & A. Bösl (Eds), *Human Rights and the Rule of Law in Namibia* (pp. 17-38). Windhoek: Macmillan Namibia.
[51] Hahlo, H.R and Kahn, E. (1968). *The South African Legal System and its background.* Cape Town: Juta, p. 14.
[52] Roederer, C., & Moellendorf, D. (2007).*Jurisprudence*.Durban: Juta, p. 25.
[53] It was the sophist, specifically Callicles, who first coined the phrase 'Natural law' and used it to challenge the laws of the State during the 4th and 5th centuries.
[54] Amoo, S. (2008). *An Introduction to Namibian Law*. Windhoek: Macmillan Education Namibia, p. 10-11.
[55] Hahlo, H.R and Kahn, E., p. 14.
[56] As long as 442 BC, THE Greek dramatist Sophocles staged the trial of Antigone at the court of King Creon in play simply called Antigone. , Roederer, C., & Moellendorf, D., p. 26-27.

unrestricted enjoyment of human desires is unnatural. Plato and Aristotle's schools of thought emphasised that the Sophist undermine the intelligible effect of natural law which may be the foundation of justice, alternatively and according to the Aristotelian cosmology, the objective foundation of justice is in the observation and study of biological growth by knowing that the nature and function of a human being is to live a rational life and to do good through prudence and practical wisdom.[57]

Amongst the Roman Stoics, Cicero (106-23 B.C)[58] characterised natural law as being immutable with its universal application, unchanging and everlasting effect, which law cannot be altered, nor repealed or abolished. According to his theory of natural law, all humans are under a universal legal order, equal before the law and their rights are determined by the universal law that is applicable everywhere, unchangeable and eternal.[59] This was the same understanding that Christianity in the middle ages gave natural law, ie as the supreme law which cannot be altered. [60]

During the sixteenth century, Dutch writer, Hugo Grotius (1583-1645) also believed that immutable natural law is based in human ability to reason and not on will or command [61] and on the inborn ability of humans to distinguish between what is just and unjust. [62]

Thomas horbbes (1588- 1670) in his work, *Leviatan* recognised that since all humans have an inclination to survive, there must be 'law' to command the relationships and conduct in a society, to be enforced by a sovereign State to guard against the enforcement of natural

[57] Roederer, C., & Moellendorf, D., p. 33.
[58] III, XXII, 33, cited d'Entreves, *Natural Law*, pp.20-1. In Hahlo, H.R and Kahn, E., p 15.
[59] Roederer, C., & Moellendorf, D., p. 35.
[60] Amoo, p. 12-15.
[61]Amoo, p. 17.
[62] Amoo, p 16.

law in a natural state.[63] John Lock (1632-1704) extended the radical change into a theory of inalienable or natural rights which provide an objective moral limit to the power of the State and its positive laws. Locke's theory dictates that citizens should be able to assert the inviolability of their natural rights and for the State to exercise power, through clearly defined laws, through impartial judges and through an effective execution of the laws and judgments.[64] Rossoueau (1712-88) supported Locke's theory, establishing that a social contract between the sovereign and its subject as a practical basis to regulate social interactions and in turn ensure full protection of human rights. It is on the Locke's theory of rights that modern natural law found it's most influential and enduring formulation.

It was not until the nineteenth century that the existence of natural law was threatened, giving way for positive law or law of men as stated by David Hume (1711-76) as the only law that regulates human conduct.[65] The twentieth century however saw a rebirth of natural law theories both in Europe and America[66] with jurists seeking a system of values against which positive law can be measured. It is from this period that natural law was couched to mean a set of values and ethics embodied in the law which has continuously maintained the ideal of justice as a moral commandment of life, ensured stability against change, as in the times of the Greeks and the medieval church.[67] The demands of natural law thus became a measuring rod against which the merits and demerits of any system of State Law could be tested, not only for substantial justice but also for internal consistency

[63] Roederer, C., & Moellendorf, D., p. 44.
[64] Roederer, C., & Moellendorf, D, p. 44.
[65]Amoo, p. 18.
[66] In the name of natural law, revolutions such as the French Revolution and the American war of Independence were fought. The American Declaration of Independence of 1776 basing itself squarely on principles of natural law, declared that man is endowed with the rights to life, liberty and the pursuit of happiness and that he is entitled to strike down any form of government which destroys these rights.
[67] Amoo, p. 20.

and formal adequacy. Principles such as good faith, absence of bias, equality, reasonableness as enunciated by the courts to fill gaps in the body of law[68] are all founded on natural law and applies universally.[69]

Natural law, immutable, eternal and omnipresent was believed to give the expression to the ideal of justice. [70] The postulates of justice has been held to directly flow from the dictates of natural law, especially the Locke's theory enabling full enjoyment of rights in a regulated society in order to maintain peace and order. [71] Dictates such as reasonableness requires the law to be reasonable and must contain rules which apply equally to all person of the same class or condition (generality). These rules must be applied consistently and where discretion is left to the courts to develop precedents, such discretion should be exercised judicially according to standards as far as possible ascertainable in advance and not capriciously.[72] Certainty and uniformity flows from like cases being treated alike as part of Locke's theory for equality before the law. Although some measure of rigidity is inseparable from fixed rules, the advantage of consistency and uniformity would not be sidelined.[73]

The concept of constitutionalism embodied the principles limiting governmental powers in order to protect Human rights. Encompassing the doctrine of separation of power, judicial review of administrative action and the rule of law,[74] it is according to Locke's

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[68] Ibid.
[69] The Universal declaration of Human rights adopted by the United Nations in 1945;the more detailed European Convention for the protection of Human Rights and Fundamental Freedoms of 1953 and the Declaration of Delhi, 1959 of the international Commission of Jurists as to the meaning of the 'rule of law are in essence emanations of natural law principles.
[70] Hahlo, H.R and Kahn, E., p. 29.
[71] Hahlo, H.R and Kahn, E., p. 26.
[72] Hahlo, H.R and Kahn, E., p. 33.
[73] Hahlo, H.R and Kahn, E., p. 35.
[74] Amoo, p. 314.

theory that the inalienable human rights imposes a duty to respect natural law greater than the duty to respect positive law. [75]

The theoretical framework provides the origin of the universal dictates of justice and the rule of law. It is these postulates that are enshrined in the Namibian Constitution which contains a bill of inalienable rights[76] which must be protected and respected by the State.[77]

1.9 Methodology

The method of research that will be used will be qualitative research methodology. Data will be collected through desk research from both primary and secondary sources, such as but not limited to text books; academic articles and journal articles, statutes and subordinate legislation. Information will also be gathered from online sources which may include web-articles and institutional websites. Great reliance is placed on judicial precedents of the Supreme Court and decisions of higher courts from the selected comparative common law jurisdictions, which includes South Africa, United Kingdom, India and Canada.

1.10 Chapter outline

Chapter One is the introductory chapter which sets out the background informing the study; its purpose and objectives, the problem statement, the theoretical framework

[75] Roederer, C., & Moellendorf, D., p. 26.
[76] Under Chapter 3.
[77] Article 5 of the Constitution states that: the Fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts. . . .'

informing the study; the significance of the study; the literature review as well as the methods to be used to collect and analyse the data.

Chapter Two will discuss the historical background of the Namibian Courts, placing emphasis on the inherent jurisdiction and powers of the Supreme Court, as the apex court of the land, to revisit and consequently reverse its own decisions in terms of Article 81 of the Constitution. The recent developments in terms of Article 81 will be discussed hereunder.

Chapter three will discuss the demands in the rule of law and the common law doctrines of judicial precedent, *stare decisis,* and *res judicata* rendering the courts *functus officio* as regards courts' judgments. An analysis will be made to identify the effect of a reversal of a final judgment on these disciplines.

Chapter four will be a comparative study and analysis of Roman Dutch law jurisdictions: South Africa, India, Canada and the United Kingdom. The lessons to be drawn from these jurisdictions will adequately be covered under this chapter.

Chapter five will contain the summary of the study, the plausible recommendations as drawn from the comparative analysis and its relevance and practical effect to the Namibian context. This chapter will most importantly contain the conclusions drawn from the study in order to determine whether the problem statement has been substantively addressed.

1.11 Research Ethics

This work is purely a desk top research in which sources used are referenced. As such, no individual or group interviews/questionnaires were used as an instrument of research, with

the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risks or hazards for research participants were made in respect of the study. Therefore, there was no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the University of Namibia for harm to participants arising from the conduct of the research.

CHAPTER TWO

JURISDICTION OF THE SUPERIOR COURTS OF NAMIBIA

2.1 Introduction

Chapter Two discusses the historical background of the Namibian Superior courts in relation to their inherent jurisdiction and the powers to adjudicate over matters where the existing law does not provide a remedy. Two decisions of the Supreme Court where the court exercised its inherent jurisdiction to revisit and consequently reverse its own decisions in terms of Article 81 are studied hereunder in an attempt to understand the exceptional circumstances under which an apex court is expected to exercise its inherent jurisdiction.

2.2 Historical backgrounds of the Namibian Superior courts

Before 1990, the South-West African judiciary was amalgamated into that of South Africa as an extension of the judicial system of South Africa.[78]As Amoo correctly sets out the pre-judicial structure, the High Court of South-West Africa was established by the Administration of Justice Proclamation 21 of 1919. After the amalgamation, the High Court of South West Africa became the Provincial Division of the Supreme Court of South Africa by virtue of the Supreme Court Act 1959 (Act 59 of 1959). This means that the Supreme Court of South Africa constituted of two divisions: the Provincial Division, previously the High Court of South West Africa, and the Appellate Division, which

[78] Amoo, S.(2008). 'The Structure of the Namibian judicial system and its relevance for an independent judiciary. In Horn, N. *et* Bosl A. *The Independence of the Judiciary in Namibia.* Windhoek: Conrad Adenauer Foundation, p. 69.

exercised final appellate jurisdiction over the decisions of the South West African Provincial Division.[79]

By virtue of the Supreme Court of South-West Africa Proclamation 222 of 6 November 1981,[80] court administration was transferred from the South African Government to the Administrator-General of South West Africa in 1981. Section 38(2) [81] of the Proclamation provides that the 'provincial or local division of the Supreme Court of South Africa' shall be the Supreme Court of South-West Africa. This converted the 'South-West Africa Division of the Supreme Court of South Africa' into the 'Supreme Court of South-West Africa'. On independence, the High Court of Namibia replaced the Supreme Court of South-West Africa [82] and its jurisdiction is determined in terms of the High Court Act 16 of 1990. The Supreme Court of Namibian substituted the Appellate Division of the Supreme Court of South Africa [83] and its jurisdiction is provided for in terms of the

[79] Amoo, p. 69.

[80] The Proclamation was brought into force by transfer proclamation, RSA Proc. 260/1981 (RSA GG 7973).

[81] Section 38 (2) reads: (2) Unless it would in any particular case be obviously inappropriate –

(a) any reference in any law other than the Supreme Court Act, 1959 (Act 59 of 1959), or in any document; or

(i) to the South-West Africa division of the Supreme Court of South Africa; or

(ii) to any division of the said Supreme Court, which immediately prior to the commencement of this Proclamation included a reference to the said South-West Africa division;

(iii) to the High Court of South-West Africa, shall be construed as a reference or as including a reference, as the case may be, to the Supreme Court;

(b) . . .'

[82] Section 40(2)(a) of the High Court Act reads: '(2) Unless it would in any particular case obviously be inappropriate, any reference in any other law, or in any document or register-

(a) to the Supreme Court of South West Africa, including a reference to that court as construed in accordance with the provisions of section 38(2) of the Supreme Court of South West Africa Proclamation, 1981, shall be construed as a reference to the High Court.'

[83] In terms 39(a) of the Supreme Court Act 15 of 1990 which reads: Unless it would in any particular case obviously be inappropriate, any reference in any other law, or in any document or register-

(a) to the appellate division of the Supreme Court of South Africa (hereinafter referred to as the Appellate Division), shall be construed as a reference to the Supreme Court'

Supreme Court Act 15 of 1990.[84] The jurisdiction of the superior courts is further captured in Article 78(4) of the Constitution which reads:

> '(4) The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose.'

2.3 Inherent jurisdiction of the Supreme Court

Inherent jurisdiction of superior courts originates from the Medieval English Law, which clothed the English superior courts with jurisdiction by virtue of their nature as superior courts.[85] In terms of the Supreme Court of South-West Africa Proclamation,[86] the inherent jurisdiction was transferred to the colonial superior courts of South Africa, and subsequently to the High and Supreme Court of Namibia.[87]

The Supreme Court of Namibia is the highest court with appellate jurisdiction over all courts of the land in terms of section 14 of the Supreme Court Act.[88] The Supreme Court is vested with inherent jurisdiction to hear and adjudicate upon any appeals emanating from the High Court including appeals which involves the interpretation, implementation

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[84] The Supreme Court of Namibia inherited the powers as provided for in terms of s 21(1A), read with s 20 of the Supreme Court Act 59 of 1959 as confirmed in *Oryx Mining and Exploration (Pty) Ltd v Secretary For Finance* 1999 NR 80 (SC) at 89G-H.
[85] Taitz, p. 93
[86] Supreme Court of South West Africa Proclamation 222 of 6 November 1981.
[87] Taits, p. 94.
[88] Section 14 (1) reads: '(1) The Supreme Court shall, subject to the provisions of this Act or any other law, have jurisdiction to hear and determine any appeal from any judgment or order of the High Court and any party to any such proceedings before the High Court shall if he or she is dissatisfied with any such judgment or order, have a right of appeal to the Supreme Court.'

and upholding of the Constitution, especially the fundamental rights and freedoms as guaranteed under the Bill of Rights.[89]

2.3.1 Meaning of 'inherent jurisdiction'

The word 'inherent' has been described to mean 'the power vested in the superior courts to make orders unlimited in amounts and may do anything that the law does not forbid in the interest of justice'.[90] Inherent jurisdiction concerns the functioning of a court towards securing a just and respected process of coming to a decision and is not a factor which determines what order the court may make after due process has been achieved.[91]

Joubert adopted the following definition of 'inherent jurisdiction':

> 'The term or expression 'inherent jurisdiction' has been explained as 'an inherent reservoir of power to regulate. . . procedures in the interest of the proper administration of justice, and does not extend to the assumption of jurisdiction not conferred upon the court by statute. The court's inherent power is reserved for extra ordinary cases where grave injustice cannot otherwise be prevented.'[92]

This definition is in line with the understanding of inherent jurisdiction as stated by Havenga when he explains that inherent power refers to the power to do whatever may be legally necessary to ensure the expeditious carrying out of the courts' functions in administering justice.[93] It is trite that in addition to an appellate courts' ordinary statutory

[89] Article 79 (2) of the Constitution.
[90] Taitz, p 49.
[91] Joubert WA *et al.* 2008. *The Law of South Africa.* Durban: Lexis Nexis, p 496, para 543.
[92] Ibid.
[93] Havenga, A.P. (1944). *Practice and Procedure in the Appellate Division of the Supreme Court of South Africa*. Cape Town: Juta & Co, p 119.

jurisdiction to entertain appeals, the superior courts has 'inherent' or 'assumed' or 'extra statutory jurisdiction' to deal with matters not covered by any existing statute.[94]

Contrast to lower courts that are creatures of statutes, superior courts have wider powers to enable them to protect their independence and impartiality and to regulate and protect their own court processes.[95] The same sentiments were expressed by Heathcote AJA in *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* [96] where he stated that a court exercises its inherent jurisdiction 'in the absence of any written laws, charter, privilege or custom' and in order for the court to regulate its own procedure, the court can dictate procedural rules and make appropriate orders to avoid grave injustices.[97]

The above seem to be in line with the following words as articulated in *S v Smith*:[98]

> 'Apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common-law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court. The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.'

[94] *Kalogeropoulus v Rex* 1944 AD 105; *Colliery Ltd and another v Alleson* 1922 AD 24 and *Collier v Redler and Another* 1923 AD 460.
[95] *S v Smith* 1999 NR 182 (HC).
[96] 2010 (2) NR 703 (HC) at 713I-716A.
[97] See further *Minister of Defence, Namibia v Mwandinghi* 1993 NR 63 (SC) (1992 (2) SA 355 at 368 – 369).
[98] 1999 NR 182 (HC).

It is therefore settled [99] that a court cannot exercise its inherent jurisdiction where statutory law provides a remedy;[100] that inherent jurisdiction does not extend to the assumption of jurisdiction not conferred upon the court by statute and that the exercise of inherent jurisdiction is justified where there is a *lacuna* in the law and not 'where the Rules of Court deals adequately with the situation'.[101] Heathcote AJA in *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* opined that inherent jurisdiction must be exercised by discretion, not guided by personal understanding as to what is equitable or not, but guided by the law.[102] *Cillier* supplements further that the Superior Courts will follow the procedures in place and will only exercise their inherent powers, and only if the requirements of justice demands, to follow procedure that is not provided for by procedural law.[103]

The inherent powers of the court is justified for the courts to be able to regulate its own procedure and to avoid abuse of court process. As Ngcobo AJA emphasized in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*[104] that the administration of justice requires of the court to protect its ability to function as a court of law by ensuring that its processes are used fairly to facilitate the resolution of genuine disputes.[105] Accordingly, unless a court protects its ability to function in that way, its processes would be turned into an instrument to perpetuate unfairness and injustice.[106]

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[99] *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd,* at 171D.
[100] *S v Strowitzki* 2003 NR 145 (SC).
[101] See *S v Hendriks* 1992 NR 382 (HC).
[102] 2010 (2) NR 703 (HC) at 718A-B.
[103] Cilliers,A.D., & Loots, C., & Nel, H.D. (2009). *The Civil Practice of the High Courts of South Africa.* (5th ed.). Cape Town: Juta, p. 51.
[104] 2012 (2) NR 671 (SC).
[105] *Aussenkehr Farms (Pty) Ltd* at 680F-G.
[106] *Aussenkehr Farms (Pty) Ltd* at 680G.

The connotation to inherent jurisdiction therefore includes the power to regulate and develop the courts' own process and procedures, in the interest of justice and where the existing law does not adequately address the issue. Guided within the parameters of the law, inherent jurisdiction must be exercised in pursuit of justice.

2.4 The Supreme Court's binding decisions

The binding nature of the decisions of the Supreme Court is contained in the following provisions:

Article 81 of the Constitution reads:

> 'A decision of the Supreme Court shall be binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'

In addition, section 17 of the Supreme Court Act, 1990 reads:

> '**Finality of decisions of Supreme Court**
>
> (1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.
>
> (2) The Supreme Court shall not be bound by any judgment, ruling or order of any court which exercised jurisdiction in Namibia prior to or after Independence.'

Article 81, read with section 17, has been interpreted to mean that the Supreme Court has the final say on all disputes that come to it and no other court has the constitutional authority to set aside the decisions of the Supreme Court.[107] In *Teek v President of The*

[107] *Teek v President of the Republic of Namibia and Others* 2015 (1) NR 58 (SC) at 69H-70A.

Republic of Namibia and Others [108]the appellant was discharged by the High Court in terms of section 174 of the Criminal Procedure Act, 1977[109] on several criminal charges. The State appealed against his discharge and a retrial was ordered by the Supreme Court.[110] Following a second acquittal by the High Court, the appellant instituted damages claims against the President of the Republic of Namibia, the Government of the Republic of Namibia, the Minister of Justice, the Attorney-General and the foreign judges who formed part of the Supreme Court bench.[111] The complaint in essence was that the proceedings of the Supreme Court were irregular and this resulted in the breach of his right to a fair trial in terms of Article 12 of the Constitution.[112] The High Court held that in determining the liability of the respondents, the High Court is called upon to examine the judgment of the Supreme Court constituting an indirect review of the thought process of the Supreme Court judgment.[113] The High court relied on Article 81 and 78, read with section 17 of the High Court Act, and upheld the special plea that it does not have such review jurisdiction. [114]

On appeal, Ngcobo AJA agreed that Article 81 and section 17 precludes any proceedings directed at appealing or reviewing a judgment or an order of the Supreme Court with the aim of setting it aside.[115] However, the Supreme Court upheld the appeal and held that the High Court misunderstood the issues before court as it was aimed at determining whether the alleged wrongful and unlawful conduct was committed to form a basis for a delictual

[108] 2015 (1) NR 58 (SC).
[109] Act 51 of 1977.
[110] See *S v Teek* 2009 (1) NR 127 (SC)
[111] *Teek v President of the Republic of Namibia and Others* 2015 (1) NR 58 (SC) at 63C-D.
[112] Ibid, at 65E-D.
[113] Ibid, at 65D-E.
[114] Ibid, at 65E-F
[115] Ibid, at 70A.

claim and further that Article 81 and section 17 did not preclude the High Court from entertaining a delictual claim for damages, for, as Ngcobo AJA reasons, the proceedings were not aimed at setting aside the judgment of the Supreme Court but at establishing whether those findings or the conduct complained of are sufficient to sustain the wrongful act complained of.[116] The matter was remitted back to the High Court for adjudication on the damages claim.

In *Schroeder and Another v Solomon and 48 Others*[117], an application in terms of Article 81 was brought to rescind a previous decision of the Supreme Court which was granted against the appellants. The application was based on grounds that the courts previous decision dismissing an application to review two court orders of the High Court was made in error, ie. That the Supreme Court has 'committed a patent error' and that the rule of law will be vitiated if such patent error is not corrected. The Court emphasised at para 13 that in the clear and unambiguous terms of both Article 81 and section 17(1) of the Supreme Court Act, a judgment or an order of the Supreme Court is final, meaning that it is not appealable or reviewable; that its decisions are binding on all other courts, and all persons in Namibia, including the Supreme Court itself, unless reversed by the Supreme Court itself or contradicted by an Act of Parliament. [118] The court further added that section 17 speaks in peremptory terms and there are no exceptions to this rule, unless parliament says otherwise.[119]

[116] Ibid, at 71C.
[117] 2011 (1) NR 20 at 28C-D.
[118] *Schroeder*, at 28E-F.
[119] *Schroeder*, at 28C-D.

Mainga JA noted at p 29 that there may be exceptions to the rule that an apex court is bound by its own decision as recognised in *Bloemfontein Town Council v Richter.*[120] Exceptional cases may be cases where a decision 'has been arrived at on some manifest oversight or misunderstanding, ie, there has been something in the nature of a palpable mistake', or its attention was not drawn in the previous decisions to relevant authorities.[121] Mainga JA further added that the court would also be entitled to depart from its decision where a judgment of the apex court is arrived at by error (*per incuriam*), in subsequent appeals before it and when satisfied that the previous decision was wrong.[122]

The court expressed its reservation in confirming the object of Article 81 by stating that the doctrine of *stare decisis* should be more rigidly applied, especially in the highest court in the land,[123] particularly when a decision has been acted on for a number of years in such a manner that rights have grown up under it. [124] Mainga JA thus reaffirmed the strict adherence to the rule *stare decisis et non quieta movere* (stand by the decisions and do not disturb settled law) as there were no exceptional circumstances in this case.[125]

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[120] 1938 AD 195 at 232.
[121] *Schroeder*, at 29A.
[122] *Schroeder*, at 29D-G.
[123] The court adopted the words of Schutz JA in *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 (3) SA 654 (SCA) at 666F – I when he stated:

> '. . . I should state again that for good reason this Court is reluctant to depart from its own decisions (Harris and Others v Minister of the Interior and Another 1952 (2) SA 428 (A) at 454A) and that once the meaning of the words of a section in an Act of Parliament have been authoritatively determined by this Court, that meaning must be given to them, even by this Court, unless it is clear to it that it has erred (Collet v Priest 1931 AD 290 at 297). Particularly is it important to observe stare decisis when a decision has been acted on for a number of years in such a manner that rights have grown up under it (Harris's case above at 454A – B and Horowitz v Brock and Others 1988 (2) SA 160 (A) at 186H – 187B). For 45 years businessmen and the revenue have been ordering their affairs on the assumption that the SA Bazaars case laid down the law.'

[124] *Schroeder*, at 29C-D.
[125] *Schroeder*, at 30C-D.

In *Kamwi v Law Society of Namibia,*[126] the appellant brought an application in terms of Article 81 for the Supreme Court to revisit its previous decision on the basis that the judgment was made *per incuriam* and was therefore a nullity; that it contained some irregularities; that it was 'outdated' and that it gave a narrow reading to Article 21(1)(j) and Article 21(2) of the Constitution.[127] The respondents argued that a Supreme Court's judgment may only be reversed if it is no longer legally tenable [128] and that Article 81 can never be used to accommodate a further appeal by a litigant dissatisfied with a decision of the Supreme Court.[129] The court dismissed the application, with costs, on the basis that the applicant did not convince the court that its decision is contrary to the principles of natural justice, or that the court had acted beyond its jurisdiction. O'Regan AJA held that Article 81 could not be interpreted to permit a dissatisfied litigant to have a decision of this court reversed on the basis that the litigant did not accept the decision made by the court. The court is of the opinion that to interpret Article 81 as such would lead to the absurd result that a litigant dissatisfied with a judgment of this court could, under the guise of seeking its reversal in terms of Article 81, effectively appeal the judgment of the Supreme Court in relation to the same facts or issues already considered by the court.[130]

2.5 The reversal of the binding decision of the Supreme Court

The Supreme Court recently reversed its own decisions on the basis of Article 81 read with section 17 of the Supreme Court Act in *S v Likanyi*[131] and the unreported petition

[126] 2011 (1) NR 196 (SC).
[127] Arguments by the appellant appears at 198C-I, para [7]-[9].
[128] *Kamwi,* at 199B-C.
[129] *Kamwi,* at 200H-G, para [16].
[130] At 200C-E.
[131] 2017 (3) NR 771 (SC).

judgment of *Minister of Finance and Another v Hollard Insurance Company and Others.*[132]

2.5.1 *S v Likanyi*[133]

S v Likanyi involves one of the accused persons from the well know ordeal of the Caprivi secession attempts during 1999. The appellant, Mr. Osbert Mwenyi Likanyi fled to Botswana during 1999 where he was given asylum as a refugee. While in Botswana, he was arrested by the authorities in Botswana and handed over to the Namibian authorities.[134] He was arrested to stand trial on charges of High Treason, Murder and Robbery. At the commencement of the criminal proceedings, 13 of the 107 accused person raised a special plea of non-jurisdiction in *S v Mushwena*[135] in terms of section 106(1)(*f*) of the Criminal Procedure Act 51 of 1977.[136] The basis of the plea is the accused were apprehended and abducted from Botswana and Zambia where they had illegally fled, handed over to the Namibian authorities without any extradition process[137] being followed. It was argued that such acts by the Namibian authorities stripped the Namibian courts of the jurisdiction to prosecute them.[138] Mr Likanyi was part of the 13.[139]

The High Court upheld the plea and held that the conduct of the Namibian Authorities was in breach of formal extradition procedures and against public international law and

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[132] (P 8 / 2018) [2019] NASC, delivered on 28 May 2019.
[133] Full bench per Shivute CJ, Damaseb DCJ, Smuts JA, Mokgoro AJA.
[134] 2017 (3) NR 771 (SC) at
[135] 2004 NR 35 (HC).
[136] Section 106 (1)(*f*) reads: Pleas: When an accused pleads to a charge, he may plead: -
(f) 'that the court has no jurisdiction to try the offences.'
[137] *Mushwena,* (HC) at 38-39.
[138] See also *S v Mushwena and Others* 2004 NR 276 (SC).
[139] *Mushwena (HC),* at 49E-F.

ordered their release from custody.[140] On appeal to the Supreme Court[141]the majority bench[142] was not satisfied that the State contravened any laws and dismissed the High Court order of release. The matter was remitted to the High Court for plea and trial. Mr Likanyi was tried and convicted on 7-14 February 2015 and was sentenced on all charges 8 December 2015.[143]

A second group[144] of detainees challenged the jurisdiction of the High Court in *S v Mununa and Others* [145] similarly in terms of section 106(1)(*f*). The accused similarly alleged that they were abducted from Botswana and Zambia and placed within the jurisdiction of the Namibian courts without any extradition process and against their will.[146] The State denied the allegations of abduction or illegality stating that the accused where handed over by the Botswana authorities which left them with no choice but to accept them back to Namibia.[147] The special plea was dismissed by the High Court. [148]

On appeal, [149] the Supreme Court was called upon to decide whether the Namibian Government engaged in unlawful conduct which resulted in the appellants being brought within the jurisdiction of the Namibian courts.

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[140] *Mushwena, (HC),* 67H-I.
[141] *S v Mushwena and Others* 2004 NR 276 (SC).
[142] However, the minority judgment (per Strydom ACJ at 288F-G and O'Linn AJA at 298C-D) upheld the plea in favour of Mr Likanyi.
[143] *State v Malumo* (CC 32/2001) [2016] NAHCMD 43 (8 December 2015)
[144] Mr Likanyi was not part of this group.
[145] 2016 (4) NR 954 (SC).
[146] *Munuma*, para 8.
[147] As per Damaseb DCJ, at 958D-E.
[148] The dismissal of the application for leave to appeal to the Supreme Court is reported: *S v Munuma* 2006 (2) NR 602 (HC).
[149] S v Munuma and Others 2016 (4) NR 954 (SC) at 958C-D, para 6.

In respect of one of the appellants, Mr Boster Mubuyaeta Samuele, the Supreme Court overruled the High Court and held that his arrest on Botswana soil was sufficient to constitute the unlawful performance by Namibian authorities in Botswana of a sovereign act of arrest in violation of international law.[150] Accordingly, the State had failed, in respect of Mr Boster Mubuyaeta Samuele, to prove beyond reasonable doubt that the High Court had jurisdiction to try him in connection with the offences he stood charged with under the indictment to which he raised the special plea of jurisdiction.[151] The Supreme Court ordered a permanent stay of prosecution against him in respect of the offences preferred against him.[152]

Following the decision in *S v Munuma*, Mr Likanyi brought a 'review application' principally asking the Supreme Court to review[153] its previous decision in *S v Mushwena*. Mr Likanyi claimed that he was one of the three people who were arrested in Botswana under the same circumstances as Mr Boster Mubuyaeta Samuele; that subsequent to the *Munuma* judgement, the Namibian Courts had no authority to convict and sentence him and similarly his convictions and sentence were irregular and should be set aside.[154] Relying on Article 10 of the Namibian Constitution, he sought a permanent stay against prosecution as ordered in the *Munuma* case.[155]

[150] *Munuma* (SC) at 970D-G, para 63-66.
[151] *Munuma* (SC) at 970H, para 66.
[152] *Munuma* (SC) at 970G-H, para 95.
[153] The review application was brought on the basis of section 16 of the Supreme Court Act, 1990 with an alternative ground to review the decision in *S v Mushwena* on the basis of Article 81. The Court however dismissed the review jurisdiction on the basis that section 16 only empowers the Supreme Court to review decisions of the High Court, Lower Court, Administrative tribunals or authority and not the decisions of the Supreme Court itself., see para 25 of the judgment.
[154] *S v Likanyi*, at 779D-E, para 15.
[155] *S v Likanyi*, at 779E, para 19.

The State based its opposition on the basis of the principle of *res judicata*, alleging that the court has no power, under any circumstance, to revisit its decision in *Mushwena*, however substantial the resultant prejudice is.[156] The State feared that this may open up floodgates for re-litigation of cases finally determined by the court and would compromise the interest of the sound administration of justice.[157]

Recognising and accepting the sentiments expressed by Mainga JA in *Schroeder and Another v Salomon and 48 Others*[158], the court accepted that Article 81 is the basis for the Supreme Court to, in exceptional circumstances, revisit and reverse its own decision.[159] Just what these exceptional circumstances were centred the courts' questioning. The court noted several circumstances that may be exceptional to warrant a reversal in terms of Article 81:[160]

- in criminal matters involving the liberty of subjects where the court is satisfied that the earlier decision was based on the wrong application of the law to the facts which resulted in an 'indefensible and manifest injustice';
- if later facts are distinguishable;
- it was arrived at *per incuriam;* or
- if found to be clearly wrong.

In applying the law to the facts, the Supreme Court found that the Namibian Authorities committed a sovereign or coercive act on foreign soil, which is against international law

[156] *S v Likanyi*, para 22.
[157] *S v Likanyi* at 779H - 780A.
[158] *Schroeder*, para 13-15.
[159] *S v Likanyi* at 781.
[160] *S v Likanyi* at 782A-C, para 30 and at 788C-D, para 53.

and which subsequently stripped the Namibian courts' of their jurisdiction.[161] The Court noted that the decision of *S v Mushwena* wrongly applied the well-entrenched international principle that a court should decline jurisdiction where the prosecuting authorities, the police or executive authorities, were involved in a breach of international law of another State.[162] Accordingly, the court did not deal 'with the distinguishable factual matrix that called for a legal conclusion different to other accused whose factual circumstances are different'.[163]

The court justified the exercise of its inherent jurisdiction on the following exceptional facts: That Mr Likanyi was arrested on Botswana soil under similar circumstances as Mr Boster in the *Munuma* case and based on Article 10 of the Constitution, [164] the same benefit of the law should be extended to Mr Likanyi. Secondly, the court in *Mushwena* made an authoritative view that his arrest was unlawful; thirdly that a floodgate of re-litigation will not be opened since Mr Likanyi was one of the three people arrested on foreign soil, one being Mr Boster who was already released and the third person is deceased. The fourth exceptional circumstance is that Chomba AJA formed part of the bench in both *Mushwena* and *Munuma*, supporting in the latter case the legal consequences attached to the manner of the arrest. [165]

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[161] *S v Likanyi*, para 72.
[162] *Mushwena* 41415H-419G, cited in *S v Likanyi*, para 70-71.
[163] *S v Likanyi*, para 22.
[164] Article 10 reads: **Equality and Freedom from Discrimination**
(1) All persons shall be equal before the law.
(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

[165] *S v Likanyi*, at 794G-H, para 76.

Although the court highlighted the importance of the *res judicata* and *stare decisis* principles and their strict adherence, the circumstances of this case justified a departure therefrom. The Court also emphasised that the resultant prejudice is apparent and 'indefensible' if the principle of *res judicata* is strictly enforced as he would not have a remedy to vindicate the benefit of the law extended by the *Munuma* decision.[166] The Court ruled that it's inherent jurisdiction must be exercised in exceptional circumstances and not as of right,[167] and in the absence of a specific procedure, an effective remedy to a litigant will be fashioned in order to do justice.

Relying on Article 81 and 10, the court reopened the *Mushwena* Appeal in so far as it related to Mr Likanyi, upheld his special plea in terms of section 106(1)(*f*) and ordered a permanent stay of prosecution with the effect that Mr Likanyi will not be prosecuted again on any charges of which he was indicted in the High Court.

2.5.2 Minister of Finance and Another v Hollard Insurance Company and Others [168]

The Minister of Finance sought leave to appeal against the order of the High Court [169] staying the application and implementation of the provisions of the Namibian National Reinsurance Corporation Act 22 of 1998 and subordinate legislation made thereunder. The Namibian National Reinsurance Corporation Act 22 of 1998,[170]establishes NAMRe to carry on reinsurance business in Namibia in respect of any class of insurance ceded or

[166] *S v Likanyi*, 794G-H, para 76.
[167] *S v Likanyi* at 788G-H, para 57.
[168] (P8/2018) [2019] NASC (28 May 2019).
[169] The statutory provisions and the measures were challenged by the respondents in the High Court under case No: HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127. The challenge is in two parts: In the first-mentioned case a constitutional challenge of the NAMRe Act and in the second-mentioned a review of the measures.
[170] Section 20(a).

offered by registered insurers or reinsurers.[171] The Minister of Finance promulgated measures under the Act[172] which compelled every registered insurer and reinsurer to cede a certain percentage of their business to NAMRe. The cession is justified on the basis that it will 'assist in building a sustainable reinsurance industry in Namibia and to minimise the extent to which reinsurance premiums are exported out of Namibia'. In terms of section 42(1), failure to comply with the measures attracts prosecution with a possible fine or an imposed term of imprisonment. [173]

Unhappy with the measures in place, the insurance industry[174] challenged the constitutionality of section 39, 40 and 43 of the Act and the measured made thereunder and simultaneously sought to review the decision of the Minister to promulgate the measures, on grounds that it is against Article 8, 16, 18 and 21(1)(j)[175] of the Constitution. Pending the constitutional and review challenge, the Minister brought an application to compel[176] the respondents to comply with the law.[177] On hearing the application to compel, the High Court stayed the application and implementation of the Act and the

[171] Section 22(a)(ii).
[172] In terms of s 39, Gazette Notice No: 333, 334, 335, 336, 337 and 338 were promulgated and came into effect on 27 June 2018.
[173] In terms of s 42(1) of the NAMRe Act, any registered insurer and reinsurer who fails to comply with the measures is guilty of an offence and liable on conviction to a fine not exceeding N$150 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.
[174] The respondents in this matter were: Hollard insurance Company of Namibia; Hollard Life Namibia Ltd; Sanlam Namibia Ltd; Santam Namibia Ltd; Trusco Insurance Ltd; Trusco Life Ltd; Outsurance Insurance Company of Namibia Ltd; Old Mutual Life Assurance company Namibia Ltd and their respective Chief Executive Officers.
[175] Article 8: Respect for Human Dignity; Article 16: Property; article 18: Administrative Justice and Article 21(1)(f):Fundamental Freedoms- withhold their labour without being exposed to criminal penalties.
[176] Application to compel under case no: *Minister of Finance v Hollard Insurance Company Of Namibia Limited* (HC-MD-CIV-MOT-GEN-2018/00227) [2018] NAHCMD 391 (29 November 2018).
[177] Nedbank had at this time already agreed to comply with the measures and is therefore not party to the application to compel.

measures made pursuant thereto. The petition was made following the refusal for leave to appeal by the High Court. Frank AJA refused the petition in chambers. [178]

Post the refusal of the petition by Frank AJA, the Minister brought an application in terms of Article 81 alleging that the presiding judge should have recused himself.[179] The grounds for recusal is an apprehension of bias on the part of Frank AJ based on the following grounds: Firstly that Frank AJA was lead counsel for the insurance industry[180] in a 1999 constitutional challenge[181] of the Namibian National Reinsurance Corporation Act 22 of 1998; that Frank AJA was a director of Trusco Holdings from 2006-2009 and worked closely with its C.E.O, Mr Quinton van Rooyen who is cited as the 13th respondent; and thirdly, that Frank AJA is the current chairman of NedNamibia Holdings Ltd which owns NedNamibia which is party to the pending constitutional challenge. [182]

The respondent strongly opposed the recusal application on the basis that the allegations do not undermine the judicial impartiality of Frank AJA.[183] Accordingly, past association and representation some 20 years ago cannot breed a possibility of impartiality; secondly that there is no proof that the subject matter of the litigation arises from such association and thirdly that Frank AJA has no involvement in the operations of NedLife, who is not a party to the petition, since it is controlled by an independent Board of Directors on which the latter does not serve.[184] It was maintained by the respondent therefore that the petition

[178] *Ministry of Finance*, para 8-19.
[179] *Minister of Finance*, para 2.
[180] Only Santam from the current respondents was a party in the 1999 proceedings.
[181] The decision of the full bench is reported as *Namibia Insurance Association v Government of the Republic of Namibia* 2001 NR 1 (HC).
[182] *Minister of Finance*, para 26-35.
[183] *Minister of Finance*, para 46.
[184] *Minister of Finance*, para 51.

judge's associations relied on in support of the recusal application are either non-existent, too remote or distant as to be of any consequence.[185] These allegations have been confirmed by the presiding judge in his memorandum submitted to the court at its invitation.[186]

In determining whether the presiding judge was conflicted or not, the court reiterated the objective test of whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge would not be impartial.[187] Departing on the rebuttable presumption that a judicial officer is presumed to be impartial, the court reiterated the principle that a man may not be a judge in his own case.[188] The principles attached to this is that if a judge is in fact a party to the litigation or has a financial, proprietary or non-financial or proprietary interest in the outcome of the case, then he is indeed sitting as a judge in his own cause which would automatically disqualify him/her from sitting on a matter. [189] This principle is extended to cases where, although not related to money or economic advantage but is concerned with the promotion of the cause in which the judge is involved together with one of the parties.[190] The court emphasised that no matter how trivial the interest may be, it would still create an apprehension of bias in the mind of a lay litigant.[191]

[185] *Minister of Finance*, para 46-51 and 68.
[186] *Minister of Finance*, para 53-56.
[187] *Minister of Finance*, para 24.
[188] The court relied on the English case of *R v Bow Street Magistrate; Ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577,
[189] *Pinochet* (2) at 587E-F.
[190] *Pinochet* (2) at 588E-F.
[191] The court relied for this principle on the South African Supreme Court of Appeal judgment of *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A) at 690A-B.

As regards the grounds raised, the court held that the unconstitutionality of the Act was the central question in the 1999 proceedings as well as in the pending constitutional and review proceedings, between parties of whom one of them, Santam, is before court.[192] Frank AJA having formed a view that the Act is unconstitutional representing Santam qualifies for a ground of automatic disqualification from determining the petition.[193] The Court highlighted that a reasonable apprehension of bias will be entertained as regards Frank AJA's decision as that stands to benefit NedLife who, although has agreed to comply with the measures, still maintains the unconstitutionality of the Act. [194]The Court further held that Frank AJA had a duty to disclose his interests to the parties no matter how trivial or irrelevant it may seem in order to afford parties the right to object to a judge as intrinsically embodied in Article 12(1).[195]

The court thus pointed out that where a member of the court ought to have recused himself but did not, vitiates the decision and would justify the reversal of the decision by the Supreme Court itself.[196] The court reversed the refusal by Frank AJA and granted leave to appeal against the order staying the implementation and application of the Act.[197]

2.5.3 Exceptional circumstances

[192] *Minister of Finance*, para 30.
[193] *Minister of Finance*, para 79.
[194] Minister of Finance, para 76.
[195] Minister of Finance, para 91.
[196] Relying on *S v Likanyi*, at 788C-G.
[197] *Minister of Finance*, para 98 – 110.

From the above sources, the Namibian courts have authoritatively defined and interpreted the scope of Article 81, read with section 17 of the Supreme Court Act. Article 81 precludes proceedings aimed at setting aside the judgment of the Supreme Court. [198] Although the court in *Schroeder* was reluctant to accept the exceptions to the *stare decisis* rule, several exceptional factors have been confirmed to warrant the reversal of the courts' decision. It is authoritatively settled that Article 81 may be invoked:

- If a judgment of the apex court is arrived at by error (*per incuriam*), in subsequent appeals before it; has been arrived at on some manifest oversight or misunderstanding, ie, there has been something in the nature of a palpable mistake as adopted from *Bloemfontein Town Council v Richter;*
- If the court is satisfied that the previous decision was clearly wrong[199];
- in matters involving the liberty of subjects, if the court is satisfied that the earlier decision was based on the wrong application of the law to the facts which resulted in an 'indefensible and manifest injustice';[200]
- when later facts are distinguishable[201];
- where a member of the court ought to have recused himself but did not.[202]
- in cases where a decision, or its attention was not drawn in the previous decisions to relevant authorities.[203]

[198] *Teek v President of The Republic of Namibia and Others* 2015 (1) NR 58 (SC) at 71C.

[199] *Schroeder* 29D-E.
[200] *S v Likanyi*.
[201] *S v Likanyi*, para 30 and 53.
[202] *Minister of Finance*, para 96.
[203] 2011 (1) NR 20 (SC) at 29A.

Other grounds on which it can be assumed that the Supreme Court may reverse its own decisions is in the case where there has been a change in law, be it by way of statutory enactment or by decision of the Supreme Court. An example may be observed in the recent constitutional decision of *Daniel v The Attorney-General & Others*[204] wherein the High Court struck down and declared unconstitutional the mandatory sentence provided for in s 14 (1)(*a*)(ii) of the Stock Theft Act 12 of 1990. There is a plethora of cases thereafter where convictions and sentences were set aside on the basis of the declaration.

Another recent development is evident from the Supreme court judgment of *The State v Gaingob and others 2018 (1) NR 211 (SC)* which determined the constitutionality of inordinately long fixed terms of imprisonment extending beyond the life expectancy of an offender. The Supreme Court held that although it is in the trial court's discretion to sentence an offender, any punishment or term of imprisonment which 'takes away all hope of release from an offender is contrary to the values and aspirations of the Namibian Constitution and more specifically the inherent right to dignity afforded to such incarcerated offender'. In highlighting the distint treatment of offenders in terms of s 115 and 117 of the Correctional Service Act 9 of 2012, read with the regulations made thereunder, the Supreme Court aligned itself with the judgment of *S v Tcoeib* 1999 NR 24 (SC) in maintaining that after the abolition of the death penalty, a sentence of life imprisonment is the most severe form of punishment a court can impose on an accused. The High Court has since been inundated with applications for leave to appeal to the Supreme Court, for the first time or second time, in light of this decision.

[204] 2011 (1) NR 330 (HC),

No decision has thus far been reversed by the Supreme Court yet, as all cases are being prepared to be placed on the court roll and to be heard. One can only assume that this will also be one of the exceptional cases where the Supreme Court would have to reverse its previous decisions confirming long sentences. In all these illustrations, the administration of justice would dictate that all person likely placed be treated equally and that is the principle that the courts have observed in revisiting cases in light of the recent change in law.

2.6 Conclusion

Chapter two thus demonstrates that the Supreme Court, as the apex court, is vested with inherent jurisdiction to do whatever may be legally necessary to ensure the expeditious carrying out of the courts' functions in administering justice where the existing law does not adequately address the issue. Unless a court protects its ability to function in that way, its processes would be turned into an instrument to perpetuate unfairness and injustice. The Supreme Court recently exercised its inherent jurisdiction in the decision of *S v Likanyi* and *Minister of Finance v Hollard* and it is discernable from both decisions that inherent jurisdiction comes to the aid of the court where the existing law does not provide a remedy and in order to avoid a grave injustice. It is further clear that inherent jurisdiction of the Supreme Court is employed where strict compliance to common law principles would cause an injustice and would contradict the provisions of the Constitution. The various grounds on which a court may reverse its decisions have also been identified which would be resorted to as an exception to the common law doctrines. These common law doctrines will be discussed in Chapter three in relation to Article 81 and the inherent jurisdiction of the Supreme Court.

CHAPTER THREE

RULE OF LAW AND THE COMMON LAW DOCTRINES OF *STARE DECISIS* AND *RES JUDICATA*

3.1 Introduction

Chapter three examines the commands of the rule of law and the common law doctrines of judicial precedent, *stare decisis,* and *res judicata* which renders the courts *functus officio* as regards courts judgments. Chapter three importantly discusses the strict adherence to these common law doctrines and the exception to that rule: the avenue provided under Article 81 of the Namibian Constitution. Overall, chapter three echoes the impact of the Supreme Court's power to reverse its own decisions against the dictates of the rule of law and the administration of justice.

3.2 Rule of law in Namibia

Namibia legal system is founded on principles of democracy, rule of law and justice for all.[205] This requires that rights and powers be governed by detailed known principles of law[206] resting on the absence of arbitrary power, [207] on equality before the law and judicial

[205] Article 1(1) reads: 'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.' These principles have been articulated by the courts in cases such as: *S v Acheson* 1991 NR 1(HC); *Swart v Minister of Home Affairs, Namibia* 1997 NR 268 (HC); *Ex parte Attorney General, Namibia: in re Corporal punishment by organs of State* 1991 NR 178 (SC).
[206] Beinard, p 104.
[207] Molteno D,.(1966). The rules behind the Rule of Law. In Beinart et al (eds) . *Acta Juridica*. Cape Town: AA Balkema , p 135-148.

decisions confirming the common law.[208] An independent judiciary equally centers the effective operation of the rule of law in any legal system.[209]

The concept of rule of law demands that rule of justice must be of general application to the citizens as opposed to an individual (generality) and not draw irrelevant distinctions based on race religion, wealth, political status or political influence.[210]; must be equally applied to all persons compatible with justice, even when the courts exercises a judicial discretion (equality) and must be definite and ascertainable (certainty).[211] The element of certainty enables persons to know and predict their rights, and therefore laws should not be formulated in wide general terms but should be reasonable, clear and precise.[212] The rule of law further requires that laws should not be applied retrospectively to the disadvantage of individuals, for retrospective laws gives the individuals no fair chance of knowing and predicting the rights. [213] The rule of law further demands uniformity and impartiality which shields against the errors of individual judgments and improper motives on the part of those administering justice for they have the benefit of all the wisdom of their predecessors. [214]

[208] Molteno D, p 26. See also the comments by the Shivute CJ in *S v Likanyi* at 776B-C.
[209] Molteno D, p. 136-137.
[210] Ibid, p 107.
[211] Molterno, p 136.
[212] Beinard, p 106
[213] Ibid.
[214] Beinard, p 105. These attributes have been carried over into the Namibian Constitution as can be seen from the wording of Article 22(a) which requires any law limiting the enjoyment of the fundamental rights and freedoms to be of general application and must not be aimed at a particular individual. Other articles confirming the attributes of the rule of law is Article 10 which guarantees equality before the law. The general language of the Constitution in containing words such as 'all persons' or any person, or no person is also an indication of the general and equal treatment and application of the law to all.

The administration of justice is entrusted in an independent Judiciary[215] which is only subjected to the Constitution.[216] The Judiciary is in terms of Article 25 of the Constitution the watchdog on other branches of government in the exercise of State powers and ensures that rights are protected and upheld in accordance with the constitutional provisions or any law.[217] It is this exercise of power according to constitutional and legal constraints under the guidance of an independent judiciary that is referred to as the administration of justice.[218] Also termed that justice is administered according to law.[219]

3.3 Common Law principles applicable

By virtue of Proclamation 21 of 1919, the Roman Dutch Law developed by the South African courts has become the common law of the South-West Africa territory and was binding on the Namibian Courts until independence.[220] After independence and with the adoption of the Namibian Constitution as supreme law, the legal pluralism is maintained and validated by Article 66 of the Constitution as long as there is no conflict with the provisions of the Constitution or any other law passed by parliament. [221]

[215] Artcle 78(1): The judicial power shall be vested in the Courts of Namibia, which shall consist of: (a) a Supreme Court of Namibia; (b) a High Court of Namibia; (c) Lower Courts of Namibia.
[216] The independence of the judiciary has been strengthened in terms of the provisions of the Judiciary Act 11 of 2015.
[217] Article 25(1) of the Namibian Constitution.
[218] Pollok F. (1918). *A first book of Jurisprudence for Students of the Common Law* (4th ed). London: Maxmillan and Co, p 37.
[219] Ibid.
[220] Ruppel, O., & Ambunda, L. (2012). *The Justice Sector & the Rule of Law.* Windhoek: Namibian Institute for Democracy, p 3-4.
[221] Article 66 of the Namibian Constitution.

As the court correctly pointed out in *Likanyi*, [222] there are two common law nuances to the binding nature of the Supreme Court decisions: the *res judicata* and the *stare decisis* doctrine.

3.3.1 Judicial Precedence - Stare decisis

The concept of precedent is based on the natural inclination in human affairs to regard the decisions of the past as a guide to inform the decisions of the future.[223] The principle is based on the desire to profit from the distilled wisdom of the past, of innate conservatism, the yearning for certainty and antipathy to analysing problems afresh.[224] This practice is preferred to maintain certainty in the law and its equal application. The general duty imposed on judges to follow previous judicial decisions and the authority given to past judgments is what is referred to as judicial precedent.[225]

Judicial precedent therefore refers to the process where judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent is expressed in the Latin maxim: *stare decisis et non quita movere* ie, to stand by precedents (decisions) and not to disturb settled points.[226] The binding nature of the decision depends on the locality of a court with the decisions of an apex court rendered binding on itself and the lower court.[227] The binding quality of a decision resides in the *ratio decidendi*, i.e the reasons for or of the decision and not in any *obiter dictum*, which means a remark

[222] *S v Likanyi*, para 30.
[223] Hahlo, H.R., & Kahn, E. (1968). *The South African Legal System and its background.* Cape Town: Juta & Co, p 214.
[224] Ibid.
[225] Ibid,
[226] *Schroeder*, para 19. See also Hahlo, p. 214.
[227] Van Wisen L, *et al*. (1997). *The Civil Practice of the Supreme Court of South Africa (4th ed).* Western Cape: Juta & Co, p. 83-84.

made in passing. [228] Van Winsen clarifies that since the binding quality of a previous decision is only attributed to the *ratio decidendi*, the doctrine of *stare decisis* does not apply when previous decisions do not lay down any binding principles.[229] This much has been confirmed by the Supreme Court in *S v Katamba*[230] that *obiter dicta*, not forming part of the *ratio decidendi* of a judgment, does not bind the Court but only has persuasive authority.[231]

The object behind the principle of *stare decisis* is that like cases be treated alike and this involves an analogical extension of the decision in an earlier case to the present identical facts.[232] This therefore means that if another dispute comes up for determination in which similar facts are present, previous decisions would be followed.[233] The advantages of *stare decisis* have over the years been endorsed: In that it maintain consistency, predictability and assurance in the law and its effect upon which individuals can rely in the conduct of their affairs; it prevents the dislocation of rights created in the believe of an existing rule of law; it cuts down the prospect of litigation which save courts resources and time as well as litigation costs; it keeps the weaker judge along right and rational paths, drastically limiting partiality, caprice and prejudice. [234] Lord Devlin stated that without precedence, the judicial process would be at the mercy of an individual mind uncontrolled by due process of the law. [235] *Stare decisis* thus ensures that the 'law will not merely change

[228] Kahn , 260.
[229] Van Wisen L, *et al*, p. 82.
[230] 1999 NR 348 (SC)
[231] *S v Katamba*, at 351D-E; See further *S v Vries* 1996 (2) SACR 638 (Nm) at 654d - h and authorities cited.
[232] MacCormick, p 175.
[233] MacCormick, p 175.
[234] Hahlo, p 214.
[235] Lord Devlin, Samples of Lawmaking (1962), p.20. Cited in Hahlo and Khahn, p. 214.

erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.[236]

Judicial precedents further maintain certainty, reliability, fairness, efficiency, stability; equality, uniformity; convenience [237] and coherence in judicial decision making.[238] The key value for the strict adherence to precedent is therefore uniformity in ensuring a degree of legal security and equality before the law.[239] The court in *Schroder* [240] emphasised that it is important to observe *stare decisis* when a decision has been acted on for a number of years in such a manner that rights have grown up under it.[241] In circumstances where there is precedents applicable to the facts, the court has nonetheless a duty to decide the rights of the parties not arbitrarily, but in accordance with fundamental principles of justice.[242]

De Walt[243] points out several disadvantages of judicial precedents. He states:

a) That judicial law is made by chance, namely only when litigation happens to take place in which a new or unsettled point of law is involved;
b) There is no prior promulgation of the law, or notice of the new law to the public and to the parties, ie the law is *ex post facto*. This means that the parties only get to know of the new law after the court has pronounced itself on it. Since the law does not apply retrospectively, the parties would have no chance in arranging their affairs in accordance with the new law;

[236] Nwabueze, 147.
[237] Hahlo and Kahn, p 215.
[238] Ibid.
[239] MacCormick, p 186.
[240] Schroder, at , para 7.
[241] *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 454A-B.
[242] De Walt, p 97.
[243] De Walt, p. 433.

c) It is not comprehensive since the judgement only decided on a single point of law in issue;

d) Even if the new law would require statutory amendments, the courts cannot repeal statutory law, or alter it or improve it as opposed to the legislature;

e) The courts cannot supply a *casus omissus*, that is, add some provision to a statute in order to ensure equity in the application of the statute in a contingency which had been overlooked by the legislature.[244]

The doctrine of *stare decisis* has positively been adopted by the Namibian Courts, occasionally acknowledging that Courts are bound by previous decision and are required to follow an earlier decision unless the earlier decision is wrong.[245] The doctrine of *stare decisis* therefore supports the binding and final effect of judgments of the courts. This is annexed to the fundamental principle of the rule of law on which the Constitution is based in order to maintain certainty, predictability and coherence.[246] The doctrine of *stare decisis* is therefore a constitutional pillar [247] limiting the exercise of the courts' power and ensuring uniformity in the application of the law and the absence of momentary interruptions of coherence.[248] For Namibia, the implication is that all decisions emanating from the Supreme Court are binding on all other courts unless reversed by an Act of

[244] De Walt, p. 432.
[245] *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018), para 61; See also *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Institutions Supervisory Authority and Registrar of Stock Exchanges* (HC-MD-CIV-MOT-GEN-2016/00233) [2016] NAHCMD 365 (17 November 2016), para 41.
[246] *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) at 185F-G para 100.
[247] Article 81 of the Constitution.
[248] McCormick, p. 183. See also *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) para 59.

parliament or the Supreme Court itself as stated by Article 81 read with section 17 of the Supreme Court Act. [249]

3.3.2 *The Doctrine of Res judicata*

Res judicata is a plea that the matter in issue has already been decided by a competent court.[250] The plea is raised to prevent a case from being adjudicated on between the same parties again, in accordance with the maxim *interest reipublicae ut sit finis litium*, ie that it is in the public interest that litigation be finalised. [251] It follows therefore that once a competent court has taken a decision in a case, that decision is conclusive and final, and binds the parties to the dispute and the parties are precluded from instituting proceedings based on the same issues that have already been decided.[252]

Cheda J in *Elias Andreas v Namutenya* [253] stated that 'in order for the judgment in question to be *res judicata*, which effectively renders it final and disqualifies it from resuscitation, it should have been on the same issue determined by the court based on the same facts and by the same parties. [254] *Daniels* seems to agree with this position and adds that the doctrine is founded upon public policy which requires that litigation instituted between the same parties, in regard to the same thing and for the same cause of action should not be endless.[255]

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[249] Ruppel, p 39.
[250] De Walt, p 202. Prinsloo J defines *res judicata* as a Latin term meaning "a thing adjudicated *in S K v S K* (I 3754/ 2012) [2017] NAHCMD 344 (17 November 2017), para 28.
[251] Hahlo and Khahn, p 216.
[252] *S v Likanyi*, para 30.
[253] (I 130/2014) [2016] NAHCNLD 08 (12 February 2016), para 9.
[254] *Ekonolux CC and Another v Shadjanale* (I 905/2014) [2016] NAHCMD 173 (16 June 2016), para 17.
[255] Daniels, H. (2002). *Becks Theory and Principles of pleadings in Civil Actions.* Durban: Butterworths, p. 163.

Smuts J in *Witvlei Meat (Pty) Ltd v Fatland Jaeren*[256] emphasised that a court faced with such a plea must have regard to the object that the *exceptio res judicata* was introduced with the endeavour of putting a limit to needless litigation in order to prevent the recapitulation of the same thing in dispute in diverse actions. Accordingly, this principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.[257]

It can therefore be understood that the doctrine of *res judicata* dictates that parties to a litigated dispute, where there was a definitive and final determination of the parties' rights and interests, cannot re-open it after the normal period for an appeal has lapsed or after they have exhausted their rights to appeal.[258] In that respect, a court would become *functus officio* in that it has itself no authority to correct, alter or supplement its own decision.[259] The courts' jurisdiction in the matter have been fully and finally exercised and the court's authority over the subject-matter ceases.[260]

In the words of Masuku J in *Christian v Namibia Financial Institutions Supervisory Authority*[261]the principle of *res judicata* and *functus officio* have over many decades, like the majestic Baobab tree, taken root in the rich soils of our legal landscape and serve a very important function in finality of litigation. Both doctrines have been held to significantly ensure uniformity and certainty in the treatment of litigants and enables the

[256] (I 2044/2010) [2013] NAHCMD 76 (20 March 2013), para 23.
[257] Ibid.
[258] *Mukapuli and Another v Swabou Investment (Pty) Ltd and Another* 2013 (1) NR 238 (SC) at 240-241C.
[259] *Sylvie McTeer Properties v Kuhn and Others* 2017 (4) NR 929 (SC), at 938C-D.
[260] *Mukapuli* at 241A-C and cases cited under footnote 3.
[261] (A 244/2010) [2018] NAHCMD 19 (8 February 2018), para 31.

allocation of precious judicial resources to deserving cases.[262] It is conclusive therefore that the doctrines allows for finality in the interest of the public.[263]

Distinguished from the doctrine of *stare decisis*, *res judicata* foreclose parties privy to the dispute from re-litigating their claims, or re-litigating questions of fact or law, while *stare decisis* on the other hand not only affects the parties privy to the dispute but everybody else.[264] Another distinction is with regard to the nature of the questions settled: While *res judicata* applies to controverted questions of fact and prevents the re-examination of issues of fact, *stare decisis* has no relation to matters of fact, but is applicable when disputed questions of law have been officially settled and determined. *Stare decisis* does not require (like principle of *res judicata*) that the facts involved in the latter case should be identically the same facts as were involved in the former case.[265]

3.4 Exception to the strict adherence of the doctrine of judicial precedents and the principle of *res judicata*

The exclusion of the rigid application of *stare decisis*, especially by an apex court, has long been critisised on the grounds that it would impair that uniformity and generality which should be the hallmark of law.[266] Brand AJ in *Camps Bay Ratepayers' and Residences' Association and another v Harrison and Another* [267] warns against

[262] Ibid.
[263] MacCormick, p. 187.
[264] Zander, M. (1989). *The Law-Making Process (3rd ed).* London: Weidenfeld and Nicolson, p 179-180.
[265] De Walt, p. 432.
[266] Nwabueze, at 146.
[267] 2011(4) SA 42 (CC) at para 30.

unwarranted disregard of the doctrine of *stare decisis*, especially in apex courts where this doctrine should be unbendingly applied, that:

> 'Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change.'

Although general rules produce certainty, it also produce rigidity. Various academics pointed out that however desirable and important justice according to law, as opposed to discretion, is for every legal state, it cannot be an absolute principle.[268] Although it is established that the practice of adjudication should endorse and implement the use of precedent as a basis for legal reasoning and legal decision making, MacCormick stated that the same principles of justice militate against any rigid or absolute bindingness of precedence.[269] In fact it is established that, in light of the fundamental principles and values enshrined in the new constitutional order, contemporary courts adopts a value based interpretation of precedents which may dilute to a certain degree, the uniform application in the law.[270] However this does not abandon the aspiration to legal coherence as a value. [271] It is thus accepted that law, in order to remain a living force, must adopt itself to changing economic and social circumstances and to changing views of justice. [272]

[268] Beinard, p 107.
[269] MacCormick, p 186.
[270] MacCormick, p 177.
[271] Ibid, 176.
[272] Hahlo, H.R and Kahn., E. 1968. *The South A frican Legal System and its background.* Cape Town: Juta, p 36.

Hahlo[273] recognises that if the body of precedent becomes too stringent in the aim of maintaining stability and certainty, it would suffer from three major defects:

1. It allows the law to become a petrified forest of erroneous notions in that a legal rule formulated before sufficient experience becomes the order of the day, disregarding the wealth of subsequent experience and constructive contemporary thoughts.
2. A strict principle of stare decisis fails to allow legal rules, once in conformity with the needs of society, but no longer so, to move with changing times and sentiments.
3. Strict adherence will lead to casuistry, ie the law descends into that codeless myriad of precedents of which its scientific development is impeded or stopped.

The courts in various common law jurisdictions have long established that although a court should be bound by its previous decisions, it may depart therefrom when convincing reasons present themselves. [274] It is stated that mere precedent is an impermissible basis for a judicial decision which is necessary but not general for a judge must be allowed full liberty to decide according to law [275] because subsequent cases are never identical to previous one and the differing considerations in each case must be differently approached.

Damaseb DCJ in S v *Likanyi* disagreed that the strict application of *res judicata* should prevail however manifest and grave an injustice done reasoning that it is untenable that an

[273] Hahlo and Khahn, p 215.
[274] Hahlo and khahn, p 221.
[275] Hahlo and khahn, p 219.

apex court is 'powerless to correct an injustice caused to an individual.[276] These sentiments weaves in with MacCormick opinion that it is in fact respect for precedent to correct a mistake in law. [277] The Court thus found no justification for a rigid rule which admits of no exceptions at all by clearly stating the following:[278]

> 'Such an approach is unsustainable in a country governed by a justiciable bill of rights coming as it does with a culture of justification for all legal rules including those developed under the common law.'

Guarding against an unwarranted relaxation of the common law doctrines, the court continued: [279]

> 'It must follow, therefore that, in an exceptional case, the Supreme Court has the competence under Article 81 of the Constitution to correct an injustice caused to a party by its own decision. The exception will apply in matters involving the liberty of subjects, primarily in criminal matters, where this court is satisfied that its earlier decision was demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.'

The Supreme Court in *Minister of Finance and Another v Hollard Insurance Company and Others*[280] hinted to a violation of Article 12 which guarantees fair trial if one is denied the right to object to a judge who is not supposed to have sat on the case when on the known facts there is established a reasonable apprehension of bias. The relaxation was justified in this case on the basis of the words of Ngobo CJ in *Bernert v Absa Bank Ltd*[281]:

[276] *S v Likanyi* at 787G-H, para 51.
[277] MacCormick M. p. 175.
[278] *S v Linkanyi* at 788A-C, para 52.
[279] *S v Likanyi* at 788C-D, para 53.
[280] (P8/2018) [2019] NASC, delivered on 28 May 2019, para 91.
[281] 2011 (3) SA 92 (CC), para 121-122

> ‘These allegations concern the proper administration of justice. They strike at the very core of the judicial function, namely, to administer justice to all, impartially and without fear, favour or prejudice. Compliance with this requirement is fundamental to the judicial process and the proper administration of justice. This is so because it engenders public confidence in the judicial process, and public confidence in the judicial process is necessary for the preservation and maintenance of the rule of law. Bias in the Judiciary undermines that confidence. And a judicial officer who sits in a case in which he or she should recuse himself or herself violates the Constitution.
>
> These are important constitutional issues that go beyond the interests of the parties to the dispute, for an independent and impartial judiciary is crucial to our constitutional democracy. It is, therefore, in the public interest that these issues be resolved. As these allegations are made against the Supreme Court of Appeal, there is no court that can investigate these issues other than this court. This court, as the ultimate guardian of the Constitution, has the duty to express the applicable law, in order to enhance certainty among judicial officers, litigants and legal representatives, and, thereby, to contribute to public confidence in the administration of justice.’ [282]
>
> . . .
>
> ‘The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.’[283]

Smuts J in *Witvlei Meat (Pty) Ltd v Fatland Jaeren AS* [284] adopted the principles in *Bafokeng Tribe v Impala Platinum Ltd and others*[285]wherein the court stated that in order to avoid grave injustice, a court may re-open the case in respect of the same parties, with respect to the same subject-matter, or thing. Smuts J endorsed these principles holding that the rigid application of the *res judicata* may create tension between a multiplicity of

[282] Bernett at 99B-E, para 21-22.
[283] Bernett at 100B-C, para 28.
[284] (I 2044/2010) [2013] NAHCMD 76 (20 March 2013), para 23.
[285] 1999 (3) SA 517 (B).

actions and the palpable realities of injustice. Accordingly, each case must be determined on its own facts without rigidity, and the overriding or paramount consideration being overall fairness, equity and substantive justice.[286]

MacCormick explains that compromise of coherence does not amount to an abandonment of aspiration to legal coherence as a value, but in fact an avenue for securing a new legal coherence.[287]Accordingly, it is this kind of coherence that is deserving of respect from the citizen and outsiders.

In addition to the *proviso* in Article 81, [288] Article 25(3) confirms the relaxation to *stare decisis* as it reads:

> 'Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

In *Communications Regulatory Authority of Namibia v Telecome Namibia Ltd And Another*[289] the court recognised that a superior court has the power, or assumes such a power, to tailor a remedy that best serves the interest of justice when it determines that fundamental rights and freedoms have been infriged.[290] Parker J in *Sheehama v Minister*

[286] *Witvlei Meat (Pty) Ltd,* para 25.
[287] MacCormick, p. 177-178.
[288] '. . . unless it is reserved by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'
[289] 2018 (3) NR 664 (SC).
[290] *CRAN*, at 688, para 100.

of Safety and Security and Others[291] held that in order to ensure the enjoyment of the right that has been violated, the 'necessary and appropriate' order to secure the applicant's enjoyment of his rights. This is the point that was emphasised and applied in S v *Likanyi*[292] when the court stated that strict adherence to the common law nuance would deprive Mr Likanyi of the benefit of the law which was extended by the Supreme Court to Mr Boster. Inorder to avoid an indefensible injustice being done, [293] the 'proper and appropriate order' was therefore a permanent stay of prosecution.

3.5 Conclusion

It can be concluded that chapter three places emphasis on the fact that judicial discretion and fixed rules are both permanent elements in the administration of justice, though their relative importance varies at different times.[294] Despite the legal justification to depart from the strict adherence of precedent, it is maintained that courts would not depart from a decision reached after due deliberation, save for convincing reasons arrived at after careful consideration.[295] It has therefore authoritatively settled that where justice dictates and in exceptional circumstances, an apex court may depart from its previous decisions

[291] 2011 (1) NR 294 (HC) at 297C-E.
[292] *S v Likanyi* at 794F-G, para 79.
[293] *S v Likanyi*, para 76 and 78.
[294] Beinard, p 107.
[295] Hahlo and Kahn, p 221. See also *Moulded Components and Ratomoulding SA (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 461F- 462H where in the court warned as follows: 'I would send a word of caution generally in regard to the exercise of the court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The rules are there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced, in my view, to persuade the court to act outside the powers provided for specifically in the rules. Its inherent power, in other words, is something that will be exercised sparingly . . . The court will exercise an inherent jurisdiction whenever justice requires that it should do so . . . the court will come to the assistance of an applicant outside the provisions of the rules when the court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.

contrary to the demands of *stare decisis* and the *res judicata.* The ultimate aim is to avoid grave injustice and to do substantial justice where circumstances allows. It is appropriate to heed to Hahlo when he warns against frequent changes in settled law for reliance on the law would be impossible [296] confirming the position that the inherent power of the court is to be sought and exercised only exceptionally and not as of right.[297]

[296] Hahlo, H.R and Kahn., E. (1968). *The South African Legal System and its background.* Cape Town: Juta, p 35

[297] *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018), para 61; See also *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Institutions Supervisory Authority and Registrar of Stock Exchanges* (HC-MD-CIV-MOT-GEN-2016/00233) [2016] NAHCMD 365 (17 November 2016), para 41.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF ROMAN-DUTCH - "COMMON LAW" JURISDICTIONS

4.1 Introduction

Roman Dutch Law and its commands have influenced various jurisdictions since time immemorial. The legal practice and court procedure in these jurisdiction are substantially similar, subject to recent development in the law. A comparative analysis will be made of Common law jurisdictions such as South Africa, India, Canada and the United Kingdom. The aim for the comparative study is to draw lessons for Namibia on how apex courts in common law jurisdictions reverses their own decisions and what exceptional circumstances have been held to justify a departure from the rigid application of the *stare decisis* and the *res judicata* principle as highlighted under chapter 3.

4.2 United Kingdom (UK)

The Supreme Court of the United Kingdom is the final court of appeal and apex court for all United Kingdom civil and criminal cases from England, Wales and Northern Ireland.[298] The Supreme Court has since 2009 replaced the House of Lords as the highest court to preside over appeals from the Court of Appeal (both civil and criminal division) and the High Court.[299]

[298] JustCite: The Good Law Guide (2011). Retrieved from http://www.justcite.com/kb/editorial-policies/terms/uk-court-structure/.
[299] Ibid.

A broad principle of practice which was recognised by the Court in the UK is that a court is absolutely bound by the *ratio decidendi* of a judgment of a court higher in the judicial hierarchy. [300] Therefore, the Courts of Appeal were bound by the decisions of the House of Lords even if they consider them wrong, [301] and were reluctant to reverse prior decision principally on the basis of ensuring certainty in court reasoning and not to usurp the jurisdiction of the apex court to correct and settle the law.[302] The House of Lords considered itself completely bound by its own decisions as far back as in 1861.[303] The rigid approach, which is based on maintaining certainty and uniformity, is based on the maxim *interest reipublicae ut sit finis litium* in that the House of Lords, having once declared what the law is, by changing its ruling would be arrogating to itself the right of altering the law and legislating by its own separate authority.'[304]

This position was however subjected to various criticism which led to the House of Lords reconsidering its position on the ability to deviate from its previous decisions.[305] In *Bright v Hutton*[306] Lord St. Leonards stated that although the House of Lords is bound by its own decisions, it is not bound by any rule of law, if upon a subsequent occasion, the court should find reason to differ from that rule. Accordingly, the House, like any court of justice, possesses an inherent power to correct an error into which it has fallen. However, Lord Campbell was not in agreement with this stance stating that a decision of the House

[300] Hahlo and Kahn, p. 227.
[301] Hahlo and Kahn, p 226.
[302] *Likanyi*, at 782F-G. See also Right Hon. Sir. Pollock F.(1918). *A first book of Jurisprudence for students of the Common Law.* London: MacMillan and Co. Ltd, p 330.
[303] *Beamish v Beamish* (1861) 9 H.L.C 274, 11 E.R.735.
[304] Cited in *R v Tailor* [1950]2 KB 368 C.C.C.A at 731. See *London Streets Tramway Company v London Country council* 1898 A.C. 375 and *Young v Bristol Aeroplane Co.* 1944 K.B 718.
[305] *Fletcher v Sondes* 1 Bli.N.S at p 249;
[306] (1852) 3 H.L.C. at p.388.

of Lords, in point of law, is conclusive upon the House itself as well as upon all inferior courts and can only be altered by an Act of the Legislature for otherwise, he argued, the rights of the Queen's subjects would be in a state of uncertainty.[307]

On 28 July 1966, the Lord Chancellor, Lord Gardiner L.C., issued a *Practice Statement* [308] on behalf of the House of Lords recognizing that a rigid adherence to precedent unduly restrict the development of the law and may lead to injustice in particular cases. The practice statement has since been authority that the House of Lords is not absolutely bound by its own decision and may depart from previous decisions when it appeared right to do so. The horizontal *stare decisis*, ie the court's approach to its own decision, did not ignore the importance of precedent and maintained the respect to the rights grown under existing laws. [309]

The House of Lords has since then identified the scope and application of the practice note in various decisions: In *Young v Bristol Aeroplane Co Ltd*,[310] it was held that the Courts of Appeal may depart from their own decision if it cannot stand with the decision of the House of Lords, although not expressly overruled; if satisfied that its own decision was given *per incuriarum* i.e by carelessness or mistake or was wrong [311] or when the liberty of a person has been infringed as a result of the misapplication or misunderstanding of the law in its previous decision.[312] A decision given *per incuriam* has been defined to include

[307] Ibid, pp 391-92.
[308] [1966] 3 ALL E.R 77.
[309] Ibid.
[310] [1944] KB 718.
[311] *R v Greater Machester Coroner, Ex parte Tal* [1985] QB 67.
[312] *R v Tailor* [1950]2 KB 368 C.C.C.A at 731.

when the court has acted in ignorance of a previous decision of its own or of a court of a co-ordinate jurisdiction or when it has acted in ignorance of a decision of the House of Lords. [313]

In *Jones v Secretary of State for Social Services*,[314] Lord Reid held that were the issue involves the proper construction of complicated provisions in a statute, previous decisions should not be revisited since there are no broad issues of justice or public policy involved or any question of legal principles. Lord Pearson warned that the liberty to depart from previous decisions affects the finality advantage that previous decision have on the litigation between parties and would necessitate reopening of issues once concluded or the risk of individual hardship in cases intermediately decided on the basis that the previous decisions were correctly decided. [315]

Lord Reid in *R v Knuller (Publishing, Printing and Promotions) Ltd* [316] further cautioned that the reversal should be done when good reasons exists and not in the hope that a differently constituted court would be persuaded to accept a view previously rejected. Good reasons existed in *R v Shivpuri*,[317] where the House reversed a prior decision in *Anderton v Ryan* [318] on the basis that there was a wrong application of the Criminal Attempts Act 1981 on which the accused was convicted. Lord Chancellor held that 'if a serious error embodied in a decision of this House has distorted the law, the sooner it is

[313] Halsbury's Laws of England, third edition, Vol. 22, para. 1687, pp. 799, 800.
[314] [1972] 1 A.C.944.
[315] *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435.
[316] [1973] AC 435.
[317] 1986] UKHL 2 (15 May 1986).
[318] [1985] A.C 560.

corrected the better.' The House in *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2*), [319] emphasised that it will re-open an appeal where, through no fault of a party, he or she has been subjected to an unfair procedure. [320] This was justified by Lord Steyn in *Rees v Darlinton Memorial Hospital NHS Trust,* [321] when he listed that a fundamental change in circumstances or experience showing that a decision of the House results in unforeseen serious injustice, may permit such a departure. [322] The emphasis on the exercise on the power to reverse its decisions have been that it should do so rarely and sparingly. [323]

The Supreme Court in *Austin v Mayor and Burgesses of the London Borough of Southwark* [324] reaffirmed the application and effect of the Practice Statement of 1966 and all decisions thereafter. [325] The Supreme Court did not find it necessary to reformulate the practice and decided to exercise the power to reverse its own decision in the same manner and to the same extend as the House of Lords did. [326] The confirmation in *Austin* has now been incorporated into the Court's Practice Directions. Direction 3.1.3 states that the Statement still applies and requires that an application for permission to appeal to the Supreme Court must indicate whether it requires the Supreme Court to reverse its own decision or one made by the House of Lords.[327]

[319] [1999] 1 All ER 577.
[320] Ibid, para 585j-586a.
[321] [2003] UKHL 52 (16 October 2003), para 33.
[322] The court cites the case of *Miliangos v George Frank* (Textile Ltd) [1976] AC 433.
[323] *Horton v Sadler* [2006] UKHL 27.
[324] [2010] UKSC 28.
[325] The established jurisprudence as regards the handling of appeals by the House was part of the jurisdiction transferred to the Supreme Court by virtue of section 40 of the Constitutional Reform Act 2005.
[326] *Austin*, para 24-31.
[327] Practice Directions available http://www.supremecourt.gov.uk/news/370.html.

The same approach has been adopted by the Supreme Court in Human rights cases as regards the Judgments of the European Court of Human Rights. [328] Although the court has reversed its previous decisions on the basis that they could no longer stand in light of the subsequent decisions of the ECtHR,[329] it does not consider itself completely bound by the decision of the ECtHR and, as Lady Hale puts it, 'can depart from such jurisprudence if there are good reasons or it appears right to do so'.[330]

In *Jones v Kaney* [331] the Supreme Court was faced with the issue of whether expert witnesses are immune from delictual claims in respect of their conduct relating to the trial. In light of the authorities [332] establishing that expert witnesses' immunity extends not only to what is said in court but also to what is said in preparation for the trial, the court was of the view that despite the Practice Statement, the court should not presume that a long established principle must be maintained. The court should accordingly faithfully engage with the standing precedent and authority on the subject to justify its maintenance.[333] Lord Kerr concluded that the court should not be deflected from conducting a clear-sighted, contemporary examination of the justification for its preservation, for errors in court

[328] Lee J.(n.d). The Doctrine of Precedent and the Supreme Court. Retrieved from: https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture_james_lee.pdf, p 20.
[329] *Secretary of State for the Home Department v AF* [2009] UKHL 28 held that its previous decision of *Secretary of State for the Home Department v MB* [2007] UKHL 46 could no longer stand in the light of the ECtHR decision of *A & Ors v United Kingdom* (2009) 49 EHRR 29.
[330] McCaughey, *Re Application for Judicial Review* [2011] UKSC 20, para 93.
[331] [2011] UKSC 13.
[332] *Stanton v Callaghan* [2000] QB 75; *Palmer v Durnford Ford* [1992] QB 483; Author Haasll v Simons [2000] UKHL 38;[2002] 1 ac 615; *Waston v M'Ewan* [1905] AC 480
[333] *Kaney*, para 149.

reasoning and non-compatibility to contemporary situations would be carried on for generations.[334]

Jones v Kernott [335] considered previous decisions which established that the property rights of unmarried cohabitants may be established through the parties' actual common intentions and that it was not possible to impute intention, ie to attribute an intention to the parties even though they did not have it.[336] The Supreme Court acknowledged that parties' intentions may change after acquisition of property and the presumption and intention held at the date of acquisition may change. The position was altered to reflect that parties' interests in the immovable property may, in exceptional circumstances, also be determined by imputing intention on the parties.[337]

It is thus settled that the House of Lords, and now the Supreme Court, does not consider itself bound by its previous decision or those of its predecessor, the House of Lords. The summary of authorities indicate the extent and framework within which the Supreme Court of appeal exercises its powers to reverse previous decision. Additional guidelines for the court were summarised as followed:[338]

1. The freedom to depart ought to be exercised sparingly;

[334] *Kaney*, para 88.
[335] [2011] UKSC 53.
[336] *Pettitt v Pettitt* [1970] AC 77; *Gissing v Gissing* [1971] AC 886 and *Lloyd's Bank v Rosset* [1991] 1 AC 10.
[337] *Kaney*, para163.
[338] Also summarised in *Jones v. Secretary of State for Social Services* [1972] A.C 944 at 966.

2. A decision ought not to be overruled if to do so would upset the legitimate expectations of people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision (the '*legitimate expectations' criterion);*[339]
3. A decision concerning questions of construction of statutes or other documents ought not to be overruled except in rare and exceptional cases;
4. A decision ought not to be overruled if it would be impractical for the lords to foresee the consequences of departing from it;
5. A decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law. Such changes are best done 'by legislation following on a wide survey of the whole field;
6. In the interest of certainty, a decision ought not to be overruled merely because the Law Lords consider that it was wrongly decided. There must be some additional reasons to justify such a step;
7. A decision ought to be overruled if it caused such great uncertainty in practice that the parties' advisers are unable to give any clear indication as to what the courts will hold the law to be; In *Austin*, the Supreme Court was not persuaded in departing from the previous decisions as the legislature adequately dealt with the problem in this case.
8. A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy.

[339] See also Right Hon. Sir. Pollock F, p. 326-327.

4.3 Canada

The Supreme Court of Canada, also referred to as 'The General Court of Appeal of Canada', exercises exclusive and ultimate appellate civil and criminal jurisdiction over Canada and its judgments are, in all cases, final and conclusive. [340] In terms of section 54 of the Supreme Court Act, [341] the judgements are binding on all lower courts including itself.[342] It has long been asserted, since 1901, [343] that the Supreme Court of Canada is not bound by its own decisions. Rule 76 of the Rules of the Supreme Court of Canada [344] confirms that by making provision for a litigant to, on motion, approach the Supreme Court for a rehearing of an appeal and the court would make an order as to the conduct of the hearing as it considered appropriate.[345] A recent report states that over 500 Supreme Court of Canada decision have been overturned by the Supreme Court itself with over 55 decision in the last 10 years.[346]

The Canadian courts' power to depart from its own precedent was tested in *Mohammed v. Minister of Citizenship and Immigration*,[347] with Federal court reaffirmed the strict

[340] Available on: https://www.scc-csc.ca/court-cour/sys-eng.aspx.
[341] R.S.C.,1985. C.s-26.
[342] The Supreme Court of Canada hears appeals from both the Federal Court, headed by the Federal Court of Appeal and the provincial court systems, headed in each province by that province's Court of Appeal.
[343] Bowal P and Syed R. 2017. *The evolution of Five Legal Doctrines in the Supreme Court of Canada.* Retrieved from https://www.lawnow.org/the-evolution-of-five-legal-doctrines-in-the-supreme-court-of-canada/
[344](SOR/2002-156). Available on Government of Canada, Justice Laws Website: https://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/index.html. Accessed on 5 August 2019.
[345] Rule 76 (1) reads: '76 (1) At any time before judgment is rendered or within 30 days after the judgment, a party may make a motion to the Court for a re-hearing of an appeal'.
[346] Bowal P and Syed R., p. 1.
[347] 2005 FC 1442 (CanLII) at para 12.

application of the *res judicata* principle but in addition identifying that special circumstances, such as (i) fresh evidence and (ii) principles of natural justice, (iii) change in law[348] would justify a departure from the rigid application of the doctrine. [349] The court would accordingly engage in an enquiry of whether, taking into account all of the circumstances, the application of the principle of *res judicata* would work an injustice' A patently unreasonable nature of the error is the appropriate standard of review used by the courts in order to determine whether to disregard precedent'. [350]

This much was confirmed in *Apotex Inc. v. Merck & Co.*[351], that any special circumstances which would give rise to an injustice would make the Court reluctant to apply the estoppel. The reluctance by the court to relax the *res judicata* rule is in the interest of having litigation finalised in the public interest. Acknowledging the inherent conflict between the interest in finality of litigation and in achieving justice between litigants, the court's approach in *Apotex* was that court achieve practical justice by not undermining the principles on which the doctrine is founded and would relax it where its application would be unfair to a party who is precluded from re-litigating an issue. [352] The Canadian courts have also departed from previous decision shown to have been wrongly decided for its application would be unfair. [353]

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[348] *Carter v. Canada* (Attorney General), [2015] 1 SCR 331, 2015 SCC 5 (CanLII), <http://canlii.ca/t/gg5z4
[349] *Mohammed,* para 10.
[350] *Mohammed* , para 12. *See also Deuk v. Canada (Citizenship and Immigration 2006 FC 1495 (CanLII). Avaialble online:* http://canlii.ca/t/4j4f.
[351] *[2003] 1 FCR 243, 2002 FCA 210 (CanLII)*
[352] *Apotex,* para 35.
[353] As support for this proposition, Laskin J.A. relied on the decision of the House of Lords in *Arnold v. National Westminster Bank Plc*., [1991] 2 A.C. 93, at pages 110-111.

R. v. Mahalingan [354] raised concerns about relitigation of decided issues. The court stated that ensuring finality in litigation is a matter of fairness and justice and putting a stop to repeated litigation is also important for the efficiency and reputation of the judicial system as it avoids the 'squandering of scarce judicial resources and the scandal of inconsistent findings between courts'[355] The court highlighted that in the exercise of its discretion, the court need to balance the competing interests and even when the jurisdictional factors for the operation of the *res judicata* have been established, the court must nonetheless be convinced that its application will not cause any injustice.[356]

The Canadian Supreme Court recently reiterated in *Ontario v Fraser* [357] that the question in every case should be whether the reasons in favour of following a precedent — such as certainty, consistency, predictability and institutional legitimacy — outweigh the need to overturn a precedent that is sufficiently wrong. In this case, the court had compelling reasons to overturn its previous decision in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [358] purely on the ground that the approach that collective bargaining cannot take place without government intervention will not stand in light of the contemporary labour law on free collective bargaining and its protection under the charter. The same approach was taken in *Mounted Police Association of Ontario v. Canada (Attorney General)*,[359] that a narrow interpretation of the Charter

[354] [2008] 3 SCR 316, 2008 SCC 63 (CanLII)
[355] *R. v. Mahalingan* , para 106.
[356] Ibid.
[357] 2011 SCC 20, [2011] 2 S.C.R. 3
[358] 2007 SCC 27 (CanLII), [2007] 2 S.C.R. 391.
[359] [2015] 1 SCR 3, 2015 SCC 1 (CanLII), <http://canlii.ca/t/gfxx8>

rights would be replaced with a purposive and generous approach so as to allow full, fee and independent exercise of these rights. [360]

It is evident that the Supreme Court regularly involve itself in the balancing exercise of two important values of correctness or certainty, ie whether it is preferable to adhere to an incorrect precedent to maintain certainty or to correct the error. [361] May reasons inform such a departure as can be glanced from the authorities above: social changing norms, turnover of judges, slim majority in the precedents, undesired impacts and a corresponding sense that the precedent was wrong, an activist yearning to effect change and new arguments and issues arising after judgment had already been delivered. [362] It therefore follows, authoritatively, that these circumstances would justify a departure from the *stare decisis* and the application of the *res judicata* rule under the Canadian jurisdiction.

4.4 India

The Supreme Court of India is the apex court [363] of India, clothed with original appellate jurisdiction to hear and determine both civil [364] and criminal appeals [365] from the

[360] The court overruled the decision in *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989 which ruled that federal legislation which denied the members employee status to collective bargaining did not infringe their constitutional freedom of association under section 2(d) of the Charter.
[361] *Canada v. Craig*, [2012] 2 SCR 489, 2012 SCC 43, overruling *Moldowan v. The Queen*, 1977 CanLII 5 (SCC), [1978] 1 S.C.R. 480
[362] Bowal P and Syed R, p 3.
[363] Article 124 of the Indian Constitution, 1949. See also Choudhury, A. (2012) *Review Jurisdiction of Supreme Court of India: Article 137.* Retrieved from http://ssrn.com./abstract=2169967.
[364] Article 133 of the Indian Constitution.
[365] Article 134 of the Indian Constitution.

provincial High Courts. Article 141 [366] states that the law as declared through judgments of the Supreme Court are final and binding on all courts in India. In *Punjab Land Development v Presiding Officer, Labour*[367] the Supreme Court acknowledges that Article 141 embodies, as a rule of law, the doctrine of precedents which is an indispensable foundation to uphold certainty, allows for the orderly development of legal rules and a further basis on which the court decide what is the law and its application to individual cases.[368]

The Indian Supreme Court purposively interpreted Article 141 to mean that the words 'all courts' does not include the Supreme Court itself. [369] This much clear from the decision in *Bengal Immunity Co. v State of Bihar* [370] wherein the Supreme Court held that the Constitution of India does not prohibit the Supreme Court to depart from its previous decisions. The approach by the court is based on the maxim '*actus curie neminem gravabit'* which means that no act of court should harm a litigant and it is the duty of the court to see that if a person is harmed by the mistake of the court, he should be restored quickly to the position he would have occupied but for the mistake.[371] Further to this, the Supreme Court of India recognises that a rigidity may lead to injustice in a particular case and may unduly restrict the proper development of the law.

[366] Article 141 reads: 'The law declared by the Supreme Court shall be binding on all courts within the territory of India.'
[367] 1990 SCR (3) 111, 1990 SCC (3) 682 at 136H.
[368] The court relied on the House of Lords decision in *Re-Dawson's Settlement Lloyds Bank Ltd. v Dawson and Others* [1966] 1 WLR 1234.
[369] Indian Institute of Legal Studies (2017) *Purposive Interpretation of Law in special reference to Article 141 of the Constitution of India.* Retrieved from: https://www.iilsindia.com.
[370] [1955] 2 SCR 603.
[371] Choudhury, p. 7.

The Indian courts assumes the same jurisdiction under Article 137 of the Constitution which allows the court to review its decision or order. The word 'review' has been defined to include a judicial re-hearing or re-examination of the case in order to rectify an error or prevent the gross miscarriage of justice.[372] Post constitutional cases in India confirms that the discretionary power of the court to review its own decision is an exception to the general principle of *stare decisis* which is based on the philosophy of accepting human fallibility in order to avoid abuse of process or miscarriage of justice.[373]

Like in other jurisdictions, the Indian Supreme Court would only depart from its previous decisions when circumstances of a substantial and compelling character warrants such a departure so as to not disturb finality in litigation. [374] Exceptional circumstances have been held to include where the court is satisfied that a judgment is given *per incuriam;* [375] cases involving broad issues of justice or public policy and questions of legal principle and only in rare cases will the Court reconsider questions of construction of statutes or other documents.[376]

R.V. Raveendran, J in *Panchaxari Shidramappa Yeligar vs Shiggaon Taluka Shikshana* [377] additionally laid down several exceptions that would apply to the strict application of the *stare decisis* rule as follows:

[372] A provision for review has been laid down under the section 114 of the Code of Civil Procedure.
[373] *Aribam Tuleshwar Sharma v Aribam Pishak Sharma* (AIR 1979 SC 1047).
[374] Northern India Carters v L. Governor of Delhi, 1980.
[375] *Jaisri Sahu vs Rajdewan Dubey and Others* 1962 AIR 83, 1962 SCR (2) 553.
[376] *Punjab*, 136H.
[377] 2000 (5) KarLJ 174.

> ‘Some of the recognised exceptions to the rule of *stare* deems, where a decision will not be binding as a precedent are: (a) when there is a subsequent statutory modification at variance with the decision; (b) a different view being taken by Courts in higher tiers, subsequently; (c) where a decision is found to have been rendered per incuriam[378] , that is, in ignorance or oversight of relevant statutory provisions, or binding decisions of Courts in higher tiers; (d) where a decision which passes *sub-silentio*[379], that is when the particular point of law involved in the decision is not perceived by the Court or present to its mind.’

Another exceptional ground was highlighted in the recent Supreme Court decision of *Navtej Singh Johar & Ors. v Union of India thr. Secretary Ministry of Law and Justice*. [380] The Supreme court reversed its previous decision[381] which criminalized certain sexual acts between two adults same sex partners on the basis of section 377 of the Indian Penal Code and as being unconstitutional. In this current review, the petitioners alleged that section 377, in criminalizing penal sex between two consenting adults, violates the constitutional right to equal protection of laws[382] ; right to non-discrimination on grounds of sex[383]; freedom of speech and expression [384] and right to life and person liberty. [385] In a unanimous 9-benched decision, the Supreme Court relied on the concept of constitutional morality which requires of the court to be cognisance in evolving moral

[378] The Supreme Court in *Siddharam Satlingappa Mhetre vs State Of Maharashtra And Others* on 2 December, 2010 adopts the definition from the English court as stated in *Young v. Bristol Aeroplane Company Limited* (1994) All ER 293 the House of Lords observed that `*Incuria'* literally means `carelessness'. In practice *per incuriam* appears to mean *perignoratium*. English courts have developed this principle in relaxation of the rule of *stare decisis*.
[379] In *Shri Mohammed Bilal Hanif Shaikh vs Shri A.N. Roy* 2006 CriLJ 1547, 2006 (4) MhLj 371, the court also defined judgment *sub-silentio* as 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'.
[380] Writ Petition (Criminal) No. 76 of 2016, India: Supreme Court, 6 September 2018. Retrieved from: https://www.refworld.org/cases,IND_SC,5b9639944.html.
[381] *Suresh Kumar Koushal and another v. Naz Foundation and others* (2014) 1 SCC 1 3 (2009) 111 DRJ 1 08.01.2018.
[382] Article 14.
[383] Article 15(1).
[384] Article 19(1)(a).
[385] Article 21.

principles that would define society today. It was held that section 377 is not a rational restriction on the exercise of the constitutional rights and that the decision of *Suresh Kumar Koushal and another v. Naz Foundation and others* was narrowly and wrongly decided. [386]

4.5 South Africa

The Constitutional Court is the apex court established in terms of section 166 [387] of the Constitution of the Republic of South Africa. [388] The Constitutional Court is the court of final instance and exercises jurisdiction over the whole of South Africa in respect of constitutional matters and issues connected with decisions on constitutional matters.[389] Section 173 is the constitutional basis for the courts' inherent jurisdiction to protect and regulate its own procedure by, amongst others, giving any order that the law does not prohibit.[390]

The Appellate Division has long since recognised the inherent jurisdiction of an apex court to correct an unfairness occasioned to a litigant through a procedure adopted by the court

[386] At para 98.
[387] Section 166 of the Constitution of the Republic reads: The Courts are:
1. the Constitutional Court;
2. the Supreme Court of Appeal;
3. the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
4. the Magistrates' Courts; and
5. any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts'

[388] Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).
[389] Section 167(3)(a) reads:
[390] Van Winsen L. (1997). *The Civil Practice of the Supreme Court of South Africa (4th ed).* Western Cape: Juta & Co.Ltd, p. 39.

and not arising from any fault of the litigant. [391] The South African courts have over the years attempted to justify the application of precedence over the commands or constitutional directive that any interpretation and application must promote the spirit, purport and object of the Bill of Rights[392] as contained in section 39 (2).[393] The Constitutional Court in *Makate v Vodacom Ltd* [394] held that the objects of section 39 (2) places a duty on the courts to purposively interpret and uphold the Bill of rights and to uphold the Constitution as the supreme law.

In the case of *S v Moluadzi*[395] the CC reheard an appeal in the wake of a CC judgment dismissing convictions of fellow perpetrators which arose under the same facts as Mr Moluadzi. Emphasising on finality of convictions, [396] the court pointed out that the inflexible doctrine of *res judicata* may be exceptionally relaxed in order to ameliorate a grave injustice.[397] Accordingly, exceptional circumstances must be present for the court to justify a departure from a previous decision.[398] The court justified the relaxation on the basis of understanding that final judgements, which could result in substantial hardship or injustice should not be allowed to stand merely for the sake of rigid adhering to the principle of *res judicata.* In this case, the court held that a refusal to entertain the appeal would have denied the appellant of his right to equality before the law and would have

[391] *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499.
[392] Mazwaxi B. (2017). *The Doctrine of precedent and the value of s 39(2) of the Constitution. Retrieved from* http://www.derebus.org.za/doctrine-precedent-value-s-392-constitution/.
[393] Section 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[394] 2016 (4) SA 121 (CC).
[395] 2015 (2) SACR 341 (CC)
[396] At 350- 351.
[397] *Moluadzi*, para 22-23.
[398] *Moloudzi*, para 38.

caused grave injustice considering that he was serving a life sentence which could similarly be overturned.

In *Bernert v Absa Bank Ltd,* [399] the court noted another exception justifying a departure from its own judgments. An apprehension of bias on the part of a presiding officer was held to be one of the grounds on which a court may depart from its previous decision. The court importantly noted that issues regarding recusal of presiding judges and apprehension of bias raises constitutional issues which ultimately impacts on the right to a fair trial and to the ultimate administration of justice.

In *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others*[400] the Supreme Court of Appeal reiterated the importance of the *stare decisis* principle. The court stated that the doctrine of *stare decisis* is fundamental to the rule of law to avoid uncertainty and confusion, to protect vested rights and legitimate expectations of the people and to uphold the dignity of the court.[401] Further acknowledging that the courts are bound by the previous precedents, Wallis JA stated the following at 110C-D:

> 'The basic principle is *stare decisis*, that is, the court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This court will only depart from its

[399] 2011 (3) SA 92 (CC).
[400] 2018 (4) SA 107 (SCA).
[401] *Patmar*, 110D-F.

previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous.'[402]

4.6 Comparative Analysis and conclusion

The jurisdictions analysed above reveals a plethora of various grounds on which superior courts have exercised the power to reverse their own decisions. The various grounds provides a useful tool and guide as an increase to our jurisprudence as urged by Damaseb DCJ in *S v Likanyi.* The scope has now been broadened on which the Namibian Supreme Court may exercise its powers in terms of Article 81. Although not cast in stone, the Supreme Court may reverse its own decision:

- if it cannot stand with the decision of the Supreme Court; if satisfied that its own decision was given *per incuriarum* i.e by carelessness or mistake or was wrong [403] or when the liberty of a person has been infringed as a result of the misapplication or misunderstanding of the law in its previous decision.[404]
- Fundamental change in circumstances or experience showing that a decision of the Supreme Court which results in unforeseen serious injustice, may permit such a departure.
- Fresh evidence and principles of natural justice, and change in law;[405]

[402] See further *Bloemfontein Town Council v Richter* 1938 AD 195 at 232; *R v Nxumalo* 1939 AD 580; *Commissioner for Inland Revenue v Estate Crewe and Another* 1943 AD 656; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363; [2002] ZASCA 35) at 24H.
[403] *R v Greater Machester Coroner, Ex parte Tal* [1985] QB 67.
[404] *R v Tailor* [1950]2 KB 368 C.C.C.A at 731.
[405] *Carter v. Canada (Attorney General),* [2015] 1 SCR 331, 2015 SCC 5 (CanLII), <http://canlii.ca/t/gg5z4

- social changing norms, turnover of judges, slim majority in the precedents, undesired impacts and a corresponding sense that the precedent was wrong, an activist yearning to effect change and new arguments and issues arising after judgment had already been delivered.
- when there is a subsequent statutory modification at variance with the decision; where a decision which passes *sub-silentio*[406], that is when the particular point of law involved in the decision is not perceived by the Court or present to its mind.

It would be prudent for the court, in deciding whether to reverse a decision or not, to follow the Canadian approach by engaging in an enquiry to ask whether, taking into account all of the circumstances, the application of the principle of *res judicata* or the *stare decisis* rule would work an injustice'. Alternatively, whether the reasons in favour of following a precedent, such as certainty, consistency, predictability and institutional legitimacy, outweigh the need to overturn a precedent that is sufficiently wrong. These are the tools gathered from the comparative analysis above which strongly concedes to the importance and rationality of the *stare decisis* and *res judicata* rule in any legal system, but at the same time accepting the rationality of a departure where circumstances wants it.

Another key element discernable from the study is the importance of a clear procedure and practice of the court in exercising its inherent jurisdiction to reverse its own decisions. The Canadian and Indian jurisdictions court rules provide for a clear process and

[406] In *Shri Mohammed Bilal Hanif Shaikh vs Shri A.N. Roy* 2006 CriLJ 1547, 2006 (4) MhLj 371, the court also defined judgment *sub-silentio* as 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'.

procedure to be followed when the court is presented, on motion, with a request to reverse its own decision. A clearly defined scope and an appropriate court procedures to be followed, in the form of Court rules or practice Directives is desirable for the Namibian perspective.

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.1 Summary

Article 1(1) of the Constitution establishes a State founded on the principles of rule of law and justice for all. in amplification of a state governed according to established and settled legal principles, the common law principles of *stare decisis* and *res judicata* are retained in this legal system in order to maintain certainty, uniformity, clarity on the applicable law, equality for all. These are all ideals of a constitutional State founded on principles of rule of law and democracy. With the power to administer justice to all being vested in the Namibian Courts, Article 81 gives the Supreme Court inherent powers reverse its own decisions , to depart from its settled principles of law which is *prima farcie* contrary to the rule of law and which would threaten the maintenance of these ideals.

It is discernable from chapter two that the Supreme Court is clothed with a reservoir of powers to make just and appropriate orders, as long as it is within the parameters of the law. It is further identified that the Supreme Court would exercise this inherent jurisdiction where the existing law does not provide a remedy. Chapter three concentrated on the meaning of the rule of law and the common law doctrines of *stare decisis* and *res judicata* which are essential in maintaining a legal system that is based on settled and consistent legal principles. The research shows that the administration of justice requires the application of the law consistently and equally. In the same vein, research also indicates that it is in the administration of justice to require a reversal of 'bad law' that may cause an injustice. Damaseb DCJ confirmed this much in *Likanyi* that a court should be able to be in a position to mitigate any injustice caused by the strict adherence to *stare decisis* and

res judicata.[407] The hypothesis therefore that a reversal threatens the common law doctrines, although well placed, is cured by the ultimate aim of enhancing the demands of administration of justice.

The scope and extent of a Court's power to reverse also was at the center of this thesis. From a comparative analysis made in chapter 4, exceptional grounds have been identified, widening the scope from what has been canvassed in Namibia in the decisions of *Schroeder, Likanyi* and *Minister of Finance*. The DCJ remarked in *Likanyi* that the Namibian jurisprudence is yet to be developed on what would constitute exceptional circumstances under which an inherent jurisdiction in terms of Article 81 would be exercised. The comparative analysis aided in this respect:

- Under the **UK** jurisdiction, a decision may be departed when it appears right to do so: if a serious error embodied in a decision of this House has distorted the law; where, through no fault of a party, he or she has been subjected to an unfair procedure; where a fundamental change in circumstances or experience showing that a decision of the House results in unforeseen serious injustice or where a decision is given *per incuriam;*

- **The Canadian approach** answered the concerns of the court in *Likanyi* as to what may constitute special circumstances. The approach used is to ask whether, taking into account all of the circumstances, application of the principle of *res judicata* would work an injustice'. Where there is fresh evidence and principles of natural

[407] *S v Likanyi*, para 52.

justice justifies a departure or where a change in the law, a reversal may be warranted. The rules of the Supreme Court of Canada, impressively dictate the procedure to bring an application for a rehearing of an appeal under rule 76 of the Rules [408] which is similar to the procedure set out by the court in *Likanyi.*[409]

- Under the **Indian jurisdiction**, decisions given *per incuriam* forms a basis for a reversal understandably on the principle as adopted by the courts that 'no act of court should harm a litigant and it is the duty of the court to see that if a person is harmed by the mistake of the court, he should be restored quickly to the position he would have occupied but for the mistake. Other grounds for reversal have been identified to be (a) when there is a subsequent statutory modification at variance with the decision; (b) a different view being taken by Courts in higher tiers, subsequently; (c) where a decision which passes *sub-silentio.*

- The **South African** jurisdiction seem to be a host of all the factors as identified under the UK and India jurisdictions.[410]

The comparative analysis above thus demonstrates that an apex court has larger grounds on which a departure from the strict adherence of the common law principles would be justified. A good lesson may be taken from UK where the court in *Jones v. Secretary of State for Social Services*[411] has indicated instances which would militate against a reversal

[408] (SOR/2002-156).
[409] *S v Likanyi*, para 58.
[410] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* 2018 (4) SA 107 (SCA).
[411] [1972] A.C 944 at 966.

of a decision. In terms of procedure to be followed where an apex court is invited to reverse its own decision may be from Canada where the procedure is provided for in the rules of the Supreme Court.

5.2 Recommendations

- The first recommendation proposed by the study is the observation of the various grounds on which the Supreme Court, as the apex court of the land, may exercise its jurisdiction in terms of Article 81. The discovery forms a significant development in the Namibian jurisprudence as regards the scope and extent of the Court's powers in terms of Article 81.

- Secondly, that a clearly defined and codified procedure be adopted by the Supreme Court as can be glanced from the UK rules of court which has incorporated the procedure in the Court's Practice Directions (Direction 3.1.3). Rule 76 of the Rules of the Supreme Court of Canada [412] makes provision for a litigant to, on motion, approach the Supreme Court for a rehearing of an appeal and the court would make an order as to the conduct of the hearing as it considered appropriate. This is the procedure as contained in *S v Likanyi* and it is highly recommended that the proposed procedure be promulgated in the form of rules or practice directives.

[412](SOR/2002-156). Available on Government of Canada, Justice Laws Website: https://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/index.html. Accessed on 5 August 2019.

5.3 Conclusion

The problem statement focused on the prima farcie conflict between the dictates of the rule of law and the Supreme Court's power to disturb settled law. Added to the concern is the lack of clearly defined circumstances under which a court may exercise its jurisdiction in terms of Article 81. The thesis reports that the reversal in terms of Article 81 is not in conflict with the rule of law, quite the contrary. The rule of law and the administration of justice informs a reversal of an injustice when warranted. The reversal, which is not encouraged, is therefore only employed in exceptional circumstances as a relaxation to the strict compliance with the *res judicata* and *stare decisis* common law doctrines.

The research reveals a plethora of justified grounds on which a court may reverse its own decision, justified on grounds of administering justice. These may include: where a decision was given *per incuriarum* i.e by carelessness or mistake or was wrong; when the liberty of a person has been infringed as a result of the misapplication or misunderstanding of the law in its previous decision; Fundamental change in circumstances or experience showing that a decision of the Supreme Court which results in unforeseen serious injustice; Fresh evidence and principles of natural justice, and change in law; when there is a subsequent statutory modification at variance with the decision; where a decision which passes *sub-silentio*[413], that is when the particular point of law involved in the decision is not perceived by the Court or present to its mind; when social changing norms, turnover

[413] In *Shri Mohammed Bilal Hanif Shaikh vs Shri A.N. Roy* 2006 CriLJ 1547, 2006 (4) MhLj 371, the court also defined judgment *sub-silentio* as 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'.

of judges, slim majority in the precedents, undesired impacts and a corresponding sense that the precedent was wrong, an activist yearning to effect change and new arguments and issues arising after judgment had already been delivered.

It is therefore emphasized that the courts should strictly follow the common law doctrines in order to maintain consistency in the application of the law. The court would therefore only invoke its powers to reverse its own decisions in exceptional circumstance and when justice required it to do so. In the exercise of its inherent jurisdiction, judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. It is thus settled that when an apex court reverses its own decision, it is not against the principle of *stare decisis* or the *res judicata* principle, but an exception necessitated by the demands of justice.

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