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INFORMATION ABOUT NAMIBIA'S LAW

GOOD GOVERNANCE

Good Governance is the process of evaluating public institutions' ability to manage resources, conduct public affairs, and ensure that human rights are largely realized free from abuse and corruption and with proper respect for the rule of law.

Good governance in a democratic republic such as Namibia will not pass muster if the rule of law is not respected. The three branches of the government of the Republic of Namibia must always uphold the rule of law.

Article 1 of the Namibian Constitution states that Namibia is a democratic republic in which all power shall vest in the people. This power is exercised through the institutions of the state, namely the executive, the legislature and the judiciary.

The legislative arm of government is the Namibian parliament which consists of two houses: The National Assembly and the National Council. Its primary task is to enact laws. Ninety-six members of the National Assembly are elected in free, direct and secret ballots for the period of five years. All Namibians over the age of 18 are allowed to vote and all Namibians over the age of 21 can be elected into public office. The President can also appoint another 8 non-voting members of parliament due to their special expertise and skills. The National Council represents the 14 Namibian regions in the lawmaking process. Each region sends three members so that there are 42 members of the National Council in total. Both the National Assembly and the National Council can propose bills and have to reach agreement for the bills to become legislation. City and regional councils form the legislature on a local as well as regional level.

The President with his or her cabinet as well as public services and enterprises constitute the executive branch. They have to ensure that the laws passed by parliament are executed.

Courts form the judicial branch of government. It is their responsibility to interpret the existing laws and apply them to the matters brought before them for adjudication. There are lower and higher courts in Namibia. The Magistrates' Court has a mandate limited by the value of the matter. If parties involved in the case are not satisfied with the judgement they can appeal the case to the next level. The High Court and the Supreme Court also interpret and apply the Constitution.

The Supreme Court is the highest court in Namibia and has to make sure existing laws and policies do not violate the Constitution or the international obligations of Namibia.

The division of powers amongst three different branches is designed to provide checks and balances so that no one branch of government is able to take control of all government activity. This is a core value of a constitutional democracy such as Namibia and therefore it is important to preserve this division.

All courts are independent. They follow only the Constitution and the law. No one can tell the courts how to decide a case, not even someone from another branch of Government.

In May 2023 the Supreme Court ordered that the Namibian government has to recognize same-sex marriages concluded outside the country for immigration purposes (Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others). This meant that the same-sex non-Namibian spouse of a Namibian citizen should receive the same immigration rights as would be the case between an opposite-sex Namibian or non-Namibian married couple. The Supreme Court substantiated its judgement by direct reference to the fundamental rights of equality and dignity ensured in Namibia's Constitution. These would be violated if same-sex and opposite sex couples are treated differently in this regard.

After the Supreme Court judgement two private member's bills were tabled in parliament that aimed to directly contradict the verdict by defining the term spouse as "a person, being one half of a legal union between a genetically born man and a genetically born woman of the opposite sex of that person." The bills passed parliament without any member of parliament opposing it.

This procedure is highly concerning. Passing bills that directly contradict a Supreme Court judgement undermines the separation of powers anchored in Namibia's Constitution. The Constitution is the supreme law of Namibia. It should not be changed and amended based on the whims of parliament. Contradicting a verdict that is based on the fundamental rights of dignity and equality does not bode well for Namibia's democracy and the protection of human rights.

Adding to the debate, the Attorney-General also confirmed that "the government is in the process of conducting a legal assessment of this constitutional ruling before determining the appropriate course of action within the available constitutional parameters". This clearly shows that the groundbreaking judgement is attracting alarming attention.

Is the President compelled to sign and execute these bills? Not necessarily. Article 64 of the Namibian Constitution provides the President the right to withhold his assent to a bill when he thinks that this bill contradicts provisions of the Constitution. In this case he can take the matter to a competent court, which would be the Supreme Court, which then has to conclude whether the bill is constitutional or not. If the conclusion is that the bill is unconstitutional the President can and should withhold his assent, even if the bill was passed by a two third majority in parliament.

Thus, the situation of the recent Supreme Court verdict being contradicted by two private member's bills challenge the separation of powers in Namibia and will indicate whether all three branches of government are committed to upholding the values of a constitutional democracy such as Namibia.

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