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INFORMATION ABOUT NAMIBIA'S LAW

Criminal Convictions as a Disqualification for Public Office

The right to participate in peaceful political activity, including the right to be elected, is enshrined in the Namibian Constitution, as well as several international charters to which Namibia is party. This right is subject to reasonable limits, however.

Serious criminal conduct is often viewed as rendering a person unfit to be an elected representative. Under Articles 47 and 72 of the Namibian Constitution, a person convicted of any crime unrelated to the struggle for independence, who is sentenced to at least one year in prison without the option for a fine, is disqualified from serving in Parliament for ten years after the completion of the sentence. If a sitting MP is convicted of such a crime while in office, that MP must vacate his or her seat.

This is a fairly stringent criminal disqualification provision. For comparison, some countries - such as the **United States, Sweden, and Finland** - do not provide *any* disqualifications based on criminal convictions. In fact, convicts in these countries may run for, or serve in, office even while imprisoned. More commonly, countries prevent convicted criminals from running for office while in prison, and when convicted of specific offences, for some time after completing their sentence – generally a period of no more than five (5) years. This is the case, for instance, in **Canada, Botswana, and Australia**.

Despite the lengthy time period covered by Namibia's criminal disqualification provision, several Namibian politicians have been convicted of offences and allowed to remain Parliamentarians. Current MP Tobie Aupindi was convicted under the Anti-Corruption Act in 2018 and fined N\$50 000. Former MPs Katrina Hanse-Himarwa, Marina Kandumbu and Paulus Kapia were all found guilty on corruption or fraud charges and fined as well. However, because they were offered fines as alternatives to prison sentences, the disqualification provision did not apply and they were allowed to retain their seats in the National Assembly.

Some members of the public were justifiably upset that these politicians continued to represent them. This was effectively acknowledged in that most of these convicted MPs failed to win places on the party lists in the most recent election.

Namibia may benefit from examining how other countries have dealt with corruption and adopting similar measures to keep corrupt politicians out of office.

Brazil has been plagued by corrupt politicians for decades. In 2010, however, Congress passed the "Clean Record Law", a citizen initiative to remove corrupt politicians. Under the 2010 law, those convicted of certain offences are ineligible to serve in public office from the date of conviction until eight years after completion of their sentence (whether the sentence was payment of a fine or imprisonment). The list of disqualifying offences includes abuse of authority, corruption, and bribery. While there have been many

legal and logistical challenges to the law's implementation, it has been a successful tool in the difficult reform of Brazil's corrupt politics.

India passed a similar law in 1951, known as the Representation of the People Act. This Act includes a long list of disqualifying crimes. In similar fashion to Brazil, a person convicted of any of the enumerated offences is disqualified from office for six years from the date of conviction if the sentence was payment of a fine or, if the sentence was imprisonment, while imprisoned and for six years from the date of release. In 2013, the Supreme Court of India held that anyone disqualified on the basis of a criminal conviction loses membership in Parliament with immediate effect, without allowing a time period for a possible appeal.

To be sure, there are arguments against restricting the right to hold public office. Ultimately, the people should be allowed to decide who represents them. Enacting laws that prevent candidates from running or that remove elected officials automatically takes this decision away from the people. As long as the election process is free and fair and the electorate is informed of any misdeeds of the candidates, trust in the people justifies a system with few limitations on qualifications for Parliament.

However, in Namibia, this argument is weakened since Parliamentarians are not directly chosen for their positions by the electorate; the members of the National Assembly take seats based on a party list system, and members of the National Council are chosen by the members of the various Regional Councils. Furthermore, in any electoral system, voters do not have the ability to immediately action their disapproval when information about the crimes of Parliamentarians surfaces. This inability is particularly relevant when MPs are convicted of offences, such as fraud or corruption, that call into question their ability to govern in the best interests of their constituents.

The public interest is best served when politicians with such criminal convictions are removed from office and ineligible for re-election for a specified time period, to ensure they are clear of undue influence and to allow them time to regain the trust of the persons they represent. This kind of disqualification affords the public an opportunity to decide who should represent them in Parliament, without forcing them to continue to be represented by corrupt politicians until the next election.

It appears that Namibia could enact a law expanding the grounds for disqualification without a constitutional amendment. Article 17 of the Namibian Constitution authorises Parliament to adopt measures restricting the right to be elected to public office based on such grounds of infirmity, public interest, or morality "as are necessary in a democratic society". This provision appears to give Parliament the authority to supplement the minimum grounds for disqualification set out in Articles 47 and 72.

We would suggest that anyone convicted of offences involving elements of bribery, fraud or corruption – as well as anyone convicted of financial or election-related crimes – should be immediately ineligible to serve in Parliament and disqualified from taking a seat in Parliament for the next five years (a time period equal to one Parliamentary term), regardless of the sentence imposed. Such a legislative provision would close the "fine" loophole which currently allows convicted politicians to retain their positions, and it would be in line with the disqualification provisions in many other democratic states.

The honesty and ethics of our Parliamentarians should set a good example for the rest of the nation.

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