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# Pro Bono

**INFORMATION ABOUT NAMIBIA'S LAW**

**RULE OF LAW SERIES**

## **Rule of Law Article #2 THE EXECUTIVE & THE LEGISLATURE: DORMANT LAWS AND THE BALANCE OF POWER**

Namibia, like most democracies, has three branches of government: the executive, legislative and judicial branches. These three branches are supposed to check and balance each other to make sure that none of them gets too strong at the expense of the others.

Picture them as three sparring partners in a single boxing ring. They may dance around each other, and even throw a few punches from time to time to test each other's limits, but no one of the three should ever overpower any of the others. A knock-out punch to any one of them would mean the end of our democracy. We need all three of them in the ring, constantly circling and checking each other, to keep our system of government vibrant.

When it comes to laws, Parliament (the legislature) makes them, the ministries (the executive) put them into action and the courts (the judiciary) interpret them, particularly in the case of disputes. Every branch has its own role – what could go wrong?

What if the executive frustrates the will of the legislature? Parliament often passes laws which say that they will come into force on a date set by the relevant minister in the future. This is generally a good system. It provides time to set up administrative bodies and write regulations once the content of the law is fixed. But it can also open the door for the executive to undermine the decisions of the legislature, or for the executive to act without proper legal authority.

Consider the case of the Namibian Institute of Pathology. It has a building, it has employees, and it carries out all kinds of tests – such as DNA tests in criminal cases and paternity tests for maintenance cases. But for *almost twenty years* now it has not really existed, because the law that established it was never brought into force. (It is about to be brought into force retroactively, to address this problem, but this has not yet taken place.)

The same is true of some other institutions. For instance, the Namibian Film Commission Act was passed by Parliament in 2000, but never brought into force even though the Commission has an office, a staff and a website.

These instances may be just the result of oversights, but nonetheless, they violate the rule of law.

Another set of examples involves laws passed by Parliament but never brought into force because of a change of heart. For example, a new Criminal Procedure Act was passed in 2004 but sat quietly dormant for almost 15 years – until it was finally repealed in late 2018.

A Lotteries Act was passed in 2002, but never brought into force. It will be repealed in due course by a new Lotteries Act passed in 2017 – but that new law has also not yet been brought into force.

Namibia's body of statutes also includes a 2004 Water Resources Management Act and another 2013 version – neither of which have ever been brought into action – confusingly leaving a 1956 statute in force as the operative law.

There is probably nothing sinister behind any of these examples. But this practice sets the stage for a showdown someday when the executive and the legislature might not be on such good terms as they are now. Imagine a situation where Parliament passes a law on land rights which the executive does not like – the relevant minister might defy Parliament by refusing to bring the law into force.

Parliament could pass laws that come into force right away, without giving any minister the power to press the start button - but this would not always be practically workable. Interested parties could take the issue to court if a law has been languishing for an unreasonable amount of time. But the better solution would be for the executive to take enacted laws more seriously and put them into force within a reasonable time. Having laws on the books which never come into force could ultimately undermine respect for the rule of law and the constitutional role of Parliament.

Where the legislature has had a change of heart about a statute, it should use its powers to *promptly* amend or repeal an ill-advised law, instead of leaving it dormant with the potential for causing confusion about what the law actually is.

One solution could be to require that, where a law is not brought into force after a stipulated timeframe (such as 1-2 years), the relevant minister must report to Parliament on the reasons for the delay so that Parliament may take appropriate action if required.

Looking at the opposite problem – where laws are in force but not applied in practice – Parliament's recent repeal of 144 obsolete statutes is to be welcomed. It is best to get rid of statutes in force which have become irrelevant. If a law exists, it should be respected. If it is no longer appropriate for Namibia, it should be repealed. Otherwise, how is a member of the public to know which laws matter and which ones do not?

In the boxing ring of government, we would not like to see the executive holding the legislature against the ropes – both need to be on their feet, interacting in a fair and coordinated manner, if Namibia is to maintain a balanced democracy.

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