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INFORMATION ABOUT NAMIBIA'S LAW

RULE OF LAW SERIES

Rule of Law Article #3
THE LEGISLATURE & THE JUDICIARY
WHO HAS THE FINAL SAY?

The Namibian Constitution has rules which set a fine balance between Parliament and the courts. The courts interpret laws and test them against the Constitution. If a court interprets a law in a way that Parliament does not like, then Parliament can change that law by amending or repealing it. But if the Supreme Court rules that a particular law, or part of a law, is unconstitutional, that is the end of the matter (unless a super-majority of Parliament amends the Constitution). Parliament can enact a law with a different approach, but it cannot overrule the Supreme Court on a constitutional question.

The Supreme Court has the final say on the meaning of the Constitution, and Parliament has the final say on expressing the will of the people within the boundaries of the Constitution.

There have been two big tests of this relationship to date. One issue involves the *Berendt* case, where the High Court ruled that it was unconstitutional to have different rules of inheritance for different racial groups. The Court also held that the procedure whereby “black estates” were administered by magistrates while other estates were administered by the more specialised office of the Master of the High Court was unconstitutional. The judgment, which was not appealed to the Supreme Court, gave Parliament a deadline of 30 June 2005 to replace the unconstitutional provisions with a new regime. This deadline was later extended to 30 December 2005.

In November 2005, just before the extended deadline passed, Parliament enacted the Estates and Succession Amendment Act. This amendment addressed the procedural problem, but its wording on the race-based rules which applied to inheritance in the absence of a will almost defy belief. The law repeals the provision which the Court found to be unconstitutional, but says that the rules in those provisions “continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed”.

So, in other words, the racially discriminatory provisions were repealed, but then simply re-applied as if they were still in force.

How did Parliament get away with defying the Court like this on a constitutional question? The parties to the case had resolved their dispute in the meantime, so no one went back to court to challenge Parliament's approach on this issue. And so the race-based inheritance rules which the Court found to be unconstitutional in 2003 are still in force today in 2019.

The second showdown between Parliament and the courts concerned the Supreme Court's interpretation of "ordinary residence" in the Constitution's provisions on citizenship. According to the Constitution, a child born in Namibia to non-Namibian parents will be a Namibian citizen if at least one of the parents was ordinarily resident in Namibia at the time. The Ministry of Home Affairs and Immigration wanted to interpret this phrase to mean "permanent residence" so that it would be easier to apply in practice. But the Supreme Court held that the Constitution would not say "ordinary residence" if it meant "permanent residence", so the two must be different concepts. The ruling left the Ministry with a fairly complex test which has to be applied on a case-by-case basis after consideration of a number of factors.

As a result, the Minister decided to ask Parliament to pass a law overruling the Supreme Court's decision. The legal profession came out in force to object. If the Supreme Court had just been interpreting a *statute* on citizenship, then Parliament would be free to re-write it. But the Court had interpreted the *Constitution itself*, which is the Supreme Law of Namibia. The only way to produce a different outcome would be to amend the Constitution.

In the wake of the outcry against the proposed bill, the executive wisely withdrew it and the delicate balance of power between the three branches of government was maintained.

We can (as in a previous article) consider a soccer analogy. Referees exercise discretion in deciding what behaviour deserves a yellow card or a red card, but they have to work within the rules of the game. At an international level, FIFA (the international federation of association football) could change some of the underlying rules, but this does not happen often. People would lose confidence in the integrity of the game if the basic rules changed too frequently.

In a similar way, the Constitution is the guiding star for all three branches of government. It can be changed, if the proper procedures are followed – but this should take place only rarely, to preserve respect for its special status as Namibia's foundational document. The Constitution should be altered only after very careful consideration. And within the boundaries of the Constitution, each branch of government must operate only within its own sphere of authority, in order for the delicate balance between the three branches to hold.

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