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Current Issues In Gender And The Law

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Human Rights in Namibia – Raising Awareness, Keeping Commitments: Project Report 2

November 2024

Content

1. Introduction

The current public and political debates on LGBT+ issues have recently been colouring the discussion of broader family law issues and contributing to incidents of gender-based violence (GBV). Moreover, Parliament's refusal to accept the recent Supreme Court ruling on the recognition of foreign same-sex marriages could lead to a damaging showdown between the legislature and the judiciary. This discussion begins with an overview of Namibian court cases on LGBT+ issues and then proceeds to look at recent developments in the areas of family law and GBV, with an emphasis on how they have intersected with LGBT+ topics.

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Following recommendations from key civil society groups in Namibia, the paper uses "LGBT+" as a comprehensive term for persons of diverse sexual orientation and/or gender identity, including persons who are asexual and persons who are queer or non-binary in their gender identification. In some contexts, the term is also intended to include intersex persons and allies of the LBGT rights movement. Because the research paper is intended to inform advocacy, it uses some "old-fashioned terms" which are widely understood in Namibia, such as "sex change" rather than "gender affirmation".

2. LGBT+ issues in Namibian law

2.1 Permanent residence for a partner in a lesbian relationship with a Namibian citizen: The Frank case (2001)

The *Frank* case must be one of the most misunderstood cases in Namibian legal history. This case was a review of an unsuccessful application for permanent residence by a German citizen, Ms *Frank*, who was in a long-standing lesbian relationship with a Namibian citizen. Despite Ms *Frank's* impressive credentials, the Immigration Selection Board rejected her application without providing any reasons for its decision, leading her to speculate that her lesbian relationship may have played a part. The Immigration Selection Board asserted that the lesbian relationship was not taken into consideration since it is not recognised in Namibian law and that Ms *Frank's* sexual orientation was a private matter with no bearing on her application.

The High Court which initially considered the case found that a lesbian relationship can be recognised in Namibian law as a "universal partnership". This legal term refers to an explicit or implicit agreement between persons about the pooling of resources for common benefit. It has been applied to govern the sharing of assets by cohabiting couples who are not covered by the laws on marital property. On this basis, the High Court found that the Immigration Selection Board should have taken the relationship into account when considering the application for permanent residence.[1]

On appeal, the Supreme Court's decision primarily concerned administrative law and the application of Article 18 of the Namibian Constitution which requires administrative bodies to act fairly and reasonably. The Supreme Court ruled that an administrative body must give an applicant an opportunity to deal with contentious matters before making a decision and that administrative bodies must give reasons for their decisions. However, the majority opinion of the Court then proceeded to evaluate the role of the lesbian relationship – going beyond the issues that were properly raised in the arguments before it and reaching issues that were not necessary to decide the case.

"The Frank case must be one of the most misunderstood cases in Namibian legal history."

Photo by Omar Vanreenen via @sister_namibia

[1] *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

The Court found Article 14 of the Constitution inapplicable on the grounds that the "family" protected by it "envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race".[2] However, this view is obviously untenable as it means that heterosexual couples who are unable to bear children due to age or health reasons, or who choose not to procreate, would also forfeit constitutional protection.[3]

The Court's judgment also asserted (somewhat obliquely) that the constitutional protection against sex discrimination does not encompass "sexual orientation",[4] and found that discrimination on the basis of sexual orientation in the context in question is not "unfair discrimination", asserting that equality before the law "does not mean equality before the law for each person's sexual relationships".[5] However, the Court emphasized that nothing in its judgement "justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution".[6]

One of the most problematic aspects of the *Frank* decision was its over-emphasis on public opinion as a guide to constitutional interpretation – overlooking the fact that one of the functions of constitutional rights is to protect minorities. The Court did express the need to exercise caution when considering the value of public opinion in constitutional interpretation, recognizing that public opinion is not always based on reason and true facts[7] – and the *Frank* case was not the first to mention Namibian values in connection with the Constitution. Still, the strong emphasis on the views of the Namibian majority was worrying, particularly since gay and lesbian relationships need constitutional protection precisely because they do not always find broad public acceptance.

The *Frank* case in essence failed to recognise the important role of the Constitution and the courts as a check on the power of the majority of the day, as part of the system of checks and balances that characterise a constitutional democracy. Furthermore, the case itself ironically contributed to *shaping* public and Parliamentary opinion, with some Parliamentarians later justifying lack of attention to equality for gay and lesbian relationships by citing the *Frank* case.[8]

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[2] *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) ("*Frank*"), page 146F-G, majority opinion by O'Linn AJA joined by Teek AJA.

[3] On this point, see for example the South African case of *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC), paragraph 51:

> From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

[4] The Court stated, remarkably, that "[w]hereas the word 'sex' can be defined as 'being male or female', or 'males or females as a group', 'sexual orientation' could encompass in theory 'any sexual attraction of anyone towards anyone or anything'. The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private". *Frank*, page 149G-H, *per* O'Linn AJA (citation omitted).

The Court also noted "in passing" that the International Covenant on Civil and Political Rights specifies 'sex' as one of the grounds on which discrimination is prohibited but not 'sexual orientation' (*Frank*, page 145E-F, *per* O'Linn AJA), when in fact, in March 1994 (*before* Namibia's ratification of the Covenant), the Human Rights Committee charged with monitoring the Covenant stated that the references to "sex" in the provisions on discrimination are "to be taken as including sexual orientation". *Toonen v Australia Communication* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

[5] *Frank*, page 155E-F.

[6] Id, page 156H.

[7] Id, page 138G, quoting *S v Vries* 1998 NR 244 (HC).

[8] See, for example, statements made in the National Assembly on 22 October 2002 and 5 November 2002, during debate on the Combating of Domestic Violence Bill, citing the *Frank* case to justify Parliament's failure to protect against violence in homosexual relationships.

The Supreme Court clarified the importance of the *Frank* ruling in the 2023 *Digashu* case on recognition of foreign same-sex marriages – which will be discussed below – without actually "overruling" it. Without getting too technical, the binding aspect of any court case is limited to the reasoning that is necessary for the case outcome. Other comments and opinions expressed in the judgement are statements made along the way (described in the legal world with the Latin phrase *obiter dicta*, or *dicta* for short). Such statements may have persuasive value in future court cases, but they are not binding precedent.

In the 2023 *Digashu* case, the Supreme Court ruled that the opinions expressed in the *Frank* case about homosexuality were peripheral to the Court's decision and therefore had no binding authority. Moreover, the Supreme Court's 2023 ruling found that the non-binding opinions expressed in the Frank case were misguided – expressly disapproving of the statement in *Frank* that "equality before the law for each person does not mean equality before the law for each person's sexual relationships" on the grounds that this approach "fails to take into account the human worth and dignity of all human beings including those in same-sex relationships which is at the very core of the equality clause".[9]

The importance of the *Digashu* case and its clarification of the 2001 *Frank* decision are discussed in more detail below.

"Equality before the law for each person does not mean equality before the law for each person's sexual relationships."

2.2 Citizenship of children born to same-sex partners via surrogacy: The Delgado-Lühl cases (2021-2023)

Multiple court cases were brought against the Ministry of Home Affairs, Immigration, and Safety and Security (MHAISS) in recent years by a gay couple comprising Mexican citizen Guillermo Delgado and Namibian citizen Phillip Lühl. The two men married in 2014 in South Africa, where same-sex marriage is legal, and in 2019 had their first child Yona via surrogacy in South Africa. Surrogacy (where a woman bears a child for someone else) is permissible in South Africa while there is no clear legal framework for it in Namibia. In 2021, the couple's twin daughters Paula and Maya were also born via surrogacy in South Africa.

Same-sex partner's residence in Namibia

The first set of court cases involving this couple concerned Mr Delgado's right to residence in Namibia. In February 2021, the issue of Mr Delgado's domicile in Namibia was decided by the High Court on procedural issues, without considering the import of the parties' marriage in South Africa, where same-sex marriage is permitted.[10] In March 2022, the Supreme Court eventually referred the matter back to the Ministry – again on procedural grounds, finding that the Ministry had violated administrative law requirements by failing to inform Mr Delgado that his application for a certificate of domicile had been rejected and ordering the Ministry to consider the application afresh. Once again, the impact of the parties' marriage in South Africa was not addressed.[11] In the meantime, Mr Delgado made an application for permanent residence in Namibia, which was rejected by the Ministry in December 2020 and again in March 2021, on the dubious grounds that he had not demonstrated that he had sufficient funds to support himself.[12]

[9] *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraph 125.

[10] *Castañeda v Ministry of Home Affairs and Immigration* (HC-MD-CIV-MOT-REV-2018/00006) NAHCMD 75 (25 February 2021). The key issues were (1) that a temporary permit authorising a person's presence in Namibia, such as an employment permit or a student permit, cannot be used to establish domicile and (2) that a so-called "domicile certificate" issued in terms of section 38 of the *Immigration Control Act 7 of 1993* is designed, not to confer domicile, but to facilitate movement in and out of the country by persons who are validly domiciled in Namibia. The Court commented that the parties' foreign same-sex marriage and its relevance to immigration issues "is not a question that falls for determination in this matter" (paragraph 27). The Ministry granted Mr Delgado permission to remain in Namibia while his appeal of the High Court's decision on his status was pending. Werner Menges & Arlana Shikango, "Babies can come home", *The Namibian*, 19 May 2021.

[11] *Castaneda v Minister of Home Affairs and Immigration* (SA 18-2021) [2022] NASC (7 March 2022). The Supreme Court agreed with the High Court about the nature of a certificate issued in terms of section 38 of the *Immigration Control Act 7 of 1993*, holding that such a certificate does not in itself confer domicile. It also confirmed an earlier Supreme Court case which held that domicile cannot be acquired only through a temporary permit such as an employment permit, even if the holder had an intention to settle in Namibia indefinitely. *Minister of Home Affairs and Immigration & Others v Holtmann & Others* 2020 (2) NR 303 (SC) (also known as the *Prollius* case).

[12] Werner Menges, "Battle to bring babies home", The Namibian, 23 March 2021; "Delgado Lühl Family Legal Cases FACTSHEET", compiled by Phillip Lühl, undated. According to the article in *The Namibian*, "Delgado has a doctorate degree, obtained from the University of Cape Town, is employed at the Namibia University of Science and Technology, and says the value of his available savings and investments exceed N$1 million".

These cases did not directly confront the issue of recognition of foreign same-sex marriages. The couple's submissions to the Court did not argue this issue, asserting instead that they had formed a "universal partnership".[13] As a result, the question of recognition of foreign same-sex marriages for immigration purposes was not addressed by the Namibian courts until 2023 in the *Digashu* case discussed below.[14]

Temporary travel documents for children born to same-sex couple via surrogacy

The second legal issue involved a request for temporary travel documents for the twins Paula and Maya, to allow the family to return to Namibia after the twins' birth in South Africa. (Paula and Maya's brother Yona had been issued with an emergency travel document in 2019 to allow his return to Namibia after his birth in South Africa, while his application for Namibian citizenship by descent was pending, making it all the more strange that the twins were not treated similarly.) In 2021, the High Court found that no decision had yet been made by the Ministry on a formal application for emergency travel documents for the twins, so it refused to intervene on the basis that the court should not usurp the Ministry's powers in this regard.[15] Thus, the Court ducked the issue of whether the Ministry was justified in demanding proof of their biological connection to Mr Lühl as the Namibian citizen parent. It was also a disappointing decision in that the High Court failed to consider the best interests of the children, as it is required to do in terms of Namibian law as well as the UN Convention on the Rights of the Child. It also failed to consider the High Court's inherent responsibility as the upper guardian of all minor children, which gives it a special duty to safeguard children's best interests.[16]

The plight of the twins captured public attention, leading to well-attended public protests and a petition that garnered almost 6000 signatures. It also galvanised the formation of the Equal Namibia Human Rights Coalition (now known as "Equal Namibia"), which brought together a range of civil society groups to protest discrimination against the LGBT+ community.[17]

Despite the Court's failure to intervene, the Ministry did eventually issue temporary travel documents to the twins while the court case involving their brother's right to Namibian citizenship was pending.[18]

Right to Namibian citizenship by descent for children born to same-sex couple via surrogacy

The third set of cases concerned Yona's right to Namibian citizenship, which would establish principles that would also apply to the question of Namibian citizenship for the twins. Under South Africa's legal framework for surrogacy, the effect of a properly-concluded surrogacy agreement is that any child born to a surrogate in accordance with the agreement is the child of both commissioning parents from the moment of birth. Thus, both Mr Delgado and Mr Lühl were listed as the parents of Yona, Paula and Maya on the children's South African birth certificates. At stake was the application of the provision in the Namibian Constitution that provides for Namibia citizenship by descent to children "whose fathers or mothers at the time of the birth of such persons are citizens of Namibia".[19]

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13 As discussed above, this refers to a pooling of resources for common benefit and is often applied to heterosexual cohabiting couples.

14 *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023).

15 *Lühl v Minister of Home Affairs and Immigration* (HC-MD-CIV-MOT-GEN-2021/00094 [2021] HAHCMD 168 (19 April 2021).

16 See Legal Assistance Centre press release, "*Lühl v Minister of Home Affairs and Immigration* - Neglecting the Children's Best Interests", 20 April 2021.

17 The petition, entitled "GRN Namibia: End State-Sanctioned Homo-Transphobia & Protect Human Rights #NoHateInMyState" and organised through <www.change.org>, had 5851 signatures as of 2 July 2024. It notes that the Equal Namibia coalition was launched on 21 March 2021. See also the Equal Namibia press release, "Re: Namibia Human Rights Groups Report Continuing Human Rights Violations by Namibian Ministry of Home Affairs, Immigration, Safety and Security- *Namibian Children Separated from Family and Denied Citizenship*", 8 April 2021. The "*Bring Paula and Maya Home!*" demonstration on 21 March 2021 was widely recognised as one of Namibia's most significant and diverse LGBT+ related protests to date. See, for example, Martha Mukaiwa, "Lacheiner-Kuhn on 'Re-Queering A Nation'", *The Namibian*, 28 April 2022, which refers to the 'Bring Paula and Maya Home' movement as "a catalyst for an increased and highly visible focus on the violation and recognition of LGBTQIA+ people's human rights in Namibia".

18 Werner Menges & Arlana Shikango, "Babies can come home", *The Namibian*, 19 May 2021. The travel documents were issued only after the family again approached the High Court when no decision had been made on the applications for the documents almost four weeks after they had been submitted.

19 Namibian Constitution, Article 4(2)(a).

The government's position was that the children had no right to Namibian citizenship without proof of a genetic link between the children and their Namibian citizen parent. The High Court disagreed, finding in 2021 that Yona was entitled to Namibian citizenship by descent. The Court noted that there is no reference in the Constitution to biology or genetics in respect of citizenship by descent – and no such requirement is applied when heterosexual parents make use of surrogacy procedures in other countries, or conceive children by means of assisted fertility techniques using donor eggs or sperm in Namibia or elsewhere. Similarly, Namibian citizenship is not dependent on a genetic link when children are adopted by Namibian parents in Namibia or abroad.[20]

In addition, the High Court noted that the surrogacy arrangement had been approved by a High Court in South Africa, which had ordered that both Mr Delgado and Mr Lühl would have full parental rights and responsibilities. International principles require mutual recognition of authentic legal documents between states – such as the child's South African birth certificate and the South Africa court order – when they do not appear to violate Namibia's public policy or laws.

Furthermore, the High Court found that it would be in Yona's best interests to live with his parents and to take up his right to Namibian citizenship by descent – noting that it would be "grossly unfair" to deny children citizenship "because of the nature and circumstances of their birth, or the sexual preference of their parents and over which the children can exercise no control whatsoever".[21] The Court also found that it was improper for the Ministry to order a paternity test when no dispute about paternity existed within the family. It held that compelling a child to be submitted to a DNA test in these circumstances would not be in the child's best interests.[22]

The High Court found that the Ministry's approach to the matter was "actuated by discrimination", thus implicating the promise of equality for all in Article 10(1) of the Namibian Constitution – adding that the phrase "for all" applies "to all people in Namibia, regardless of colour, gender, sexual orientation, etc.".[23]

In short, the High Court declared that Yona was a Namibian citizen by descent and ordered the Ministry to issue him with a certificate of Namibian citizenship, explicitly rejecting the Ministry's application to compel the child to undergo a DNA test to prove which parent was his biological father.[24]

On appeal, in a 2023 decision, the Supreme Court sidestepped the substantive issues completely, finding that the family had not satisfied the requirement that the birth of a child to a Namibian citizen outside Namibia must be properly notified to Namibian authorities as a precondition to citizenship by descent.[25] The Supreme Court held that the family had not complied with this requirement,[26] making it unnecessary for the Court to consider any other aspects of the case.

So the citizenship rights of Yona, Paula and Maya remained in limbo.

The final outcome

The family's position might well have led to more legal challenges, but the protracted legal struggles described here eventually exhausted them, and they relocated from Namibia to Mexico in mid-2023.[27]

[20] *Luehl v Minister of Home Affairs and Immigration* (HC-MD-CIV-MOT-GEN-2019/00473 [2021] NAHCMD 481 (13 October 2021), paragraphs 34 and 65.

[21] Id, paragraph 81.

[22] Id, paragraphs 54-62.

[23] Id, paragraph 66.

[24] Id, order, paragraph 89.

[25] Article 4(2) of the Namibian Constitution specifically authorises "such requirements as to registration of citizenship as may be required by Act of Parliament". Section 2(2) of the *Namibian Citizenship Act 14 of 1990* accordingly makes registration abroad or in Namibia a pre-condition of citizenship by descent. See *Minister of Home Affairs and Immigration v Luehl* (SA 96/2021) [2023] NASC 3 (20 March 2023), paragraph 44.

[26] The family contends that they did register Yona's birth, but this fact was not apparently not properly placed before the Court. "In the replying affidavit the respondent did not engage with the very specific allegation by the minister that YDL's birth was not registered in terms of s 2(2) of the Citizenship Act. […] Since the minister's allegation of non-compliance with s 2(2) of the Citizenship Act was unanswered it stood uncontroverted that, as a fact, YDL's birth was not registered in terms of the requirements of s 2(2) of the Citizenship Act." *Minister of Home Affairs and Immigration v Luehl* (SA 96/2021) [2023] NASC 3 (20 March 2023), paragraphs 16-17.

[27] A farewell email dated 1 October 2023 and signed by the family members was widely circulated. See also Phillip Lühl, "Letter From (a Beautiful) Exile", *The Namibian*, 9 March 2024.

2.3 Recognition of foreign same-sex marriages for immigration purposes: The Digashu/Seiler-Lilles case & the "Ekandjo Bills" (2023)

Namibia's courts and Parliament soon found themselves engaged in a tug-of-war on LGBT+ issues. In May 2023, the Namibian Supreme Court found that it was unconstitutional for Namibia to refuse to recognise spouses in same-sex marriages concluded outside Namibia for immigration purposes. The case involved two couples where Namibian citizens had married non-Namibian citizens of the same sex while living in countries that allow same-sex marriage. The Namibian citizens were seeking to live in Namibia with their spouses.

The High Court considered that persons "in homosexual relationships are worthy of being afforded the same rights as other citizens",[28] but felt itself bound by the *Frank* decision discussed above, even though it believed that the *Frank* decision was erroneous on several points.

Namibian Constitution

Article 8 Respect for Human Dignity

(1) The dignity of all persons shall be inviolable. […]

Article 10 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.

On appeal, the Supreme Court ruled that the foreign same-sex spouses must be treated like any other foreign spouses regarding permission to reside in Namibia, in order to comply with the constitutional rights to dignity and equality.[29] As noted above, the Supreme Court expressly disapproved of some of the reasoning in the *Frank* case without actually overruling it, drawing a distinction between its binding holding and other points that were simply discussed along the way.

The Supreme Court discussed the concept of dignity in Namibia's constitutional framework, noting that "the first sentence of the preamble to the Constitution proclaims the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' as 'indispensable for freedom, justice and peace'". The Supreme Court also stated that the value attached to dignity "is at the very heart of our constitutional framework and fundamental to it as a value of central significance", being both a self-standing right entrenched by Article 8 and a value related to the protection of other rights, particularly the right to equality. Moreover, it emphasised that the protection of the right to dignity in Article 8 is absolute, with no provision for any limitations - and that the term "inviolable" used in Article 8 does not allow for any exceptions.[30]

One important point made by the Supreme Court in this case was that constitutional rights are not dependent on public opinion:

> Whilst public opinion expressed by the elected representatives in Parliament through legislation can be relevant in manifesting the views and aspirations of the Namibian people, the doctrine of the separation of powers upon which our Constitution is based means that it is ultimately for the court to determine the content and impact of constitutional values in fulfilling its constitutional mandate to protect fundamental rights entrenched in the Constitution. That is the very essence of constitutional adjudication which is at the core of our Constitution.[31]

[28] *Digashu v Government of the Republic of Namibia* (HC-MD-CIV-MOT-REV-2017/00447) *and Seiler-Lilles v Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2018/00427) [2022] NAHCMD 11 (20 January 2022), paragraph 125.

[29] *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023).

[30] Article 8(1) of the Constitution states: "The dignity of all persons shall be inviolable." *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraphs 97-99.

[31] Id, paragraph 103.

The Court went on to express agreement with the following statement of the South African Constitutional Court:

> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order […] The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.[32]

It should be noted that this case involved couples who married outside Namibia while resident in the other countries in question. It is not clear whether or not the same holding would apply in a case where two Namibian residents married in a country which allowed same-sex marriage *without being domiciled in that country*, purely to avoid the Namibian legal position on same-sex marriage.

Reaction to the case

The case gave rise to mixed signals from government officials. The Office of the Attorney-General (AG) issued a press release on 26 May 2023 which reported that a majority of the Supreme Court had concluded "that the exclusion of same-sex marriage spouses for purposes of the Immigration Act, 1993 constituted a contravention of the interrelated right to *dignity* and *equality* guaranteed under Articles 8 and 10 of the Namibian Constitution, respectively".

It acknowledged that a decision of the Supreme Court is "*binding on all other Courts and Persons in Namibia*, unless it is reversed by the Supreme Court itself or contradicted by an Act of Parliament *lawfully* enacted" (emphasis from the AG) and concluded as follows:

> Given the magnitude of this judgment and its wider legal implications, 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. Government will inform the public of the official Government response to this Supreme Court ruling, at the appropriate time.

The press release commendably included a caution that the exercise of the constitutional rights of freedom of speech and expression, especially with regard to the subject matter of the Supreme Court ruling, "must be done in a constructive, responsible and respectful manner that does not violate the rights of others" and undermine the constitutional mandate of any of the three branches of government.[33]

Initially, the Minister for Home Affairs, Immigration, Safety and Security stated that the Ministry would not process any residence-related permits for foreign same-sex spouses married to Namibians before receiving legal advice from the Office of the Attorney-General.[34] Then, on 27 June 2023, the Executive Director of the Ministry issued a public notice stating that it "takes note of the above judgment and acknowledges the independence of the Courts and finality of Supreme Court decisions" and that it would accordingly comply with the judgment.[35] On the same day, the Ministry circulated an internal memorandum directing its staff to comply with the ruling.[36] At the same time, the Swapo Politburo and the Swapo Party Youth League both spoke out against same-sex marriage and criticised the Court's judgment.[37]

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[32] Id, quoting *S v Makwanyane & another* 1995 (3) SA 391 (CC), paragraph 88, with emphasis added by the Namibian Supreme Court.

[33] "Media Release, Subject: Press Release In Re Supreme Court Judgement Seiller Lilles [sic] and Digashu vs Minister of Home Affairs on the recognition of same-sex marriages concluded outside the Republic of Namibia", issued by the Attorney-General, 26 May 2023.

[34] Jemimah Ndebele, "Kawana Awaits AG on Same-Sex Direction", Namibian Sun, 6 June 2023.

[35] MHAISS, "Public Notice regarding the Supreme Court judgment on the treatment of same-sex marriages validly concluded between Namibians and foreign nationals outside Namibia for purposes of section 2(1)(c) of the Immigration Control Act, 1993 (Act No. 7 of 1993)", dated 27 June 2023 and signed by Etienne Maritz, Executive Director. The sex change issue is discussed in more detail in the discussion of the Civil Registration and Identification Bill.

[36] See US State Department, *2023 Country Reports on Human Rights Practices: Namibia*, section 6, under the heading "Acts of violence, criminalization, and other abuses based on sexual orientation, gender identity or expression, or sex characteristics".

[37] See, for example, Shinovene Immanuel, "Swapo politburo rejects same-sex-marriage", *The Namibian*, 6 June 2023.

Then – despite the Court's clear discussion of the relationship between Parliament and the courts on constitutional interpretation – there was an immediate attempt on the part of Parliament to negate the Supreme Court's decision.

SWAPO MP Jerry Ekandjo quickly tabled two private member's bills. One was the "**Marriage Amendment Bill**", which limits civil marriages solemnised in Namibia to members of the opposite sex – a pointless exercise since this is already the legal position in Namibia in terms of the common law (the law developed over time through court decisions). The original version of this Bill was amended by the National Council to add an oddly-worded and highly-controversial definition of "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" – apparently with an intention to ensure that there was no loophole in the prohibition of same-sex marriage for transgender persons (given that sex changes will in future lack recognition in Namibia except in the case of intersex persons).[38] One of the Bill's most concerning provisions would make it a criminal offence for anyone to "promote or propagate" same-sex marriage in Namibia, punishable by a fine of up to N$100 000 or imprisonment for up to 6 years[39] – which would be a clear violation of the constitutionally-protected freedom of speech and expression.

The other "**Definition of Spouses Bill**" explicitly attempts to "overrule" the Supreme Court decision in the *Digashu* case. This Bill includes a provision entitled "Contradiction of decision of the Supreme Court" and states that "No marriage between persons of the same sex shall be recognised as a valid marriage in the Republic of Namibia". It also asserts that Parliament is the principal legislative authority of Namibia and can essentially do whatever it likes:

> "…the National Assembly asserts its representative nature in respect of all persons in Namibia, and… as the principal legislative authority in Namibia, in the interests of the people of Namibia, enacts [the section contradicting the Supreme Court judgment] to protect the family values as provided under article 14 of the Namibian Constitution".[40]

These two "Ekandjo Bills" were passed unanimously by Parliament in July 2023[41] - although one Swapo MP spoke out against them, saying "I believe the underlying consequences of the way a constitutional matter is dealt with may be severe and, therefore, I cannot support the bill in its current state".[42] But at the time of writing, these bills have not yet been signed by the President – meaning that they are not yet valid laws of Namibia.[43] On 4 July 2024, a petition – which had almost 10 000 signatures at that stage – was delivered to the President, calling on him not to sign the "Ekandjo Bills" and urging Parliament to enact inclusive legislation prohibiting hate speech.[44] The petition was been referred to the National Assembly's Standing Committee on Petitions,[45] which has not yet commented on it.

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38 National Council Amendment moved by MP Andreas N Amundjindi, 18 July 2023.

39 Proposed amendment to section 11 of the *Marriage Act 25 of 1961* in clause 3 of the Ekandjo "Marriage Amendment Bill".

40 Clause 3(1) of the "Definition of Spouses Bill".

41 Andreas Thomas, "Ekandjo's anti-gay marriage bills sail through National Assembly", *The Namibian*, 12 July 2023. They are referred to as the "Ekandjo Bills" to emphasise their sponsorship by a Private Member of Parliament, which refers to a Member of Parliament who does not occupy any Government portfolio or ministerial position. Article 60(2) of the Namibian Constitution says that a private members' bill may be introduced in the National Assembly if supported by one-third of all the members of the National Assembly. The Ekandjo Bills are the first Private Member's Bills ever approved by the Namibian Parliament.

42 Eliaser Ndeyanale, Mercy Karuuombe and Kelvin Chiringa, "Schlettwein breaks rank over same-sex bill", *The Namibian*, 10 July 2023, quoting MP Calle Schlettwein.

43 The Constitution sets no time frame for signature by the President.

44 Instagram post by Equal Namibia, 4 July 2024, available at <www.instagram.com/p/C9C8HsmoIVa/?utm_source=ig_web_copy_link>. See also, for example, "Namibia: Call for President to Veto Anti-LGBTQ+ Bill", mambaonline.com, 8 June 2024. The petition was handed over after a protest march on 29 June 2024, organised under the hashtags #MarchForLove and #VetoTheBill. The petition, entitled "NAMIBIA: VETO ANTI-LGBTQ+ BILL" was organised by Equal Namibia through <https://action.allout.org> and had 9 784 signatures as of 8 July 2024.

45 Minutes of the National Assembly, 10 July 2024.

Ekandjo has asserted in Parliament that the President has no power to veto the Bills. It is correct that Article 56(2) of the Namibian Constitution obligates the President to assent to a bill that is passed by a majority of two-thirds of all the members of the National Assembly and confirmed by the National Council. But this does not negate the President's duty under Article 64 to withhold assent to a bill approved by the National *Assembly by any majority* if the President believes that it is in conflict with the Constitution. The procedure in such a case is for the President to inform the Speaker of the National Assembly and the Attorney-General of this opinion, and for the Attorney-General to then take appropriate steps to have the matter decided by a "competent Court". If the "competent Court" concludes that the disputed bill would indeed be in conflict with the Constitution, the President has no power to assent to the bill, which lapses without becoming law.

At the moment, the President has simply taken no action on the Ekandjo Bills, leaving them in legal limbo. However – as will be discussed in more detail below - the definitions of "spouse" and "marriage" put forward in the "Ekandjo Bills" are being cited in Parliament in connection with virtually every bill that even mentions marriage, thus impeding legislative progress on important issues. In the meantime, press reports indicate that Ekandjo has incorrectly maintained that his bills would "criminalise homosexuality altogether".[46]

Threats to the separation of powers

The conflict between Parliament and the courts has ramifications that go far beyond LGBT+ issues, by threatening the separation of powers between the three branches of government – the legislature (Parliament), the executive (President, Cabinet and public service) and the judiciary (courts). This division of functions amongst three different branches helps to prevent abuses of power because the three branches monitor and limit each other. If Parliament can "overrule" the Supreme Court's interpretation and application of the Constitution, this would undermine the courts' ability to uphold minority rights that cannot be adequately protected through the democratic process and put the basic structure of Namibia's constitutional system into jeopardy.

Namibian Constitution
Article 64- Withholding of Presidential Assent

(1) Subject to the provisions of this Constitution, the President shall be entitled to withhold his or her assent to a bill approved by the National Assembly if in the President's opinion such bill would upon adoption conflict with the provisions of this Constitution.

(2) Should the President withhold assent on the grounds of such opinion, he or she shall so inform the Speaker who shall inform the National Assembly thereof, and the Attorney-General, who may then take appropriate steps to have the matter decided by a competent Court.

(3) Should such Court thereafter conclude that such bill is not in conflict with the provisions of this Constitution, the President shall assent to the said bill if it was passed by the National Assembly by a two-thirds majority of all its members. If the bill was not passed with such majority, the President may withhold his or her assent to the bill, in which event the provisions of Article 56(3) and (4) hereof shall apply.

(4) Should such Court conclude that the disputed bill would be in conflict with any provisions of this Constitution, the said bill shall be deemed to have lapsed and the President shall not be entitled to assent thereto.

46 "Ekandjo says Kawana's anti-gay bill not enough", *Namibian Sun*, 15 July 2024.

Article 81 of the Constitution says that a decision of the Supreme Court is binding "unless it is reversed by the Supreme Court itself, or *is contradicted by an Act of Parliament lawfully enacted.*" But the key word here is "*lawfully*". This means "subject to the Constitution", as Article 63 on the powers and functions of the National Assembly states repeatedly. Read in context with the rest of the Constitution, Article 81 cannot mean that Parliament is allowed to "overrule" the Supreme Court's decisions on the application of the Constitution and the fundamental rights and freedoms it protects as this would undermine the role of the judiciary that is set out in the Constitution.

It is noteworthy that the Preamble to the Constitution states that the rights which are the cornerstone of Namibia's system of government are "most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, *operating under a sovereign constitution and a free and independent judiciary*".

Threats of increased discrimination

One member of the National Council asserted that the "Ekandjo Bills" do not go far enough, suggesting that the law should require hospitals to report gay people seeking treatment for criminal prosecution – prompting the Minister of Health to offer assurances that Namibia's health services are available to all.[47] The head of the United States' President's Emergency Plan For AIDS Relief (PEPFAR) – which provides substantial funding to Namibia to combat the spread of HIV-AIDS – criticised the potential health impact of the two bills, stating that everyone in a country should have the right to access quality healthcare without fear of discrimination, segregation and being criminalised, adding, "You will not win the war against HIV-AIDS and bring it to an end as a public health threat if you continue to segregate a whole segment of your population and discriminate against a segment and stigmatise the population".[48] This discussion foreshadowed the importance of the court case on decriminalisation of consensual sodomy, which is discussed next.

2.4 Sodomy between consenting adult men decriminalised: The Dausab case (2024)

In June 2024, the Namibian High Court ruled that two crimes criminalising consensual sexual contact between adult men in private were unconstitutional and invalid: (1) sodomy, which applies to anal intercourse, and (2) unnatural sexual offences, which covers other forms of consensual sexual contact.[49] These sexual activities were not criminalised if they took place between a man and a woman or between two women. As in the *Digashu* case, the Court relied on the constitutional rights to equality and dignity.

The Court found that the crimes in question have a very harmful and prejudicial impact on gay men, demeaning them and making them feel less worthy of protection as individuals. The laws in question could expose them to blackmail, entrapment, discrimination in access to services and even violence, and constituted a severe limitation of gay men's rights to privacy, dignity and freedom.[50] The Court also noted the prejudicial impact of criminalisation on policy decisions taken by the State – such as the policy of the Namibian Correctional Service not to provide condoms to inmates even though it is common knowledge that consensual sexual intercourse takes place between men in Namibia's correctional facilities.

"In June 2024, the Namibian High Court ruled that two crimes criminalising consensual sexual contact between adult men in private were unconstitutional and invalid."

47 Shellygan Petersen, "Pepfar to continue funding Namibia", The Namibian, 27 July 2023, quoting Okalongo constituency councillor Laurentius Makana Iipinge and health minister Kalumbi Shangula.

48 Id, quoting John Nkengasong.

49 *Dausab v The Minister of Justice* (HC-MD-CIV-MOT-GEN- 2022/00279) [2024] NAHC 331 (21 June 2024). Some related legal provisions were also declared unconstitutional as a result of the invalidation of the law on sodomy:

- the inclusion of the crime of sodomy in Schedule 1 of the *Criminal Procedure Act 51 of 1977* (crimes in respect of which police can make arrests without a warrant or justifiably use lethal force to prevent escape)
- section 269 of the *Criminal Procedure Act 51 of 1977* (competence of convictions of indecent assault or assault on charges of sodomy)
- the inclusion of the crime of sodomy in Schedule 1 of the *Immigration Control Act 7 of 1993* (concerning criminal convictions that result in a declaration that a person is a prohibited immigrant)
- the inclusion of the crime of sodomy in section 68(4) of the *Defence Act 1 of 2002* (concerning jurisdiction of local courts over members of visiting forces).

50 Id, paragraph 40.

Importantly, the judgment again addressed the role of public opinion, stating that the fact that some – or even a majority – of the Namibian public may consider sodomy unacceptable does not justify making it a criminal activity; personal aversions do not justify restricting another person's freedoms. The Court found that the harmful impact of the law on gay men threatens society more than a situation where members of the public must be expected to show tolerance. The Court concluded that "the criminalisation of anal sexual intercourse between consenting adult males in private, is outweighed by the harmful and prejudicial impact it has on gay men and that its retention in our law is thus not reasonably justifiable in a democratic society". [51]

Shortly after the High Court's judgment was handed down, a prominent lawyer (who is a Swapo central committee and politburo member) gave a public lecture entitled "Can there be a Constitutional Court-made law or principle having no roots in the language and scheme of the Namibian Constitution? A critical look at the recent judgment of the High Court of Namibia on the crime of sodomy." He reportedly argued that the Court gave insufficient attention to "majority views and opinion on the necessity of the crime of sodomy", arguing that constitutional interpretation should be guided by the values and aspirations of Namibian society. He also asserted that the Court erred by relying on the constitutional rights to dignity and privacy, saying that the absence of a constitutional prohibition on the basis of sexual orientation should have been decisive – and emphasised the Swapo position that sodomy should remain a crime and that same-sex marriage should not be recognised in Namibia.[52]

In July 2024, the Government filed an appeal against the High Court decision in the *Dausab* case, arguing amongst other things that the drafters of the Constitution deliberately excluded "sexual orientation" from the listed grounds on which discrimination is prohibited in Article 10(2) of the Constitution, which means that the Article 10 guarantee that all persons are equal before the law cannot be understood to apply to discrimination on the basis of sexual orientation.[53] The Government also asserts that the High Court conflated "mere public opinion with public mores", failing to consider the "fundamental underlying and enduring norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people" – which it refers to as "societal norms".[54] In support of this point, the Government also points to a provision in the African Charter of Human and People's Rights which states that the "promotion and protection of morals and traditional values recognized by the community shall be the duty of the State"[55] – ignoring the fact that the Commission which monitors the implementation of that Charter expressed concern in 2016 about discrimination and stigmatization practices that limit health care access for vulnerable groups in Namibia, particularly by the LGBT community,[56] or that the Namibian Government acknowledged in its 2021 presentation to the Commission that many challenges exist in the protection of sexual minorities.[57]

[51] Id, paragraph 42. The Court's decision does not affect any sexual activities that take place by means of coercion, nor does it remove the protections for children who are not old enough to give legal consent to sexual activity. Non-consensual sexual contact is covered by the *Combating of Rape Act 8 of 2000* – which includes a gender-neutral definition of "sexual act" that covers anal intercourse and other forms of penetration as well as oral sex and criminalises sexual acts that take place in coercive circumstances or with children under age 13 – and the *Combating of Immoral Practices Act 21 of 1980* – which covers sexual acts and other "indecent or immoral acts" with children under age 16 and in situations where the ability to consent is impaired by mental disability or intoxicating or stupefying substances.
The decision also does not affect the law on public indecency, which applies to anyone who engages in sexual activity in public. Public indecency is a common law offence defined as "unlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public sense of decency and propriety". See, for example, *S v F 1977* (2) SA 1 (T).

[52] The lecture was given by lawyer Sisa Namandje. See Erasmus Shalihaxwe, "Dausab case challenging sodomy law should have been dismissed – Namandje", *Windhoek Observer*, July 2024, available at <www.observer24.com.na/dausab-case-challenging-sodomy-law-should-have-been-dismissed-namandje/>; Andrea Damon, "Same-sex marriage not Namibian law – Namandje", *The Namibian*, 9 July 2024, <www.namibian.com.na/same-sex-marriage-not-namibian-law-namandje/>.

[53] Government's Notice of Appeal in the matter between Minister of Justice & Others v Dausab, High Court Case No. HC-MD-CIV-MOT-GEN- 2022/00279, paragraph 16. The Government argues that the Constitution does not prohibit "any and all forms of discrimination", but only what the Constitution itself, "and not judges", regards as unfair discrimination. "If the Constitution does not proscribe a particular ground of discrimination (by virtue of a deliberate decision of its drafters), that cannot constitute impermissible or *unfair* discrimination under Article 10. To hold otherwise would render the Constitution in contradiction with itself." Id, paragraph 14.

[54] Id, paragraph 6.

[55] African Charter of Human and People's Rights, Article 17(3).

[56] African Commission on Human and People's Rights, "Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2013)", 6-20 April 2016, paragraph 32(iii).

[57] See Adélaïde Etong Kame, "ACHPR 69: Periodic Review of the Republic of Namibia", International Service for Human Rights, 25 November 2021, available at <https://ishr.ch/latest-updates/achpr-69-periodic-review-of-the-republic-of-namibia/>.

As in the *Digashu* case, the *Dausab* appeal is set to test, and possibly strain, the relationship between the legislature and the courts when it comes to constitutional interpretation.

Namibia has been marked by inconsistencies in legal and policy protections against discrimination for LGBT+ individuals since independence. For example, the country's first labour law (enacted in 1992) explicitly prohibited discrimination on the grounds of sexual orientation in the employment context.[58] This protection was removed in subsequent labour laws passed in 2004 and 2007 despite lobbying by civil society for its retention,[59] although a 2013 report on human rights commissioned by the Office of the Ombudsman recommended its reinstatement.[60] In contrast, Namibia's 1998 Patient Charter developed by the Ministry of Health and Social Services provided for the right to receive health care regardless of gender or sexual orientation (amongst other grounds),[61] with the updated 2016 version still calling for equal treatment irrespective of "gender and sexuality".[62] (The Patient Charter is not a legally-binding document in itself, but the Ministry would be expected to follow its own policy guidelines in administrative decision-making.)

More specifically, there have been confusing signals from government on the sodomy law in recent years:

- Namibia's *National Human Rights Action Plan 2015-2019*, which was approved by Parliament in late 2014, identifies the LGBT+ population as a "vulnerable group" in need of protection against discrimination, identifying the continued criminalisation of sodomy as one of several key concerns in this regard.[63]
- In 2016, then-Ombudsman Adv John Walters spoke out in favour of the repeal of the sodomy law.[64]
- In September 2017, then-Minister of Health, Dr Ben Haufiku, asserted that the sodomy law was leaving inmates in correctional facilities vulnerable to HIV infection and claimed that the failure to repeal it was forcing the Ministry to sneak condoms into correctional facilities.[65]
- In November 2020, Namibia's statutory Law Reform and Development Commission published a report recommending the repeal of the offences of sodomy and unnatural sexual offences, noting their infringement of the constitutional rights of equality, dignity and privacy.[66] (Note that the Commission has no power to propose legislation to Parliament directly, but must work through the Minister of Justice.[67])

"Namibia has been marked by inconsistencies in legal and policy protections against discrimination for LGBT+ individuals since independence."

[58] *Labour Act 6 of 1992*, section 107(1)(a).

[59] *Labour Act 15 of 2004*, which was not brought fully into force before being replaced by the current *Labour Act 11 of 2007*. For more background, see Namibian Law on LGBT Issues, Legal Assistance Centre, 2015, section 7.2.

[60] *2013 Baseline Study Report on Human Rights in Namibia*, Office of the Ombudsman, 2013, page 2.

[61] *Namibian Law on LGBT Issues*, Office of the Ombudsman, 2015, section 9.2.5.

[62] The revised 2016 Patient Charter can be found online at <www.lac.org.na/laws/codes/Patient_Charter.pdf> and at <https://mhss.gov.na/documents/146502/2041604/MOHSS+PATIENT+CHARTER+%281%29.pdf/16502fb1-7242-fa4e-3f48-8707a96afe59?t=1685540925569>.

[63] *National Human Rights Action Plan 2015-2019*, Republic of Namibia, pages 37-38.

[64] See, for example, Denver Kisting, "Let gays be – Walters", *The Namibian*, 23 August 2016.

[65] "We sneak condoms into prison – Haufiku", *The Namibian*, 25 September 2017.

[66] Law Reform and Development Commission, *Report on the Abolishment of the Common Law Offences of Sodomy and Unnatural Sexual Offences*, LRDC 43, November 2020.

[67] *Law Reform and Development Commission Act 29 of 1991*, sections 7 and 9. In terms of section 9(1), the Commission's proposals for draft legislation are submitted to the Minister of Justice for consideration.

- As recently as 2021, during its most recent Universal Periodic Review (an international peer review mechanism under the auspices of the UN Human Rights Council), the Namibian government made the following statement in its response to recommendations on the decriminalisation of sodomy and the removal of discrimination on the basis of sexual orientation and gender identity:[68]

  16. The Namibian Government does not persecute members of the Lesbians, Gays, Bisexual, Transgender and Intersexed (LGBTI) community and homosexuality is not illegal in Namibia. The Government continues to explore effective mechanisms to clarify its position on LGBTQ rights despite existing normative and religious barriers. In the meantime, the Government continues to implement the general right to non-discrimination in the promotion and protection of human rights for all persons in Namibia, as provided for under Article 10 of the Namibian Constitution. Further, Namibia's National Human Rights Action Plan 2015-2019, which was approved by Parliament in late 2014, identifies the Lesbian Gay Bisexual Transgender and Intersex population (LGBTIs) as a "vulnerable group" and points to the need to protect members of vulnerable groups against discrimination.

  17. On 17 May 2021, the Law Reform and Development Commission presented a report to the Minister of Justice on abolishment of the common law offences of sodomy and unnatural sexual offences. The report includes a draft repeal legislation for the consideration and further action of the Minister of Justice. The Minister of Justice will table the report on the abolishment of sodomy and unnatural sexual offences in Parliament for discussion and consideration to kickstart progressive reform of the common law and legislative provisions to better promote the rights of LGBTQ persons. Currently, it must be noted that Namibia does not have laws that criminalise homosexuality.[69]

- The government's most recent *National Strategic Framework for HIV and AIDS Response in Namibia 2023/24 to 2027/28* (dated 1 March 2023) sets out a plan for a human rights and gender equality programme to ensure that no one is discriminated against, stigmatised and violated on the basis of their gender, sex and sexuality (amongst other grounds) and includes amongst its primary target populations men who have sex with men, transgender persons and "LGBTIQ+ persons" – as well as specifically calling for the decriminalisation of "same-sex relations" as part of this initiative.[70]

Government's position has clearly hardened more recently. It is unclear why the Government moved from recommending the repeal of the laws on sodomy and unnatural sexual offences on the basis of their infringement of key constitutional rights, to opposing the legal challenge to their constitutionality.

During the discussion of the "Ekandjo Bills" in the National Assembly, one lawmaker urged Ekandjo to propose another private member bill that would limit the recognition of transsexuality, noting that some Namibians procure sex change procedures overseas and suggesting that this should be criminalised.[71] Trans issues have also been specifically raised in Parliament in the discussions of various family law bills, as will be discussed below.

"It is unclear why the Government moved from recommending the repeal of the laws on sodomy and unnatural sexual offences to opposing the legal challenge to their constitutionality."

[68] Namibia's next review is scheduled to take place in 2026. Stakeholder reports are due on 25 September 2025, and the National Report must be submitted by 1 February 2026. "Namibia: Timeline for UPR engagement in the current cycle", UPR info, available at <https://upr-info.org/en/review/namibia>.

[69] In addition to these government policies and statements, in 2019, the then-First Lady of Namibia, Monica Geingos, called for the repeal of the law on consensual sodomy, pointing out that no convictions have been recorded under this law since Independence and that it would not be feasible to prosecute anyone for consensual sodomy without violating the constitutional protections for privacy. Speech by First Lady Monica Geingos, at the official opening of the "The Journey", an interactive human rights dialogue, on 12 June 2019 in Parliament Gardens. See Jemima Beukes, "Sodomy Law's Days Numbered – Geingos", *Namibian Sun*, 14 June 2019; "Namibia's First Lady Cautions Nation Against Violence and Discrimination of LGBTIQ Persons", *Kuchu Times*, 27 May 2021.

[70] *National Strategic Framework for HIV and AIDS Response in Namibia 2023/24 to 2027/28*, Ministry of Health and Social Services, Directorate of Special Programmes, 1 March 2023, section 6.7, available at <https://hivpreventioncoalition.unaids.org/sites/default/files/attachments/national_strategic_framework_for_hiv_and_aids_response_in_namibia_2023_to_2028.pdf>.

[71] Andreas Thomas, "Ekandjo's anti-gay marriage bills sail through National Assembly", *The Namibian*, 12 July 2023, referring to statements by PDM MP Vipuakuje Muharukua.

2.5 Public attitudes

Public opinion is repeatedly cited as a touchstone by Members of Parliament, who tend to ignore the fact that public views are also being influenced by the statements by Parliamentarians as well as pronouncements by prominent community leaders and traditional and social media.

Some have suggested that there should be a national referendum on the issue of recognising same-sex marriage – or on attitudes about LGBT+ issues more generally.[72] However, this proposal seems to stem from mistaken ideas about the potential impact of such a referendum. Even if public opinion were totally negative on LGBT+ rights, this could not be a basis for overturning any court judgments or weakening any of the constitutional rights which those judgments relied upon. The entire chapter of the Namibian Constitution on fundamental rights and freedoms is protected against any amendment that would diminish or detract from those rights.[73] The courts have also made it clear in both the *Digashu* and *Dausab* cases that public opinion is not the decisive factor in constitutional interpretation, since the Constitution must protect the rights of minorities.[74]

In terms of information about public opinion, the widely-respected Afrobarometer surveys have already collected information from nationally-representative samples of respondents on attitudes toward LGBT+ issues in Namibia and a host of other African countries.[75] Since 2014, all the Afrobarometer country surveys have included this question on tolerance:

For each of the following types of people, please tell me whether you would like having people from this group as neighbours, dislike it, or not care: People of a different religion? People from other ethnic groups? Homosexuals? People who have HIV/AIDS? Immigrants or foreign workers?

Those who answered that they would not mind, somewhat like or strongly like to have persons from the indicated groups as neighbours were considered to be tolerant of those groups. In Namibia, the percentage of respondents who were tolerant of homosexuality by this measure has been consistently over, or almost at, half.

Afrobarometer survey data
TOLERANCE TOWARD HOMOSEXUALITY

SURVEY YEAR	2014/15	2017/18	2019/21	2021/23
Namibia	55%	54%	64%	49%

These findings place Namibia amongst the African countries most tolerant of homosexuality. In the 2019/2021 survey, Namibia ranked third out of 34 countries on this measure (with tolerance at 64% of the sample), behind Cabo Verde (82%) and South Africa (71%). In the 2021/2023 survey, Namibia was the country fifth most tolerant of homosexuality out of the 37 African countries surveyed (with tolerance at 49% of the sample) – behind Cabo Verde (82%), South Africa (71%), Seychelles (66%) and Mauritius (60%).[76]

At the same time, it is worrying that tolerance of homosexuality is declining in Namibia at a time when the LGBT+ community is more visible than ever. This could be a response to signals from political leaders, a result of the increased prominence of the LGBT+ community, the influence of opposition by some church groups, or for some other reason.

" Namibia is one of the most tolerant countries in Africa on the issue of homosexuality."

[72] Donald Matthys, "Debate on same-sex marriage referendum intensifies", *The Namibian*, 30 May 2023; Niël Terblanché, "IPC calls for a referendum on same-sex marriages", *Windhoek Observer*, 26 May 2023; Roberto Igual, "Namibia's EFF condemns same-sex marriage ruling as 'un-African'", mambaonline.com, 18 May 2023.

[73] Article 131, Namibian Constitution.

[74] *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraph 103; *Dausab v The Minister of Justice* (HC-MD-CIV-MOT-GEN- 2022/00279) [2024] NAHC 331 (21 June 2024), paragraph 42.

[75] "Afrobarometer is widely recognised as setting the 'gold standard' for survey research in Africa. Its data collection process adheres to rigorous methodological standards, including face-to-face interviews with randomly selected respondents. Sample sizes of 1,200-2,400 respondents aged 18 and above, representing each country's demographics, meet or exceed global standards in public attitude research. Afrobarometer works closely with national statistics offices, and its survey samples are based on population projections using the most recent census data." "Afrobarometer debuts Round 10 surveys, aims to increase footprint to about 42 countries by 2025", Afrobarometer news release, 5 Jan 2024, available at <www.afrobarometer.org/articles/afrobarometer-debuts-round-10-surveys-aims-to-increase-footprint-to-about-42-countries-by-2025/>.

The households surveyed are chosen by means of a systematic random sampling method. The interviews are conducted in the language of the respondent's choice, to enhance the reliability of the responses. The scientific sampling method ensures that the survey results can be used to allow for generalisations about broader public opinion with a reasonable margin of error – about ±2.8% at a 95% confidence level for the smaller samples and ±2% for the larger ones. This means that the survey is able to reflect the views of all voting-age citizens within the surveyed countries accurately. C Keulder, "Public Opinion Survey on attitudes towards LGBTBQIA+ in Namibia", unpublished research report, Windhoek, 2024.

[76] Id.

Afrobarometer's national investigator for Namibia, Christiaan Keulder, has pointed out that the data "also show that toleration in Namibia is consistent. Those who are tolerant of homosexuality are also tolerant of ethnic, religious, and political diversity, and show little sign of being xenophobic. This degree of toleration may well contribute to the political stability Namibia has enjoyed since independence."[77]

Keulder draws a **distinction between toleration and acceptance**, with toleration constituting "a refusal to impose punitive sanctions for dissent from prevailing norms or policies or a deliberate choice not to interfere with behaviour of which one disapproves". Importantly, toleration accepts diversity without implying approval or agreement – and is crucial for dealing with socio-political and cultural diversity.[78] He also points to more recent distinctions between **toleration and tolerance** – with toleration denoting passive non-interference with persons with different beliefs or practices, while *tolerance* goes farther, referring to active "acceptance, respect, and openness towards diverse perspectives, identities, and behaviours", and even "appreciation and celebration of differences".[79]

Keulder also points to recent scholarly research that emphasises the role of political leadership in either encouraging or discouraging homophobia, "suggesting that political agendas significantly impact public attitudes".[80] Indeed, this may be why toleration of homosexuality appears to have decreased somewhat in Namibia between 2021 and 2023, with members of the public responding to signals from Parliamentarians and other leaders.

The most recent Afrobarometer survey (Round 10) included more detailed and extensive questions on attitudes about homosexuality as part of Namibia's country-specific questions.[81] While the answers do not indicate the level of toleration one might hope for, **the data indicate that roughly one-third of the Namibian population is neutral or accepting of various dimensions of homosexuality – not a majority, but not an insignificant proportion by any means. And 40% of the survey respondents would tolerate or accept the homosexuality of a friend or family member.**[82]

OVERVIEW OF ATTITUDES ABOUT HOMOSEXUALITY
Afrobarometer Round 10
For each of the following statements, please tell me whether you disagree or agree.

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Aggregate of neutral, agree or strongly agree
A. Individuals who are attracted to people of the same gender should have the same legal rights as everyone else in Namibia.	38%	26%	9%	20%	6%	**35%**
B. It is important for Namibians to be tolerant of those who are attracted to people of the same gender, even if they feel it is against their own morals.	35%	27%	12%	20%	5%	**37%**
C. People should have the right to marry whoever they choose no matter the gender of their partners.	43%	25%	9%	16%	7%	**32%**
D. It is possible to follow my religion and accept people who are who are in same sex relationships	41%	27%	10%	14%	7%	**31%**
E. People who are in same sex relationships have the right to be parents just like anyone else.	44%	24%	9%	15%	6%	**30%**

The percentages do not total 100% because "don't know" is excluded.

77 Christiaan Keulder, "Public opinion and tolerance of homosexuality", Afrobarometer, 3 May 2023, first published in *The Namibian* and the *Namibian Sun*; available at <www.afrobarometer.org/articles/public-opinion-and-tolerance-of-homosexuality/>. Keulder is the owner of Survey Warehouse, Afrobarometer's national partner in Namibia.

78 Id.

79 C Keulder, "Public Opinion Survey on attitudes towards LGBTBQIA+ in Namibia", unpublished research report, Windhoek, 2024.

80 Id.

81 The bulk of Afrobarometer survey questions are uniform across all countries to allow for comparisons across the continent, but the surveys make provision for a few questions that are unique to the individual country being surveyed, to reflect topical issues in each country.

82 C Keulder, "Public Opinion Survey on attitudes towards LGBTBQIA+ in Namibia", unpublished research report, Windhoek, 2024.

How accepting or rejecting would you be if you found out that a friend or family member is attracted to people of the same gender?	
Completely rejecting	38%
Somewhat rejecting	20%
Neither accepting nor rejecting	18%
Somewhat accepting	11%
Completely accepting	11%
Aggregate of neutral, somewhat accepting or completely accepting	**40%**

The percentages do not total 100% because "don't know" is excluded.

Women are slightly more supportive of LGBT+ rights than men, particularly in areas such as same-sex marriage. Older adults and those with lower educational backgrounds are most likely to be opposed to same-sex marriage and same-sex couples' parenting rights, while younger respondents and those with higher education levels are more tolerant – which could point to a shift towards increased tolerance in the future. Urban dwellers also tend to be more accepting of LGBT+ rights than those in rural areas, probably due to their greater exposure to diverse cultures and lifestyles – with this possibly being another factor that may lead to future shifts towards tolerance. [83]

As part of the issue of tolerance, Namibians have engaged in debate in public forums on whether homosexuality is "African or "un-African" [84] – which seems less important than the fact that there are undeniably LGBT+ individuals in diverse Namibian communities at present. Furthermore, in a clearly African commitment on the topic, the African Commission on Human and Peoples' Rights adopted a "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" in 2014 – which, although not legally binding, reflects the African Commission's concern about the protection of LGBT+ individuals in African states. [85]

2.6 Can the Supreme Court reverse its own judgments?

Some have wondered if the Supreme Court can overrule its own judgments on LGBT+ issues. For example, what if issues similar to the ones discussed in this report came before the Supreme Court when different judges were assigned to hear the case? Is it possible that the government might even attempt to appoint future judges on the expectation that they might oppose LGBT+ rights?

Judges are appointed to the Supreme Court and the High Court by the President, acting on the recommendation of the Judicial Service Commission [86] – which is a body consisting of the Chief Justice, the Deputy-Chief Justice, the Attorney-General and two members of the legal profession nominated by professional organisations representing the interests of the legal profession in Namibia. [87] This procedure would make it hard for a judge to be selected on the basis of a stance on a specific issue.

"Namibians who are tolerant of homosexuality are also tolerant of ethnic, religious, and political diversity – which may contribute to the nation's political stability."

[83] Id.

[84] See, as recent contributions to this debate in Namibia, Kaitira E Kandjii, "Debate Over Same-Sex Relations as UnAfrican is a Fallacy and a Cultural Myth" (opinion piece), The Namibian, 30 June 2024; Arlana Shikongo, "The Silent Infiltration: Tracing the Threads of American Evangelical Influence on LGBTQ+ Rights", Sister Namibia, 8 April 2024, available at <https://sisternamibia.org/2024/04/the-silent-infiltration-tracing-the-threads-of-american-evangelical-influence-on-lgbtqi-rights/>.

[85] Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, ACHPR/Res/275, <www.achpr.org/sessions/55th/resolutions/275/>. Resolution 275 condemns the increasing incidence of violence and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity and urges State Parties to the African Charter on Human and Peoples' Rights to enact and effectively apply appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities and to ensure that human rights defenders are not subjected to violence and abuse because of activities aimed at protecting the rights of sexual minorities.

[86] Namibian Constitution, Article 82-Appointment of Judges.

[87] Id, Article 85-The Judicial Service Commission. Temporary acting appointments must also be based on recommendations of the Judicial Service Commission. *Judicial Service Commission Act 18 of 1995*, section 4(1).

The Supreme Court has the power under the Constitution to overrule its own judgments; Article 81 says that a decision of the Supreme Court is binding "unless *it is reversed by the Supreme Court itself*" or (as discussed above) "is contradicted by an Act of Parliament *lawfully* enacted". However, it is very rare for the Supreme Court to reverse itself.[88] In fact, this has happened only once since Namibian Independence, in a case where a quirk of circumstances led to contradictory outcomes for two persons in separate criminal cases involving identical facts.[89] It is likely that the Supreme Court would depart from its own previous decision only where the Court lacked awareness of a relevant statutory provision or a binding court ruling that would have led to a different outcome or where the Court finds its prior decision to be clearly wrong.[90] This would never be done lightly, to avoid undermining the important concept of legal certainty.[91]

The importance of not lightly departing from previous precedent is one reason why the *Digashu* case did not "overrule" the *Frank* case, but rather *clarified* what portions of it were binding legal precedent as opposed to statements that were extraneous to the dispute it was deciding. Thus, it is not likely that the Supreme Court would overrule itself on any of the LGBT+ issues it has decided – but this possibility cannot be ruled out entirely.[92]

[88] Just to be clear, it is perfectly acceptable for the Supreme Court to come to a conclusion that is different from that of the High Court. This is the very purpose of the system of a hierarchy of courts with provision for appeals. It is also entirely permissible for the courts to depart from the precedent of *pre-independence* court judgments, which were obviously decided before the advent of the Namibian Constitution. *Supreme Court Act 15 of 1990*, section 17(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."

[89] *S v Likanyi* 2017 (3) NR 771 (SC). The issue was that several accused persons in the Caprivi treason trial were taken into custody by Namibian agents on foreign soil, leading to a question as to whether they had been properly brought before Namibia's criminal courts. Two of the persons taken into custody in exactly the same manner stood trial separately, before different trial judges and different benches of appeal judges, with the result that their cases had different outcomes even though the circumstances of their arrest were identical. This exceptional circumstance prompted the Court to reverse its own judgment in the case involving Mr Likanyi, to ensure that the two persons in question received equal treatment under the law and to avoid a grave injustice to Mr Likanyi. Here the Supreme Court found that "in an exceptional case, the Supreme Court has the competence under Art. 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." Id, paragraph 53 (emphasis added).*

In contrast, see *MN v LI & Another* 2022 (1) NR 135 (SC), paragraph 29. Here the Supreme Court was once again asked to reverse its own decision in respect of the same issues involving the same parties, but it refused to do so - emphasising that the court will invoke its art 81 reversal power only where it 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" (at paragraph 29).

As noted above, the *Digashu* case did not technically overrule the previous Supreme Court ruling in the *Frank* case, but rather clarified what parts of that case were binding precedent and what parts were incidental comments that did not form part of the binding holding of the case.

[90] *Likanyi v S* 2017 (3) NR 771 (SC), paragraph 30.

[91] One Namibian judge explained it this way:

> If this court does not respect its previous decisions appeals would be more akin to lotteries rather than establishing universal judicial practise as, instead of producing legal certainty, it will produce endless uncertainty and confusion. Thus the underlying policy consideration*[s]* such as the importance of legal certainty so as to allow persons to arrange their affairs accordingly, the protection of vested rights, the catering to legitimate expectations and the upholding of the dignity of the court are all factors that needs *[sic]* to be considered when a decision is made to depart from a previous approach.

Id, paragraph 100 (footnotes omitted), per Frank AJA, partially concurring opinion. On the other hand, the same judge noted that if the Court can never depart from previous approaches, "there will be no development of the common law which is also an undesirable consequence" Id. The concurring opinion also quoted with approval this statement from the South African Constitutional Court in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), paragraph 28:

> The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.

Id, paragraph 101.

[92] The unexpected overturning of the *Roe v Wade* precedent on abortion in the US is a cautionary example. See *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022).

3. Family law reforms in progress

LGBT+ issues raised by Parliamentarians have been dominant in discussions of family law reforms that raise a much wider range of significant issues. This section provides an overview of key points in some of the family laws which were discussed in Parliament in 2024 as well as the LGBT+ topics that have been implicated.

3.1 Law reform on marriage

A Marriage Bill was tabled in Parliament in July 2024, having been in process for many years.[93] It was designed as a replacement for the *Marriage Act 25 of 1961* that Namibian inherited from South Africa at independence. This Bill covers only civil marriages, with customary marriages currently governed only by customary law.[94]

Positive innovations

The Marriage Bill contains many improvements to the current law on civil marriage.

(1) *Tighter control over marriage officers to prevent abuse:* Under the Bill, magistrates, civil servants and actively-serving religious leaders can serve as marriage officers. The Bill provides for training and testing requirements for all marriage officers who are not magistrates, and authority to act as a marriage officer can be revoked on grounds of misconduct. Fees for conducting marriages will be prescribed, and it will be a criminal offence for a marriage officer to accept unauthorised fees, gifts or rewards. Marriage officers who knowingly abuse their positions can also be charged with a range of offences.

(2) *Advance notice of intention to marry:* Couples intending to marry must approach an office of MHAISS at least 90 days in advance. This gives Ministry officials time to confirm that neither of the intending spouses is currently in a civil marriage, thus preventing bigamy. It also gives officials time to confirm that the parties are old enough to give independent consent to marry, or that they have obtained the parental consent required for persons under age 21.

Notice of the intended marriage will also be made public, to allow anyone with knowledge of a legal impediment to come forward with an objection – coupled with a criminal offence aimed at anyone who provides false information in an attempt to stop the marriage. The couple will also choose their matrimonial property regime at this stage, giving them time to make sure that they understand the financial consequences of the marriage. Some observers suggest that 90 days is too long or that this requirement constitutes excessive government interference,[95] although there is a provision for exceptions in the case of a serious illness or impending death of one of the intending spouses, the impending death of a close family member, the anticipated birth of a child to the intending spouses, or other circumstances that the Minister may set out in regulations.

(3) *A fair procedure to address marriages to non-Namibian citizens that are not in good faith:* It is well known that foreign nationals sometimes take advantage of Namibian citizens, cajoling or tricking or bribing them into marriages purely for the purpose of obtaining the right to live in Namibia and, eventually, Namibian citizenship (after 10 years of marriage). The Bill authorises investigations of marriages to foreign nationals that are suspected of being in bad faith – and if bad faith is discovered, then the marriage cannot be the basis for any Namibian residency or citizenship rights. There are several protections to make sure that such investigations are carried out fairly. The investigation must be concluded within a reasonable period after the marriage takes place, and the marriage under scrutiny must be treated as being in good faith while the investigation is underway. The Bill also rules out enquiries into the sexual relationship between the spouses, to protect their privacy.

[93] Marriage Bill [B5-2024].

[94] Although the Namibian Constitution and many statutes recognise customary marriages for a range of purposes, law reform on this issue has not moved forward significantly since the Law Reform and Development Commission published a draft bill on the recognition and registration of customary marriages twenty years ago. The *Child Care and Protection Act 3 of 2015* makes 18 the minimum age for both civil and customary marriage, as well as criminalising arrangement of a child marriage – thus bringing the minimum age for customary marriage in line with that for civil marriage, which was set at 18 by 1996 amendments to the *Marriage Act 25 of 1961*. But the lack of other progress in this area means that currently there is no formal procedure for recognising and registering customary marriage (which can make proving marriage difficult for things such as bank loans or medical aid coverage), and no uniform protection for property rights upon divorce or the death of one spouse or for the best interests of children in the event of divorce.

[95] See, for example, Shellygan Petersen, "Ask Govt three months before saying "I do'", *The Namibian*, 11July 2024. One MP suggested that this time period would be used to determine the "authenticity of the relationship". This is not correct, as the Bill refers only to checking for *legal* impediments to marriage, such as a subsisting marriage or one spouse being underage.

Problematic issues

(1) *Parental consent to marry for persons under age 21:* Article 14 of the Namibian Constitution gives persons "of full age" the right to marry. The minimum age for civil marriage is now and will continue to be age 18 – which is also the age of majority. But the Bill requires persons between the ages of 18 and 21 to have the consent of a parent or guardian before they can conclude a civil marriage. It gets around the constitutional issue by defining the term "full age" to include this exception. The parental consent requirement is not new – it was already incorporated into the *Child Care and Protection Act 3 of 2015*. The question is whether this is really what the Constitution intends by "full age".

(2) *Prohibition on same-sex marriages in Namibia:* Civil marriages concluded in Namibia have always been limited to marriages that are "a union of one man with one woman, to the exclusion, while it lasts, of all others", [96] in line with the common law rule that underpins the current *Marriage Act 25 of 1961*. But the Marriage Bill makes this even more explicit by defining marriage as "a legal union entered into voluntarily between two persons of the opposite sex", with "opposite sex" meaning the male sex in relation to the female sex or the female sex in relation to the male sex, based on the sex "determinatively assigned for purposes of birth registration". [97]

However, putting this rule into the Bill does not really change anything – if the courts find that this rule is contrary to the Namibian Constitution, it does not matter if the rule is in a statute or in the common law. [98] As discussed below, this will depend in great part on the interpretation of Article 14 of the Namibian Constitution, which says that "men and women" have the right to marry and to found a family. Given that it is inconceivable that Parliament will enact legislation allowing same-sex marriage, this is an issue that the courts will likely be called upon to decide in future based on Namibia's constitutional framework.

(3) *Attempting to prevent recognition of foreign same-sex marriages in Namibia:* The most immediate problem with the Marriage Bill is that it would generally prohibit the recognition of foreign same-sex marriages [99] - which contradicts the Supreme Court ruling in the *Digashu* case on the recognition of foreign same-sex marriages *for immigration purposes*. This is almost certain to put Parliament and the Namibian judicial system on a collision course.

Namibian Constitution

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary; …

Article 25(1)-Enforcement of Fundamental Rights and Freedoms

Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law… which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid…

Article 81 - 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.

[96] An early articulation of this rule can be found in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59, page 61.

[97] Marriage Bill [B5-2024], clause 1, definitions of "marriage" and "opposite sex".

[98] For example, in South Africa, a Constitutional Court case on same-sex marriage struck down aspects of the common law and the *Marriage Act 25 of 1961* on constitutional grounds. *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

[99] Marriage Bill [B5-2024], clause 31 on recognition of foreign marriages states that a foreign marriage is valid in Namibia only if it is not affected by "any other legal impediment to marriage under Namibian law" – with Namibian law requiring that marriages can take place only between persons of opposite sexes.

The government's attempt to enact a detour around the *Digashu* judgement is based on the theory that the case relied on the common law rule that the validity of a marriage is determined by the law of the country where the marriage was solemnised – and that the Supreme Court failed to apply the exception to the common law principle that "no country is under an obligation on grounds of international comity to recognize a legal relation which is repugnant to the moral principles of its people".[100] The argument is that, against the background of the repugnancy principle, the Bill is attempting to modify the common law by removing the possibility of recognition of foreign same-sex marriages.[101]

It is correct that the Supreme Court noted that there are no statutory provisions in Namibia that would preclude the operation of the common law principle that the validity of a marriage is based on the law of the country where they took place;[102] however the Court also held that failure to recognise foreign same-sex marriages would violate the constitutional rights to equality and dignity, noting that "where legislation or its interpretation or application would significantly impair the ability of spouses to honour their obligations to one another, this would infringe the constitutional right to dignity of the spouses".[103] Thus, the attempt to change the underlying common law principle on the recognition of foreign marriages through the Marriage Bill still contradicts the Supreme Court ruling.

In introducing the Bill, the Minister for Home Affairs, Immigration, Safety and Security oddly emphasised the policy in the "SWAPO Family Act" of December 1977, which was designed to regulate the family affairs of SWAPO members in exile in other countries. This "Act" was not a law, but a policy approved by the SWAPO Central Committee. It states that a marriage shall be valid "when two parties of different sex state their agreement to marry before a body and/or person authorised by this Act to contract marriage in a manner prescribed by this Act".[104] After independence, marriages concluded in accordance with the SWAPO Family Act were recognised as marriages in Namibia and treated as if they had been solemnised under Namibia's *Marriage Act 25 of 1961*. This recognition of such marriages did not, contrary to what the Minister stated, make the SWAPO Family Act "part of the Namibian laws".[105]

Furthermore, the policy of a single political party decided long before the Namibian Constitution was even drafted cannot be a reliable guide to the interpretation of the Constitution. And moreover, even if the SWAPO Family Act reflects the opinion of a significant portion of the current Namibian public, the Supreme Court made it clear in the *Digashu* case that public opinion is not the decisive factor.

Namibian Constitution
Article 1(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.

The same caveat applies to the Minister's statement that the "values, traditions and customs of the Namibian nation are anchored in Christianity. As a result, Namibia today can be referred to as overwhelmingly Christian nation."[106] This statement is probably factually accurate, but it does not justify imposing Christian values – or more accurately one interpretation of Christian values, as opposed to other Christian approaches that emphasis compassion and tolerance – on all persons in a secular state.[107]

In legal terms, the Supreme Court clearly stated that the government's refusal to recognise the spouses of Namibian citizens in same-sex marriages validly concluded in a foreign jurisdiction *for the purposes of immigration* violates the interrelated constitutional rights to dignity and equality. It is the job of the Supreme Court to make pronouncements on the interpretation and application of the Namibian Constitution, and, as explained above, Parliament cannot *lawfully* overrule the Supreme Court in this task.

100 Motivation Speech by Hon. Dr. Albert Kawana, MP, Minister of Home Affairs, Immigration, Safety and Security, on the occasion of motivating the Marriage Bill (hereinafter "Motivation Speech"), 2 July, paragraphs 10-11.

101 Id, paragraphs 18-20.

102 *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraphs 89-90 and 108.

103 Id, paragraph 108.

104 SWAPO Family Act, Article 8.

105 Motivation Speech, paragraph 13. *The Recognition of Certain Marriages Act 18 of 1991* sets out the provisions of the SWAPO Family Act in its Schedule, but without making them part of the current law of Namibia.

106 Id, paragraph 9.

107 Article 1(1) of the Namibian Constitution states: "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." Article 21(1) protects freedom of religion as well as freedom of "thought, conscience and belief".

The attempt to characterise what is being done in Parliament as a change to a common law rule instead of a contradiction of the Supreme Court on a constitutional point simply does not hold water; the ruling of the Court on the recognition of foreign same-sex spouses *for purposes of immigration* still stands, while the question of whether foreign same-sex marriages must be constitutionally recognised for other purposes or whether constitutional rights mandate the solemnisation of same-sex marriages *within Namibia* are still open questions that Parliament is free to legislate on.

But, whatever path Parliament takes, these issues seem to be shaping up to be a struggle between Parliament and the courts – which carries the danger of destabilising Namibia's constitutional system.

(4) *Marriages by transgender persons:* Some Parliamentarians expressed concern about the possibility that persons who have undergone sex changes overseas will engage in undetected same-sex marriages back in Namibia – since, as discussed below, the government intends to end recognition of sex changes for trans individuals. The National Assembly debate was at times dismissively jocular, with one MP making fun of a situation where "Johann becomes Johanna" – but the question was raised as to what investigations the Ministry intends to do to identify transgender persons and prevent their marriage to persons of the same sex as the transgender person was at birth. Parliamentarians also used this opportunity to promote the "Ekandjo definitions", which they claimed would close this "loophole".[108] Ekandjo was quoted in the press shortly after that debate as complaining, "The Kawana amendment [referring to the Marriage Bill] doesn't talk about genetically-born males and females. That lack of clarity can be exploited by people who may go through therapies and change their gender. We have to clear that up."[109]

Lack of law reform on race-based rules on marital property

The outcry about same-sex marriage stands in sharp contrast to the lack of public concern about the continued operation of the astonishingly-named **Native Administration Proclamation 15 of 1928**, which provides one set of rules for marriages between "natives" in the northern regions, while another rule applies to all other marriages. This is not simply a relic on the statute books, but a law that continues to be applied in everyday life. Its constitutionality has not yet been challenged in court, and a Uniform Matrimonial Property Bill that would rectify the situation - based on a 2003 report of the Law Reform and Development Commission - was not put forward for tabling this year. The Bill would make community of property the default regime for everyone who enters into a civil marriage. It would also provide a grace period during which couples covered by the discriminatory apartheid-era law can change their property regime. It is hard to understand how this is treated as being of less urgency than the urgent moves to combat even limited recognition of foreign same-sex marriage in Namibia.

"Some Parliamentarians expressed concern about the possibility that persons who have undergone sex changes overseas will engage in undetected same-sex marriages back in Namibia."

[108] National Assembly, 3 July 2024 session, viewed on the Facebook page of "Parliament of the Republic of Namibia", statements made by MPs Bernadus Swartbooi (Landless People's Movement) and Tjekero Tweya (Swapo).

[109] "Ekandjo says Kawana's anti-gay bill not enough", *Namibian Sun*, 15 July 2024

The Marriage Bill was approved by the National Assembly without amendments on 11 July 2024.[110] It was approved by the National Council shortly afterwards, with recommendations for amendments that would remove (a) the definition of "customary marriage" and (b) the provisions intended to protect the property of women in a customary marriage where the husband enters a civil marriage with another woman at the same time, on the theory that this should rather be covered in a future law on customary marriages.[111] The National Council's motivation was that issues pertaining to customary marriage should be dealt with in future legislation on the registration of customary marriages – ignoring the fact that the concerns in question arise when there is an *overlap* between civil marriage and customary marriage, which requires attention in the laws on *both* types of marriage.

When the National Council's amendments went back to the National Assembly for consideration, the issue of same-sex marriage was once again raised, with the sponsoring Minister rejecting the National Council's proposal to remove the definition of "customary marriage" on the grounds that it is urgent to ensure that no customary marriage involves same-sex partners "so we comply with our cultures and traditions".[112] The Marriage Bill was passed by the National Assembly in its original form, without the amendments proposed by the National Council, on 18 September 2024.[113] However, as of late November 2024, it had not been published in the *Government Gazette* (which is a requirement for all legislation).[114]

Same-sex marriage in Namibia?

Whether or not the Namibian Constitution supports a right to same-sex marriages within Namibia depends on the interpretation of **Article 14(1)**, which says that "men and women" have the right to marry and to found a family – does this mean that men have the right to marry and women have the right to marry, or that the right applies only when a man and a woman want to marry each other? This is an issue that the courts must still decide.

In considering the meaning of "family" in the Constitution, the *Frank* case interpreted the wording of Article 14(1) to mean that "marriage is between men and women – not men and men and women and women", stating further that homosexual relationships, "whether between men and men and women and women, clearly fall outside the scope and intent of Article 14".[115] However, as we have seen, the Supreme Court recently clarified that the discussion of homosexual relationships in the *Frank* case does not constitute legally binding precedent and was in many respects misguided.[116]

Namibian Constitution
Article 14-Family

(1) **Men and women of full age**, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status **shall have the right to marry and to found a family**. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

110 National Assembly, 11 July 2024 session, viewed on the Facebook page of "Parliament of the Republic of Namibia".

111 Amendment to the Marriage Bill [B.5-2024] moved by Hon Ngunaihe, 30 July 2024, available from the Office of the Chairperson of the National Council.

112 Proceedings of the National Assembly on 18 September 2024 recorded live and viewed on the Facebook page of the Parliament of the Republic of Namibia.

113 See Minutes of Proceedings of the National Assembly of Namibia, Wednesday, 18 September 2024, point 5.

114 In any event, once it is published, it is set to come into force only at a later date set by the Minister.

115 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at page 144.

116 *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraphs 108 and 125.

To understand the origin of Article 14, it is helpful to know a bit about the procedure involved in the drafting of the Namibian Constitution. This is particularly important since the recent debates around LGBT+ issues have inspired false claims that the Constitution was drafted by Western powers.[117] During the struggle years, international negotiations led to the passage of UN Security Council Resolution 435 of 29 September 1976, which set out a framework for free and fair elections to be held in Namibia under international supervision as a precursor to Namibian independence. One player that was instrumental in achieving agreement on Resolution 435 was the "Western contact group", an unofficial group of representatives from the United States, France, the United Kingdom, Canada and West Germany. During a conference in 1981, the interested parties – including SWAPO and other Namibian political groupings as well as the Western contact group – agreed on a set of principles that would be incorporated into the Namibian Constitution. These principles became known as the "1982 Constitutional Principles".[118] The principles do not mention family or marriage at all, but they state that the Constitution's declaration of rights "will be consistent with the provisions of the Universal Declaration of Human Rights".[119]

In 1989, in the first free and fair election ever hold in Namibia, a Constituent Assembly was chosen to formulate the Namibian Constitution. When the Constituent Assembly met for the first time on 21 November 1989, its members unanimously resolved to use the 1982 Constitutional Principles as a framework.[120] The shaping of the Namibian Constitution was the task of a twelve-person Constitutional Committee which included representatives of all the political parties in the Constituent Assembly and was chaired by the late Hon Hage Geingob.[121] The working draft used as the starting point had been prepared by Swapo and accepted by the other political parties for this purpose. The Constitutional Committee met in closed sessions to discuss the draft with a panel of three constitutional law experts who re-worked the document in accordance with the Committee's instructions, to produce a final draft for consideration by the full Constituent Assembly.[122]

"The reference to "men and women" in Article 16 of the Universal Declaration of Human Rights was inserted at the behest of women because there was still widespread discrimination against women in matters relating to marriage at the time."

[117] Independent Patriots for Change presidential candidate Dr Panduleni Itula stated in July 2024 that Namibia's Constitution was drafted by Western countries. See Eliaser Ndeyanale "Constitution written by Western countries – Itula", *The Namibian*, 7 July 2024. This false claim was picked up on social media. For more details, see Frederico Links, "No, the constitution was not 'written by Western countries'", *Namibia Fact Check*, 17 July 2024.

[118] The 1982 Constitutional Principles are formally named "Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia". They are contained in the Annex to the UN Secretary-General's Report S/15287 (dated 12 July 1982), which can be found at <https://digitallibrary.un.org/record/31638/?ln=ru&v=pdf>.

[119] There is only one statement about fundamental rights in the 1982 constitutional principles:

> 5. There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.

[120] Marinus Wiechers, "Namibia's Long Walk to Freedom: The Role of Constitution Making in the Making of an Independent Namibia" in Laurel E Miller, ed., *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, DC: United States Institute of Peace, 2010, page 88.

[121] Hon Hage Geingob became the first Prime Minister of independent Namibia and was elected as Namibia's third president in 2014.

[122] Marinus Wiechers, "Namibia's Long Walk to Freedom: The Role of Constitution Making in the Making of an Independent Namibia" in Laurel E Miller, ed., Framing the State in Times of Transition: Case Studies in Constitution Making, Washington, DC: United States Institute of Peace, 2010, page 88.

During this process, Article 14 on the family was consciously modelled on Article 16 of the Universal Declaration of Human Rights.[123] Adv Arthur Chaskalson, one of the three constitutional law experts, stated that the article on the family was a new item that was inserted by the lawyers to conform with their instructions to bring the document "into line with the Universal Declaration of Human Rights, which was part of the 1982 Principles, and we felt that the family right was such a provision".[124]

The reference to "men and women" in Article 16 of the **Universal Declaration of Human Rights** was inserted at the behest of women because there was still widespread discrimination against women in matters relating to marriage at the time that the Universal Declaration was being drafted.[125] According to the Office of the United Nations High Commissioner on Human Rights, "Some subsequently interpreted the wording as limiting marriage rights to heterosexual couples, although nowadays it is increasingly interpreted as simply referring to both sexes having an equal right to marry, rather than stipulating they must marry someone of the opposite sex."[126]

However, the interpretation of Article 14 in the *Frank* case has some support internationally. Similar wording in Article 23(2) of the **International Covenant on Civil and Political Rights** ("The right of men and women of marriageable age to marry and to found a family shall be recognized.") was interpreted in **2002** by the Human Rights Council that monitors compliance with the Convention to apply only to marriages "between a man and a woman".[127] However, this view is not supported by the background documents on the drafting of the Covenant, which indicate that the gendered language in Article 23(2) was included to emphasize the need for equality between men and women in marriage, with no discussion of any intent to exclude same-sex couples.[128]

In **2010**, the European Court of Human Rights ruled that similar language in the **European Union Convention for the Protection of Human Rights and Fundamental Freedoms** ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.") could not be understood to mean that "the right to marry […] must in all circumstances be limited to marriage between two persons of the opposite sex" – without indicating what the "circumstances" in question might be. The Court also found that the EU Convention did not impose an obligation on its State Parties to allow same-sex marriage, holding that this issue must be left to each country's discretion.[129]

123 The only difference is that, while Article 16 of the Universal Declaration of Human Rights explicitly prohibits limitations only on three grounds ("race, nationality or religion"), Article 14 of the Namibian Constitution inserts additional grounds: "race, colour, ethnic origin, nationality, religion, creed or social or economic status".

124 Namibia Constituent Assembly Committee Debates, Volume 2, 18 December 1989-15 January 1990, Standing Committee on Standing Rules and Orders and Internal Arrangements (Constitutional Matters), 15 January 1990, page 25.

125 The background documentation on the Universal Declaration of Human Rights indicates that its drafters incorporated the phrase "men and women" at the suggestion of the Commission on the Status of Women to emphasize that women, as well as men, have the right to marry, as well as to underscore the idea that marriage should be contracted between adults and not children. Evan Wolfson, Jessica Tueller and Alissa Fromkin, "The Freedom to Marry in Human Rights Law Worldwide: Ending the Exclusion of Same-Sex Couples from Marriage", *Indiana International & Comparative Law Review*, Vol 32, Number 1, 2022, page 21.

126 "30 Articles on the 30 Articles: Article 16: Right to Marry and to Found a Family", Office of the United Nations High Commissioner on Human Rights [2018].

127 *Joslin and Others v New Zealand*, Merits, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999, (2002) 10 IHRR 40, IHRL 1719 (UNHRC 2002), 17 July 2002. The Human Rights Committee stated at paragraph 8.2: "Use of the term 'men and women,' rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other".

128 Evan Wolfson ,Jessica Tueller and Alissa Fromkin, "The Freedom to Marry in Human Rights Law Worldwide: Ending the Exclusion of Same-Sex Couples from Marriage", Indiana International & Comparative Law Review, Vol 32, Number 1, 2022, pages 15 and 21.

129 *Schalk and Kopf v Austria* [2010] ECHR 30141/04, paragraph 61.

Article 17(2) of the **American Convention on Human Rights** again uses similar language ("The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."). In **2017**, the Inter-American Court of Human Rights issued an Advisory Opinion stating that States bound by the Convention must allow same-sex couples access to marriage, reading Article 17(2) in the context of the Convention's provisions on equality and non-discrimination.[130]

In **South Africa**, the Constitutional Court has pointed out that while international law expressly protects heterosexual marriage, it does not necessarily exclude "equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples".[131] The Constitutional Court held that "the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage", violates their right to equal protection under the law (which is similar to that in Namibia's Constitution), as well as violating South Africa's explicit prohibition against discrimination on the basis of sexual orientation.[132]

In **Namibia**, the Supreme Court explicitly avoided providing any clues regarding the applicability of *Digashu* case to an argument that same-sex marriages must be allowed to take place within Namibia. The Court stated that "the legal consequences of marriages are manifold and multi-facetted and are addressed in a wide range of legislation" and then emphasised that its judgment addresses only the recognition of spouses for the purpose of the *Immigration Control Act* and "is to be confined to that issue", noting that the "precise contours of constitutional protection which may or may not arise in other aspects or incidents of marriage must await determination when those issues are raised."[133]

3.2 Law reform on divorce

The current antiquated law on divorce is fault-based, meaning that one partner must accuse the other partner of wrongdoing in order to obtain a divorce. Divorces are currently processed through the High Court which operates only in Windhoek and Oshakati, and a personal appearance is required – which necessitates arduous travel for many. It is virtually impossible to secure a divorce without the assistance of a lawyer, and legal aid is currently unavailable for divorces except in cases of very serious violence. The result is that spouses –especially women – often stay in abusive marriages because they are unable to afford a divorce. Alternatively, couples often separate without obtaining a formal divorce, meaning that the legal protections for property rights are not implemented and there is no monitoring of the best interests of the children of the marriage. In a 2013 judgment in a divorce case, the Judge President of Namibia's High Court called the current divorce law "archaic" and stated that "a more fertile ground for violence in the family is hardly imaginable".[134]

A proposed Divorce Bill was tabled in the National Assembly on 11 June 2024. This Bill was aimed at introducing a no-fault system of divorce based on irretrievable breakdown. This is a very positive development. Marriages are complex relationships which can break down due to the interplay of many factors. No-fault divorce protects children from the fall-out of accusations being hurled back and forth between their parents, and less bitter divorces can make it easier for ex-spouses to cooperate in parenting after the dust has settled. A no-fault approach can also help to avert domestic violence by de-escalating the break-up rather than inflaming it.

130 Inter-American Court of Human Rights, Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, OC-24/17 (2017), as summarised in English on ESCR-Net at <www.escr-net.org/caselaw/2018/advisory-opinion-gender-identity-equality-and-non-discrimination-same-sex-couples-2017>.

131 *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), confirming *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA), paragraph 105. The Court noted that the references to "men and women" in various international instruments "is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time" (paragraph 100), It also noted that "same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different from the norm." (paragraph 76).

132 Id, paragraphs 75-76.

133 *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraph 134.

134 *Voigts v Voigts* (I 1704/2009)[2013] NAHCMD 176 (24 June 2013), paragraph 8.

The Divorce Bill would also pave the way for regional magistrate's courts to handle divorces, thus making divorces more accessible. It would introduce the possibility of obtaining divorces without any personal appearances where there is no dispute about the division of property and no concerns about the best interests of any minor children. These features would reduce the costs of divorce and possibly even make it feasible for spouses to secure divorces without legal assistance – perhaps with the support of appropriate civil society organisations.

Up to now, issues about child custody and maintenance, spousal maintenance and the division of marital assets have been primarily determined under common law rules, with reference to any ante-nuptial agreement made between the spouses. The Divorce Bill provides guidelines for the exercise of judicial discretion on these issues. Another innovation would be allowing a court to order access to a minor child of the marriage by a person *other than* the parent of the child, such as a step-parent or a grandparent, if this would be in the child's best interests.

One other component of the Bill is a rule that donations and gifts given in anticipation of marriage become part of the assets of the person who received them, meaning that their return cannot be demanded as a condition of a divorce. This would apply to items as diverse as lobola or an engagement ring. The provision of such gifts, which may have cultural significance, would not be forbidden – but they would play no *legal* role in civil marriage and the law would not include any requirement for their return as a pre-requisite for civil divorce. This is important because, with gifts such as lobola, the property may not even remain within the control of the spouse who eventually seeks the divorce.

Debate in Parliament

The very first issue raised in Parliament was the need to limit divorces to marriages involving opposite-sex spouses. The current law gives Namibian courts jurisdiction to grant a divorce in any case where either party to the marriage is domiciled in Namibia or has been ordinarily resident in Namibia for at least one year before instituting the divorce – no matter where the marriage was solemnised.[135] The purpose of this provision is to prevent hardship for couples who are settled in Namibia and might not be easily able to return to the country where the marriage was concluded to obtain a divorce. This approach could, in theory, make it possible for a couple to seek a divorce in a same-sex marriage concluded in a foreign jurisdiction.

But, even before the Parliamentary concerns about same-sex marriage were aired, the tabled version of the Divorce Bill already limited divorces by a restrictive definition of "marriage" that appears to generally prevent Namibian courts from granting divorces in respect of foreign marriages[136] – thus going far beyond just the exclusion of same-sex marriages.

The debate also saw variations on the same issues that have arisen in discussions of LGBT+ issues. For example, MPs presented opposing views on whether spousal maintenance is "African" or "un-African", and there were proposals from the floor to legislate moral obligations, such as "obligations to love" or the imposition of requirements aimed at "saving" marriages – but with no amendments to this effect being formally proposed.

"The very first issue raised in Parliament during discussion of law reform on divorce was the need to limit divorces to marriages involving opposite-sex spouses."

[135] *Matrimonial Causes Jurisdiction Act 22 of 1939*, section 1.

[136] The definition cover only marriages "concluded and registered in Namibia" in terms of the *Marriage Act 25 of 1961* and those concluded in exile under the Swapo Family Act which have been recognized in Namibia under the Recognition of *Certain Marriages Act 18 of 1991*, which treats such marriages as if they were concluded under the *Marriage Act 25 of 1961*. The new law on divorce thus appears to exclude *all other* foreign marriages, since the *Marriage Act* it refers to makes no provision for the "registration" of any foreign marriages. See Divorce Bill [B.3 – 2024], definition of "marriage" in clause 1; *Dissolution of Marriages Act 10 of 2024*, definition of "marriage" in section 1. This definition was not included in the 2022 version of the Bill that was circulated for comment.

Another area where the Bill seems to be coloured by concerns about morality is the introduction of a provision on forfeiture of patrimonial benefits that brings "fault" in again through the back door. In short, forfeiture of patrimonial benefits applies only to marriages in community of property. Instead of the usual 50-50 division of assets, this system requires the spouse who has contributed less to the joint estate – most often the wife – to give up part of the shared assets if that spouse has engaged in "misconduct". There is no need for this provision on forfeiture of benefits since the Bill also includes a comprehensive approach to the division of marital assets that applies to *all* marriages, based on economic fairness in light of a range of factors including the marital property regime that applied to the marriage, the provisions of any ante-nuptial contract between the parties and the duration of the marriage. The extra provision on forfeiture of patrimonial benefits takes the law around in a circle, by re-introducing notions of "fault".

The Divorce Bill, renamed the Dissolution of Marriage Bill, was passed without amendments in September 2024, and published as the *Dissolution of Marriages Act 10 of 2024*.[137] It will be brought into force on a future date set by the Minister of Justice in a notice published in the *Government Gazette*.[138]

Photo by Nicola Brandt via @sister_namibia

3.3 Law reform on civil registration

The Civil Registration and Identification Bill comprehensively overhauls the current law on the registration of births, deaths, marriages and divorces, as well as the law on identification documents.

The current law on birth registration, which pre-dates DNA testing, places gender-biased limits on the birth registration of a child when the parents are unmarried. Single fathers cannot register the births of their children at all, and single mothers sometimes defer registration hoping to get the father to participate. The Bill will make it easier for single parents of either sex to register their children. It will also make provision for the birth registration of children whose parents lack documentation and who might otherwise end up stateless. The proposed Bill also covers registration of deaths, marriages and divorces and provides for a new computerised regime with increased security measures which MHAISS has already put in place. It will also institutionalise the Ministry's system of e-notification of births and deaths at hospitals and clinics, as a way of providing information which can be used for verification and follow-up.

This Bill was introduced into the National Assembly in 2023 but was immediately caught up in the furore about definitions of spouse and marriage. It was withdrawn by the Ministry and revised to ensure that the registration system would exclude marriages between persons of the same sex as well as joint adoptions by persons of the same sex, even where such marriages or adoptions were validly concluded in another country. The Bill would even prevent persons who have changed their name due to a same-sex marriage concluded in another country from having that name officially recognised in Namibia. One can imagine the practical difficulties that this may create for families who move to Namibia from countries with different approaches to same-sex issues; the official view seems to be that such families should simply accept that they are not welcome in Namibia, even where this denies Namibian citizens the ability to live in Namibia with their closest family members. It is possible that the Bill's provisions may not be understood as a direct contradiction to the *Digashu* judgment since their focus is *registration* of foreign marriages (and adoptions), but they certainly contravene the spirit if not the letter of that holding – and they could also be found to violate the constitutional requirement that the family must be afforded protection by society and the State.[139]

[137] The *Dissolution of Marriages Act 10 of 2024* was published in *Government Gazette* 2487, dated 24 October 2024.

[138] *Dissolution of Marriages Act 10 of 2024*, section 23(1).

[139] Namibian Constitution, Article 14(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

The revised Bill would also eliminate most options for sex change. Under the current law, a change of sex can be made in the birth register on a case-by-case basis. If the change is approved, the person in question will be issued with an updated birth certificate which will facilitate changes to that person's other legal documents, such as their Namibian ID or passport. The application to alter a sex designation in a birth record requires a sworn declaration setting out the reasons for the request, supporting evidence including documentation of medical steps undertaken and certified copies of a government ID.[140] Ministry officials reported that this provision in the current law has been utilised from time to time in practice and has worked smoothly. Earlier versions of the Civil Registration and Identification Bill provided similar procedures for recognition of sex changes, but the Bill was more recently changed to limit this option to persons who are born intersex.[141]

The Civil Registration and Identification Bill was passed by the National Assembly and approved by the National Council without any changes in late 2024.[142] As of late November 2024, it had not yet been published in the *Government Gazette*.

"Under the current law, a change of sex can be made in the birth register on a case-by-case basis once some medical steps have been undertaken in this regard. The revised Civil Registration and Identification Bill will allow sex changes only for persons who are born intersex."

3.4 Other law reforms

Parliament's concerns about same-sex marriage seem to be arising in virtually any law that mentions the words "marriage" or "spouse" – in some cases, leading to delays of significant laws while this issue is examined.

For instance, this issue seems to have delayed the progress of a Bill intended to assist **persons residing in Namibia who have no official documentation other than South West African IDs** ("SWA IDs") to prevent these persons, along with their spouses and children, from remaining undocumented and in many cases stateless.[143] The government estimates that there are at least 141 048 stateless and undocumented people residing in Namibia,[144] the bulk of whom would fall into the category of SWA ID holders. The delay has meant that this law was not enacted in time to allow the affected persons to register to vote in the forthcoming election.

Other law reforms have languished for other reasons. One is an updated law on intestate succession (inheritance in the absence of a will). The current law still contains some race-based components. It also makes no provision for spousal maintenance from deceased estates and provides no meaningful protections against property-grabbing.

Another proposed reform is a law providing some basic financial protections for cohabiting couples. Increasing numbers of persons are living together without being married under civil or customary law, for a variety of reasons. Many of these relationships resemble marriage in every way except that they lack protection under the law. When a cohabiting couple breaks up, or when one partner dies, individuals often suffer because there are no legal mechanisms in place for property distribution, maintenance or inheritance. Because men are still usually the breadwinners in Namibian society, women tend to be the most economically vulnerable partners in these situations.

However, if law reforms in these areas should garner any momentum, the drive to exclude same-sex partnerships from their coverage is certain to play a part.

140 *Births, Marriages and Deaths Registration Act 81 of 1963*, sections 7B and 42(3).

141 Civil Registration and Identification Bill (2024 version provided by National Assembly Tabling Office), clauses 21(2)(g) and (8). The term "intersex" is not defined. Government policy-makers seem to have few problems with intersexuality. The draft Civil Registration and Identification Bill encompasses the option of leaving "sex" initially blank on birth certificates or having birth records changed later, and recent discussions with government officials from the health professionals have illustrated an awareness of the ethical issues involved in addressing intersex children.

142 Aletta Shikolol, "Four 'unchanged' Bills sail through", New Era, 19 Nov 2024, available at <https://neweralive.na/four-unchanged-bills-sail-through>.

143 Regularisation of Status of Certain Residents of Namibia, their Spouses and Descendants Bill.

144 Eino Vatlileni, "Over 141 000 people stateless, undocumented", *The Namibian*, 6 April 2024.

4. Gender-based violence (GBV)

4.1 GBV based on sexual orientation or gender identity

The current political climate has intensified danger and insecurity for the LGBT+ community. For example, Equal Namibia, speaking in May 2024, reported that six members of the LGBT+ community were murdered in hate crimes in the preceding year. It asserts that such hate crimes have been spurred by the virulent Parliamentary opposition to the *Digashu* ruling.[145] It is also noteworthy that the man who challenged the sodomy law, Friedel Dausab, appeared at the High Court to hear its decision in the company of a bodyguard.[146]

Attitudes about transgender issues seem to have been particularly problematic. The victim of one of the most recent murders constituting a hate crime against the LGBT+ community, in May 2024, was a trans woman who was discovered naked, with 32 stab wounds and her mutilated genitals placed on her chest.[147] In January 2024, it was reported that a transgender woman was brutally attacked by two men at a truck stop near Walvis Bay when one of the men realised that she was a trans woman after sexually assaulting her[148] - in an illustration of the intertwining of gender-based violence and transphobia.

Even before the recent political controversies, in November 2021, well-known trans woman Mercedez Von Cloete won civil damages of N$50 000 from the government for a 2017 assault by members of the Namibian Police during an unlawful arrest accompanied by transphobic slurs,[149] marking the first time that discrimination and hatred on the basis of transgender status have been addressed by the Namibian courts.

Photo by Opaluwa Onucheyo • @esperincedphotography

[145] Puyeipawa Nakashole and Shelleygan Petersen, "Hate Kills", *The Namibian*, 5 May 2024, which quotes a statement from Equal Namibia saying, "The undignified killings of LGBTQ+ Namibians is a direct result of the parliament legislating hate and sanctioning hate crimes."

[146] Personal information, 21 June 2024.

[147] Puyeipawa Nakashole and Shelleygan Petersen, "Hate Kills", *The Namibian*, 5 May 2024; Puyeipawa Nakashole and Shelleygan Petersen, "Mutilated body of transgender woman discovered", *The Namibian*, 2 May 2024.

[148] The victim was Stay-C Lapworth, and her alleged attackers – Shabombee Gift Shiaimenze and Jonathan Kamfwa – were both arrested. See Daniel Itai, "Transgender woman brutally attacked in Namibia", *Washington Blade*, 16 January 2024; Andrew Davis, "WORLD: World leaders, Namibia attack, Taiwan electoral win", Irish LGBTQ+ groups", *Windy City Times*, 19 January 2024.

[149] *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL 404 of 2018) [2021] NAHCMD 523 (12 November 2021). See also, for example, Tujoromajo Kasuto, "Home Affairs Ministry ordered to fork out N$50 000 in assault damages for trans women [sic]", *Windhoek Observer*, online version undated; Roberto Igual, "Namibia: Transgender woman wins police abuse case", mambaonline.com, 2 November 2021.

Interestingly, Namibia's National Safe Schools Framework, launched by the Minister of Education, Arts and Culture in September 2018, identifies a number of acts based on sexual orientation and gender identity as manifestations of verbal, psychological or physical GBV – including homophobic name-calling; shaming, teasing or humiliating related to gender or sexuality; and excluding or physically harassing those who do not conform to gender or sexuality norms.[150] This policy also explicitly encourages non-discrimination and tolerance:

> ***Sexuality and gender identity***
>
> An individual's sexuality – perceived or otherwise – is a common trigger for GBV. In Namibia there are still many myths, fears and inaccurate beliefs surrounding homosexuality and non-conforming genders. The LGBTI+ community is protected by national and international laws, including the Namibian Constitution, which states that all persons shall be equal before the law. This wording stresses the responsibility of the Namibian state to ensure that unequal treatment is met with a strong set of non-discrimination measures. Schools should play a central role in promoting tolerance. Remember, sexual orientation is not a choice that people make.[151]

But laudable goals such as these are currently being undermined by the hate speech coming from persons who are in positions of political leadership.

At the same time, a draft law on hate speech initially proposed in 2019 seems to be stalled. The last version of this Bill that was shared publicly would prohibit discrimination and hate speech on the grounds of sex, including gender, sexual orientation and transgender or intersex status[153] – but, even if the Bill were to move forward now, it is doubtful that these grounds would remain in the final law.

4.2 Recent law reforms

There have been recent amendments to both the *Combating of Rape Act 8 of 2000* and the *Combating of Domestic Violence Act 4 of 2003* to fine-tune these laws. Although Parliament had no trouble with including a variety of forms of sexual contact in the definition of rape, regardless of the sex of the persons involved, the exclusion of same-sex couples from the protection of the domestic violence law has not been addressed.

Amendments to Combating of Rape Act

The following are the key substantive changes made by the rape amendments:

- a new provision to cover abuse of power or authority to the extent that the victim cannot communicate unwillingness to the sexual act;
- amendments to the prescribed minimum sentences to increase the lowest sentence, to punish rapes of persons with disabilities more severely, to reduce the highest sentence to comply with a 2018 Supreme Court ruling,[154] and to provide increased guidance on what may and may not constitute "substantial and compelling circumstances" that justify sentences lower than the required minimums;
- a clearer duty on prosecutors to ensure that rape complainants receive proper orientation to court procedures before the trial – and particularly an explanation of the special provisions aimed at reducing the trauma of testifying for vulnerable witnesses;
- an amendment to provide that a court may not draw any negative conclusions *only* from the absence of semen or other bodily fluids on any part of the complainant's body or the fact that the complainant's hymen was not ruptured – because rape can encompass sexual acts other than intercourse, and because even where there is intercourse, there may not be ejaculation or rupture of the hymen.

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150 Namibia's National Safe Schools Framework, PART B: Practical Guide for Building Safe Schools, Ministry of Education, Arts and Culture and United Nations Children's Fund, Republic of Namibia, 2018, page 64.

151 Id, page 67.

152 This Bill was initiated by the Ombudsman, due to the fact that the *Racial Discrimination Prohibition Act 26 of 1991* has fallen into disuse and failed to produce the intended results. A draft Bill was developed along the lines of the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, aimed at addressing unfair discrimination, harassment and hate speech in a prompt and accessible manner. Consultations with key stakeholders were held in 2020 and 2021, and written comments were provided by various civil society and government institutions. Draft Explanatory Memorandum pertaining to the Draft Combating of Discrimination, Discriminatory Harassment and Hate Speech Bill including an Evaluation of Comments Received, as revised in 2021.

153 Draft circulated at 2021 civil society workshop attended by author.

154 In 2018, the Supreme Court found that "informal life sentences" with no realistic prospect of release are unconstitutional as cruel, inhuman or degrading punishment and a violation of the right to dignity. "A sentence of life imprisonment results in possible release on parole after 25 years. Parole for very serious crimes is generally possible after two-thirds of any sentence is served. This means that any term of imprisonment longer than 37 and a half years (where two-thirds = 25 years) is harsher than life imprisonment and not allowed." *S v Gaingob & Others* 2018 (1)NR 211 (SC). However, in *Bezuidenhoudt* v S (CC 04/2005) [2023] NAHCMD 669 (19 October 2023) – decided after the rape law amendments were already in place – the High Court held that the Gaingob ruling does not apply to statutorily-prescribed mandatory minimum sentences, which remain in place unless and until a competent court declares them unconstitutional.

Progress on these amendments was very slow. They are based primarily on a 2006 study of the implementation of the *Combating of Rape Act* by the Legal Assistance Centre.[155] These and some additional proposals were discussed at stakeholder workshops convened by Namibia's Law Reform and Development Commission in 2008 and 2009, and the Commission issued a report on the proposed amendments in 2012.[156] The amendments were enacted in October 2022, but brought into force only in May 2024.[157]

Amendments to Combating of Domestic Violence Act

The following are the key substantive changes made by the amendments to the law on domestic violence:

- broadening the definition of "domestic relationship" to cover relationships between children or persons with illnesses or disabilities and their primary caretakers;
- improved protection for the safety of domestic violence victims, with stronger provisions on monitoring for intimidation if an applicant does not return to court after getting an interim protection order;
- more options for involvement of social workers to help with assessments of the family situation;
- applying the special arrangements for vulnerable witnesses already in place for criminal cases to protection order proceedings;
- introducing a procedure that would allow a court to refer a perpetrator of violence to a counselling or treatment programme.

Here again, the process was a slow one. The amendments are based primarily on a 2012 study of the implementation of the law by the Legal Assistance Centre.[158] In 2016, the Ministry of Justice invited public input on possible amendments and commissioned the Legal Assistance Centre to provide a working draft based on this input. The amendments were enacted in November 2022, but brought into force only in May 2024.[159]

A glaring omission here is the failure to amend the provision that limits the law's protection to couples "of different sexes", even though civil society groups lobbied for its removal. The Legal Assistance Centre pointed out that the law protects unmarried opposite-sex couples, but no one assumes that this is the same as condoning sex before marriage. It also noted that rapes involving perpetrators and victims of the same sex are already covered by the rape law, so it seems illogical not to apply the same reasoning to domestic violence. It noted further that allowing same-sex couples access to a procedure for protection against domestic abuse is not about approval or disapproval of any relationships, but simply about combating violence.[160] Namibia's most recent Universal Periodic Review also recommended giving same-sex couples equal protection against domestic violence.[161] In light of the recent court decisions, it seems unlikely that this limiting provision would withstand a future constitutional challenge.

"A glaring omission in the amendments to the Combating of Domestic Violence Act is the failure to amend the provision that limits the law's protection to couples 'of different sexes'."

155 *Rape in Namibia*, Legal Assistance Centre, 2006.

156 *Further Report on the Law pertaining to Rape*, Law Reform and Development Commission, LRDC 18, June 2012.

157 *The Combating of Rape Amendment Act 4 of 2022* was published in *Government Gazette* 7932, dated 20 October 2022, and brought into force on 15 May 2024 by Government Notice 113 of 2024 published in *Government Gazette* 8365, dated 15 May 2024.

158 *Seeking Safety*, Legal Assistance Centre, 2012.

159 The *Combating of Domestic Violence Amendment Act 6 of 2022* was published in *Government Gazette* 7964, dated 29 November 2022, and brought into force on 15 May 2024 by Government Notice 112 of 2024 published in *Government Gazette* 8365, dated 15 May 2024.

160 See, for example, the Legal Assistance Centre "ProBono" column "Protecting Same-Sex Couples from Domestic Violence", published in *The Namibian* in 2021 and available at <www.lac.org.na/news/probono/Probono_51-DOMESTIC_VIOLENCE_and_SAME-SEX_PARTNERS.pdf> and "7 Reasons to Protect Same-Sex Couples under the Combating of Domestic Violence Act", Legal Assistance Centre Factsheet, 2020, available at <www.lac.org.na/projects/grap/Pdf/Factsheet_on_domestic_violence&same-sex_couples.pdf>.

161 "Report of the Working Group on the Universal Periodic Review: Namibia", United Nations. Human Rights Council, A/HRC/48/4, 29 June 2021, Recommendation 138.94: "Include the protection of same-sex couples in reforms and proposed amendments to the Combating of Domestic Violence Act (4 of 2003) (United States of America)". As noted above, the Universal Periodic Review is an international peer review mechanism under the auspices of the UN Human Rights Council.

4.3 Other GBV issues

The sluggish approach to even relatively minor amendments to the key laws on GBV is indicative of a lack of a sense of urgency on gender-based violence in general. Plans of action on this topic are regularly renewed, but never fully implemented. The slow pace of divorce law reform has already been discussed. Legal provisions targeting child pornography and other online and direct forms of sexual exploitation of children have also moved at a snail's pace.[162] Improved forms for protection order applications in cases of domestic violence were developed by the Legal Assistance Centre and extensively trialled with magistrates in 2003, but repeated efforts to persuade the Ministry of Justice to adopt these revised forms have proved fruitless.[163] Government shelters for victims of gender-based violence were planned for every region, but none are yet fully operational. Discussions of the pros and cons of introducing a sexual offender register have flagged.

Corporal punishment in schools was found unconstitutional in 1991, reinforced by legislative prohibitions that apply to public and private schools – but severe beatings and other forms of physical punishment in schools remain rife, despite widespread international evidence that corporal punishment of children contributes to the likelihood that they will resort to violence against family members later in life.[164] The failure to implement to prohibitions on this practice both perpetrate the cycle of violence and undermine the notion that law and rights have any meaningful power.

In July 2024, Namibia's Children's Parliament called on the President to declare a State of Emergency on Violence against Children, recognising the urgent need for attention to child protection.[165]

Maintenance is an issue that is closely related to gender-based violence, since concerns about the ability to support children are often a barrier for persons who wish to leave abusive relationships. The Ministry of Justice published an advertisement inviting public comment on proposals to improve the *Maintenance Act 9 of 2003 in 2015*. The Legal Assistance Centre was then commissioned by the Ministry to prepare a draft amendment bill, which was completed during 2016. But there appears to be little or no progress on the topic since then. Even under the original 2003 law, maintenance investigators who were intended to play a key role in locating absent parents and investigating their financial capacity to provide support were put in place for the first time only in October 2019.[166]

Again, the contrast between the slow action on GBV with the urgent attention to curbing LGBT+ rights is stark.

[162] The draft Cybercrime Bill circulated for comment in 2019 and 2020 contains some limited provision on child pornography and grooming, but has not moved forward. A more comprehensive draft Combating of Sexual Exploitation Bill prepared on the recommendation of a 2020 workshop of government stakeholders, with support from UNICEF, has also not progressed even though it has been received enthusiastically by stakeholder groups such as the Permanent Task Force on Children.

[163] Personal information from the Legal Assistance Centre, where the author was employed for 30 years.

[164] See, for example, "Corporal Punishment: National and International Perspectives", Legal Assistance Centre Research Brief, 2015; "The Links between Corporal Punishment and Gender-Based Violence", Legal Assistance Centre, 2017. The *Child Care and Protection Act 3 of 2015* says that any person with control of a child, including the child's parents, must respect the child's right to dignity when disciplining the child, in accordance with Article 8 of the Namibian Constitution. It explicitly outlaws the use of corporal punishment in any registered facility for children (including children's homes, shelters, crèches and day care centres); any form of alternative care by court order (such as foster care); public and private schools; and prisons and police cells. The Act also gives the Minister responsible for child welfare a duty to promote alternatives to corporal punishment (section 228). More complex provisions in the *Basic Education Act 3 of 2020* prohibit physical and mental violence against learners (section 8 read with definition of "corporal punishment" in section 1).

[165] Feni Hiveluah, "Children's Parliament Calls for State of Emergency On Violence Against Children", *The Namibian*, 23 July 2024.

[166] Ministry of Justice Facebook Post, 30 September 2019, available at <www.facebook.com/moj.gov.na/posts/the-ministry-is-about-to-have-a-fully-fledged-maintenance-investigators-division/2101353630160381/>. See also "Call for maintenance investigators", The Namibian, 3 June 2016; "Namibian parents neglect maintenance duty", *The Namibian*, 29 April 2021.

5. Conclusion: Intolerance versus inclusivity

Imposing specific moral views

Legal developments on LGBT+ issues, family law and gender-based violence all implicate to some extent Parliament's apparent drive to impose specific moral views on society. Recent Parliamentary debates provide evidence of a willingness to curb both rights and freedoms on hot-button issues, as well as an absence of tolerance for diverse personal choices and views. This is also likely to arise in respect of proposed law reforms on reproductive rights, and on abortion in particular. The support for legislative imposition of morality is selective, with not a peep from Parliament or the churches when the Supreme Court ruled that civil actions for damages arising from adultery would no longer be allowed in Namibia, for example.

On the other hand, it must be noted that the government has consistently supported formal equality between men and women since independence[167] – even though it is not clear that this approach finds favour with a majority of the Namibian population. Government has been steadfast in the face of opposition from some religious groups and communities on a few controversial issues that involve sexuality – such as comprehensive sexuality education in schools and a policy on learner pregnancy aimed at allowing young mothers to continue their education.[168]

While there is an overall tendency towards social conservatism on the part of Namibian policy-makers when it comes to matters involving sexuality, it is sometimes difficult to predict which issues will inspire tolerance and which issues will trigger impulses for moral control. There are also frequent contradictions on issues that implicate sexuality. For instance, despite Parliamentary concerns about teen pregnancy and baby-dumping, Cabinet was unprepared to put forward a law with a provision on the age of access to contraceptives[169] – even though Namibia's National Guidelines on Family Planning give adolescents (aged 10-19) the power to access contraceptive methods without parental consent.[170]

When it comes to law and policy on such difficult questions, the Namibian Constitution should be the foremost guiding light.

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[167] For example, a husband's "marital power" over his wife in respect of civil marriages was abolished by Parliament through the *Married Persons Equality Act 1 of 1996*, even though these was significant public opposition. In a dispute that pre-dated the new law, marital power was also ruled to be a violation of Article 10(2) of the Namibian Constitution, as a differentiation was based on stereotyping that failed to take cognisance of the equal worth of women and impaired their dignity individually and as a class. *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

[168] See, for example, "Namibia: Comprehensive Sexuality Education", UNESCO, last modified 24 February 2023, available at <https://education-profiles.org/sub-saharan-africa/namibia/~comprehensive-sexuality-education>; D Hubbard, "Realising the Right to Education for All: School policy on learner pregnancy in Namibia" in Oliver C Ruppel, ed, Children's Rights in Namibia, Windhoek: Konrad Adenauer Stiftung, 2009; Dorthea Nanghali Etuwete Shiningayamwe, "Learners' perspectives on the prevention and management of pregnancy school dropout: a Namibian case", *Frontiers in Sociology*, 22 June 2023, available at <www.ncbi.nlm.nih.gov/pmc/articles/PMC10325619/>.

[169] A draft provision on this point was removed from the Child Care and Protection Bill by Cabinet before the Bill was approved for tabling in Parliament.

[170] "National Guidelines on Family Planning", Ministry of Health and Social Services, February 2018, page 110.

Families and children

Parliament's narrow approach to the concept of "family" is worrying. When it comes to constitutional protection for the "family", Namibia's Supreme Court has specifically rejected the view of the *Frank* case that this protection is limited to formal relationships between males and females for the purpose of procreation[171] - without attempting a definition of what the term "family" encompasses. In a nation where the extended family has long been recognised as an important institution in society, it seems strained to promote a limited notion of what constitutes a "family". In fact, Namibia's *Child Care and Protection Act 3 of 2015* takes an intentionally broad approach to this issue, defining a "family member" in relation to a child as including a parent, grandparent, step-parent, brother, sister, uncle, aunt or cousin of the child or any other person with whom the child has developed a significant psychological or emotional attachment.[172]

Moreover, none of the court cases on LGBT+ issues involving children have given sufficient attention to the best interests of the child, which Namibia is obligated to treat as the "the paramount consideration" by the *Child Care and Protection Act*[173] as well as the African Charter on the Rights and Welfare of the Child[174] and the UN Convention on the Rights of the Child.[175]

The government's current policies would deprive a family comprising a Namibian citizen married to a foreign national of the same sex, and any children that they adopted jointly or conceived via surrogacy, of the chance to live in Namibia as part of a family and experience the Namibian heritage which is a component of the family's make-up. It remains to be seen what practical problems may arise if such "non-traditional" families are not recognised in Namibia - could this affect the rights of same-sex parents to consent to medical treatment on their children if they find themselves in Namibia? Will the attitudes of government about families that include same-sex couples inspire violence against the adult partners or bullying of their children?

The constitutional protection afforded to the "family" should extend to the full variety of families that make up Namibian society.

Tolerance and stability

The themes "One Namibia, One Nation" and "Unity in Diversity" have been prominent in Namibian political discourse, and many credit the emphasis on inclusivity as being a key element in Namibia's political stability. The Namibian Constitution itself pledges that the people of Namibia "will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state" and "constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to *all* our citizens justice, liberty, equality and fraternity".[176] As the late President Hage Geingob famously stated in his inaugural address on 21 March 2015, "Let us stand together in building this new 'Namibian House' in which no Namibian will feel left out."[177]

And yet, even now, a generation since independence, overcoming discrimination on various grounds in order to forge a common sense of nationhood remains a challenge. The Office of the Ombudsman has consistently looked at discrimination against persons on the basis of sexual orientation and gender identity in the same vein as discrimination on the grounds of race, ethnicity, disability and other personal attributes.[178] As the Afrobarometer surveys indicate, intolerance on one dimension of difference tends to go hand-in-hand with other forms of intolerance. Encouraging discrimination against members of the LGBT+ community is likely to undermine Namibia's overarching goals of a national identity based on the acceptance of differences alongside respect for all Namibians.

Such concerns highlight the importance of giving more urgency to the finalisation of a carefully-crafted law prohibiting hate speech and the importance of having a political leadership which respects and demonstrates the values enshrined in the Constitution.

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171 Digashu and Another v GRN and Others; *Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023), paragraph 131.

172 *Child Care and Protection Act 3 of 2015*, section 1, definition of "family member".

173 Id, section 3(1): "This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or *under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general*, the best interests of the child concerned is the paramount consideration." (emphasis added).

174 African Charter on the Rights and Welfare of the Child. Article 4(1): "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

175 UN Convention on the Rights of the Child, Article 3(1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

176 Namibian Constitution, Preamble (emphasis added).

177 See "Namibia inaugurates President Hage Geingob", *The Namibian*, 21 March 2015. This slogan has been often quoted since then.

178 See for example *A Nation Divided: Why Do Racism And Other Forms Of Discrimination Still Persist After Twenty-Seven Years Of Namibian Independence?*, Office of the Ombudsman, 2017; *2013 Baseline Study Report on Human Rights in Namibia*, Office of the Ombudsman, 2013.

Threats to the rule of law and Namibia's constitutional system

Namibia has long and rightfully boasted about its respect for the rule of law and its independent judiciary. These are indeed important factors that make Namibia a leader in Africa and an attractive destination for foreign funding and investment – which may now be more important than ever to help Namibia overcome the challenges of widespread unemployment and financial inequality.

But the current state of play around LGBT+ issues is in danger of straining Namibia's constitutional system to the breaking point. It tests the issue of protection for minority rights against the belief of some that it is acceptable for majority views to control the exercise of rights and freedoms in private life. The current debates may rock the stability that has characterised Namibian democracy from the outset and undermine the independent role of the judicial system. This could be a turning point for Namibia.

This issue is not only about LGBT+ rights. If Parliament can override the courts' interpretation of the Namibian Constitution on how equality and dignity apply to the issue of same-sex marriage or the crime of sodomy, this could happen in connection with any of the fundamental constitutional rights – freedom of religion, freedom of speech, freedom of assembly, property rights or any of the other basic human rights protected by the Constitution. If Parliament is all-powerful, then the bedrock of Namibia's political structure of three separate branches of government is no longer sound. This could eventually harm Namibia's international standing as a stable state and thus undermine future economic development. This may sound alarmist, but respect for the rule of law and the role of the judiciary is meaningless if it is not consistent.

The importance of the rule of law and respect for the Namibian Constitution as the country's Supreme Law needs to be renewed, taught as part of school curricula and emphasised in the orientation of new Members of Parliament.

"The current state of play around LGBT+ issues is in danger of straining Namibia's constitutional system to the breaking point."

Some politicians may be strongly opposed to LGBT+ rights. But if they abuse their positions to impose these personal views on others in defiance of the Namibian Constitution, the country is in trouble. As one LGBT+ activist recently warned, we need to be careful not to "burn down the Namibian house".[179]

[179] This apt observation was made by Mercedez van Cloete in the "Pride in a Pod" podcast entitled "Breaking Barriers: The Journey to Equality" produced by The Namibia Pride Consortium and released in July 2024. It is available on Spotify.

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This research report was funded by the government of the Federal Republic of Germany.

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Incorporated Association Not for Gain Registration Number 21/2000/468.
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