

# Review: Government-Constitution relationship

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Government needs to forge a multidisciplinary approach to identify the inarticulate premises, basis and conditions breeding into perpetrators of gruesome murders, if it is to abate such crimes, Law Reform and Development Commission (LRDC) chairperson, Sacky Shangala says. Shangala, whose commission is tasked to review and propose law reforms in the country, says the increasing incidences of gruesome crimes will not be solved by making changes to existing or introducing new laws alone.

President Hifikepunye Pohamba let a great opportunity pass by to address the issue of gender-based violence (GBV) head-on at a time when he had the attention of the entire nation and indeed the world during his 2014 Independence Day address. Instead, Pohamba, either through omission or commission, concentrated on the country's achievements over the past 24 years, such as the maintenance of "peace, security and stability, which in turn have ensured a conducive environment for our Government to deliver public goods and services to our people." This, despite the fact that the vast majority of the people, most notably women and children, do not enjoy peace of mind, personal security and stable living environments as quite clearly evident by Pohamba's speech on 6 March at the National Prayer Day. "The values and traditions of good governance and the rule of law have been nurtured and continue to grow deep roots, feeding a healthy tree of democracy," Pohamba said during his Independence Day speech while the law seems to have failed the majority of the country's citizens who now live in constant fear for their lives due to an upsurge in cases of gender-based violence (GBV). "Furthermore, we have implemented policies that empower women, the youth, veterans of the

liberation struggle, the elderly, people with disabilities, as well as orphans and vulnerable children," Pohamba said, negating the many problems, including GBV faced in the country practically only dedicating one sentence to them: "Yes, the challenges are many, however, they are not insurmountable. Therefore, we are facing the future with confidence and determination". But Shangala says these crimes need social interventions too and while the LRDC restricts itself to the legal position prevailing in the country, It should explore alternative avenues to deal with the unfortunate situation gripping the country.

The law reform commission is currently conducting consultations with various stakeholders in line with President Pohamba's recent directive that the country's laws be toughened up, to serve as deterrence to the increasing cases of violent crimes. "To this extent, the LRDC will undertake desk research to inform it of the need for reform and in the process engage stakeholders, such as the Office of the Prosecutor-General, the Namibian Police (Nampol), the ministries of Justice and Gender Equality and Child Welfare, as well as the Law Society of Namibia and civil organisations including the Council of Churches in Namibia (CCN), to ensure the LRDC is guided in its decision to reform existing laws or develop a pragmatic and new legal framework that is responsive to the needs and concerns of the nation," explains Shangala. The LRDC chairperson cannot commit himself to an exact timeframe for this reform, although points out the task at hand is multifold, complicated and needs utmost, careful considerations. Crimes against vulnerable groups continue unabated even after the national prayer day held last month, with yet another woman gruesomely killed in

Walvis Bay, the following Wednesday.

## ANTICIPATED LAW REFORMS

### Denying bail vs. Article 12

President Pohamba has called for the amendment of the Criminal Procedure Act of 1977, to tighten bail requirements. However, tightening bail requirements and denying someone bail would go against the accused person's constitutional rights. This is because Article 12 (1) (d) of the Namibian Constitution states that every person accused of a crime is presumed innocent until proven guilty in a court of law.

"The purpose of bail is to strike a balance between the interests of society, in that the accused should stand their trial without any interference from the administration of justice and the liberty of an accused is safeguarded, pending the outcome of their trial," says Shangala. To accommodate the President's request on bail, Shangala says, proposals may be made that Namibia introduces models similar to those of either South Africa or Zambia. "The LRDC shall give due consideration to these and other models of bail, however, any recommendation made shall give due consideration to the constitutional imperatives embedded in Chapter 3 of the Namibian Constitution," says Shangala. South Africa shares a jurisprudential history with Namibia and South Africa's legal system post democracy in 1994 has championed a human rights approach and this has permeated its legal reforms. Adds Shangala: "To this understanding, the South African model can be rendered informative even though the same fervour for human rights has been championed by the Namibian legislature and judiciary. Comparisons are always helpful."

In this model, due to security con-

cerns, Shangala says the South African legislature intervened by providing legislative guidelines that the courts have to consider in the exercise of their discretion in bail applications, to satisfy the broad constitutional limitations that the rights in the Constitution of South Africa's Bill of Rights may be limited only in terms of law. Shangala gives reference to the provisions of Section 60(11) (b) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) of South Africa, stating it is an Act that only applies to serious violent crimes enumerated in its Schedule 6. For instance, in premeditated murder, an accused is required to adduce evidence that satisfies the court that exceptional circumstances exist, which in the interest of justice, permits their release on bail.

Other models that will be introduced for consideration include that of Zambia whereby the country's legislature has, in the interest of State security and securing the presence of the accused before the jurisdiction of the courts, thought it prudent to draw a distinction between 'bailable' and 'non-bailable' offences.

"The former consist of less serious non-scheduled offences over which the courts have unfettered discretion to make pronouncements on whether or not bail must be granted. The latter consist of serious or scheduled offences in which the courts are mandated to refuse bail."

#### Denying parole vs. Article 8

Pohamba also wants the amendment of the Correctional Service Act of 2012, to deny parole and give longer prison sentences to persons who are convicted and sentenced for GBV offences. To this end, LRDC says life imprisonment without the option of parole as statutory prescription introduced with the view to act as a deterrent or in retribution of the murder committed by a convict, may very well violate the right to dignity and is cruel, inhumane and degrading. Such punishments, it says, are prohibited by Article 8 of the Constitution, no matter how dastard a crime is. "It is the hope of parole that makes life imprisonment constitutional in our legal system," says Shangala, adding, 'legally, the courts are charged with exercising discretion in the length

of a sentence a convicted person is imposed.'

With reference to **Section 276(1) of the Criminal Procedure Act, 1977**, Shangala says it prescribes the nature of punishments but does not prescribe any limit on the period of imprisonment, which can be imposed by a court of law. This Act further grants the courts discretion in the imposition of sentences. The Legislature has, however, provided for minimum sentences in respect of certain offences such as stock theft, rape and drug related offences". Asserts Shangala: "The LRDC places emphasis on any legislative reforms that increase minimum sentences for murder as constitutionally permissible provided that such legislation does not prescribe mandatory sentences whereby the courts are prohibited from exercising punishment and sentencing discretion."

Letting courts do their work  
Courts should not be prohibited from considering mitigating factors, LRDC says. This could eliminate the courts' punishment and sentencing discretion and would likely violate Article 78 of the Constitution, which guarantees judicial independence. "The imposition of minimum sentences has been found to be in want of the Constitution where such minimum sentences are coupled with the elimination of the courts' discretion to consider the individual circumstance of the specific case before the court". Courts should thus defer to the provisions of Article 25(1)(a) of the Constitution and thereby as far as reasonably possible observe the principle of separation of powers.

#### Counselling offenders according to Nampol

Regarding the provision of mandatory counselling to all persons who have committed serious offences, including GBV, the spokesperson of the Namibian Police (Nampol), Edwin Kanguatjivi, says the reason why the police do not give counselling immediately to those brought in on charges of passion killing is because of the articles in the Constitution, which protect the arrested perpetrators.

Kanguatjivi says a perpetrator is perceived innocent until such a time when they have appeared in court and found

guilty of the charges.

"When we arrest someone with an alleged crime, we take them in as suspects, even if they come in and confess the crimes themselves. We don't take plea as a statement but submission and we suggest legal representation to such a person," explains Kanguatjivi. However, Kanguatjivi highlights when a police notices symptoms of mental illness in an arrested offender, the arresting officer can, at his discretion, seek medical help for them. "In some cases where an investigating officer feels that something is not right with the person, they can suggest medical counselling or take them for evaluation". Physical evidence is, however, investigated to back up a confession. "But the situation is more complicated than what meets the eye of the ordinary citizen on the street". As such, once the person is sentenced, social workers are allocated to them.

#### Witness protection

The introduction of a witness protection programme to protect witnesses who testify against accused persons in cases of GBV, is also part of the President's wish-list. Notably, Namibia already has an existing witness protection programme, which according to Shangala, is not sophisticated enough. Legally, it exists. While it works in big countries it is a challenge for a country as small as Namibia. This will be challenging as the term "gender-based violence" does not exist in the Criminal Procedure Act, 1977 (Act No. 51 of 1977) or in literature relating to the Criminal Justice System, which is operable in the country's jurisdiction. LRDC is, therefore, dispatching requests for initial reaction and suggestions based on the communication the President made on the national prayer day, which was on 21 February. Only then will LRDC say when, how and which of these provisions will be implemented.

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