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### **Children and Detention**

Last week, an article on the front page of *The Namibian* (“Boy (9) accused of raping two girls”, 22 October 2019) misleadingly reported that the Namibian Constitution says that “no law [...] shall permit children under the age of 16 years to be detained”. The words omitted in that statement are crucial, as what Article 15(5) of the Constitution actually prohibits is “*preventive detention*” of children under age 16, not detention of children awaiting trial or convicted of a crime.

Internationally, “preventive detention” refers to the detention of persons who are not charged with committing any crime. This understanding of the term’s meaning is borne out by the discussions of preventive detention by Namibia’s Constituent Assembly during the constitutional drafting process.

Preventive detention is a sore topic in Namibia’s history. This practice, commonly referred to as “detention without trial”, was commonplace under the apartheid regime and the framers of the Namibian Constitution agreed that it should not be a part of a democratic society where everyone should be able to live in peace and security.

Article 11 of the Namibian Constitution states that no one can be subject to arbitrary arrest or detention. It says that a person who is arrested needs to be informed of the grounds for the arrest, and brought to the nearest judicial officer within 48 hours.

However, the Constitution also provides for special measures during states of emergency or times of war. Certain constitutional rights can be suspended during such times. Article 26 gives the President power to issue regulations for the protection of national security, public safety and the maintenance of law and order during such periods – and those regulations can provide for detention without trial.

Certain safeguards are provided. Article 11 can be suspended, but the right of access to a court and to legal representation cannot be denied even during emergencies. Also, even during a state of emergency or a time of war, a person who is detained must be informed within 5 days of the grounds for their detention, and the names of persons in detention must be published in the *Government Gazette* within 14 days. Every detention must be reviewed within one month by an

Advisory Board established on the advice of the Judicial Service Commission for this purpose. Every detention must be reviewed again every three months, to see if continued detention is warranted (Articles 24-26).

The statement about the preventive detention of children must be read against this backdrop as another constitutional safeguard. If there is a state of emergency or war which has necessitated preventive detention, Article 15(5) of the Namibian Constitution states that no law authorising preventive detention may allow the detention of children under age 16 years. This protection for children can not be suspended during emergencies.

This understanding is confirmed by a 2010 High Court case (*S v Amunyela*, CC 01/2010) where the Court noted, after quoting the restriction forbidding preventive detention of children under age 16, that “although the incarceration of juvenile offenders should as far as possible be avoided, neither the Constitution nor the international conventions forbid the incarceration of children”.

The arrest and detention of a child should be a measure of last resort and for the shortest appropriate period of time, according to the Child Care Protection Act 3 of 2015. The statute also mandates that any child held in a prison or a police cell must be kept separately from adults, with two exceptions: (1) Children may eat or exercise in the same room as adults, as long as there is proper supervision by police or a correctional officer. (2) Children may stay with their parent, guardian or care-giver in circumstances where this would be in the best interests of the child.

The Act requires specific record keeping about children in prisons or police cells, and provides for social worker investigations and appropriate follow-up in a case of a complaint about the situation of any child in a prison or police cell.

Children who are detained must be kept with children who are at the same stage of criminal prosecution, so that children awaiting trial are detained separately from children who have been convicted of a crime.

Furthermore, children who are detained must be kept in conditions that take into account the particular vulnerability of children, and reduce the risk of harm.

The Criminal Procedure Act 51 of 1977 also contains several provisions aimed at minimising the detention of juveniles (children under age 18). It provides that a court or a police official may place a juvenile who is awaiting trial in a place of safety as an alternative to custody in a prison or police cell if release on bail is not appropriate. (A “place of safety” is a place approved by the Ministry of Gender Equality and Child Welfare for the temporary reception and care of children.)

It also provides that a court may convert a criminal trial into a child protection enquiry if it appears that the juvenile accused may be a child in need of protective services – such as in a case where a child was forced into criminal activity by an adult, or driven into crime by neglect, poverty or substance addiction. Such circumstances could mean that the child needs assistance rather than criminal punishment.

Another safeguard can be found in the Correctional Services Act 9 of 2012, which requires that a female juvenile held in a correctional facility must at all times be under the care and charge of a female correctional officer.

The Convention on the Rights of the Child, which Namibia has joined, directs that children deprived of liberty must be treated with humanity and respect for their dignity, treated in a manner that takes into account their age, held separately from adults and allowed to maintain contact with their families through correspondence and visits (except in exceptional circumstances).

The African Charter on the Rights and Welfare of the Child, to which Namibia is also a party, emphasises the need to apply special treatment to juvenile offenders to respect their dignity, and to work towards the child's reintegration into family and society.

So a correct reading of the Namibian Constitution does not prohibit the detention of children charged with or convicted of a crime, but it is clear that this is a step to be avoided if possible and carried out with care when necessary.