



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

**DISCUSSION PAPER ON THE POSSIBLE
STATUTORY INTERVENTIONS TO CURB THE
ALARMING SPATE OF DOMESTIC VIOLENCE,
GENDER BASED VIOLENCE, AND MURDER**

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Windhoek, Namibia
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LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The current Commission members are—

Mr S Shanghala, Chairperson
Adv J Walters, Ombudsman

Under section 3 of the Law Reform and Development Commission Act, 1991, Commissioners are appointed by the President. Previous Commissioners ceased to hold their office when their term of office for three (3) years lapsed on November 8, 2013. They were –

Ms Dianne Hubbard;
Mr Nixon Marcus;
Ms Damoline Muroko;
Ms Yvonne Dausab; and
Mr Raywood Rukoro

The Secretary to the Commission is Mr J.T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Law Reform and Development Commission Act, 1991. The Commission and Secretariat are housed on the 1st Floor, Mutual Platz Building, Post Street Mall, Windhoek.

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FOREWORD

The Law Reform and Development Commission (LRDC) is established as a State body with the purpose of reforming and developing law through research and consultation. When His Excellency The President convened the Special Cabinet on Gender Based Violence and issued his Government's position on the matter, the LRDC did not wait for a specific instruction, as the matter discussed by the Cabinet was indeed a matter at the heart of society's concerns for a safe existence and healthy environment for children to be raised in.

We set about to consult various stakeholders and institutions for their input. Much appreciation to those institutions that responded to our request for input into the possible ideas and areas for intervention, reform or development. We appreciate that perhaps not enough time was granted for your consideration of the input, however, what is clear is that your efforts notwithstanding have contributed to the production of this Discussion Paper.

A Discussion Paper is just that, a document to discuss over a particular matter, so as to generate debate, input and analysis. It is not a fait accompli on the subject matter. After the National Workshop, the LRDC expects the organizers and the rapporteurs to prepare commentary and definite legislative suggestions for consideration by the LRDC and transmitted into the Report to the Minister of Justice as required under section 9 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991). Therefore, even direct responses to the Discussion Paper made to the LRDC are welcome.

As we conclude herein, there can be no amount of law making that can alone cure the evils that bedevil our society. We need to adopt a multi-sectoral approach to this social ill. The post-conflict society that we are requires more investment into social engineering, in as much as we are required to develop the highways that our people can travel on into the destinies of their lives.

Only then can we begin to heal the wounds that perhaps we have passed on to the younger generations of Namibians growing up in a peaceful country, interrupted only by news reports of killings of the most gruesome fashions. If this is the beginning of looking deeper and wider with all, then it is a good beginning that the entire nation pauses to reflect on these unfortunate events. We therefore congratulate the President and his Government for the bold moves on the subject matter.

Permit me to use this space to also thank the young lawyers that are at my disposal and who have put in efforts to ensure that this Discussion Paper is compiled, the time factor notwithstanding. They are, Fenni Nashilundo, Tangi Shikongo, Kaurumbua Koujo and Ndjodi Ndeunyema. Excellent teamwork, impressive research work and encouraging work ethics. Those that may seek to dissuade you by calling you water boys and girls forget one thing, what we know in life, we know second hand by and large, and there is nothing wrong in seeking to learn. Soon you will be teaching other younger lawyers on the diverse subjects we have worked on during your attachment as students and now as lawyers, and I can think of no better tutors.

Permit me to thank the young men and women led by who Tangi Namwandi and Naftal Shailemo, who are always available to print the Reports and Discussion Paper with specific legalese requirements and mostly on short notice. Your work has grown into a reliable partnership for the LRDC and we are glad to support young entrepreneurs such as yourselves. Yours is exemplary empowerment. Keep up the good work and thank you.

To my entire team at the LRDC, I am proud of how you have transformed the LRDC into a functional and relevant institution. Perhaps years ago, when the LRDC set to do its work, it went unnoticed. Not any more. That brings along a sense of responsibility for what we say and do. Let us remain above the fray, willing to serve the intellectual needs of Namibia, in all spheres of policy and law, without fear or favour. If we don't tackle some of the thornier issues on behalf of minorities within our fold as a society, who will? Keep up the good work. Last but not least, much thanks go to the Office of the Prime Minister for their sponsorship of the printing of this Discussion Paper. I trust it serves its purpose.

Sakeus Edward Twelityaamena Shanghala

Chairman of the Law Reform and Development Commission

LIST OF ABBREVIATIONS

- COLL - Centre of Open and Life Long Learning
- CPA - Criminal Procedure Act, 1977 (Act No. 51 of 1977)
- CRC - Convention on the Rights of a Child
- GBV - Gender Based Violence
- LRDC - Law Reform and Development Commission
- NCS - Namibia Correctional Service
- IPHK - Intimate Partner Homicide/Killing

LIST OF STAKEHOLDERS WHO PROVIDED INPUT

The LRDC would like to thank and is indebted to the following organisations, Ministries/Offices/Agencies that have provided input into this Discussion Paper:

Council of Churches in Namibia

Legal Assistance Centre

Ministry of Gender Equality and Child Welfare

Namibia Correctional Services

Namibian Police Force

Office of the Ombudsman

Polytechnic of Namibia

Psychological Association Namibia

The International University of Management

The Law Society of Namibia

1. INTRODUCTION

- 1.1 Every day, in the newspapers and electronic media Namibians are bombarded with the horror of killings of national and non-nationals alike. The seeming randomness has terrified the Namibian nation and public outcry follows each gruesome story. Yet, these killings in a domestic setting have become a foot note to many, often being sensationalized and achieving prominence only for a few days after the fact. Often, the circumstances surrounding these killings entrench stigma given the social myths and stereotypes that it is the fault of the victim.
- 1.2 Lately, Namibia has witnessed an escalation in the killing of mostly women at the hands of their purported male cohorts, killings that are colloquially known as “passion killings”. This term seeks to suggest that these callous crimes qualify, to a greater extent, to something less than what it in reality is - murder – which is legally defined as the unlawful and intentional killing of another human being.
- 1.3 Although women can also perpetrate violence against men within relationships, and have also killed their spouses, men are the overwhelming perpetrators. Such killings are therefore often encompassed under the one-catch phrase ‘gender-based violence’ even though the definition of the phrase does not include murder. This catchy phrase-tags pinned to these cold-blooded and gruesome murders (in most cases by the print, electronic and social media) - whilst popular and alluring to the public audience – may in actual fact entice, legitimize, popularize and burgeon these murders for potential offenders who may, in the worst case scenario, seek these deeds as conduits to instant fame. Other potential offenders may simply emulate these murders as a conventional method in the resolution of their disputes with their intimate partners or former partners.

- 1.4 Gender-based or sexual violence can be viewed as having patriarchal origins and can still be understood as an offence of power, domination and force¹. This is mainly because culture often socializes a man to express anger through violence, but the plea of the nation is that our courts should not reinforce such cultural *mores* by mitigating punishment and allowing such murderers to live comfortably in prison.² Impunity for violence against women compounds the effects of such violence as a mechanism of control. When the State fails to hold the perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behaviour are normalized³.
- 1.5 Many were quick to condemn the Executive branch of States' call for a National Day of Prayer so that society reflects and introspects⁴. However, and in addition to prayer day, His Excellency tabulated 13 points which if followed would result in a societal shift and change in perspective and attitude on the issue of gender based violence (hereinafter referred to as GBV). The Law Reform and Commission (hereinafter referred to as LRDC) as a body entrusted under section 6 of the Law Reform and Development Commission Act, 1991⁵ (Act No. 29 of 1991) *'to undertake research in connection with and examine all branches of the law and to make recommendations for the reform and development*

¹ *Masiya v Director of Public Prosecutions (Pretoria) and Others*, Case No. CCT 54/06 (May 10, 2007) (unreported).

² E. Horváth, Monwabisi Zukani, Desmond Eppel, Monica Kays, Abdoul Konare, Yeora S. Park, Ekaterina Y. Pischalnikova, Nathaniel Stankard & Tally Zingher. *Gender-Based Violence Laws in Sub-Saharan Africa* (2007), 17.

This Report was prepared for the Committee on African Affairs of the New York City Bar by the lawyers listed above in collaboration with Elizabeth Barad, of the Law Offices of Elizabeth Barad, and Elisa Slattery, of the Center for Reproductive Rights, as part of a pro bono project coordinated by The Cyrus R. Vance Center for International Justice. Available at

http://reproductiverights.org/sites/default/files/documents/GBV_Laws_in_Sub_Saharan_Africa.pdf , accessed 19 June 2014.

³ R. Manjoo. *Report of the Special Rapporteur on violence against women, its causes and consequences*. United Nations General Assembly: Human Rights Council, (23 May 2012).5.

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-16-Add2_en.pdf accessed 19 June 2014.

⁴ "The Introduction of Measures to Address Gender-Based Violence in the country", as communicated to the nation by His Excellency Dr Hifikepunye Pohamba, President of the Republic of Namibia, on 21 February 2014.

⁵ Law Reform and Development Commission Act 1991 (Act No. 29 of 1991).

thereof responded to the President and Cabinet's call by soliciting input in the development of this Discussion Paper.

- 1.6 The purpose of the paper is to stimulate responses from a legal perspective which are congruent with the Constitutional set up aimed at the available redress and punishment to curd this escalating social phenomenon of GBV. Once the nation has discussed and shaped opinion on the way forward, the LRDC will be in a position to recommend to the Minister of Justice as required by section 9⁶ of the Law Reform and Development Act, 1991 and should any Bills be proposed, they will then be attached.
- 1.7 This Discussion Paper does not present society with a *fait accompli* but is a discussion document for purposes of generating input in national discussions on GBV. Ultimately, this work is much more than an academic or statistical collection of facts and data. It is a call to action to those who seek safety and justice for all.

(This part deliberately left blank)

⁶ Section 9 of the Law Reform and Development Commission Act, 1991 states:

(1) The Commission shall prepare a full report in regard to any matter examined by it and shall submit such report together with draft legislation, if any, prepared by it, to the Minister for consideration.

(2) The Commission shall annually not later than the first day of March submit to the Minister a report on all its activities during the previous year.

(3) The report submitted to the Minister in terms of subsection (2) shall be laid upon the Table of the National Assembly by the Minister within one month after receipt thereof if the National Assembly is then in ordinary session, or, if the National Assembly is not then in ordinary session, within one month after the commencement of its next ensuing ordinary session.

2. DEFINITIONAL EXPOSITION

2.1 At the very core of addressing issues related to any kind of violence, including gender-based violence is the Namibian Constitution. The provisions of the Namibian Constitution that are directly relevant to violence are:

Article 8 Respect for Human Dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

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.

2.2. The provision that is most relevant for purposes of this Discussion Paper, particularly the current chapter is the right to life as provided for under Article 6 of the Namibian Constitution:

Article 6 Protection of Life

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

(Emphasis added)

Gender Based Violence (GBV)

2.3. Article 1 of the SADC Protocol on Gender and Development 2008 defines “gender based violence” as:

all acts perpetrated against women, men, girls and boys on the basis of their sex which could or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.

- 2.4. Namibia's National Gender Policy (2010-2020) in defining gender-based violence, employs similar terminology as that used in the Protocol and adds the following words - "or in situations of natural disasters, that cause displacement of people" - to the definition in the Protocol.
- 2.5. On the other hand, gender-based violence includes acts of violence in the form of physical, psychological, or sexual violence against a person specifically because of his or her gender.⁷ In most instances this form of violence is perpetrated against women and children. In relation to women, the violence includes all the forms above and in the most extreme, the violence results in the killing of women.
- 2.6. The perpetration of violence, often fatal violence, against women and children that has recently become a growing concern for the Namibian populous needs to be defined more accurately than the current misnomer "passion killing." The killing of women has been defined in various literature using different terms; passion killing, intimate partner killing, femicide or murder. These crimes (abuse, assault, murder, etc.) need to be defined into the nomenclature they deserve to be placed without the sensational tag or convenient label/characterisation which diminishes or seeks to lessen these crimes.

⁷ Horváth, Op.Cit. 1.

“Passion Killing”

- 2.7. “Passion Killing” is a term that refers to the killing of another human being in the heat of passion; although this form of killing is not excused, it is less repugnant when compared to calculated or premeditated murder.⁸ Consequently this crime is followed by a line of thought that seeks to distribute blame to both the victim and the perpetrator or a third person,⁹ and because of the apportioned blame, it becomes a gender issue. Passion killing is viewed to be patriarchal and when perpetrated by women it is usually in self-defence.¹⁰
- 2.8. “Passion killing” may appropriately be ascribed to some instances of reported cases across Namibia; however, it cannot be used to describe every instance where a woman is killed by her intimate or former intimate partner. Some of these killings labelled as ‘passion killings’ may be perpetrated in the ‘heat of passion’ or ‘heat of the moment’, but others may prove to be premeditated, gruesome cold murders. A better suited definitive term encapsulating all killings of women by their partners or former partners is therefore necessary as ‘passion killings’ does not do justice to the nature of the crimes.

Intimate Partner Homicide/Killing

- 2.9. In Africa and elsewhere in the world, the killing of women by their intimate partners or former intimate partners (such as husbands, boyfriends or ex-boyfriends) is aptly referred to as ‘Intimate Partner Homicide’ or ‘Intimate Femicide’. The World Health Organisation (WHO)¹¹ defines femicide as the intentional murder of women because they are women, but have also narrowed it down to be the intentional murder of women. Intimate Partner Homicide/Killing (IPHK) on the other hand refers to instances where at the time of the killing the

⁸ E.Hickey, *Encyclopedia of Murder and Violent Crime: Types of Homicide and Degrees of Murder*. Available at: http://www.sagepub.com/peak/study/materials/reference/07350_2.1ref.pdf; last accessed 20 June 2014.

⁹ E. Deiner and Thurton Wilfreda E. 2009. ‘Understanding ‘Passion Killings’ in Botswana: An Investigation of Media Framing’, *Journal of International Women’s Studies*, 10/4 (2009) 8.

¹⁰ *ibid.* p. 2.

¹¹ World Health Organisation, *Understanding and addressing violence against women: Femicide*. (2012). Available at: www.who.int/iris/bitstream/10665/77421/1/WHO_RHR_12.38_eng.pdf; last accessed 20 June 2014.

perpetrator and the victim are or formerly were involved in an intimate relationship of some sort. The term IPHK is preferred to the term 'femicide' because it is gender-neutral. Despite the gender inequalities reflected in the killing of women by their partners, it is important to identify the definition of the crime that is gender-neutral and as objective as possible.

- 2.10. Such gender neutral constructs are required to permeate throughout the criminal justice system so as to avoid the shifting of blame (which is important in the determination of criminal culpability) in an already overly patriarchal society. The objective of gender neutrality in the criminal justice process is an imperative that should not be taken lightly and subsumed by the popular rhetoric of gender equality in politics currently prominent in political discourse.
- 2.11. The collective or general term that can be used to describe the killing of women by their intimate partners or former intimate partners is 'murder', which is defined as the unlawful and intentional causing of the death of another human being.¹² The term *murder* is favoured for two reasons; firstly, it accurately describes the action of killing a human being and secondly, it removes the gender connotation that is attached to all the other terms. However, the prescription of the definition of the crime of *murder* under the common law, requires direct or indirect intention¹³ and this may prove to be a problem in instances where there is no intention to kill; therefore, *murder* will not be a fitting term to describe such circumstances.
- 2.12. In light of the above, with a view to avoid gender connotations, inaccurate descriptions of the crimes in terms of the law, mis-labelling of the killing of women by their intimate partners or former intimate partners in the media and to cater for possible paradigm shifts, it is recommended that the term 'Intimate Partner Homicide/Killing' be adopted as the defining term for the subject of concern.

¹² Snyman, C.R. 2007. *Criminal Law*. 5th Edition. Durban: LexisNexis, at p. 447.

¹³ See also: Smith J.C. & Hogan, B. 1986. *Criminal Law: Cases and Materials*. 3rd Edition. Butterworths: London, p. 302. The authors define murder as "the unlawful and intentional killing of another human being." The Latin term for direct intention is *dolus directus* whilst for indirect intention is *dolus eventualis*.

3. OVERVIEW OF THE CURRENT LEGAL POSITION

- 3.1. This section shall discuss relevant legal provisions in Namibian law that relate to the subject of Intimate Partner Homicide/Killing (IPHK).

RIGHT TO LIFE

- 3.2. An individual's right to life has been described as "[t]he most fundamental of all human rights,"¹⁴ "without which all other rights are nought [sic]".¹⁵
- 3.3. In Namibia, the right to life is sacrosanct and is guaranteed by Article 6 of the Namibian Constitution which provides that:

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

- 3.3. The Namibian Constitution is explicit in its prohibition of taking another human being's life; the right to life is absolute! The right to life is to be respected and upheld by all persons (natural and juristic) and all Organs of the State. This means that judicial authorities cannot prescribe death as a competent sentence upon any human being in respect of any crime whatsoever.¹⁶ An often forgotten aspect of the right to life is that private citizens and individuals do not have the right to take the life of another, irrespective of the relationship that they may share with such person, save of course for those rare exceptions relation to private defence or necessity as recognised in our Namibian jurisprudence.

¹⁴ Per Lord Bridge in *R v Home Secretary, Ex parte Bugdaycay* (1987) AC 514 at 531G, cited in *S v Makwanyane* 1995 (3) SA 391 (CC), at para. 83.

¹⁵ *S v Makwanyane*, ibid. at para. 210.

¹⁶ Links F. 2011. *The Constitution in Context*. In Hishoono N, Hopwood G, Hunter J, Links F and Sherazi M. 2011. *The Constitution in the 21st Century: Perspectives on the Context and Future of Namibia's Supreme Law*. Windhoek: Namibia Institute for Democracy (NID) and the Institute for Public Policy Research (IPPR), p. 29.

- 3.4. As a matter of fact, the law places an inherent obligation upon persons to take positive steps to protect the right to life.¹⁷ In situations where gender-based violence results in death – whether directly or indirectly through the transmission of life-threatening infections such as HIV/AIDS – the victim’s right to life is violated.¹⁸
- 3.5. It is equally imperative at this juncture, that the LRDC pauses to address the calls from various sectors of the public seeking the amendment of the Namibian Constitution to re-introduce the death penalty as a response to IPHK. Other proposals relate to castration, live burials and other uncouth and unconventional treatment of offenders have also been made and reported in the print, electronic and social media.
- 3.6. The LRDC takes this opportunity to state that the Republic of Namibia, acting through its Executive, Legislature and Judiciary is constrained by the Namibian Constitution as the supreme law of the land, and can only advocate for, legislate for, and impose sentences that are constitutionally consistent. The above proposals are, with respect, patently unconstitutional and it is the duty of the Executive, Legislature and Judiciary and indeed all citizens of the Republic of Namibia to promote, protect, respect and uphold the Namibian Constitution.
- 3.7. As a member of the International community, Namibia is also obliged to observe certain instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955; and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1984; to mention but a few, to which Namibia has acceded to and are binding upon it in terms of Article 144 of the Namibian Constitution.

¹⁷ This obligation emanates from the text of Article 5 of the Namibian Constitution (Protection of Fundamental Rights and Freedoms) read together with Article 6 (Protection of Life). All natural and legal persons in Namibia have the duty to respect, uphold and protect all fundamental rights and freedoms, including the right to life.

¹⁸ Manjoo, Op.Cit.16. This particular subject is not expanded upon in this Discussion Paper as it warrants further critical examination. It is merely referred to as any discussion to the right to life may be considered incomplete. The LRDC intends to investigate this subject matter in the future.

- 3.8. It is a supervening impossibility for the LRDC to propose any amendment to the Namibian Constitution which seeks to re-introduce the death penalty – whatever limited form it may be. Chapter 3 is entrenched in the Namibian Constitution and the rights and freedoms contained therein cannot be amended by way of detracting or diminishing therefrom as this is explicitly prohibited by Article 131 of the Namibian Constitution. Nothing, however, prohibits the amendment of any Chapter 3 provision with the view to add onto or enhance the rights and freedoms therein. This is the only legally competent amendment that may be effected upon Chapter 3.
- 3.9. Therefore, no legislative body created under the Namibian Constitution can amend Article 6 by re-introducing the death penalty, irrespective of the voting majorities that are normally required by the Namibian Constitution to amend a constitutional provision.
- 3.10. The LRDC requests, with humility, that those in the public limelight and whose opinions yield high public influence, exercise due caution, reflection and restraint in their pronouncements during those emotive periods when gruesome murders and GBV are committed with frequency and seeming impunity. The rule of law, not the incitement of vigilantism, should prevail.

THE RIGHT TO A FAIR TRIAL

- 3.11. Article 12 of the Namibian Constitution provides that all persons charged with a criminal offence are to be presumed innocent until proven guilty. It is thus a constitutional requirement that a person can only be convicted of a crime after such person is afforded a fair trial. No matter the hideousness of the crime, this principle is inviolable!

3.12. The High Court of Namibia in the case of *S v Acheson*¹⁹ categorically stated that this presumption of innocence means that “an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment.”²⁰

BAIL PROVISIONS

3.13. The current position with respect to bail under Namibian law is informed by Constitutional imperatives, namely, that every person accused of a crime is presumed innocent until proven guilty in a court of law²¹ and that no person shall be subject to arbitrary detention²². Therefore, in the absence of justifiable grounds, an accused person cannot be deprived of his or her right to liberty. It must be noted that there is no right to bail; an individual only has the right to apply for bail.

3.14. Although it is tempting to assume that anyone who is arrested is probably guilty,²³ the issue of guilt or criminal liability is not determined in the course of a bail application.²⁴

3.15. In principle, the purpose of bail is to strike a balance between the public interest and the fundamental right to liberty of the accused in the administration of justice. The consideration in law is therefore to make sure that the accused is brought before court, the right to liberty is safeguarded and there is no interference with the administration of justice.

¹⁹ 1991 NR 1 (HC). Acheson was arrested on charges of having murdered SWAPO stalwart Adv. Anton Lubowski. He was detained for a lengthy period pending the finalisation of police investigations. Acheson, being an Irish citizen, was not granted bail upon application in a Magistrates Court. He appealed the decision to the High Court, which found in his favour and granted him bail. Upon the granting of bail, Acheson absconded by fleeing Namibia, from his trial and has not answered to the charges to date. This unfortunate state of affairs notwithstanding, the decision of Mahomed J (as he then was) is a landmark judgement as it has laid the foundation for the adjudication of competing constitutional fundamental rights and freedoms.

²⁰ Ibid. at p. 19D-F.

²¹ Article 12 (1) (d) of the Namibian Constitution.

²² Article 11 of the Namibian Constitution.

²³ Hubbard, D. and Holmes, T. 2013. *Bail In Cases Of Gender-Based Violence*, p. 1.

²⁴ Amoo S.K. *The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia*, p. 2.

3.16. In keeping with the call of His Excellency The President, for the reform of bail provisions under Namibian law, a further and detailed discussion of these provisions shall be undertaken below, with comparative analysis of the bail systems in Namibia, South Africa and Zambia.

4. PAROLE

4.1. The now repealed Prison Act, 1998 (Act No. 17 of 1998) and the Correctional Service Act, 2012 (Act No. 9 of 2012) do not define 'parole'. However, as persuasive authority, parole is defined under South African law as follow²⁵:

...a period whereby an offender who has served the prescribed minimum detention period of his sentence in a correctional facility is conditionally released to serve the remaining sentence in the community under the supervision and control of the Department of Correctional Service.

4.2. The Correctional Service Act, 2012 provides that all prisoners must be considered for parole after they have served a certain portion of their sentences. The general rule is that convicted offenders who have served half of their terms of imprisonment must be considered by the National Release Board for parole if three conditions are met:²⁶

- (a) the offender has displayed meritorious conduct, self-discipline, responsibility and industry during the time already served;
- (b) the offender will not present an undue risk to society by committing another crime before the expiration of the sentence he or she is serving; and

²⁵ Mapaure C. and Hamunyela R.T. 2012. 'Once jailed, wait for fuzzy mercy: A critical legal analysis of the blurred prison and parole laws in Namibia.' *Namibia Law Journal*, Volume 4(2), p. 81-106.

²⁶ Section 110 of the Correctional Services Act, 2012.

(c) the release of the offender will contribute to his or her reintegration into society as a law-abiding citizen.

- 4.3. Conditions are normally imposed upon the release on parole of offenders, and failure to obey them can result in the withdrawal of the parole.
- 4.4. There are special rules on parole for groups of offences; for example in cases of murder, rape and assault resulting in a dangerous wound, the offenders are not eligible for parole unless they have already served at least two-thirds of their term of imprisonment. An offender who was sentenced to life imprisonment is eligible for parole only after serving a prescribed minimum term of imprisonment²⁷.
- 4.5. The procedure for considering parole also differs with the gravity of the crime, with decisions on the release of more serious offenders being made by higher authorities and in some cases requiring hearings instead of being made on the basis of reports from correctional facility officials.²⁸
- 4.6. The proposition that persons convicted of serious offences (in this case murder) be denied parole has previously been brought before our courts in the case of *S v Tcoeib*²⁹, where the Supreme Court of Namibia was called to decide on the constitutionality of the sentence of life imprisonment under the now repealed the Prisons Act, 1959 (Act No. 8 of 1959) which stated as follows:

[T]he sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

²⁷ Section 117(2) of the Correctional Services Act, 2012.

²⁸ *ibid.*

²⁹ 1999 NR 24 (SC) at p. 33

- 4.7. The Supreme Court in *S v Tcoeib*³⁰ continues to state that the imposition life sentences without parole does not equate a death sentence and may be imposed:

because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence.

- 4.8. The late Mahomed CJ considered the consequence of locking up offenders regardless of the particular circumstances of each case and in language that only that jurist was capable of deploying concludes in *S v Tcoeib*³¹ that:

To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past.

- 4.9. In a nutshell, the Supreme Court found that life imprisonment without the prospect of parole violates the right to human dignity and is, therefore, unconstitutional.

- 4.10. It is also important to note that Article 37 of the United Nations Convention on the Rights of the Child (CRC) specifically prohibits the imposition of life imprisonment without the prospect of release for juveniles (i.e. persons who are under the age

³⁰ At p. 31.

³¹ At page 32-33.

of 18 years at the time of the commission of the offence). The relevance of Article 37 of CRC is that it may very well be that an offender (of odious crimes such as IPHK) is a juvenile.

4.11. It is beyond argument that the levels of violent crime in Namibia, in particular GBV, have reached alarming proportions. It affects us all, and poses a threat to democracy and development, which are primary goals of the Namibian Constitution. Nevertheless, as a class of offenders, a blanket denial of parole to GBV offenders would most likely violate the Namibian Constitution.

4.12. Moreover, life imprisonment without the option of parole as a 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 may be considered as cruel, inhumane and/or degrading treatment and punishment which is prohibited by Article 8 of the Namibian Constitution, no matter how *dastard be the crime he or she has committed*. As was stated in *Bull and Another v the State*³² -

It is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment.

4.13. The above dictum is highly persuasive and may very well encapsulate the position of Namibian law on the issue of parole. At the time of going to print of this Discussion Paper, the High Court of Namibia has reserved judgement on the constitutionality of certain sections of the Correctional Service Act, 2012 relating to parole.

³² *Bull and Another v The State* Case No. 221/2000 [2001] ZASCA 105 [26 September 2001] (Unreported) at para. 23.

5. HARD LABOUR

5.1 Article 9(3) states that for the purposes of this Article, the expression "forced labour" shall not include:

- (a) any labour required in consequence of a sentence or order of a Court;
- (b) any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a Court, is reasonably necessary in the interests of hygiene.

5.2. This Article is authority for the position that mandatory labour in correctional institutions does not amount to forced labour. Instead mandatory labour, which may involve work within the private sector firms outside correctional institutions on a daily basis, is increasingly perceived as a manifestation of forced labour. Workers organizations have noted that wages for these correctional institution labourers are very low and lack protection to negotiate for sound terms and conditions.³³ Article 9 is also in line with the International Forced Labour Convention (1930), the Standard of Minimum Rules for the Treatment of Prisoners (1955) as well as the African Charter on Prisoners' Rights which all reaffirm that prisoners can be compelled to work.³⁴

5.3. In most modern penal thought, work is part of an overall prison regime which aspires to the rehabilitation of criminal offenders, preparing them for eventual reintegration into life as free citizens. In fact, this is one of the functions of the Correctional Service in Namibia in terms of section 3(c) which is –

as far as practicable, to apply such rehabilitation programmes and other meaningful and constructive activities to sentenced offenders that contribute to their rehabilitation and successful reintegration into community as law abiding citizens.

³³ Kanchana N. Ruwanpura and Pallavi Rai. 2004. *Working Paper on Forced Labour: Definitions, Indicators and Measurement*. International Labour Office: Geneva, p. 5.

³⁴ Namibia is signatory to all these international instruments.

- 5.4. The term “hard labour” presumably embodies a set of properties that can be contrasted with a different set of properties describing a separate condition, that of “non-hard,” but nonetheless mandatory labour. The latter condition is also presumably less harsh from the perspective of the inmate, to a degree that would ideally correlate to whatever “the punishment’s intended punitive impact” is meant to be.
- 5.5. This is consistent with the originating purpose of punishment by forced labour as, in part, an act of public shaming, which has both a deterrent goal and a symbolic, “expressive” one. The question may be asked: how much more harsh should forced labour be than what non-incarcerated working people endure?³⁵ This question can be answered by looking at two of the penological justifications that are used for the labour. Most criminologists devolve into two broad camps: the retributive and the consequentialist. As Campos explains³⁶ -

[t]he retributive view is founded on the idea of desert - we punish the criminal because the blameworthiness he has incurred through his actions makes it morally fitting (perhaps imperative) that we do so. The consequentialist position is essentially utilitarian: Punishment is justifiable to the extent that the good results that flow from it (primarily deterring future violations of the law) outweigh the evil consequences that result from inflicting pain on the individuals who are punished.

- 5.6. The two “camps” represent abstractions of the opposite ends of the penological theory spectrum, and correctional policies will usually employ some mix of both in their purposes and justifications. Johnson explains as follows:³⁷

³⁵ Raghunath , R. (2009). “A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?” *William and Mary Bill of Rights Journal*. Volume 18, Issue2, Article 4. Available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1176&context=wmborj> , pg.437.

³⁶ Raghunath (2009:437).

³⁷ Johnson E.H. 1974. *Crime, Correction and Society*. 3rd Edition. London: Irwin-Dorsey International, p. 445.

The first trend reflects the attitude that prison labour is somehow different from labour in general. In keeping with the punitive ideology, the prisoner is thought of as part of the abnormal world of repressive confinement. Work is seen as punishment and an obligation imposed on the prisoner. "Hard labour while wearing stripes" is considered an efficient means of deterring future crime or of balancing the scales of retribution. It is also argued that the prisoner should work to pay for at least part of his keep as an obligation to taxpayers.

The second trend has been toward improvement of prison labour conditions and increased concern that prison employment should play a role in the rehabilitation of character. The aim is to prepare the inmate for a constructive life after release and prison labour is intended to reduce the alienation of the offender from society. Vocational instruction is used to develop occupational skills and work motivation in tasks related to the inmate's self-interest. The rhythm of work and rest and the conditions of employment are as similar as possible to those in the free world.

- 5.7. A key challenge when it comes to forced labour however is ensuring that the work done is in accordance minimum standards consistent with human dignity for all prisoners at work, protecting them against economic exploitation. This involves at least minimum standards regarding wages, safety and health, and education about workers' rights as required in terms of the.³⁸
- 5.8. At present the Namibia Correctional Service (NCS) in keeping with the requirements of the Standard Minimum Rules has strict requirements as to the type of work that prisoners can do. These requirements are contained in the Commissioners Directive³⁹ which includes amongst others a ban on:
- (i). using prison labour directly for the erection of buildings, excavation of foundation, mixing of concrete, transportation of sand, stone and bricks

³⁸ As per the requirements of the Standard Minimum Rules for the Treatment of Prisoners, 1955.

³⁹ Directive No. 03/2007 on the Amendment of Prison Service (now the Correctional Service) Orders B-Chapter 10. The specific bans on the use of prison labour are under No.10.7.

to sites where buildings are to be erected. Prisoners are not to be used for any other work on the sites

- (ii). any work in connection with digging or in mines
- (iii). prisoners at railway yards being used to couple or uncouple trucks or where prisoners can be easily injured
- (iv). prisoners carrying heavy objects such as grain bags on their heads as it can result in serious neck injuries
- (v). the use of prisoners in sanitary services.

5.9. In terms of the Directive, prisoners engaged in any work, just like any other employee should not work more than 8 hours a day and they too are entitled to a rest period of one hour which is consistent with the Labour Act, 2007 (Act No. 11 of 2007).

5.10. It is very important to note that in terms of the International Labour Convention, if there has been no conviction in a court of law, compulsory prison labour is contrary to the Convention. It is therefore contrary to the Convention to impose prison labour on persons who have been deprived of liberty but have not been convicted.⁴⁰ This does not mean, of course, that these persons should be denied the possibility of carrying out prison labour while they are awaiting trial, as the Convention does not prohibit work as long as it is on a purely voluntary basis (except, for common sense reasons, for keeping the prisoners' own cell clean and orderly).

6. SENTENCING

6.1 The current legal position in Namibia is that our Courts are charged with exercising discretion in the length of a sentence a convicted person is imposed.

⁴⁰ Trial a waiting accused persons detained in prisons cannot be subjected to mandatory labour other than by personal decision or for hygienic purposes. NB: the Katima Mulilo Police Cells previously declared as prison cells, remains a correctional facility under the Correctional Services Act, 2012. Accused persons held in those facilities cannot be compelled to perform mandatory labour.

As a matter of fact, section 276(1) of the Criminal Procedure Act, 1977⁴¹ (hereinafter referred as the CPA), which prescribes the nature of punishments, does not prescribe any limit on the period of imprisonment which can be imposed by a court of law.

- 6.2 The CPA further grants the Courts discretion in the imposition of sentences.⁴² The Legislature has, however, provided for minimum sentences in respect of certain offences such as stock theft, rape, and drug related offences.
- 6.3 Any legislative reforms that increase minimum sentences for murder are constitutionally permissible provided that such legislation does not prescribe mandatory sentences whereby the Courts are prohibited from exercising punishment and sentencing discretion. Courts should not be prohibited from considering mitigating factors; as such a prohibition eliminates the courts punishment and sentencing discretion and would likely violate Article 78 of the Namibian Constitution, which guarantees the independence of the Judiciary.
- 6.4. The imposition of minimum sentences has been found to be in want of the Namibian 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.
- 6.5. Authority for this legal position may be found in *S v Vries*⁴³ and *Daniel v Attorney-General and Others; Peter v Attorney-General and Others*.⁴⁴ Whilst the LRDC does not necessarily endorse the wide and sweeping *striking* of legal text *in curium*, on account of the incapacities at syntactical and lexical drafting skills ordinarily available to a judicial officer, and whilst the LRDC endorses the approach adopted in the *Vries* case, the principle of the *Daniel* case is

⁴¹ Criminal Procedure Act, 1977 (Act No. 51 of 1977).

⁴² See section 283(1) of the CPA.

⁴³ 1998 NR 244 (HC).

⁴⁴ 2011 (1) NR 330 (HC).

acceptable as far as judicial sentencing discretion is concerned. Courts should defer to the provisions of Article 25(1)(a) of the Namibian Constitution and thereby as far as reasonably possible observe the principle of separation of powers.

- 6.6. Although life imprisonment is rarely imposed, the same cannot be said of very long determinate prison sentences. Many examples of very long sentences are readily available. One of the longest sentences imposed by our courts was an effective sentence of 87 years' imprisonment, in the case of *S v Aibeb*.⁴⁵ The horrific crime involved three murders, the stabbing of further victims, and arson of the home where his girlfriend was staying, which caused the death of two small children.
- 6.7. In the triple murder case of *S v Katamudi*,⁴⁶ the accused was found guilty of stabbing his three neighbours to death and sentenced to an effective term of 85 years imprisonment. In *S v Hamukoto*⁴⁷ the accused, a nurse Jeckonia Hamukoto who killed three people in a shooting in a Windhoek bar in early 2007, was sentenced to an effective imprisonment term of 90 years.
- 6.8. Another example is that of the Kareeboomkolk Massacre,⁴⁸ involving the two brothers, Sylvester Beukes and Gavin Beukes, who executed eight people at the farm Kareeboomkolk in the Kalkrand District on March 2005 in cold blood. They were sentenced on eight murder charges, housebreaking with intent to rob, robbery with aggravating circumstances, defeating or obstructing the course of justice, arson, illegal possession of firearm and ammunition. The brothers were sentenced to a combined total of 670 years in jail but because several sentences were ordered to run concurrently, the result was an effective prison term of 105

⁴⁵ (CC 10/2010) [2011] NAHC 338 (21 November 2011).

⁴⁶ (CC 07/2003) [2002] NAHC 8 (31 January 2002).

⁴⁷ (CC 19/2008) [2011] NAHC 289 (28 September 2011).

⁴⁸ (CC 21/2006) [2011] NAHC 347 (21 November 2011).

years for Sylvester Beukes, and 84 years for Gavin Beukes. This translates to a combined total of 189 years.

6.9 The above examples are used here to show that the Courts are not shy of using their discretion to impose longer sentences, and that in fact, when the circumstances require them to, the perpetrators are removed from society for a very long time.

7. WITNESS PROTECTION

7.1 Namibia has no formal witness protection programme, unlike other similar jurisdictions such as South Africa, although there are safeguards to protect witnesses and victims within our legal framework.⁴⁹

7.2. In terms of Section 153 of the CPA, a court may make such orders so as to exclude members of the public or the media from the proceedings or by imposing limits on the publication of certain information, such as details that could disclose the identity or whereabouts of the victim or witness. This protection however is only afforded while the witness is set to testify and does not extend beyond that.

7.3. Article 12(1)(a) of the Namibian Constitution also provides that a court or tribunal, before whom a hearing takes place, may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order, or national security, as is necessary in a democratic society.

7.4. Furthermore, arrangements for the physical protection of witnesses at a relocated place can be arranged with the police on an informal case-to-case basis.

⁴⁹ Zenobia Beatrix Barry. *Challenges in the Investigation, Prosecution and Trial of Transnational Organized Crime in Namibia*. Resource Material Series No.73: Office of the Prosecutor General. Available from www.unafei.or.jp/english/pdf/RS_No73/No73_12PA_Barry.pdf, pg.79.

7.5. Similarly, Section 158A in the Criminal Procedure Amendment Act, 2003 (Act No. 24 of 2003) makes provision for special arrangements for vulnerable witnesses. Section 158A defines a vulnerable witness as a person:

- (i) who is under the age of 18 years;
- (ii) against whom an offence of a sexual or indecent nature has been committed;
- (iii) against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship; or
- (iv) who as a result of mental or physical disability, the possibility of intimidation by the accused or any other person, or by any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.

7.6. This section further provides for inter alia testimony to be given behind a screen or in another room which is connected to the courtroom via closed circuit television or a one way mirror or by any other device that complies with subsection (vi) (i.e. that the witness must be seen and heard by all parties to the proceedings whilst giving evidence). That of course includes testimony through Section 166(4) of the same Criminal Procedure Amendment Act, 2003 (Act No. 24 of 2003) also provides that:

...the cross-examination of any witness under the age of thirteen years shall take place only through the presiding officer or judicial officer, who shall either restate the question put to such witness or, in his discretion, simplify or rephrase such questions.

7.7. Whilst witness protection is an important aspect of any criminal justice system, and whilst it is undisputable that Namibia seek to incorporate such, it may

resultantly amount to a better suited investment if resources are deployed for the purposes of securing safe houses to shelter victims of domestic violence and abuse. Statistics reveal that many domestic abuse matters are often abandoned when the victims are within the same household or close proximity with the perpetrators. There may very well be other societal justifications for the withdrawal or recalcitrance of witnesses (who are normally the abused persons and their immediate family members), however, the viable separation of victims from perpetrators, may ensure that the cycle of violence is disturbed with permanency.

- 7.8. Assets forfeited to the State may be adapted and utilised for purposes of the creation of safe houses. Safe houses in themselves will serve no purpose without the professional human resource compliment of social workers, psychologists, psychiatrists, and law enforcement officers. Ultimately, a multi-sectorial approach is an indispensable prerequisite to the successful implementation of this and other similar initiatives aimed at pooling expertise, resources, specialisations etc. together to mitigate and ultimately the eradication of GBV and IPHK.

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8. BAIL REFORM

INTRODUCTION

- 8.1. The Namibian legal framework with respect to bail has recently come under public, Executive and Legislative scrutiny in light of the escalation in GBV and IPHK cases. This prompted His Excellency The President effectively recommending a review and overhaul of bail provisions for suspects in GBV and IPHK cases.
- 8.2. In light of the above, the LRDC considers it appropriate to firstly ensure that an accurate diagnosis is made and the reform of bail provisions are in fact an appropriate response which will successfully ensure that GBV and IPHK in Namibia is eradicated. This is particularly true in as far as the granting or refusal of bail is concerned as it is an *ex post facto* reaction to incidences of GBV and IPHK. In effect, the LRDC is inspired by the age-old idiomatic expression, “if it is not broken, do not fix it.”
- 8.3. This Discussion Paper shall outline the legal regime regulating bail as primarily anchored in the Namibian Constitution and the triadic ideals of democracy, the rule of law and - critical to this context – human rights, the bail jurisprudence in Namibia, the current bail model applied in Namibia, as well as highlighting other models of bail in similar and comparable jurisdictions internationally.
- 8.4. This Discussion Paper, therefore, seeks to gauge the views of respondents and stakeholders involved in the Criminal Justice System and who are practically knowledgeable of the difficulties experienced with respect to the denial or granting of bail.

MODELS OF BAIL SYSTEM⁵⁰

8.5. As Amoo posits, there are three models or approaches to bail as a human right, which aims to balance the right of the individual to liberty and the security of the community.⁵¹ These models are discussed below:⁵²

The First Model of Bail

8.6. The first model is premised on a policy and a constitutional position that makes the Legislature the repository of the determination of the right to bail and leaves the Judiciary with the implementation of broad legislative directives. The legislative directive invariably includes mandatory refusal of bail in certain offences and the Judiciary is left with the discretion to determine to grant or refuse bail in other cases with the primary objectives of promoting the due process of law and securing the presence of the accused or arrestee before the jurisdiction and judgment of the court.

The Second Model of Bail

8.7. The second model is premised on the constitutional position that grants the sole determination of the right to bail to the Judiciary, subject to a minimum degree of legislative intervention. This approach does not prescribe for bailable and non-bailable offences. The accused or arrestee has the *prima facie* constitutional right to apply for bail, irrespective of the seriousness of the alleged offence.

⁵⁰ See generally: Mapaure C., Ndeunyema N.M.L., Masake P.H., Weyulu F and Shaparara L.A. 2014. *The Law of Pre-Trial Criminal Procedure in Namibia*. University of Namibia Press: Windhoek, p. 268.

⁵¹ Amoo, SK. 2008. "The bail jurisprudence of Ghana, Namibia, South Africa and Zambia". *Forum on Public Policy: A Journal of the Oxford Round Table, Summer*, p 6. Available from: <http://forumonpublicpolicy.com/summer08papers/archivesummer08/amoo.pdf> (last accessed 1 June 2013).

⁵² Ibid.

- 8.8. The first model/approach is adopted by countries such as Zambia, Ghana, India and certain states in the United States and the second model/approach by countries such as Namibia.

The Third Model of Bail

- 8.9. The third model may be described as an amalgam or hybrid of the first two models. The power over determination of matters relating to bail is generally vested in the Judiciary. There is no legislative mandatory refusal of bail; the law does not draw a distinction betweenailable and non-ailable offences. However, there is a legislative intervention in the form of legislative guidelines that the Courts must follow in the exercise of their discretion to grant or refuse bail in serious or scheduled offences. This is the South African model.
- 8.10. In light of the above, the subsequent discussion shall consider the Namibian approach to bail, with comparative reference made to the South African and Zambian approaches respectively where relevant.

9. THE LEGAL REGIME REGULATING BAIL IN NAMIBIA

- 9.1. Bail has been described as the conditional release of someone who has been suspected or accused of a crime.⁵³ Bail is a form of pre-trial release from custody after a person has been arrested and charged with an offence. Other forms of pre-trial release are:
- a) Release by reason that no charge is brought against a person;⁵⁴
 - b) Release on warning;⁵⁵ and

⁵³ Mokoena, M.T. 2012. *A guide to Bail Applications*. Juta and Co. Ltd: Cape Town, p. 1.

⁵⁴ See section 50(1) of the Criminal Procedure Act, 1977.

⁵⁵ See section 50(3) read with section 72(1) of the Criminal Procedure Act, 1977.

c) Release on a written notice to appear in Court.⁵⁶

9.2. For purposes of this Discussion Paper, the legal regime regulating pre-trial release manifested as release on bail shall be discussed. Bail is a procedural device which attempts to strike a balance between the accused's right to freedom and the interests of society, which has been aggrieved by his or her alleged criminal misconduct.⁵⁷ The ultimate goal is to ensure that the accused stands trial and that there should be no interference with the administration of justice. From this, it is clear that bail has legal implications on rights and freedoms which are given expression within our legal regime, primarily anchored in the Namibian Constitution.

9.3. The relevant provisions of the Namibian Constitution are:

Article 7: Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.

Article 11: Arrest and Detention

- (1) No persons shall be subject to arbitrary arrest or detention.
- (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.
- (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.

Article 12: Fair Trial

- (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public

⁵⁶ See section 50(3) read with section 56(1) and (2) of the Criminal Procedure Act, 1977.

⁵⁷ Mokoena (2012:1).

from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

[...]

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

9.4. These foundational principles and procedures contained in the Namibian Constitution therefore inform the law and practice of bail in Namibia. These principles and procedures are given substantive meaning by the Criminal Procedure Act, 1977, in its Chapter 9 (sections 59 – 71). One must pause to appreciate that the Criminal Procedure Act, 1977 was passed and came into force an approximate 13 years before the Namibian Constitution and its relevant bill of rights provisions came into force. Therefore, the Namibian Courts have played a critical role in ensuring that the procedure and practice of bail, as an integral part of the criminal justice system, are interpreted and applied in a broad and liberal manner so as to coherently align common law and case law as it relates to bail, with the Namibian Constitution.

9.4. The role of post-constitutionalism courts and their casuistic jurisprudence as expressed in their judicial decisions play a critical role in understanding bail law as thereby thoroughly informing any reform initiatives. This does not, however, suggest that pre-1990 jurisprudence that is uninfluenced by any constitutional provision is irrelevant, and such judgements, which are concurrent with the Namibian Constitutional principles, procedures and values shall be referred to casually herein.

10. CASUISTIC JURISPRUDENCE ON BAIL IN NAMIBIA

10.1. Since 1990, the Namibian Courts have considered the bail provisions of the Criminal Procedure Act, 1977 and weighed them against the Namibian Constitution as an imperative yardstick. Various landmark decisions have been handed down and these shall be considered *seriatim*.

Onus of proof in Bail proceedings

10.2. Much debate has surrounded the question of who bears the onus of proof in bail proceedings. According to some, the onus of proof in bail proceedings should rest upon the State because it is the State, which deprives the individual of his liberties, and therefore it is the State that should prove that the accused should be incarcerated. However, over the years it has been established that the applicant bears the proof in bail applications. The argument advanced to rebut the averments by those postulating in favour of the onus resting on the State, is that the State need only prove lawful arrest.

10.3. Proving bail pending trial, however, rests on the accused in that he or she has to satisfy the court that, if released on bail he or she will not abscond, tamper with State witnesses and will not interfere with the general administration of justice.⁵⁸

10.4. Therefore, in Namibian courts of law, the approach that the onus of proof is upon the applicant to prove that bail should be granted is still the applied norm.⁵⁹

10.5. It is now settled law that the point of departure, when an arrested person appears in court, is that he or she had to be released unless fairness stood in his way and this required that the State had to take the initiative to place indications before the court why justice demanded that the person in question ought not to be released but it did not indicate that the State had to be saddled with the whole burden of showing that the interests of justice were stronger than the claims of

⁵⁸ See: *Julius Dausab v The State* Case No. CC 38/2009 (unreported).

⁵⁹ See *Albert Ronny du Plessis and Another* unreported judgment of the High Court delivered on 15 May 1992; *Fouche v The State* Case No. CA 20/1993 (unreported).

the person in question. An application for bail is not a criminal proceeding, but rather unique judicial proceedings and the question of onus, which was important at criminal proceedings, did not play a comparable role at an enquiry as to the desirability of releasing an arrested person.⁶⁰

10.6 From both old and new authorities it is quite clear that it is now an established in our law that the *onus* is on the accused to show on a balance of probabilities that the granting of bail will not prejudice the interests of justice where it was stated that if the crown opposed the application the *onus* is on the accused to satisfy the court that he will not abscond or tamper with State witnesses and if there are substantial grounds for the opposition bail will be refused.⁶¹ It is necessary to strike a balance as far as it can be done between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice.⁶²

10.6. As stated by Kriegler J in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*⁶³ a presiding judicial officer, in weighing up the relevant factors is exercising a value judgment. A similar approach was adopted by the court in *S v H*⁶⁴ wherein Labe J stated the following:⁶⁵

The interests of justice served by his being detained must be balanced by those interests served by permitting bail to be awarded to him.

11. BAIL IN SOUTH AFRICA

11.1. The law regulating criminal procedure in both Namibia and South Africa was first passed as the Criminal Procedure Act, 1977. Since its passing in 1977, however,

⁶⁰ See *Charlotte Helena Botha v The State* Case No. CA 70/95 (unreported).

⁶¹ See, for example, *S v Nichas and another* 1977 (1) SA 257 (C) and *Rex v Mtatsala and another* 1948 (2) SA 585 (E).

⁶² See for example *R v Essack* 1965 (2) SA 161 (D) and *S v Mhlawli and others* 1963 (3) SA 795 (C).

⁶³ 1999 (2) SACR 51 (CC).

⁶⁴ 1991 (1) SACR 72 (W).

⁶⁵ 1991 (1) SACR 72 (W) at p. 77a.

the Act has been amended several times, given the independent trajectories of legislatures of both Namibia and South Africa, respectively. Therefore, it is important to note that although the principal Act remains the same, the bail provisions of South Africa differ substantially from those in Namibia.

- 11.2. Amoo concisely captures and outlines the South African approach to bail as follows:⁶⁶ Although the South African bail laws do not draw a distinction between bailable and non-bailable offences [as is the case in countries such as Zambia and Ghana], because of security concerns, the Legislature has intervened by providing legislative guidelines that the Courts have to consider in the exercise of their discretion in bail applications. This is in order to satisfy the broad constitutional limitations that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.
- 11.3. Under the provisions of section 60(11)(b), which applies only to serious violent crimes enumerated in schedule 6 of the Criminal Procedure Act, 1977 of South Africa, the accused is required to adduce evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permits his or her release. The South African bail scheme, in general, takes detailed account of the State's legitimate interests in protecting the integrity of the criminal justice system and the public safety between the time of arrest and trial, giving the courts broad discretion to detain individuals who pose an identifiable risk to the interests of justice pending trial.
- 11.4. Not only does the South African Constitution's "interests of justice" standard permit detention of any individual whose liberty would threaten the interests of justice between the time of arrest and trial, but the statutory provisions that guide

⁶⁶ See Amoo, SK. 2008. "The bail jurisprudence of Ghana, Namibia, South Africa and Zambia". *Forum on Public Policy: A Journal of the Oxford Round Table*, Summer, p 20-21.

the application of this constitutional standard give thorough consideration to the state's interests, enumerating in great detail factors relevant to assessing dangers to the public safety, risks of flight, threats of interference with witnesses or evidence, jeopardy of the criminal justice system and exceptional threats to public order pending trial.

12. BAIL IN ZAMBIA

- 12.1. The Zambian position, as described earlier, falls under the first model/approach and the sources of the legal principles and rules governing the grant or refusal of bail are the Constitution, the Criminal Procedure Code⁶⁷, and case law. In the context of the right to bail the Constitution of Zambia encapsulates the constitutional rule that the defendant is presumed to be innocent until he is proven to be guilty. From this rule flows the proposition that the defendant shall not be subject to unnecessary pre-trial deprivation of his freedom. This is contemplated under Article 13(3) and 18(1) of the Constitution of Zambia; and Section 33(1) of the Criminal Procedure Code⁶⁸ provides that arrested persons are to be taken before a competent court without undue delay and if not tried within reasonable time should be released either conditionally or unconditionally.
- 12.2. These are the fundamental provisions relating to bail and the protection of the rights of the detained person or the accused. The rest of the legislative principles, both substantive and procedural, are contained in the Criminal Procedure Code.⁶⁹ In essence, the primary policy is that in the interest of the security of the community/society and guaranteeing the completion of criminal proceedings and promoting the due process of the law, a person charged with a scheduled offence such as murder, treason, aggravated robbery, rape etc. is not eligible for bail.

⁶⁷ Chapter 160 of the Laws of the Republic of Zambia.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

- 12.3. The Zambian legislature has accordingly legislated for bailable and non-bailable offences. As stated earlier, in the case of the latter, the Courts are mandated to refuse bail under section 123 of the Criminal Procedure Code. The right to bail is therefore guaranteed under Zambia's Constitution and international law. However Section 123 of the Criminal Procedure Code provides for specific offences that may not be bailable.
- 12.4. The effect of this is that the accused person in such an instance is condemned unheard. The provisions in the Criminal Procedure Code curtailing the discretion of the courts to grant bail the specified instances can be considered to be unconstitutional as Articles 13(3) and 18(1) of the Constitution that require any accused person charged with an offence to be afforded a fair hearing before an independent tribunal within a reasonable time. The automatic denial of bail negates the spirit of the provisions of the Constitution as such an accused person is ab initio denied the opportunity to appear before an impartial tribunal and ventilate reasons why he believes he should be granted bail.
- 12.5. In addition, the offending provisions can also be regarded as unconstitutional as they attempt to curtail the unlimited jurisdiction of the High Court to hear all civil and criminal matters, which is guaranteed under Article 94(1) of the Constitution of Zambia.
- 12.6. In summary, under Zambian bail jurisprudence, the determination of whether or not an accused has the right to apply for bail depends on the classification of the offence. The Courts have unfettered discretion to entertain applications for bail in offences prescribed as bailable and make determinations on the applications taking into considerations a mix of factors. However, in cases involving serious offences prescribed as non-bailable the Courts are mandated to refuse such applications. Under the so-called 'Constitutional bail' concept,⁷⁰ an accused is entitled to bail if the trial does not take place within a reasonable period through

⁷⁰ See *Chetankumar Satkal Parekh v The People* (Supreme Court of Zambia unreported).

no fault of the accused. However, as stated earlier under this bail regime, the rights of the accused stand compromised and susceptible to be violated.

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13. CONCLUSIONS

- 13.1. As noted in the foregoing, it is critical that a proper diagnosis be made before embarking upon legal reforms of bail, parole, sentencing provision etc., if any. Various constitutional imperatives must be soberly considered so as to ensure that reactions to GBV and IPHK do not become wanting of our constitutional supremacy. For example, the bail models outlined above can be explored further so as to establish their propriety within our criminal justice system.
- 13.2. Patent difficulties are foreseeable if models such as those of Zambia and Ghana (i.e. the classification of bailable and non-bailable offences) are imported into our law. The South African position may find suitability as there are similarities in the constitutional entrenchment of the right to liberty with Namibia.
- 13.3. No amount of legislative ingenuity on its own can curb the spate of violence being experienced in Namibia. A multi-disciplinary approach is required: laws being promulgated to protect vulnerable members of society falling prey to Intimate Partner Homicide/Killing, coupled with well-equipped law enforcement agencies, investigating and presenting evidence to the prosecution system to present before court, and social workers available to ensure that the victims of crime, the perpetrators as well as relatives of victims and perpetrators of crimes are counselled.
- 13.4. That there are only a handful of psychiatrists and psychologists in the public service doing psychiatric and psychological work is telling of perhaps the underlying and inarticulate premise of thinking within which we operate – let's build a nation of schools, roads and so forth, yet we leave the human to fit into the dreams, and even when the plans are about the human being's well being, the soul of the human is left to fend for itself – and this, for a post conflict generation, may be the one thing we may have omitted in our planning rooms.

- 13.5. Efforts such as the February 2014 National Prayer Day and the July 2014 2nd National Conference on Gender Based Violence are remarkable moments in a nation's life – taking stock of the ills of society with a view to correct such. However, if Namibia finds itself congregated in another conference a few years from now, still asking what went amiss, then it ought to caution to us that the goodwill notwithstanding, nothing is coming out of our efforts. To avoid this, we need to make recommendations that are practical, obtainable and assignable to responsible Offices/Ministries/Agencies and institutions that can remain seized with the matters and gauged from time to time.
- 13.6. Poverty, unemployment and alcohol remain one of the drivers for crime in general. When visitors to Namibia express concern over the proliferation of liquor outlets in our society, perhaps it is time to reform the liquor laws to ensure that the processes for the issuance of liquor licenses is multi-disciplinary and based on the demographics of a given locale. As an example, 10 liquor outlets in small settlements and neighbourhoods should be avoided. Entrepreneurship cannot be defined by alcohol outlets alone or predominantly, yet this is the sad reality for many commerce chamber branches.
- 13.7. The purpose of this Discussion Paper is to contribute to the discussion that may give rise to some practical solutions for implementation in the national response to the crimes being perpetrated in our societies. It is not a manual with solutions per se. Therefore, the LRDC welcomes input and looks to the suggestions to guide its further intensive research on the subject matter.

End.

14. ANNEXURE A: STATISTICS

NAMIBIAN POLICE STATISTICS ON GBV AND IPHK TABLE PER REGION

JANUARY 2013 TO 17 FEBRUARY 2014

Perpetrator		Victim		Relationship	Crime		
Age	Sex	Age	Sex		Location	Date	Type
NL	M	28	F	BG	Omusati	13/02/14	Chopping with axe
57	F	51	M	BG	Hardap	01/02/14	Stabbing
24	M	24	F	L	Oshana	04/02/14	Beheading
24	M	41	F	BG	//Karas	06/02/14	Stoning
28	M	30	F	BG	Omusati	31/01/14	Stabbing
27	F	31	M	BG	Omaheke	21/01/14	Stabbing
30	M	31	F	NL	Oshikoto	13/01/14	Assault with stick
NL	NL	22	F	Ex-BG	//Karas	31/12/13	Shooting (of victim) & suicide (of perpetrator)
40	M	51	F	NL	Kavango	01/01/14	Stabbing
35	M	24	F	NL	//Karas	05/01/14	Shooting (of victim) & suicide (of perpetrator)
20	M	18	F	NL	Kavango	19/01/14	Murder with unknown object
NL	NL	NL	F	NL	Ohangwena	29/12/13	Shooting (of victim) & suicide (of perpetrator)
44	F	37	M	NL	Hardap	29/12/13	Stabbing
NL	NL	23	F	BG	Omusati	29/12/13	Strangling with shoe lace (of victim) & suicide-shooting (of perpetrator)
25	M	18	F	BG	Omusati	30/11/13	Chopping with panga
NL	NL	38	F	NL	Omusati	16/11/13	Cutting with panga (of victim) & suicide-hanging (of perpetrator)

25	M	20	F	Ex-BG & CH	Ohangwena	14/11/13	Stabbing
NL	NL	30	F	BG	Omusati	19/09/13	Shooting (of victim) & suicide-shooting (of perpetrator)
30	M	25	F	Ex-BG	Khomas	11/09/13	Cutting of throat
29 42	M F	34	M	MM -1 of suspects & victim, L - suspects	Omaheke	24/08/13	Stabbing
38	M	34	F	NL	Kavango	28/08/13	Stabbing
39	M	27	F	NL	Otjozondjupa	31/07/13	Stabbing
28	F	28	M	BG	Hardap	02/06/13	Stabbing
64	M	64	F	NL	Kavango	22/04/13	Assault with unknown object
29	M	33	F	NL	Omusati	15/03/13	Strangling
36	M	31	F	BG	Erongo	18/03/13	Stabbing
26	M	21	F	NL	Omaheke	11/03/13	Stabbing
25	M	22	F	Ex-BG	Otjozondjupa	02/03/13	Stabbing
31	M	34	F	BG	Omusati	21/02/13	Hitting & Kicking
19	M	19	F	NL	Kavango	15/02/13	Beheading with axe
25	M	28	F	NL	Ohangwena	21/02/13	Stabbing
21	F	25	M	NL	Karas	03/02/13	Set room on fire
25	M	26	F	NL	Kavango	26/01/13	Axing
29	M	26	F	NL	Omaheke	30/01/13	Stabbing
23	M	19	F	NL	Kavango	19/01/13	Strangling
21	M	40	F	NL	Ohangwena	05/01/13	Stabbing

KEY:

NL = not listed

M = male

F = female

CH = had a child together

BG = boyfriend/girlfriend

LT = lived together

MM = married

L = lovers

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CRIMINAL STATISTICS AS PROVIDED BY THE OFFICE OF THE PROSECUTOR- GENERAL

2007-2014

Place	Assault	Assault GBH	Assault by threat	Domestic violence	Violation of protection order	Violation of formal warning	Crimen iniuria	Murder	Attempted murder	Rape	Withdrawn cases
Aranos	2	2	8			2	6				
Gochas	10	2	12				9				3
Omaheke Region: Gobabis, Leonardville, Epukiro, Witvlei, Otjinene and Du Plessis Police Stations	41	52	5		4			2	1	1	17
Kalkrand	10	2	12				9	1			4
Keetmanshoop	7	20	12		6		2				14
Maltahohe	9	2	11			2	8				
Mariental	16	44	5	33				5			3
Otjiwarongo	7	26	12				2	3	3	32	8
Stampriet	7	4	7			1	6				4
Windhoek (D Court, Mag Court)	1	11	12					1	1	12	9
TOTALS	110	165	96	33	19	5	42	12	5	45	62

In the **Omaheke Region, Gobabis District**, of all the murder, assault, assault with intent to do grievous bodily harm and violation of protection order cases reported, 56 of them were perpetrated by boyfriends against their girlfriends, 17 by girlfriends against their boyfriends, 23 by husbands against their wives, 1 involved a brother and sister while one case of assault was reported by a child against their parent. From the statistics, only the males (boyfriends and husband) violated protection orders taken out against them.

In **Keetmasnhoop**, 6 protection orders were taken out by wives against their husbands. Of the assault (GBH and by threat) cases, 4 of them were instituted by a mother against their son while two were in a mother daughter relationship. 25 of the assault cases (common, GBH and by threat) involved those in boyfriend girlfriend relationships.

Of all the rape cases reported in **Otjiwarongo**, none of them were committed by strangers. The perpetrators range from uncles, ex-boyfriends, boyfriends, half- brothers, family friends and neighbours, family acquaintances, nephews, cousins, the mothers' boyfriends, biological fathers, a grandfather and other family members as well as one involving a pastor.

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15. ANNEXURE B: MEASURES PROPOSED BY THE SPECIAL CABINET MEETING

Address to the Nation by His Excellency Dr Hifikepunye Pohamba, President of the Republic Of Namibia, on the introduction of measures to address Gender-Based Violence in the Country – 21 February 2014.

The special Cabinet Meeting resolved as follows:

1. The Criminal Procedure Act of 1977 should be amended, in order to tighten the requirements for bail in cases of gender-based violence.
2. The Correctional Service Act, of 2012, should be amended, in order to deny parole, to persons who are accused and convicted of gender-based violence.
3. The Ministry of Justice is directed to introduce legislation aimed at imposing longer prison sentences to persons who are convicted and sentenced of gender-based violence offences.
4. The Ministry of Education is directed to ensure that the curricula of schools and other institutions of learning should include aspects of educating the youth, about the need to avoid, prevent and discourage gender-based violence.
5. A Campaign, against gender-based violence, be initiated involving Government leaders, members of Parliament, religious leaders, traditional leaders, community leaders, civic organizations, Regional Councils, Local Authority Councils and the business community.
6. A suitable date and time be identified, during which all persons in Namibia, will be required to observe a minute of silence, in honour of all women and girls, who are the victims of gender based violence, and that all bells in the country should ring concurrently.
7. To fast track, the investigation and trial, of gender-based violence cases.

8. To provide mandatory counselling, to all persons who have committed gender-based violence as well as offer counselling to the victims of gender-based violence and their families.
9. That a second national Conference on Gender-Based Violence, should be convened as soon as possible, and that the Office of the Prime Minister coordinates preparations of such Conference.
10. A national day of prayers, should be declared on Thursday, 6 March 2014, starting at 10h00, and that political leaders, students, civil servants, workers, youth, peasants, traditional leaders, religious leaders, business leaders, civic organizations, community leaders and all Namibians from all parts of our country, and from all walks of life, be mobilized, to participate in the planned event, and that, I deliver a message to the nation, on that occasion, in my capacity, as Head of State and Government.
11. Government and other public leaders should speak out against gender- based violence, whenever they address meetings and other public gatherings.
12. A witness protection programme, should be introduced, by the Ministry of Justice, to protect witnesses, who testify against accused persons, in cases of gender-based violence.
13. That effective measures, be adopted by Government, in order to address alcohol and drug abuse, in the country.

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16. ANNEXURE C: RESPONSES FROM STAKEHOLDERS/COMMUNITY

16.1. LEGAL/ SECURITY BASED RESPONSES

Ad the Criminal Procedure Act, 1977 (Act No. 51 of 1977)

- 16.1.1 A similar provision as section 24 of the Combating of Domestic Violence Act of 2003 should be incorporated into the CPA to enable the victims and their families to be consulted when bail is granted in cases of GBV.
- 16.1.2. Domestic violence offences should be listed as Schedule 1 and Schedule 2 Offences in the CPA.⁷¹
- 16.1.3. Section 60 of the CPA should be amended to state that bail should be refused where an accused has been accused of an offence relating to GBV, especially:
- 16. 1.4. The offence of contravening section 2 of the Combating of Rape Act, 2000⁷² (No. 8 of 2000)
- 16.1.5. Violating a protection order granted in terms of the Combating of Domestic Violence Act of 2003
- 16.1.6 . Murder, where such murder is a result of GBV
- 16.1.7. Amend section 62(2) and section 63 to the effect that the victim under a domestic violence order in terms of the Combating of Domestic Violence Act of 2003, as well as the victims' family where murder emanates from GBV, should consent to or refuse the granting of bail.

⁷¹ Not all GBV offences fall under offences in terms of the Combating of Domestic Violence Act of 2003, therefore, the Combating of Domestic Violence Act must either be amended to include both GBV or the GBV offences should specifically be included in the CPA.

⁷² Combating of Rape Act, 2000 (Act No. 8 of 2000).

- 16.1.8. The common law offence of murder should be codified , incorporating degrees of murder as is the position currently in the United States of America
- 16.1.9. The number of years that an accused person has spent in custody pending trial should be considered at sentencing.
- 16.1.10. Once a case involving physical assault is reported and case number issued, it should become a State case to prevent its withdrawal.
- 16.1.11. There should be no bail given for murderers
- 16.1.12. Punishment given for murderers is too lenient which means no deterrence. Rather have life imprisonment without the option of parole.
- 16.1.13. Future changes to Namibia’s bail law should ideally provide a more specific list of factors which courts should consider in deciding whether to grant bail and under what conditions.
- 16.1.14. Hold speedier trials in cases of serious offences. This could improve conviction rates, give quicker closure to crime victims and their families, and reduce the period in which bail is a concern.
- 16.1.15. GBV offenders should be penalised to the fullest extent of the law – but within the parameters of our Constitution.

Ad the Correctional Service Act, 2012 (to deny parole)

- 16.1.16. GBV offences should be included in Schedule 3 of the Act of 2012 To avoid recidivism; the NCS uses rehabilitation programmes for offenders. However, the effectiveness of such programmes is only tested through the system of parole. Hence, is an important tool which the NCS has and can use in implementing its mandate of rehabilitating and integrating offenders as law-abiding citizens.

Therefore, with the implementation of the release procedures being put in place in terms of the new Correctional Services Act⁷³, there is no need to change the law at this time.

Based on the decision of *S v Tcoeib*, if a law is enacted on the total ban of life imprisonment without the option of parole in GBV offences, we might expect legal challenges.

Ad the Combating of Domestic Violence Act, 2003

- 16.1.17. Incorporate sections similar to the Zambian Anti-Gender Violence Act, 2011 (Act No. 1 of 2011) into Namibia's Combating of Domestic Violence Act. The important sections from the Zambian Act are section 9, section 11(2) (4), section 24, section 29, section 30, section 31 and section 32.
- 16.1.18. Include a whistle-blower and witnesses protection clause in the Act
- 16.1.19. Stalking should be listed in the First Schedule of Offences in the Act.
- 16.1.20. Compulsory counseling session for persons charged with assault by threat should be done as from arrest
- 16.1.21. Introduce specialized Court on GBV cases
- 16.1.22. Amend the Act to authorize station commanders at places where there are no resident Magistrates to issue emergency barring /protection orders.
- 16.1.23. Section 27 of the Act which requires the Police to keep records and statistics of domestic violence as well as section 28 which require

⁷³ The Correctional Services Act (Act No. 9 of 2012) only came into force in 2012 and has made provision on how to deal with perpetrators of GBV. Thus, the two years within which it has been operational is not sufficient time enough to judge whether or not what is currently in place is working.

the Minister of Safety and Security to compile and table a report on those statistics in parliament are underused.

- 16.1.24. Section 25 of the Act is under-utilized by our Courts. It allows a complainant or the deceased's next of kin to appear in court and make submissions in respect of sentencing.

16.2. Ad Imposing longer prison sentences

- 16.2.1. Sections 3(1)(a)(i), (ii) and (iii)(ff) of the Combating of Rape Act of 2003 should be amended to increase the periods of imprisonment to 15⁷⁴, 25⁷⁵ and 50⁷⁶ years respectively.
- 16.2.2. Section 3(1)(b)(i), (ii) and (iii) should be amended to reflect life sentences⁷⁷ with the possibility of parole after serving 50 years.

16.3. Ad General Law Amendment Ordinance⁷⁸

- 16.3.1. Amend the Ordinance to prohibit the possession of all forms of weapons in public places

16.4. Ad Maintenance Act

- 16.4.1 . Strictly enforce provisions in Act

16.5. Ad Police Stations

- 16.5.1. Persons who report assault cases should be given detailed information about protection orders

⁷⁴ Section 3(1)(a)(i) which currently says the period of imprisonment should not be less than 5 years.

⁷⁵ Section 3(1)(a)(ii) which currently says the period of imprisonment should not be less than 10 years.

⁷⁶ Section 3(1)(a)(iii)(ff) which currently says the period of imprisonment should not be less than 15 years.

⁷⁷ The case of *Schick* 1954 (US on the constitutionality of life sentences and *Graham v Florida* (US) regarding life sentences for juveniles should be considered.

⁷⁸ Ordinance No. 1 of 1956.

- 16.5.2. Persons issuing threats of assault should have no option of paying a fine, they should go through formal court process and confiscate any weapons in their possession.
- 16.5.3. A copy of a protection orders issued by Court should be given to the Police stations in the area of the complainant and have victims placed on a special database in order for complaints received by them to receive special attention.
- 16.5.4. Offenders should report themselves to the police station twice a week so that the Police can keep reinforcing the provisions of the protection order, and for them to easily monitor compliance with such order.

Ad Others

- 16.6. Enact new divorce law to broaden the grounds of divorce and allow Magistrates to annul marriages. This will prevent married women being forced to stay in abusive relationships because they cannot handle the high legal costs of divorce
- 16.7. Persons convicted of domestic violence should automatically be disqualified from obtaining a gun license
- 16.8. Train and retain clerks of the court properly so as to prevent them from turning back victims of GBV on the basis that it was merely a threat and not physical.
- 16.9. Allow victims of GBV to be granted a hearing in cases where they seek an eviction order even though it's a non-violent crime
- 16.10. Reform the liquor laws vis-à-vis the trading hours of shebeens and limiting the number of liquor licences issued in certain areas.
- 16.11. Establish facilities and put infrastructure into place at community level to enable community and traditional courts to deal with GBV

- 16.12. Introduce Justices of the Peace⁷⁹
- 16.13. Declare corporal punishment as illegal
- 16.14. Introduce a nationwide campaign to educate parents about non-violent disciplinary methods
- 16.15. Consider mandatory parenting classes for expectant mothers and their partners (these could be implemented by the Ministry of Gender Equality and Child Welfare as well as by the Ministry of Health and Social Services' antenatal clinics).
- 16.16. Conduct nationwide family workshops to educate parents, guardians and caretakers on the importance of parenting, with emphasis on developing the emotional intelligence in children and parents, prevalent norms, beliefs and practices across cultures in Namibia when it comes to child rearing.
- 16.17. Undertake in-depth research on the underlying values and beliefs of our Namibian family systems as well as the risk factors involved in GBV.
- 16.18. Mental health practitioners and church leaders should organize workshops and or information sharing sessions on parenting and child rearing.
- 16.19. Include GBV sensitization material in the school curriculum.
- 16.20. Introduce a national domestic violence helpline - anyone aware of domestic violence can call the helpline and report such violence.
- 16.21. Awareness creation campaigns.
- 16.22. The values of non-violence, tolerance and respect need to be an integral part of the pre-primary curriculum.
- 16.23. Identify bullies in school and deal with them accordingly
- 16.24. Comprehensive sex education should be presented to students in the context of healthy relationships and intimacy.

⁷⁹ This is a paralegal honour bestowed on prominent law abiding citizens in each community who can act as role models and play the role of a social worker, counsellor, mentor or primary adjudicator for early and low level disputes.

- 16.25. Develop a thorough ongoing rehabilitation programme in all Namibian prisons
- 16.26. The Ministry of Safety and Security should invest in the training and sensitization of police officers especially those working at Women and Child Protection Unit.
- 16.27. Re-open the state rehabilitation (alcohol and drugs) facility and invest in funding other rehabilitation centers around the country.
- 16.28. Create/ introduce more recreational activities for the youth across the country
- 16.29. Information on mental health should be widely distributed through all media through the Ministry of Information Technology
- 16.30. The Ministry of Health and Social Services should upgrade facilities pertaining to mental health
- 16.31. The newly established committee to address mental health needs of the veteran population by the Ministry of Veteran Affairs should receive the necessary support to move forward with its aims.
- 16.32. A decent unemployment benefit scheme should be urgently considered to counter the socio-economic routes of violence.
- 16.33. Implement the Gender Studies Programme through the Centre of Open and Life Long Learning (COLL) at the Polytechnic of Namibia in order to initiate research on gender based violence.
- 16.34. COLL can develop video clips and radio programs/tutorials on GBV as part of the coursework development. The videos can be played to students, at regional centers, posted on the website and on facebook.