Denying Parole for GBV Offenders

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This is the second in a series of articles by the Legal Assistance Centre commenting on legal points in the recent Cabinet plan for combating 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."

It is beyond argument that the level of violent crime in Namibia, and in particular gender-based violence (GBV), has reached alarming proportions. It affects us all, and poses a threat to democracy and development, which are primary goals of the Constitution. Nevertheless denying parole to GBV offenders as a class would quite likely violate the Namibian Constitution.

What is the current law on parole? The Correctional Service Act 9 of 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: (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 (c) the release of the offender will contribute to his or her reintegration into society as a law-abiding citizen. There are normally conditions to the release on parole, and failure to obey them can result in the withdrawal of the parole.

There are special rules about parole for a group of specific offences, including murder, rape and assault resulting in a dangerous wound. In such cases, 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 imprisonment.

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.

In 1999, the Namibian Supreme Court considered whether a sentence of life imprisonment constituted cruel, inhuman or degrading treatment or punishment - which is prohibited by the Namibian Constitution (Art 8). The Court held that such a sentence could not be justified if it locked the gates of the prison permanently, but was permissible if release on parole was possible in appropriate circumstances. The Court found that a prisoner's Constitutional right to dignity must include belief in, and hope for, an acceptable future. Thus, a sentence of life imprisonment without the possibility of parole would be unconstitutional.

This case considered the value of parole as being in the "hope of release" provided by the statutory mechanisms, which depend in part on the efforts of the sentenced offender. A

prisoner hoping for parole can "by his own responses to the rehabilitatory efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realisation of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation".[1]

Parole has been found in other jurisdictions to be a privilege and not a right.[2] The only clear right at stake is an administrative one: where the law provides the option of parole, each prisoner's case must receive fair consideration by the relevant authorities. As the Namibian Supreme Court said in the life imprisonment case, no matter how dastardly the crime committed, every prisoner "is entitled to be treated lawfully and fairly", and the officials entrusted with decisions on parole must "act fairly and reasonably", applying their minds to the merits of each case.

To remove the possibility of parole from some classes of offenders and not others might violate the Constitutional promise that all persons are equal under the law. It is clearly justifiable to make distinctions on the rules regarding parole based on the seriousness of the crime in question, as our law already does. However, it is an open question as to whether or not a complete denial of parole based on the category of crime victim involved would pass constitutional muster - depending on whether a court found the categorisations in question to be rationally related to a legitimate government purpose.

However, allowing for the possibility of parole is arguably good policy. For example, in a 2001 High Court case in South Africa, the Court stated: "Parole is a privilege. However, it is an integral and important part of penal policy. Where a prisoner has demonstrated during his/her incarceration that he/she has been rehabilitated, that he/she is unlikely to be a danger to society and that there is full awareness of and a contrition for the crime or crimes committed, a parole board may recommend that prisoners be released on conditions. This is contemplated by the legislation and it is eminently appropriate in a country such as ours which espouses the values set forth in the Bill of Rights. The prospect of parole even in the distant future provides prisoners with this incentive to demonstrate their commitment to rehabilitation and reform which I believe is an important element of punishment."[3]

In any event, legislating on the possibility of parole many years in the future would probably not have any deterrent effect, even for the rare criminal who might give logical thought to the future consequences of his or her actions. The current law on parole seems reasonably strict. Further limits on parole might help to satisfy society's need to feel that proper punishment has been applied to convicted offenders, but would probably not be very helpful in stemming the horrifying tide of gender-based violence.

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[1] *S v Tcoeib* 1999 NR 24 (SC).

[2] See, for example, *Combrink and Another V Minister of Correctional Services and Another* 2001 (3) SA 338 (D) and *Greenholtz v Inmates of the Nebraska Penal and Correctional Complex et al* 442 US 1 (1979): "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."

[3] Id.