



ZAMBIA: Contribution from the World Organisation Against Torture (OMCT) to the Universal Periodic Review (UPR) Process

OMCT wishes to draw the attention to the serious situation as regards torture and other cruel, inhuman or degrading treatment or punishment in Zambia, with a specific focus on the following issues:

1. The Human Rights Commission

The Human Rights Commission was established following a recommendation by the Munyama Human Rights Commission of Inquiry, appointed in 1993 to investigate the human rights situation in the Second Republic after 31st October 1991.

OMCT acknowledges the fact that the Human Rights Commission has powers to investigate on Human Rights violations either on its own initiative or on receipt of a complaint or allegation by (i) an aggrieved person acting in such person's own interest, (ii) an association acting in the interest of its members, (iii) a person acting on behalf of an aggrieved person, or (iv) a person acting on behalf of and in the interest of a group or a class of persons.

However, the Commission, which is not in a position to take any further action once the recommendations are issued, especially in the case where a recommendation issued is not implemented by the "appropriate authority". Additionally, the Commission is not competent to initiate legal proceedings on behalf of the complainants. The dependence by the Human Rights Commission on other authorities to take action does not give assurance to the complainant for redress. This procedure also unduly prolongs the possible proceedings.

Another weakness of the Human Rights Commission is its lack of independence, as the Commissioners are appointed by the President, who has the power to decide upon the composition of the Commission. It is important to note that the President has power to relieve any of the Commissioners of their duties if they grossly misconduct themselves. Currently, none of the Commissioners has been dismissed on these or any other grounds. However, the weakness of the Human Rights Commission is not so much in the security of tenure of the Commissioners but in the powers given to the Commission in the executions of its mandate. Much as the power to visit detention facilities and investigate cases of human rights violations, the Commission does not have the power to take any act against persons found guilty as it can only make recommendations to the relevant authorities on what actions should be taken in relation to the findings of the Commission. These recommendations can either be adopted or ignored by government authorities.

Additionally, the budget of the Commission, which is adopted by the Parliament, remains extremely low and does not cover the basic expenses of the Commissioners¹. The Commission is not allowed to receive grants or any other financial support from international institutions or other donations from any source, unless they have been expressly approved by the President. This may also undermine appropriate funding and result in an unnecessary administrative burden.

2. Non-discrimination and equality of men and women

The application of customary law and English law gives rise to difficulties. The rule is that in case of conflict between customary law and statutory law, the latter prevails (Article 23[4][c] of the Constitution). Given the fact that most marriages are contracted under customary law, the Constitutional exception provided for in Article 23[4] [c] excluding the gender equality principle in

¹ See « The Human Rights Commission Act », Section 22

matters such as “adoption, marriage, divorce, burial, devolution of property on death” is of particular importance. Moreover, the Local Court Act, Chapter 29 calls upon Local Courts not to administer matters in a way that is repugnant to natural justice. Therefore, to protect women’s rights in the family, Article 23[4][c] of the Constitution must be removed or amended and local court justices must be sensitized to gender equality matters.

In addition, provisions of statutory law must be revised as well since they maintain discriminatory practices. Whereas customary law continues to deny the existence of forced sex within and out of marriage, statutory law also falls short of expressly prohibiting forced sex within marriage. Indeed, according to the Penal Code section 132, forced sex or rape is defined as any unlawful carnal knowledge of a woman.

Discriminatory practices related to marriage and family are still widespread. Since they create an hostile atmosphere against women, it is worth rapidly mentioning some of them such as early marriages, malobolo (lobola or bride price), polygamy, discriminatory rules for transmission of nationality, rules of succession and restriction in the freedom of movement. Other persisting discriminatory practices are directly harmful, such as the custom of ritual purification following the death of a spouse, also called “sexual cleansing”².

3. Prohibition of torture and other ill treatment

Part III of the Constitution of Zambia provides that no one shall be subjected to torture or any inhuman or degrading punishment or other like treatment. This provision however does not define the term torture neither does it provide for an act of torture as a crime. It is important to note that there is no other provision in the laws of Zambia that provides for torture as a crime in Zambia. This in itself has perpetuated acts of torture.

To this effect officers implicated in acts of torture are charged with the offence of causing grievous bodily harm and not torture. Such officers are charged in accordance with sections of the Penal Code.³

One of the characteristics of these cases is the impunity of the perpetrators. Indeed, in spite of the numerous complaints of inmates, few cases have been brought to the courts to date. Furthermore, the State established the Police Public Complaints Authority (PPCA). The Act establishing this institution has been given to the authority to direct prosecution or dismissal of those officers found guilty of violation of human rights (torture inclusive). It is important to note that since 2005, officers found guilty by the PPCA have been dismissed or discharged of their duties on recommendation by the PPCA. However, none of the perpetrators of torture has been prosecuted.

Criminal legislation on gender-specific forms of torture

In Zambia, torture or ill-treatment by State agents against women tend to be characterized by sexual violence as well as by degrading treatment, such as being forced to parade naked in front of groups of male law enforcement officials. The perpetrators of this violence have largely gone unpunished and the victims have not been granted compensation for the injuries they suffered. Women victims of torture involving rape or other forms of sexual violence are very unlikely to report the full extent of the torture they have suffered due to shame and fear, even more since the police is the perpetrator and,

² The practice consists in the surviving partner having sexual intercourse with a relation of the deceased in order to appease the spirit of the deceased husband. The documented cases demonstrate that this ritual is more often practiced by widowers’ families than by those of widows.

³ See Criminal Code : **section 229** - which provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for seven years, **section 232** - which provides that any person who unlawfully wounds another or unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person, is guilty of a felony and is liable to imprisonment for three years, **section 247** - which provides that any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year, **section 248** - which provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

at the same time, the authorities which is supposed, to report on these facts. Another obstacle is the victims' lack of awareness of their own rights.

Rape and other forms of sexual violence

Sections 133 and 134 of Chapter 87 ("Offences against morality") of the Zambian Penal Code provide for a sentence of life imprisonment for persons found guilty of rape or attempted rape. Rape is defined in Section 132 of the Code as "...unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband". Crimes of rape are considered to be one of the causes of the increasing spread of contagious diseases, such as the HIV/AIDS virus. Nevertheless, the Penal Code does not provide for cases in which the rapist is a carrier of a sexually transmitted disease. Abduction and indecent assaults are also criminalized under Sections 135-137 of the Penal Code and these crimes are punishable by prison sentences ranging from seven to fourteen years. The Penal Code also contains the crime of "defilement" which is committed by "any person who unlawfully and carnally knows any girl under the age of sixteen years" and is punishable by life imprisonment.

In 2006, the VSU at the Lusaka Police Division registered 124 cases of rape, 6 cases of attempted rape and 34 cases of indecent assaults on females. Additional complaints were filed in 2006 on cases that occurred in 2005: 58 cases of rape, 8 attempts of rape and 15 indecent assaults. Out of these reports, 72 resulted in arrests, 54 were brought to court and 87 are being investigated. The Young Women's Christian Association (YWCA) reported in November 2006 that its shelter in Lusaka received, every week, 8 girls and 10 adult women who were raped⁴.

Domestic violence

The Government of Zambia has not yet introduced specific legislation on domestic violence. No provisions for prohibiting or punishing such practices are contained within the Marriage Act. Perpetrators of domestic violence can only be sued in instances of violence resulting in bodily harm, that is invoking the Zambian Penal Code (Section 248 of Chapter 24, "Assaults"). This excludes instances when women are victims of psychological violence or marital rape. Clear prohibition of incest and early marriage are also lacking⁵.

Many women in Zambia are subjected to violence by members of their husband's family and this violence is often exacerbated by the practice of malobolo, since the family has the impression it purchased the bride and is allowed to subject her to violence and other forms of ill treatment. Wife battering is also widespread. The persistence of early marriages, combined with malobolo, places young girls in an extremely vulnerable position⁶. In this regard, the Government through the VSU has been carrying out advocacy tours, especially in rural areas, sensitising people against all forms of violence related to dowry-bride price especially in cases involving young girls. However much remains to be done in this area, and enacting new legislation would be the first step.

Corporal punishment against children

The right of parents, teachers and other persons in charge of juveniles to administer lawful punishment is recognised by the law⁷. This legislation seriously endangers the protection of children against any form of ill treatment or punishment.

In practice, corporal punishment and other forms of humiliating and degrading punishment are widely practised against children, in Zambia as a means of discipline and education. Beatings with the hand and items as well as humiliating treatment occur regularly at home and in schools. It seems to be more limited in child care institutions.

⁴ See IRIN, *Zambia: More than 10 girls raped every week*, Johannesburg, 27 November 2006. See appendix.

⁵ For further details on how cases are dealt with by Zambian authorities see section 3 (Right to an Effective Remedy, Article 2§3).

⁶ A clear criminal provision that prohibits marriage under a certain age, even with parental consent, is still lacking.

⁷ Section 46.7 of the Juvenile Act.

In 1999 the Supreme Court of Zambia ruled that corporal punishment, as a sentence, was in direct conflict with Article 15 of the Zambian Constitution⁸, meaning that corporal punishment as a sentence imposed by a court is unconstitutional. As a consequence of this decision, several provisions on corporal punishment were repealed, especially by the Penal Code Amendment Act 1 (2003) and the Prisons Amendment Act (2004), so as to be in accordance with the case law. However, some provisions still need to be repealed, such as section 73(1)e of the Juveniles Act which provides that a court may order that the offender be caned.

An appropriate interpretation of the law should apply the Banda case law. OMCT considers that this decision should not be interpreted strictly and should mean that corporal punishment of any kind and for any purpose is prohibited in the domestic law. However, this open interpretation is not unanimous and corporal punishment remains permitted as a form of discipline. Therefore, a clear overall prohibition (accompanied with penalties) of corporal punishment in the legislation is necessary.

Child labour and exploitation

Some sectors are especially concerned by child labour, such as prostitution and sexual exploitation. The Penal Code prohibits sexual exploitation of young women, including girls.⁹

There is a large and increasing number of child victims of commercial exploitation, including prostitution and pornography, especially among girls, child orphans and disadvantaged children. According to information received by relevant authorities, Zambia is a country of origin, destination and transit for trafficking in persons.

4. Treatment of persons deprived of their liberty

Situation in prisons

In Zambia, the prison population has increased from 3,000 prisoners in 1964 to 14,427 as of August 2005 with the following breakdown¹⁰:

- 8568 convicted prisoners,
- 4938 remand prisoners,
- 273 condemned prisoners,
- 25 mentally sick,
- 294 prohibited immigrants
- 79 convicted juveniles
- 230 remand juveniles

The prison population has grown immensely without any extension of the infrastructure and capacity of the prisons. The consequence has been endemic overcrowding.

Most of the Zambian prisons were built in the colonial days and are now outdated and need major refurbishment. Nevertheless, it is very difficult to have a clear and comprehensive picture of the current situation in prison facilities as there is a lack of figures and statistics.

Lusaka Central Prison - pre-trial prison:

According to the recent research and interviews carried out by OMCT, the situation in the Lusaka Central Prison is alarming. The regular visits from Lusaka Central Prison undertaken by the OMCT's partner "Prison Fellowship Association" show that there is a population of 1600 inmates for only 320 places available – showing a level of overcrowding of 500 %. The vast majority is in pre-trial detention¹¹.

⁸ This decision is now referred to as the Banda decision. Kassan, D. & Gallinetti J. (2005), Report on the legal status of corporal punishment and other forms of humiliating and degrading punishment of children in South Africa, Swaziland and Zambia, Cape Town, Community Law Centre.

⁹ African Charter Periodic Report 2006.

¹⁰ Human Rights Commission, report on prison and police cells visits, Central province, 2005, introduction to the report, p. iii

¹¹ Information based on interview conducted with representatives of "Prison Fellowship Association", in Lusaka, April 2007.

Currently, each of the 16 cells which has a capacity of 20 places (20m²), is occupied by 100 inmates. They are not allowed to leave their cells from 4.30pm to 8.00am. Each cell has one toilet and there are only 4 showers for all the prison.

The food is provided once a day and is always composed of manioc and beans. With regard to the medical situation, a trained nurse is available within the prison and “Prison Fellowship Association” is providing the basic medication, as the detainees cannot afford it.

5. Administration of juvenile justice, including arrest and deprivation of liberty

In Zambia a person younger than 8 years old is not criminally responsible.¹² A child under 12 is not criminally responsible unless it is proved that at the time of committing the act or making the omission s/he had capacity to know that s/he ought not to do it.¹³ Clearly, there is a need to rise the minimal age of criminal responsibility, which is far too low. Nevertheless, a major problem remains the difficulty in establishing the real age of the child accused.

The reform of the juvenile justice system started in 2000 created the Child Justice Administration System and the Child Justice Forum (CJF)¹⁴ which focus on compliance with international standards, on adequate training and on increasing efficiency and preventing recidivism. However, today, the CJF still fails to properly implement strategies and plans at local level.

It sometimes happens that children are arrested and put in a cell without warrant. Moreover, the right to inform a relative or any other person is regularly violated. A OMCT local partner also reported that arbitrary arrests of street children are carried out, generally for cognisable offences or loitering.

According to recent studies, a majority of children which wait for trial in remand prisons reported that they had been assaulted by the police during arrest and questioning. This included explicit torture for the extraction of information, using handcuffs, pieces of hosepipe to flog the child and a whip¹⁵.

Despite the law provides for separation of juveniles detained in custody in remand prisons from adults, in practice, numerous police stations have no separate cell for children and even when they have one, it is often used for another purpose. Juveniles are then kept together with adults.

Children deprived of their liberty face several problems. Additionally to the harsh living conditions in Zambian prisons, children also suffer from the lack of separation from adults; the absence of juvenile courts and judges; the lack of social workers; the very limited rehabilitation and integration services for juveniles and the limited training of judges, prosecutors and other staff. In practice, detention of children is not used as a measure of last resort: pre-trial detention is excessively common and no alternative to detention, such as rehabilitation measures, is really applied. Moreover, both in the law and in practice, children do not have special guarantees in the right to legal assistance.

¹² Section 14.1 of the Penal Code, Part I, Chapter 87 of the Laws of Zambia.

¹³ Section 14.2 of the Penal Code, Part I, Chapter 87 of the Laws of Zambia.

¹⁴ Helene Lindström and Ida Salomonson, *Juvenile justice in Zambia-An Evaluation of the three pilot projects* (2005), available at

<http://www.mrforum.se/upload/files/1/Utbildning%20och%20forskning/Barns%20r%20Zambia.pdf> (avril 2007) at 2.

¹⁵ Lukas Muntingh, Evaluation Report on Zambia Child Justice System, Government of the Republic of Zambia, 2005, at 21.

Recommendations

In view of these elements, OMCT recommends that the Government of Zambia to:

1. Ensure that the **Human Rights Commission** is established in full conformity with the Principles related to the status of national institutions for the promotion and protection of human rights (Paris Principles) annexed to General Assembly resolution 48/134. To that end, the State party should:
 - reinforce the independence of the Commissioners, especially with regard to the appointment process
 - ensure that the recommendations adopted by the Human Rights Commission are fully and promptly implemented
 - allow the Human Rights Commission to receive funds to carry out its activities.
2. Domesticate all international instruments it has ratified that promote the **equal rights of women and men**, as well as those promoting affirmative action measures, especially the Convention on the Elimination Against All Forms of Discrimination against Women, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. In this regard, repealing article 23[4] [c] of the Constitution is of utmost importance
3. Amend its legislation to ensure that **torture and cruel, inhuman or degrading treatment or punishment** are criminalized in accordance with the UNCAT.
4. Enact **gender-based violence legislation**. Due to the increase in gender-based violence and continuance of retrogressive practices like early marriages, forced marriages, psychological torture of women, sexual harassment, dry sex against a woman's consent, we recommend for the speedy enactment of the Sexual Offences and Gender Violence Bill which addresses these issues in a broader way than the current legislation.
5. Take immediate measures to **eliminate corporal punishment** as a legitimate measure in its law; and take all necessary measures, like awareness raising campaigns towards both children and adults, to discourage its use in all contexts, including in the homes, towards the eventual and effective total abolition of corporal punishment.
6. Take measures to address the very high level of overcrowding and poor physical **conditions prevailing in the prisons** and other detention facilities, as well as the lack of hygiene, adequate food and appropriate medical care. Zambia should consider alternative measures to imprisonment to address the situation in the detention facilities.
7. Ensure that **deprivation of liberty of children** is effectively only used as a measure of last resort (particularly for children in need of care and protection); develop alternative to detention as well as diversion and rehabilitation programmes taking into consideration the vulnerability of children and their particular needs in terms of education and social recovery.
8. Ensure respect for human rights and fundamental freedoms throughout the country in accordance with national laws and international human rights standard.