SURVEY OF DETENTION OVERSIGHT MECHANISMS PROVIDED FOR IN THE LAWS OF SADC COUNTRIES

By

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The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building.

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INTRODUCTION

In 2006 the Optional Protocol to the Convention against Torture (OPCAT) came into force.[2] The fundamental principle underlying OPCAT is that visits to places of detention by independent and impartial authorities is the most effective method to prevent and eradicate torture and other ill treatment of detained persons.[3] To date eight African countries have signed OPCAT and a further ten have ratified it.[4] Of the countries that have ratified, only two (Democratic Republic of the Congo and Mauritius) are SADC members while three SADC countries (Madagascar, South Africa and Zambia) have signed the Protocol.[5] It is only Mauritius that has designated a National Preventive Mechanism (NPM) as required by Article 17 of the Protocol. The overall impression gained is that SADC countries[6] have been slow in signing and ratifying OPCAT compared to their counterparts in West Africa where seven of the 17 ECOWAS countries had already ratified the Protocol.

Given the tardiness of SADC countries to sign and ratify OPCAT, this paper explores existing statutory detention oversight mechanisms in the domestic laws of SADC countries with a particular emphasis on prisons. The notion of individuals or institutions visiting places of detention to inspect conditions of detention and treatment of detained persons is not new and is found even in the antiquated laws of several countries reviewed here. Of more concern are the frequency, quality and impact of these inspections. In many regards the conditions of detention and the treatment of prisoners in SADC countries fall below the accepted international norms, such as the UN Standard Minimum Rules for the Treatment of Prisoners.

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[2] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, Entered into force on 22 June 2006.

[3] See e.g. *Optional Protocol to the UN Convention against Torture: Implementation Manual (revised edition)* (2010) Geneva: Association for the Prevention of Torture and the Inter-American Institute for Human Rights, 16-20, http://www.apt.ch/ Accessed 7 April 2011.

[4] Association for the Prevention of Torture (2011) Global Status of ratifications, signatures and NPM designations Optional Protocol to the UN Convention against Torture as of March 2011, http://www.apt.ch/npm/OPCAT0311.pdf Accessed 5 April 2011.

[5] Ibid.

[6] Currently SADC has 15 Member States, namely; Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

There is thus a real and justified need for expanded and intensified monitoring of places of detention in the SADC region and existing inspection mechanisms provided for in law can contribute to this.

A substantial limitation to this review is the availability and accessibility of the domestic legislation of a number of SADC countries, such as Madagascar and Angola. Assessing the impact of existing visiting mechanisms presented even more challenges due to the lack of available and accessible information.

ANGOLA

In mid-2008 the Angolan government passed Law No. 8/08, dated 29 August 2008 (Prison Act), which replaced the 1936 prison law inherited from Portugal. Despite the reference details, it was not possible to access the document.

Questions remain as to whether the new prison law brought some new developments in the area of prison oversight mechanisms. However, available data indicates that as at 1978 the administration and management of prisons in the country was entrusted to the Internal Affairs State Secretary and later in 1982 to the *Direcção Nacional dos Serviços Prisonais* or National Prison Service.[7]

Importantly, the Office of the Attorney General is charged with the mandate to ensure the preservation of democratic legality. The Attorney General and the officials working under his office can explore this mandate to exercise prison oversight functions.[8] Similarly, Parliament can also play an important oversight role although it is not specifically provided for. Parliament's function as prison oversight mechanisms is legitimated by virtue of the fact that Parliament has an oversight mandate in respect of the executive branch of government.

[7] Law No. 12/78 dated 26 may 1978 transferred the management of prisons from the Justice Ministry to the internal Affairs Sate Secretary. See also Law No. 54/82 of 1982.
[8] Articles 185 and 186 of the Constitution of Angola of 2010.

BOTSWANA

The Botswana Prisons Act (28 of 1979; Ch 21:03 of the Laws of Botswana) created two mechanisms of oversight, namely the Prison Visiting Committee (PVC) and Official Visitors.[9] A PVC is appointed for each prison by the Minister of Defence, Justice and Security.[10] The PVC is granted access to prisons, may conduct interviews with prisoners and monitor whether basic needs are met. The PVC is appointed to visit each prison at least once every three months[11] and submits its reports to the Commissioner of Prisons. The PVC's mandate includes the ability to enquire into any complaint or request made by a prisoner and thereafter to consult the officer in charge in respect of any such complaint. Ditshwanelo reports that quarterly visits are mostly carried out when due. However, reports, findings and recommendations are not made public and there exists no duty to make such records public. This makes independent monitoring of the implementation of recommendations problematic.

In addition to the PVC, Official Visitors - being judges, magistrates or any other person appointed by the Minister for this purpose, are mandated to access all records, all parts of prisons and prisoners, to inspect food, basic conditions and to enquire into complaints made by prisoners. A record hereof is kept by the officer in charge and submitted to the Minister. Again, there is no duty to publish records or recommendations made.

The Ombudsman, whose office falls under the Ministry of the State President, is mandated to investigate complaints against government agencies, officials or statutory corporations. Complaints normally include abuse of power, maladministration, corruption, and human rights violations. The powers of the Ombudsman are limited, insofar as he is prohibited from investigating complaints relating to the security

[9] Sections 131 – 138 of the Prisons Act

[10] The Botswana Prison Service (BPS) was under the Ministry of Labour and Home Affairs until 2009. In this year, the BPS was moved to the Ministry of Defence, Justice and Security, following a government restructuring process of placing related institutions under the same roof. While official government websites do not yet reflect this change, the International Centre for Prison Studies has included this change in their latest World Prison Brief which is updated monthly using date from reputable sources. See http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=4 [accessed 6 April 2011]

[11] Prisons Act section 135

of the state and the investigation of crimes. While it is possible for a prisoner to lay a complaint with this office, in practice public awareness and utilisation of the Ombudsman is poor.[12]

The strength of these oversight mechanisms lies in the fact that the legal framework exists for external monitoring to be carried out. The legal framework is inadequate insofar as the Commissioner is able to refuse entry to external visitors and that the public has no means of obtaining insight into reports and recommendations made by prison visitors. A further limitation is that the PVC members are appointed by the Minister of Defence, Justice and Security, thus raising questions about their independence and impartiality. Another weakness lies in the practical implementation of the provisions of the legal framework. There seem to be no clear guidelines or strategies supportive of the oversight mechanisms created by law. Reports indicate that recommendations are not always adhered to, since prison conditions are generally below international standards and prisoners are often subjected to ill treatment.[13]

DEMOCRATIC REPUBLIC OF THE CONGO

The legislation governing the prison and detention sector in the Democratic Republic of the Congo (DRC) dates back to 1965. New legislation in this regard is being drafted, but at the time of writing no new laws had been adopted. The 1965 Prison Decree (*Ordonnance n° 344 du 17 septembre 1965 relatif au régime pénitentiaire*') provides a mechanism of oversight in Part III, which deals with the inspection of prisons and places of detention (houses of arrest). Part III provides that the territorial inspector (Art. 24), the provincial governor (Art. 25), the mayor (Art. 26), the doctor appointed to be in charge of public health (Art. 27) and the public prosecutor (Art. 28) are all permitted to visit the prisons, holding cells and 'detention camps' within their area of responsibility at least once a month.

[12] African Commission of Human and Peoples Rights (2005) Mission report to the Republic of Botswana
[13] Ditshwanelo (1998) Torture in Botswana: An exploration of forms and effects; Reuben Pitse, 23 November 2009, *Botswana prisoners treated Guantanamo style – Testimony*, Botswana Press Association

While these provisions on inspection do not generally specify the purpose or method, it does specify the roles of the doctor and prosecutor. The doctor is required to monitor in particular whether prisoners receive sufficient nutrition and if their conditions of detention meet hygiene standards. The prosecutor has the obligation to monitor the register of detainees to verify the lawfulness of their arrest and detention and whether they had been brought before a judge in due time. In practice these visits are generally limited to monitoring the lawfulness of the arrest and detention and do not focus on the general treatment and conditions of detention.[14] Judges and magistrates generally do not perform prison visits, unless they take up this responsibility as a replacement for the public prosecutor.[15] The term used in Art. 28 'officer of the public ministry' ('*officier du ministère public*') refers to judges, magistrates and prosecutors, while it is commonly the practice that a prosecutor fulfils this role.

Art. 29 provides that all mentioned visitors have a right to request all information necessary within their mandate and to speak to prisoners in the absence of prison staff. Their findings are to be noted in the special registry at the prison director's office and should be sent to their superiors and to the Prison Inspector who shares the reports with the Minister of Justice.

While these visits tend to generally take place as prescribed, the effect of these visits remains limited. Even if certain conditions or practices of concern are reported to the central Ministry of Justice and, in some instances, to the public, the deplorable prison conditions show that responses to these reports are limited.[16] Information gathered during these official visits is also rarely shared with the public, leaving little space for public involvement or concern. The function of oversight to create more transparency and accountability regarding the prison system is therefore not truly fulfilled.

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[14] Phone interview with prosecutor in Lubumbashi, 23 August 2010.
[15] Phone interview with magistrate in Lubumbashi, 23 August 2010.
[16] See for instance the Amnesty International 2009 Report on DRC, available at: https://www.amnesty.org/en/region/democratic-republic-congo/report-2009# [accessed 23 August], stating that "[c]onditions in most detention centres and prisons were poor and constituted cruel, inhuman or degrading treatment. Deaths of prisoners from malnutrition or treatable illnesses were regularly reported." And Immigration and Refugee Board of Canada: The treatment of prisoners and prison conditions in Kinshasa [COD103415.FE], 31 March 2010 http://www.ecoi.net/local_link/137718/237995_en.html [accessed 23 August 2010]

Members of Parliament, both national and provincial, in particular the portfolio committees dealing with correctional services, also carry out visits. There is no legislation that mandates this particular activity, but it can be seen as part of their general function of oversight. Occasionally, the findings are published,[17] but no information was found as to how the parliamentary committees engage the responsible authorities on their findings.

LESOTHO

The Office of the Ombudsman, established under the Ombudsman Act of 1996, plays an important role in overseeing places of detention. Section 135(2)(a) of the Act mandates the Ombudsman to receive and to investigate complaints against any government department or its officials. For example, in 2005 the Ombudsman conducted visits to some police stations and cells, and issued recommendations that the government must address the dire situation found during the visits.[18] Other oversight mechanisms include the Inspector of Police and the Police Complaints Authority, both established under the Lesotho Police Act of 1998. While the Act entrusts the Inspector of Police with a general mandate to monitor the performance of the police, the Police Complaints Authority is charged with receiving public complaints referred to it by the police. However, this practice has been criticised for undermining the independence of Police Complaints Authority.[19] There is chance that selected complaints with less prospects of success will be referred to the Police Complaints Authority. The importance of the Police Complaints Authority mainly relates to the fact that arrest and detention is done by the police. In these processes there may be gross violation of human rights, hence the importance of this oversight mechanism.

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[17] See for instance a report by Radio Okapi in which a delegation of provincial parliamentarians and civil society criticise conditions in the prisons in their province. Report in French: http://radiookapi.net/actualite/2010/10/09/tshikapa-les-deputes-provinciaux-deplorent-les-conditions-inhumaines-dans-les-prisons/ [accessed 10 October 2010].

[18] See Para. 95 of the African Commission on Human and Peoples' Right report on the promotional mission to Lesotho available at http://www.achpr.org/english/Mission_reports/Lesotho/Mission%20Report_Lesotho.pdf.

[19] See Berg J 'Lesotho Policing Overview' in 'Overview of Plural Policing Oversight in selected Southern African Development (SADC) Countries', available at http://www.policeaccountability.co.za/Publications/Pub-Categories.asp?PubCatID=15. See also Para. 51 of African Commission on Human and Peoples' Right report on the promotional mission to Lesotho available at http://www.achpr.org/english/Mission_reports/Lesotho/Mission%20Report_Lesotho.pdf.

In addition, Lesotho is preparing to establish a National Human Rights Commission.[20] It is expected that the Commission will use its oversight mandate to address problems affecting the management and running of prison facilities and to deal with issues concerning human rights abuses in places of detention other than prison facilities. Lastly, the National Assembly is also capable of playing an important oversight role over the activities of all State institutions.[21] Parliament can use this role to oversee the prison system, to address the situation in prisons and to monitor other places of detention as well. However, the effectiveness of the National Assembly in discharging its oversight duties has been questioned as there are no effective parliamentary committees in place to watch over the executive functions.[22]

MADAGASCAR

No information could be obtained with regard to domestic law in relation to the prison system. The Law against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law No. 2008-008) contains specific provisions for the criminalisation, prevention and punishment of torture and for reparations for victims of torture.

Madagascar established a National Human Rights Commission (NHRC) by decree in 1996. The NHRC's aim was to raise awareness of citizens' rights and duties by ensuring that human rights education was widespread. Its functions were to advise on policy, and provide information and training, human rights education and advice. The Commission heard and investigated complaints from individuals and groups,

[20] Details can be seen on the UNDP report available at http://www.undp.org.ls/democratic/Human_Rights_Commission_Establishment.php. See also Para 33 of African Commission on Human and Peoples' Right report on the promotional mission to Lesotho available at http://www.achpr.org/english/Mission_reports/Lesotho/Mission%20Report_Lesotho.pdf.
[21] Hendricks C & Musavengana T (ed) (2010), 'The Security Sector in Southern Africa', ISS Monography, pgs. 90 – 91, available at http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/EGUA-8BCNP9-full_report.pdf/$File/full_report.pdf.
[22] Hendricks C & Musavengana T (ed) (2010), 'The Security Sector in Southern Africa', ISS Monography, pgs. 90 – 91, available at http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/EGUA-8BCNP9-full_report.pdf/$File/full_report.pdf.

but had no binding decision-making powers.[23] The NHRC became inactive in October 2002, when the members' terms expired and no new members were appointed. In 2008, following critical remarks regarding the mandate and functionality of this NHRC in concluding observations by several treaty bodies,[24] the National Human Rights Council was established by law (as opposed to by decree in 1996) and replaced the National Human Rights Commission.[25] No information could be obtained on the role and activities of the NHRC with regard to monitoring places of detention. Similarly, no information was found on the role and activities of the Ombudsman's Office (*Médiateur de la République*), established by decree in 1992.[26] It appears that the Ombudsman is mainly in place to assist citizens in cases of disputes with the administration, and not taking up the role of proactive and independent oversight over the executive.[27]

According to the 2009 US State Department Human Rights Report, the government generally permitted independent monitoring of prison conditions by the International Committee of the Red Cross (ICRC), several local NGOs, and some diplomatic missions, and such visits occurred during the year.[28] No information is, however, available on visits by other bodies and officials.

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[23]Committee on the Elimination of Racial Discrimination, Summary Record of the 1645th Meeting: Madagascar. 08/09/2004. CERD/C/SR.1645. Available at: http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/a778cce07764db9cc1256eed004df0da?Opendocument [accessed 25 August 2010]

[24] See concluding observations by the Committee on the Elimination of Racial Discrimination (CERD/C/65/CO/4, 10 December 2004, para 18), the Committee on the Elimination of Discrimination against Women (CEDAW/C/MDG/CO/5, 7 November 2008) and the Human Rights Committee (CCPR/C/MDG/CO/3, 11 May 2007, para 7).

[25] Law No. 2008-012, 17 July 2008. Also see Madagascar Country Report for the Universal Periodic Review, A/HRC/WG.6/7/MDG/1, para 24. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/169/12/PDF/G0916912.pdf?OpenElement [accessed 25 August 2010]

[26] Decree 92-012, 29 April 1992.

[27] Human Rights Council, Report of the Working Group on the Universal Periodic Review, A/HRC/14/13, 26 March 2010. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/125/41/PDF/G1012541.pdf?OpenElement [accessed 25 August 2010]

[28] US State Department, Bureau of Democracy, Human Rights and Labor '2009 Human Rights Report: Madagascar', 11 March 2010, available at: http://www.state.gov/g/drl/rls/hrrpt/2009/af/135962.htm [accessed 25 August 2010].

MALAWI

The Malawi Prison Act of 1969 is the main instrument governing the management of the Malawi prison system. Section 169 of the Act makes provision for an Inspectorate of Prisons. It regulates the powers and functions of prison inspectors. Among other powers and functions, the 'Inspectorate of Prisons' is mandated to:

1. *monitor the conditions, administration and general functioning of penal instructions;*
2. *investigate on questions arising on matters of concern to the conditions, administration and general functioning of the prison system;*
3. *visit all prison facilities; and*
4. *to exercise any other powers prescribe by an Act of Parliament.*[29]

Section 170 sets out that the 'Inspectorate of Prisons' shall consist of (1) Justice of Appeal or Judge; (2) Chief Commissioner for Prisons or person nominated by the Chief Commissioner for Prisons; (3) members of the Prison Service Commission; (4) Magistrates; and (5) Ombudsman. Recent attempts at prison law reform in Malawi have also taken into account the need to establish and adequate oversight mechanism for prisons. For example, the 2003 Prison Bill of the Malawi Prison Services grants powers to judges and Members of Parliament to access prisons in the country.[30] However, the 2003 Prisons Bill has not yet been enacted.

[29] See section 169 of Malawi Prison Act of 1969.
[30] See part XXVII, Arts. 131 – 133 of the 2003 Prison Bill of the Malawi Prison Services.

MAURITIUS

The main organ responsible for oversight of places of deprivation of liberty in Mauritius is the National Human Rights Commission (NHRC) which was designated as National Preventive Mechanism following OPCAT ratification.[31] Art. 4(1)(d) of the Protection of Human Rights Act of 1998 provides that the Commission may visit any police station, prison or other place of detention under the control of the State to study the living conditions of the inmates and the treatment afforded to them. This NHRC makes regular visits to places of deprivation of liberty and publishes its reports.

The Reform Institutions Act of 1988, in Part VI, provides for the establishment of Boards of Visitors and describes their mandate. Boards may be assigned to two or more institutions and shall be composed of not less than three magistrates, a law officer and four other members, three of whom shall not hold public office.[32] Art. 53 prescribes that this Board shall enquire into the conditions of detention of detainees and hear complaints by detainees. The Board is to report to the Minister on any abuse, urgent repairs needed and other matters which it may consider expedient. Visits are to be carried out every month and these visits include the inspection of any part of the institution, the detainees at work, in hospital or in separate or other rooms or wards and all the books, journals and records relating to detainees. All findings are to be recorded in a Board minute book.[33]

Judges and magistrates are mandated to visit institutions and to note their observations in the visitor's book.[34] No further indications are given, however, as to how often this could or should be done and what the purpose is of these visits.

[31] Mauritius ratified OPCAT 21 June 2005 and the National Human Rights Commission is designated as NPM since 2007. See http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm [accessed 6 April 2011]
[32] Art. 53 of the Reform Institutions Act of 1988.
[33] Art. 55 of the Reform Institutions Act of 1988.
[34] Art. 60 of the Reform Institutions Act of 1988.

MOZAMBIQUE

Mozambique remains saddled with antiquated prisons legislation dating back to colonial times. During the colonial era, the 1936 law which regulated the prison system in Portugal[35] was extended in 1954 to the Portuguese colonies in Africa including Mozambique.[36] The 1936 prison law, which remains in force, did not make provision for a prison oversight mechanism. Attempts to reform the system between 2002 and 2006 included the adoption of a new prison policy and the establishment of the *Serviço Nacional das Prisões*, (National Prison Services) now entrusted with the administration and management of prisons in the country.[37] The need to establish an independent oversight mechanism was not addressed A limited mechanism exists in the form of the "*juiz da instrução criminal*", with the purpose of assessing the legality of the arrest and detention of detained persons. The practice has been that the *'juiz de instrução criminal'* is placed at facilities for unsentenced prisoners, under the Ministry of the Interior. However, these judges have no specific mandate to inspect the facilities.

Despite attempts to unify its prison system, the country still remains with more or less a dualist system, where detention facilities for unsentenced prisoners are managed by the Ministry of Interior and the facilities for sentenced inmates are administered by the Ministry of Justice. The facilities under each department are subject to visits and inspection of the Ministers of Justice and of the Interior, respectively.

Available data indicates that the Parliamentary Committee on Legality and Human Rights plays, on occasion, an important role by visiting prison facilities and reporting to the Parliament on the status and conditions of detention of prisoners. In addition, the Office of the Public Prosecutor and its staff may visit prisons at any time. Prosecutors are not limited to the number of visits to prison facilities. Lastly, the growing influence of human rights institutions, such as the *Liga dos Direitos Humanos*, has also helped to

[35] Law No. 26 643, dated 28 May of 1936.
[36] Decree-Law No. 39 997, dated 29 December of 1954, extended the application of the Portuguese prison laws to its colonies in Africa.
[37] See Resolution No. 65/2002, dated 27 August 2002 (Approves the Prison Policy and Strategies of its implementation) and Decree No. 7/2006, dated 17 May 2006 (Establishes the National Prison Services).

highlight rights violations committed against prisoners. However, their role is limited to the extent that it is at the discretion of state authorities to take action on reports submitted these organisations.

NAMIBIA

The law governing the prison system in Namibia is the Prisons Act (17 of 1998). This law contains provisions on visiting justices, official visitors and ministers of religion (Part XIV, ss 112-116). A list of those who are visiting justices *ex officio* is provided for in Art. 112, and it includes judges, magistrates, government ministers, members of regional and national councils and the National Assembly. The title 'visiting justice' is valid for prisons in the geographical area the listed officials are mandated for.

The functions of visiting justices are set out clearly in Art. 113, stating that they may inspect every part of the prison and every prisoner, including those in solitary confinement. They can inspect and test the quality and quantities of food served to prisoners and inquire into any prisoner's complaint. Furthermore, they have the mandate to ascertain whether the applicable rules, standing orders and administrative directives are being observed and all documents, books and registries are accessible for inspection.[38] All remarks, suggestions and recommendations are to be entered in the visiting justices' book and the Commissioner is to be notified of these entries. In addition to the visiting justices, the Minister may also appoint any staff member in the public service (other than a prison member) to serve as an official visitor who shall have the same tasks and mandate as visiting justices.[39]

Ministers of religion, probation officers and representatives of prisoners' aid societies may visit prisons with prior written authorization of the Commissioner. The time and place is to be prescribed by the officer in charge.[40] Pursuant to the Ombudsman Act of 1990, the Ombudsman of Namibia has a mandate to protect human rights, but only acts following a specific complaint or request for assistance, including

[38] Art. 113 Prisons Act 17 of 1998.
[39] Art. 114 Prisons Act 17 of 1998.
[40] Arts. 115-116 Prisons Act 17 of 1998.

those in relation to the deprivation of liberty. It does not carry out regular oversight visits to places of deprivation of liberty.

SOUTH AFRICA

Under the South African Correctional Services Act (111 of 1998), section 99 mandates Judges of the Constitutional Court, Supreme Court of Appeal or High Court, and a magistrate within his or her area of jurisdiction, to visit a prison at any time. The visiting judge or magistrate has access to all persons, documents and places during a visit and may interview inmates who then have the opportunity to lodge any complaint or request with the visiting judge or magistrate. The visiting magistrate or judge may bring any matter to the attention of the Commissioner. The Act also affords members of the Parliamentary Portfolio Committee on Correctional Services (PCCS), members of the relevant committees of the National Council of Provinces, and the members of the National Council on Correctional Services the same unrestricted access to prisons, prisoners and documents.

The PCCS has since 2004 played an active role in holding the DCS accountable, to the extent that clear tensions developed between the Minister and the PCCS.

The Act furthermore established the Judicial Inspectorate for Prisons (later renamed Judicial Inspectorate for Correctional Services - JICS) which is headed by a judge of the High Court. The JICS, although funded from the DCS budget, is an independent body. The Inspecting Judge (IJ) has a broad mandate to investigate any matter concerning the treatment of prisoners and may also report on corruption and dishonest practices. The IJ is assisted by Independent Visitors who are members of the public who visit prisons on a regular basis to record complaints from prisoners at the 237 prisons with a view to resolution. It is mandatory for the Department of Correctional Services (DCS) to report certain issues to the IJ,

namely deaths[41], use of force[42], solitary confinement[43], use of mechanical restraints[44]; the latter two requires approval from the IJ before implementation.

The Minister is also advised by the National Council on Correctional Services (NCCS), consisting of representatives from other departments in the cluster, academia and civil society. The extent to which the NCCS is able to fulfil an oversight function is uncertain as this is a closed group and minutes of their meetings are not made public.

Following the full promulgation of the 1998 CSA in 2004, civilian parole boards were established in the 52 management areas of the DCS. The fact that they are civilian parole boards implied a level of oversight and monitoring, but the parole system has been marred by a series of poor decisions, primarily the result of poor interpretation of a confusing legal framework. This has resulted in a sharp increase in litigation by prisoners against the DCS regarding their release.

There is little to be found fault with the overall oversight and accountability architecture. How the oversight mandates are interpreted is, however, very much dependent on the mandate holders. The performance of the PCCS pre and post 2004 is a good example of this, with the post 2004 Committees taking a far more active role in exercising oversight. The Auditor General and the Standing Committee on Public Accounts (SCOPA) have consistently been rigorous in holding the DCS to account. The oversight architecture has also been significantly strengthened following a 2008 amendment to the Correctional Services Act requiring the JICS to submit its inspection reports to both Parliament and the Minister.[45]

[41] S 15(2).
[42] S 32(6).
[43] S 30(6).
[44] S 31(5).
[45] S 90(3).

SWAZILAND

The law governing the prison system in Swaziland is the Prison Act (40 of 1964). The country's prisons fall under the management and control of the Department of Justice and Correctional Services.[46]

The Commissioner of Correctional Services reports to the Ministry of Justice and Constitutional Development and he is assisted by a deputy commissioner, two assistant commissioners, four senior superintendents, and a medical officer. Among other tasks, the four senior superintendents are charged with the inspection and ensuring security in prisons.[47] Their mandate to inspect prisons fits well as an oversight function established within the Swaziland prison system. No information could be sourced to assess how this internal oversight mechanism fulfils its functions.

TANZANIA

The Tanzanian prison legislation dates back to 1967. Section 100 of the Act provides for the establishment of visiting justices with the mandate to oversee prison facilities. In terms of the Act, Ministers and Judges are ex-officio visiting justices of all prisons in the country.[48] The Act also provides that every Regional Commissioner shall be an ex-officio visiting justice of all prisons in his region and members of the National Assembly are ex-officio visiting justices of all prisons in their constituencies.[49] Other visiting justices of all prisons within the area of their respective jurisdictions include Area Commissioners, and Magistrates and Justices of the Peace.[50]

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[46] Bruyns H (2007), 'The impact of prison reform on the inmate population of Swaziland', unpublished LLD, Faculty of Law, University of South Africa (UNISA), pg. 147, available at http://uir.unisa.ac.za/bitstream/handle/10500/1723/thesis.pdf;jsessionid=4BD7293EBAC6ABE6F73F4B1CF7A0B52F?sequence=1.
[47] Idem pg. 147.
[48] Section 100(2) of the Tanzanian Prison Act of 1967 as amended in 1968.
[49] Section 100(3) and (4) of the Tanzanian Prison Act of 1967 as amended in 1968.
[50] Section 100(5) of the Tanzanian Prison Act of 1967 as amended in 1968.

The oversight mechanisms are afforded with discretionary powers to submit reports to the Commissioner at the end of every year or at any given time at their convenience detailing the state and conditions of prisons within their jurisdiction. They may also enter recommendations, suggestions and other such remarks in the visitors' registers kept at the prisons. The officer in-charge shall then be required to advise the Commissioner on all such recommendations and suggestions entered by visiting justices.

The Commission for Human Rights and Good Governance is also mandated to visit prisons and places of detention or related facilities and to investigate complaints on matters concerning violation of human rights.[51] The powers and duties of the Commission for Human Rights and Good Governance are sufficient to enable it to play an effective oversight role over prisons and other places of detention. However, no information was available describing the extent to which the Commission has addressed human rights issues in place of detention.

ZAMBIA

The law governing the prison system in Zambia is the Prisons Act (56 of 1965, amended 2004; Vol 7, Ch 97 of the Laws of Zambia). Similar to Malawi, this law contains provisions on visiting justices, official visitors, ministers of religion and prisoners' aid societies (Part XIX, Arts. 123-132). Art. 123 provides that any justice of appeal or judge may visit and inspect any prison at any time, and, while so doing, my inquire into any complaint or request made by a prisoner. Visiting justices are the Minister and Deputy Minister for all prisons (Art. 124 (1)), while the minister in charge of a province (Art. 124 (2)) and a magistrate (Art. 125) can visit prisons within their province or jurisdiction respectively.

[51] The Commission for Human Rights and Good Governance Act of 2001, available at http://www.chragg.go.tz/documents/complaintreports/7-2001.pdf.

The powers of visiting justices are described in Art. 126, stating that they may call for all books, papers and records relating to the management and discipline of the prison. They may visit every part of the prison and every prisoner in confinement. They can inspect and test the quality and quantity of food served to prisoners and inquires into any prisoner's request or complaint. All remarks, suggestions and recommendations are to be entered in the visiting justices' book for the information of the Commissioner. In addition to the visiting justices, the Minister may also appoint official visitors to any prison.[52] According to the Prisons Act, official visitors shall at least once in every two months visit the prison to which they are appointed to between such hours as may be prescribed. They have the same duties and powers as the visiting justices and also record their remarks, suggestions or recommendations in a book which is kept for that purpose.[53]

Articles 131 and 132 give access to ministers of religion, probation officers and prisoners' aid representatives respectively, although visits need the approval of the Commissioner. The time and place is to be prescribed by the officer in charge. Ministers of religion may be admitted to the prison to visit prisoners who desire their services and to hold general religious services.

The Human Rights Commission Act (39 of 1996; Vol 4, Ch 48), in Art. 9 (d), provides that the Human Rights Commission (HRC) has the powers to "visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of persons held in such places and make recommendations to redress existing problems." According to the HRC website, this is a mandate which the HRC has carried out every year since 1997, having visited all the nine provinces of Zambia.[54]

The Commission for Investigations Act (23 of 1974; Vol 4, Ch 39) establishes the Commission for Investigations, which is a body of the same nature as the Ombudsman in other countries. It has a mandate

[52] Art. 128 Prisons Act (Vol 7, Ch 97).
[53] Arts. 129-130 Prisons Act (Vol 7, Ch 97).
[54] It may be of interest to note that an evaluation of the criminal justice system in Zambia by the Institute for Security Studies led to a recommendation to establish a separate ombudsman for prisons. See Chapter 7 of ISS Monograph Series No. 159, The Criminal Justice System in Zambia, Enhancing the Delivery of Security in Africa, available at http://www.iss.co.za/pgcontent.php?UID=2611 [accessed 10 September 2010]

to investigate allegations of maladministration or abuse of office or authority. It can, therefore, respond to complaints against members of the prison service, but it does not carry out a function of general independent visits to prisons.

ZIMBABWE

The law governing the prison system in Zimbabwe is the Prisons Act (1956, amended 2004; Ch 7:11). Part VII of the Zimbabwe Prisons Act (ZPA) provides for a number of oversight mechanisms, both governmental and non-governmental. Art. 44 provides that the Vice-President, Judges, Ministers and Deputy Ministers may visit prisons, while the Vice-President, Ministers and Deputy Ministers and any Judge of the Supreme or the High Court may visit and inspect any prison at any time with full access to all areas and the full documentation of the facility. Furthermore, Art. 45 gives the same powers to magistrates as 'visiting justices' of the prisons situated in their area of jurisdiction. Arts. 48-50 prescribe a mechanism of so-called 'official visitors' to be appointed by the Minister. Arts. 50 and 51 give access to ministers of religion and probation officers or prisoners' aid representatives respectively, although these visits need the approval of the Commissioner. A report of the Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender (ZACRO) dated October 2008, however, presents the finding that judges, magistrates, lawyers and prosecutors are not visiting prisons in order to ensure proper oversight.[55] No changes have been reported since.

The Parliamentary Portfolio Committee on Justice, Legal and Parliamentary Affairs also plays a role in oversight of the prison system. Committee reports are, however, not made available on the Parliament's website.

[55] Interestingly, a Supreme Court ruling in a constitutional application by human rights activist Jestina Mukoko, on 28 September 2009, referred to the poor conditions in the prison where she was held. http://allafrica.com/stories/200901300573.html [accessed 5 August 2010]

In 2009, the Zimbabwe Human Rights Commission was established, but it has not yet become fully operational. Its mandate would include the promotion of human rights, monitoring human rights observance and investigation of human rights violations. This would apply to the prison system as well. Leading human rights NGOs and activists, however, openly questioned the efficiency and independence of the institution in the current political context of Zimbabwe.[56]

CONCLUSION

The above review found that in a number of countries there exists, at least in law, a nominal designation of an oversight mechanism over the prison system. In general, domestic law provides that certain persons who are independent from the prison system (e.g. judges, magistrates and members of parliament) may visit prisons and conduct inspections, and report their findings to the head of the prison and the commissioner of the prison service.[57] It can thus be concluded that there is a broad acceptance of the principle that independent oversight by impartial persons is required for a well-functioning prison system. It is, however, also evident that very little information is available in the public domain on how these inspections are being conducted and what, if anything, is done with the recommendations made.

The antiquated prison legislation of several countries (e.g. Malawi and Mozambique) presents a further obstacle in respect of oversight. These laws came into force in the first half of the 20th century and predate the Universal Declaration of Human Rights and the international human rights instruments flowing from it. A consequence is that human rights standards and more particularly, minimum standards for humane detention, were in all likelihood not well developed and also not a particular focus of the domestic prison legislation. Effective oversight requires domestic legislation that is informed by the international standards that have now become part of the global human rights framework.

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[56] See e.g. the statement by the Zimbabwe Human Rights NGO Forum of 11 April 2006, available at http://www.hrforumzim.com/frames/inside_frame_press.htm [accessed 5 August 2010]

[57] See also Community Law Centre submission to the African Commission on Human and Peoples' Rights 47th ordinary Session, 12 -26 May 2010, Banjul, the Gambia, available at http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/publications-1/cspri-submissions-and-presentations/submission-to-achpr-47th-session.pdf/view, accessed on 07 April 2011.

On account of the findings in this review, it is recommended that immediate reforms take place to fill the gaps left by antiquated prison laws. Where prison oversight mechanisms are already in place, but faced with deficiencies, efforts should be made to improve them and to ensure effective protection of persons in detention. The strengthening of domestic oversight mechanisms should remain a goal even if states have not yet signed or ratified OPCAT since OPCAT requires the designation of an NPM at domestic level which may be an existing or new mechanism.

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