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Introduction

More than 60 years after the adoption of the Universal Declaration of Human Rights¹, there is undoubtedly an awareness that all people are accorded with basic rights and fundamental freedoms. Amongst these, the right to life, the right to the highest attainable standard of health and the right not to be treated or punished in a cruel, inhuman or degrading manner, have been substantively regulated in several global and regional legal instruments.² However, the process of domesticating these international standards has, in many states, proven to be less than satisfactory. This is indeed the case in Mozambique.

The Constitution establishes the right to life and the freedom of movement for all citizens.³ It also prohibits the imposition of the death penalty.⁴ Despite these provisions, which offer significant protection to citizens (a category inclusive of prisoners), the legal framework pertaining to prisoners leaves much to be desired. Mozambique is saddled with prison legislation dating back to the colonial era.⁵ Notwithstanding the inclusion of international law standards in the Constitution, the adequate protection of prisoners' rights can only be achieved when such standards are

reflected in subordinate legislation.

This newsletter is an account of the rights of prisoners and prison law in Mozambique. It also includes recommendations as to what still needs to be achieved in order to align domestic law and practice with the provisions of the Mozambican Constitution (the Constitution) and various international instruments. It is argued that the shortcomings in the existing domestic system are insufficient in their purported protection of the rights of prisoners. It is proposed, therefore, that a rights-based legislative framework be established that seeks to protect the inherent right to dignity for prisoners, and their right to be held in an environment that complies with the minimum standards for humane detention.

Mozambique prison law

The Constitution states that "validly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State."⁶ This means that as soon as treaties have been ratified and officially published, they became part of domestic law. Mozambique has approved, ratified and officially published many international law instruments, including those which regulate the administration and management of prisons.⁷ It follows, therefore, that the country's prison legislative framework comprises of both international and domestic norms. Unfortunately, Mozambican courts rarely apply prison-related international law norms. Moreover, save for Article 42(2) which outlaws the death penalty, there are no other provisions in the Constitution which are specifically applicable to prisoners.⁸ There are, however, provisions in the Constitution that may be used to advance prisoners' rights. As was noted above, these include provisions dealing with the rights to life, health, education, freedom of expression, access to information and freedom of religion. Important too, is the right to access the courts, which can be utilized by prisoners to challenge acts that may violate constitutionally protected

rights.⁹

Mozambican prison legislation dates back to 1954, the year in which Portuguese prison law (Decree Law No. 26 643, dated 1936¹⁰) was extended to the African colonies.¹¹ Absent from such legislation was any mention of standards of hygiene in prisons, general conditions of detention, food and nutrition and health care.¹² It was, and remains, silent too on issues that have now become part and parcel of modern prison laws across the world, such as parole, non-custodial sentencing options, and presidential pardons.¹³ The old colonial law, which remains in force, regulates the competencies and powers of prison officials and says little about the rights of prisoners.¹⁴ At a minimum the law includes a guarantee that male and female as well as children and adult prisoners must be kept separately.

Thus far, Mozambique has enacted three Constitutions (in 1975, 1990 and 2004 respectively). Despite the incremental advances in rights-based protection afforded by each constitutional review process, the colonial prison law remains in force. Recently, the Technical Unit for Law Reform, "*Unidade Técnica de Reforma Legal*," entrusted with the mandate of preparing new legislation, has called for legislative reform in this regard.

Notable efforts entailing the reform of the country's prison legislation began in 2002 following the promulgation of *Política Prisional e Estratégia da sua Implementação* (Prison Policy and the Strategies for its Implementation). The establishment of a unified national prison service, the *Serviços Nacional das Prisões* (SNAPRI) represents what were once two separate systems of detention in which the Ministry of Interior was responsible for un-sentenced prisoners and the Ministry of Justice responsible for sentenced prisoners.¹⁵ Unfortunately, and despite the apparent clarity of SNAPRI's mandate, there remains confusion regarding which of the two Ministries is

ultimately responsible for prisons and detained persons.

Despite efforts to reform the prison system, the overall impression that remains is that the Mozambican prison system does not prioritise the safe and humane custody of prisoners and continues to face substantial challenges relating not only to general conditions of detention, but in respect of gross rights violations. The arbitrary killing of prisoners, unexplained deaths with limited, if any, investigations into their cause perpetuate a culture of impunity.¹⁶ A range of other problems are also prevalent in the prison system. These include overcrowding, poor sanitary conditions as well as unmotivated and poorly trained personnel.¹⁷ It is against this background that the development of a modern legislative framework for the country's prison system, compliant with the international norms and standards and the 2004 Constitution, is proposed. The achievement of the objectives of the Prison Policy depend on such a framework and would form the basis for reform, capacity and infrastructure development and regulating relationships with external stakeholders. In developing such a framework, advice should be sought from other states that have recently undergone prison law reform, for example Malawi and South Africa. The South African Correctional Services Act 111 of 1998 is recognised for its clarity, user-friendly style and comprehensive regulation of the South African prison system.

Reasons to look at South Africa's prison law

There are a number of reasons why the South African experience would assist in the Mozambican prison reform project. Firstly, both Mozambique and South Africa are constitutional democracies rooted in the ideal of the separation of power between the legislative, executive and the judiciary. Arguably, democratic systems aspire to uphold the rule of law and protect citizens from abuse of power by state officials. South Africa's movement towards promoting the rights of prisoners is therefore relevant to Mozambique. Second, lessons from the South African prison system can be used to help promote accountability, transparency and the rule of law within the Mozambican

prison system. Since the Correctional Services Act was promulgated in South Africa, the Department of Correctional Services has on numerous occasions, been held accountable by the Parliamentary Portfolio Committee on Correctional Services for the mismanagement of prisons and the mistreatment of prisoners.¹⁸ Moreover, there is a significant body of South African jurisprudence on prisoners' rights emanating from the High Courts, Supreme Court of Appeal and Constitutional Court.¹⁹ These may be used to help improve the Mozambican prison system. Third, among the SADC countries with similar pressing socio-economic and political challenges as encountered by Mozambique, South Africa has the most comprehensive prison legislation, as will be discussed below.

Overview of a proposed prison law

There are important features of the South African Correctional Services Act which are not found in the 1936 and 1954 Mozambican prison legislation. These include: the regulation of conditions of custody of all inmates, community corrections, parole and day parole.²⁰ It also establishes and regulates the functioning of the Judicial Inspectorate for Correctional Services, supported further by provisions governing an independent prison visitor mechanism. It has a human rights based approach to prisoners' protection and regulates prison management standards. It also provides for the internal inspection of prison facilities, as well as the separation of different categories of prisoners. The South African Correctional Services Act sets clear minimum standards for the humane detention of prisoners. If similar standards and provisions were to be incorporated into Mozambican prison legislation, there would be greater legal certainty regarding prisoners' rights and the effective monitoring of compliance with said requirements. Independent oversight mechanisms remain the most effective means of preventing torture and the ill treatment of prisoners in general. Moreover, comprehensive legislation may in fact assist in dealing with the problem of overcrowding by providing for a release mechanism through parole and non-custodial sentencing options, such as community corrections. It should be noted that although the Constitution of Mozambique includes provisions on presidential pardons,²¹ there is no subordinate

legislation creating the mechanism for its implementation.

Despite comprehensive legislation on prison management and prisoners' rights, the South African legal system should be criticised for not having criminalised torture and similar practices in supplementing legislation.²² The criminalisation of torture in domestic legislation is a necessary and important mechanism when it comes to holding perpetrators of this crime accountable. Like South Africa, Mozambique has ratified the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT).²³ Mozambique is therefore obliged, under Article 4 of UNCAT, to criminalise torture.²⁴ The legislation criminalising torture must include a clear definition of torture that contain at least the elements defined in Article 1 of UNCAT.²⁵

Mozambican prison law should also include an individual complaints mechanism for prisoners, compliant with Rule 36 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR), to enable prisoners to lodge complaints regarding their treatment and conditions of detention. The South African Correctional Services Act affords prisoners with the opportunity make such complaints to the heads of the prison.²⁶ Undoubtedly, if provided for in the Mozambican prison law, this would assist oversight bodies in the fulfilment their mandates.

Lastly, the proposed law needs to retain the positive features of the current Mozambican prison law. These include the separation of different categories of prisoners (male from female, children from adults and sentenced prisoners from un-sentenced prisoners) and regulations regarding the quality of ventilation in places of incarceration. In addition, the law should compel warders to enable prisoners to exercise for a certain amount of time each day.

Conclusion

The 1936 prison law inherited from Portugal is inadequate and divorced from the realities and requirements of human rights obligations arising from the Constitution and Mozambique's obligations under international law. Binding international law, the Constitution and the Prison Policy, *Política Prisional e Estratégias da sua Implementação*, require from the State certain minimum standards in respect of prisoners' rights and a new prison law must be enacted to account for these needs.

The legal reform unit, *Unidade Técnica de Reforma Legal*, should work towards an inclusive law reform process. A broad spectrum of stakeholders should be encouraged to engage in this so as to ensure that a comprehensive prison law, compliant with the country's international law obligations, is enacted. The government as well as other national and international organisations focusing on the promotion and protection of prisoners' rights, including the UN technical support institutions and national and international experts, should all contribute to the law reform process. In particular, experts familiar with prison law reform processes should be involved in the consultation and drafting phases to develop a Mozambican prison law that is compliant with international norms and standards.

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[1] Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948.

[2] See Article 3 UDHR.

[3] See Articles 40(1) and 55(2) of the Constitution of Mozambique.

[4] See Article 40(2) of the Constitution of Mozambique.

[5] Mozambique became a colony of Portugal in 1501 and gained independence on 25 June 1975.

[6] See Article 18(1) of the Constitution of Mozambique.

[7] Mozambique has ratified the International Covenant on Civil and Political Rights (ICCPR), the United Nations Conventions against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT), and the African Charter on Human and Peoples' Rights.

[8] Article 42(2) of the Constitution of Mozambique: "*There shall be no death penalty in the Republic of*

Mozambique."

[9] See Article 62 of the Constitution of Mozambique.

[10] Decree-Law No. 26 643, dated 28 May 1936 (Regulated the Prison system of the Republic of Portugal).

[11] Portuguese colonies in Africa included Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe.

[12] *Idem*.

[13] It should be noted that the penal reform process currently underway in Mozambique has contributed with a draft Bill on alternative sentences which is waiting to be passed into law. See All Africa.com, at <http://allafrica.com/stories/201101310217.html>, accessed on 31 January 2011.

[14] See CSPRI Newsletter No. 34, May 2010 available at http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/CSPRI_Newsletter_34.pdf/, accessed on 4 March 2011.

[15] See the Decree No. 7/2006, dated 17 May 2006 (Establishes the National Prison Services).

[16] Recently, reports said that a dangerous criminal called Todinho, who was being held at the Machava Maximum Prison (Maputo) in connection with the killing of police officials and armed robbery was found dead in his prison cell. Amnesty International said that the prison authorities argued that Todinho died of natural death. However, the cause of death had not been fully explained. For a fully report see Amnesty international 'Informe 2010 - Amnistia Internacional - O estado dos direitos humanos no mundo', 2010, at http://www.observatoriodeseguranca.org/files/AIR2010_BR.pdf, accessed on 20 December 2010. See also All Africa.com follow up report of Mozambique Universal Periodic Review (UPR) process at the level of the United Nations. The report said that Alice Mabota, from the League of Human Rights claimed that arbitrary killing of prisoners remains a problem in the country's prisons controlled by the Ministry of the Interior, available at <http://allafrica.com/stories/201102281465.html>, accessed on 4 March 2011.

[17] See *Política Prisional e Estratégias da sua Implementação*, approved by Ministerial Council Resolution No. 65/2002, dated 27 August 2002.

[18] See for example how the Department of Correctional Services of South Africa was taken to task in the annual report of Judicial Inspectorate for Correctional Services, and more specifically when the Inspecting Judge, Judge Deon van Zyl, briefed Parliament on the failure of the Department of Correctional Services to ensure the prosecution of prison warders who negligently left prisoners to die in custody. For a full report see <http://www.pmg.org.za/files/docs/101116jics.pdf> accessed on 6 December 2010.

[19] For examples of South African jurisprudence on prisoners' rights see De Vos P, '*Prisoners' rights litigation in South Africa since 1994, a critical evaluation*', CSPRI Research Report published November 2003, available at http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/publications-1/cspri-publications/cspri-publications/folder_summary_view?b_start:int=21&-C=, accessed on 20 December 2010.

[20] See '*Perfil do Sistema da Justiça Criminal em Moçambique*', p. 43 available at http://rechten.uvt.nl/icvs/StratPlanPRM/reports_port/PRM%20Actual.pdf, accessed on 15 December 2010.

[21] See Article 159(i) of the Constitution of Mozambique.

[22] See Muntingh, L and Fernandez, L (2006) "Civil Society Prison Reform Initiative (CSPRI) submission to the UN Committee Against Torture in response to "Republic of South Africa: First country report on the Implementation of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment", available at <http://www.csvr.org.za/docs/correctional/prisonsinsa.pdf>, accessed on 24 December 2010.

[23] Mozambique ratified the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) on 14 September 1999.

[24] Article 4(1) states:

'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.'

Article 4(2) adds that:

'Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

[25] The definition of torture in Article 1 states "any act by which severe pain or suffering, whether physical or mental,

is intentionally inflicted on a person for such purposes as obtaining from him or her or from a third person information or a confession, punishing him or her for an act he or she or the a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." However, pain or suffering arising from inherent in or incidental to lawful sanctions shall not be included in the definition of torture unless such pain or suffering is inflicted intentionally.

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