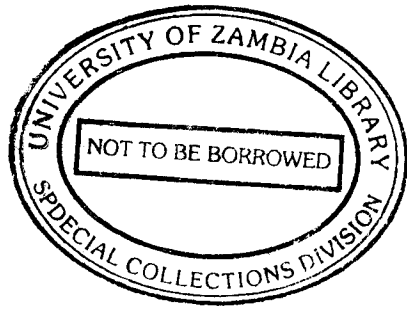


**TITLE**



**THE PROBLEM OF TORTURE AND THE DIFFICULTIES  
REGARDING ITS COMPLETE ABOLITION**

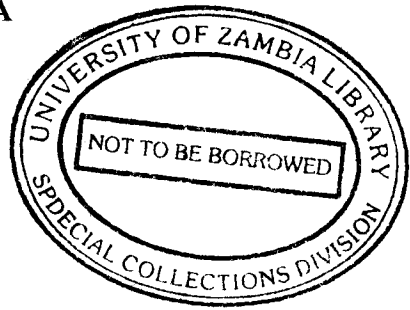
**A research paper submitted to the school of law of the University of Zambia in  
partial fulfillment of the requirement for the award of the degree of Bachelor of  
laws (LLB).**

**BY: KABISA ELIZABETH HANDIA**

**UNZA**

**JANUARY 2007**

**THE UNIVERSITY OF ZAMBIA**  
**SCHOOL OF LAW**



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.....  


Mr. M. Malila (SC)  
(SUPERVISOR)

Date. January 2007 .....

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## **CHAPTER ONE**

### **A BRIEF HISTORY OF TORTURE AND THE DEFINITION AND NATURE OF TORTURE, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT.**

#### **1.0.INTRODUCTION**

Torture has been practiced systematically through the ages and continues to be practiced today. From time immemorial, both the state and individuals have practiced it without any regard to the rights of a victim.

This chapter is intended to introduce torture as a subject. It will begin by showing a brief history of torture, and how it has been used over the centuries. The chapter will also show how it has changed in terms of legislation, that is from being sanctioned by the early church and authorities, and gradually being frowned upon in the 18<sup>th</sup> and 19<sup>th</sup> century's and finally being totally abolished in the 20<sup>th</sup> century. The chapter will also attempt to evaluate the various definitions of torture. Finally the nature of torture will be looked at.

#### **1.1 BRIEF HISTORY OF TORTURE**

The positions taken on the issue of torture and capital punishment between the 14<sup>th</sup> and 18th centuries are indicative of the dramatic changes that occurred in the value systems over this period in one particular aspect, namely, the importance assigned to the body, to the physical integrity of the individual.

Religious authorities first approved torture in the fourteenth century. Torture to elicit confessions was first authorized in the church on May 15<sup>th</sup>, 1252 by Pope Innocent IV. Pope Alexander confirmed this in 1259 and Pope Clement IV approved this in 1265. Pope Innocent IV wrote,

*'When those adjudged guilty of heresy have been given up to the civil power by the bishop or his representative or the inquisition, the podest or chief magistrate of the city shall take them at once, and shall within five days at the most execute the laws made against them.'*

It must be noted that it was during this period that the Church was seen as the ultimate authority and highly respected by everyone including secular authorities. The church's influence during this period was so great that whatever it decreed was obeyed and carried out by the secular authorities. This was the period when the Naturalists began to assert their ideas. It would seem a bit ironic today that those who should have been at the forefront of advocating for the humane treatment of man were instead advocating the worst punishment, apart from death, to man. In fact in several cases it was priests who carried out and observed these acts of torture all 'in the name of God'.

The evolution in the 'penal culture' of Western Europe over the course of the centuries was becoming evident. In this evolution, it was not so much the human being who changed, but the view of the human being that was held by those in power.

As earlier stated, the 14<sup>th</sup> century saw the origins of institutionalised and legalised torture in Roman and canon law. The inquisitors of the 14<sup>th</sup> century, such as Nicolas Eyemich (1320-1399) in his *Directorium*, legitimated the use of torture against heretics. Initially, torture was used primarily against heretics and those whom the church regarded as having offended God. In time, no suspect was spared the ordeal of torment as torture was inflicted on anyone who gave vague or evasive answers; anyone who had been slandered; anyone against whom damaging evidence could be established; anyone who had been accused, even by a single witness.<sup>1</sup>

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<sup>1</sup> Symonides. (1998). Human Rights and Culture. Essex, University of Essex.



It could be argued that the church at this time missed the point of Christianity because among the central tenets of the faith are the commands to love one another, to do unto others as you would have them do unto you, Christ's forgiveness and unfailing love etcetera. In no place in the Bible does it state that people should be ill treated for not believing in Christ. As earlier stated, it was at this time that the first school of thought arose. The belief at this time was that there was a divine law that was God's law, and humans partook of this law through revelation in the scriptures. The church was the sole interpreter of the scriptures. There was also human law, which had to be in conformity with the divine law otherwise it would not be regarded as law at all. It was therefore, not surprising that torture was eventually promulgated into secular legislation. The church was therefore, responsible for codification of torture into law.

Pope Urban IV, in turn, allowed the inquisitors themselves to torture the accused for, according to him, *'one does not get to the bottom of things without torture'*. According to Francisco Pena, who was charged by the Holy See to codify the inquisitions rules, the purpose of torture was *'less a matter of establishing a fact than of making a suspect who remains silent confess'*. Torture merely served to make up for lack of evidence, or if you will, to fabricate the evidence. Pena stated that anyone could be tortured without regard for age or gender, for *'the horrible crime of heresy knows no special privilege, no exception'*<sup>2</sup>. Torture was perfectly legitimate for the greater glory of God. The justification for the use of torture and extreme corporal punishment was that it was only permissible to secure the proof that was needed to convict the accused. In no case, however, were such means so excessive that they resulted in the patient's death. This was not out of concern for humanity but in order to preserve the public spectacle of

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<sup>2</sup>ibid

public execution that the condemned had to be kept alive so that he would be set as an example. During this same period, the royal legislation set out to integrate torture in its criminal procedure while resuming the inquisitor's procedure<sup>3</sup>.

There was in the 16<sup>th</sup> century a shift in attitudes toward torture. The purpose of torture was to produce evidence, but if the deed was patent and proven, torture was forbidden: and if torture was in fact necessary, the patient must not be allowed to die in the process. Anyone who had violated- or was outside- the economic or moral bounds of the law forfeited any and all rights he may have had. One can discern a difference between the ideologies of Pena (14<sup>th</sup> century) and that of Eymerich two centuries later. Pena makes no effort whatsoever to legitimate the use of torture: it is imperative as a matter of course. In the 16<sup>th</sup> century, on the other hand, Eymerich is more critical in the sense that he endeavors to justify the application of torture and to set certain limits, even if in the matter of faith, everything is permissible if it will make the truth prevail<sup>4</sup>.

At the outset of the French Revolution, the *Cahiers de doléances* [Registers of Grievances] called for the abolition of torture and corporal punishment as being contrary to respect for human dignity. This sentiment was a reflection of a general trend in favour of penal reform, which was prevalent throughout Europe during the latter half of the 18<sup>th</sup> century. In the project for the Penal Code proposed at the Constituent Assembly in May 1791, Le Pelletier de Saint-Fargeau called for, among other things, the humanisation of punishments. The call for humane punishments, in the name of respect for human rights and with the aim of rendering the new penal system more effective, was part and parcel

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<sup>3</sup> ibid

<sup>4</sup> ibid p.187

of the design for a new political order and a new type of relations between the citizen and the state<sup>5</sup>.

According to Saint-Fargeau, in order for a punishment to be effective, it must be useful, and it ceases to be useful in the same measure as it is inhuman. Torture is also condemned in the name of the same principle: it is not useful, and therefore not effective, because it works to the advantage of someone who is guilty but robust and thus able to physically withstand the pain, whereas it works to the disadvantage of a weaker but innocent person who ultimately confesses to relieve his anguish. And so the practice of torture was limited to those who did not deserve to be regarded as human beings, did not deserve to benefit from the 'Rights of Man', for by their own conduct, they had lowered themselves to the level of '*betes brutes*' (savage beasts)<sup>6</sup>.

Tuscany was one of the first abolitionist states, and its enlightened prince Leopold, brother of Joseph II, granted his subjects the first penal 'code' which respects the principles of the *Declaration of the Rights of Man* prior to the writing of this document.

The 20<sup>th</sup> century saw an increase in the recognition of the dignity of a person in various instruments such as the Universal Declaration of Human Rights (UDHR) and the Convention Against Torture (CAT), in particular. This was largely due to the atrocities witnessed during the two world wars. However, it was only on the 10<sup>th</sup> December 1984 that CAT was adopted and opened for signature and accession by the General Assembly. In different societies, up to the present day, human rights are held in contempt, despite the international conventions on human rights. What is different from the *ancient regime*

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<sup>5</sup> Criminal Law and Human Rights in Western Europe (14<sup>th</sup>-18<sup>th</sup> C). The example of Torture and Punishment

<sup>6</sup> *ibid* p.193

nonetheless is that in most countries torture has ceased to be written into the law. This is a huge step forwards in the respect for the dignity of man. It is unfortunate that although torture has ceased to be written into law (as regards its being allowed), the vast majority of countries that have ratified the CAT, Zambia inclusive, have not taken the extra step to domesticate this important document and make torture a crime. Though this may not have amounted to effective protection in practice, it has provided for the right to appeal against torture and ill treatment, and the right to a defense, at the very least for those who have the means to take advantage of them.

## **1.2. THE NATURE OF TORTURE**

Many countries, including Zambia, provide for the protection against torture. However, the Zambian legislation does not provide a definition of torture or cruel, degrading treatment or punishment. Article 1 of CAT, defines torture as 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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.

Torture is the intentional infliction of severe pain or suffering for a specific purpose. This nefarious crime of torture may be used to obtain information or a

confession, to punish, to take revenge or to create terror and fear within a population<sup>7</sup>.

Torture is, therefore, an aggravated form of cruel, inhuman and degrading punishment.

The aim of torture, as it has been established earlier, is not to kill the victim, but to break down the victim's personality<sup>8</sup>.

Going by the above definition, the torturer must be a 'public official' acting in a position of authority. However, the torturer can also be a private individual, but he must be acting in an official capacity or with the authority, consent or acquiescence of a public official. This tends to limit those who can be punished for torture. For example, in Zambia, particularly in rural areas there is a practice of witch-hunting. The acts that the witch finder uses to make the alleged witch or wizard confess are in most cases tantamount to acts of torture. Such acts are unfortunately not isolated to cases of witch-hunting. There have been several cases where mothers have burned their children's limbs or worse, in order to make them confess to stealing money. It is difficult for such cases if brought before the courts as acts of torture, to succeed. This is because Article 15 of the Zambian Constitution, which prohibits torture, requires that the state should pay compensation for such acts. It would be very difficult however to envisage a situation where the state is made to pay compensation for acts of torture committed by private individuals. It would seem then that the prohibition of torture applies only to officials or private individuals acting in an official capacity. If an act that is done by an official can amount to torture, and that same act is done by a private individual, this is usually regarded as grievous bodily harm or wounding and not as torture, because of the absence

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<sup>7</sup> A world without Torture, International Rehabilitation Council for torture Victims.p2

<sup>8</sup> ibid

of the official element and above all, because torture is not a distinct offence under the Penal Code.

It is worth adding and emphasising that the definition of torture as given under CAT requires that, ‘for one to prove torture there must be pain or suffering arising from the action of one person on another’. Such pain or suffering must be inflicted for the purpose of obtaining a confession from the victim or a third party close to the victim<sup>9</sup>.

However, it should be emphasised that acts of torture will not include any of those acts that may arise from lawful arrests, detentions or any sanctions of a court of law.

It should be noted however, that deprivation of food or water might also constitute an act of torture. If prisoners are made to starve or to endure slow suffering through water deprivation, these are acts of torture. The Rome Statute of the International Criminal Court (ICC)<sup>10</sup>, sub paragraph 2(e) of Article 7 of the Statute defines torture as the ‘intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

To this extent, the ICC Statute may be said to have mitigated or remedied some of the weaknesses of the CAT, such as the limitation of the offender to a public official thereby excluding private officials. The Rome Statute of the ICC, adopted in 1998, prohibits torture without linking it to public officials; thus, whether the offenders are public or private officials, they can be charged with torture and be given the appropriate punishment if found guilty of the act.

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<sup>9</sup> S.E. Kulusika, ‘The Legal Validity of the Universal Prohibition of Torture’, ZLJ, Vol 31, UNZA, Lusaka, 1999 p.84

<sup>10</sup> Statute of the International Criminal Court, Article 7(2) (e) [hereinafter called the statute of ICC], Reprinted in 37 I.L.M 999 (1998). As at January 1999, more than 71 States had signed the document.

Zambia needs to come up with its own definition of torture so as to capture all cases of torture in the Zambian jurisdiction.

### **1.3.CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT**

When discussing the meaning of the concepts of inhuman or degrading treatment or punishment, the Commission in the case of Denmark, Norway, Sweden and the Netherlands V. Greece<sup>11</sup> observed that:

*'The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable ....'*

Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience. Inhuman treatment is treatment that causes, if not actual bodily injury, at least intense physical and mental suffering to persons subjected to it. Degrading treatment must arouse in a victim the feeling of fear, anguish and inferiority, capable of humiliating or debasing. It may therefore be said that cruel inhuman and degrading treatment or punishment is relative because what one society may perceive as being cruel inhuman and degrading treatment or punishment may not necessarily be regarded as such in another society. It would seem that this is an essential qualifier in the definition that it pays attention not so much in the act itself but rather the effect that it has on the victim.

Ill-treatment must attain a minimum level of severity, and this includes the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and in some cases, the sex, age and status of the health of the victim.

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<sup>11</sup> Applications 3321/67, 3322/67, 3322/67 filed in September 1967 against Greece for alleged torture acts

Cruel, inhuman and degrading treatment or punishment refers to:

- (i) Any harsh or neglectful treatment that could damage a detainee's physical or mental health.
- (ii) Any punishment intended to cause physical or mental pain or suffering, or to humiliate or degrade the person concerned<sup>12</sup>.

Like torture, cruel, inhuman and degrading treatment can occur in a number of places and for a number of reasons. A distinction, however, ought to be drawn further between 'torture', and, 'inhuman and degrading treatment or punishment'. It is submitted that there are two main differences between the two, viz.:

- (i) The severity of the pain or suffering inflicted: Torture constitutes a severe form of cruel inhuman and degrading treatment. The severity of the pain may be determined by such factors as, duration of the act, physical health of the victim, age and sex of the victim etcetera.
- (ii) Torture is always a deliberate and purposeful act aimed at imposing great suffering, while ... inhuman and degrading treatment might occur because of neglect<sup>13</sup>. An example of this would be a situation where men, women and children are not separated in custody. This constitutes a form of inhuman and degrading treatment. However, if as a result of the lack of separation, women are raped by male inmates, or children by adults, these acts could be seen as constituting a form of torture because in effect, they have occurred with the consent or acquiescence of the authorities<sup>14</sup>.

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<sup>12</sup> Supra note 1 at p. 11

<sup>13</sup> *ibid* p.20

<sup>14</sup> *ibid*



It is difficult to make a clear-cut distinction between an act of torture and that of inhuman and degrading treatment or punishment.

#### **1.4.SUMMARY OF THE CHAPTER**

It is clear that attitudes toward torture have changed over the centuries. This is especially as regards the fact that torture was once seen to be a norm and a necessity but today it is greatly criticised as being an abominable scourge. This is evidenced by the fact that it is one of the few rights that cannot be derogated against, under any circumstances. However, torture continues to be practiced in many parts of the world due to lack of countries taking active steps to legislate against, and punish acts of torture.

While torture and cruel, inhuman and degrading treatment and punishment are brought out as two separate concepts, it is undeniable that that they are inter-related. It would appear that the only distinction between the two lies in the fact that the degree of pain or suffering of the victim is different: in torture it is more severe as compared to cruel, inhuman and degrading treatment or punishment which could be said to be less serious or less severe. Cruel, inhuman or degrading treatment or punishment, therefore, is a 'lesser' form of torture.

## **CHAPTER TWO**

### **ASSESSMENT OF THE TYPES AND INCIDENTS OF TORTURE, AND THE PERPETRATORS OF TORTURE.**

#### **2.0.INTRODUCTION**

The aim of this chapter is to highlight what types of torture exist and the rate of occurrence. An attempt is also made to examine who the perpetrators of torture are and what exactly drives them to continue such acts. In the previous chapter, it was shown that for an act to be called torture, such an act must be committed by a public official, or a private individual acting at the instigation or with the acquiescence of a public official or other person acting in an official capacity. The focus of who the perpetrators of torture are, will be police officers and prison warders.

Torture by police officers is rampant in Zambia. It is not uncommon to hear cases where the police, in order to get information from suspects, torture them. This unfortunately does not only occur during interrogations. The acts of torture usually begin from the arrest stage when the police, in order to show their authority, usually beat up suspects in order to intimidate them. The police abuse the authority that has been granted them. While the police do have the right to use force when arresting suspects, such force should be reasonable. Unfortunately this information is unknown to several people especially the poor and illiterate who often times fall prey to torture by the police.

This attitude is accepted by poor and/or illiterate people. This attitude stems from the colonial days when it was normal for the police to severely beat suspects and those who fell foul of the law. This attitude continued even after independence when the police were seen as having the authority to beat suspects and political dissidents. It is unfortunate that this attitude still continues to this day especially with those who do not

realise that torture is a human rights violation. Torture does not however only happen to poor illiterate people. The police have also been known to torture other citizens such as coup suspects and politicians who have fallen out of favour with the government.

While torture does occur in prisons, very rarely does it get reported. The prisoners are treated less than humanely and while the aim of torture in prisons may not be to extract a confession from the prisoner, as he has already been convicted, torture in prisons occurs so as to intimidate or punish the prisoner.

As shown in the previous chapter, torture has been used since time immemorial. It would seem that as the years have gone by, and alluding to the increased awareness of the need to respect other people's rights, the types of torture would reduce in intensity. This however, has not been the case.

To highlight how brutal torture used to be, is the 18<sup>th</sup> century report of the torture of one Damiens<sup>15</sup>.

Damiens was condemned on the 2<sup>nd</sup> of March 1757 to confess and make amends in front of the main door of the Church of Paris, where he was to be taken in a tambrill, naked except for a shirt, carrying a heavy wax candle weighing more than two pounds: then, the said tambrill, having arrived at the *Place de Greve*, and on at the place of execution, bound at breast, arms, legs and calves, his right hand holding aloft the knife with which he committed the said patricide, cleansed in a fire of intense heat, his bonds would be loosened, he would be thrown into the depths of boiling oil, a pot of burning resin, wax together brought to the highest heat to maximize suffering and finally his body to be hung, drawn and quartered, and the entrails to be burned, reduced to ashes and these ashes to be thrown to the winds.

This method of treatment would seem barbaric today but some medieval techniques of torture remain in wide use today. Images of the body of Muzafar Avazov, an Uzbekistan man apparently killed by torture, is an example of how torture today has not changed much over the centuries. Muzafar Avazov was an Uzbekistan torture victim. He died in

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<sup>15</sup> Symonides. 1998. Human Rights and Culture. P.193

2002, apparently from religiously-motivated torture. Human Rights Watch recorded his death as "suspicious" with apparent signs of torture, highlighting Uzbekistan's repression of independent Muslims. Individuals who had seen the body told Human Rights Watch that it showed clear signs of torture. Avazov was imprisoned at Jaslyk Prison, said by the same organization to be "well-known for its harsh conditions and ill-treatment and torture of religious prisoners." Medical examiners found severe burns on Avazov's legs, buttocks, lower back and arms, covering 60-70% of his body, which they believed to be the result of immersion in boiling water. Eye witnesses also report a *"large, bloody wound on the back of the head, heavy bruising on the forehead and side of the neck, and that his hands had no fingernails."*<sup>16</sup>

## **2.1 TYPES OF TORTURE**

There are various forms of torture that are used today. These include physical and psychological torture. Physical torture uses physical pain to inflict torment and is the most well known form of torture. Psychological torture uses psychological pain to inflict torment and is less well known because its effects are often invisible to others. This is especially true in Zambia where the majority of cases reported on torture consist of physical torture acts. Psychological torture uses non-physical methods to induce pain in the subject's mental, emotional, and psychological states. There also exists psychiatric torture, which uses psychiatric diagnoses and their associated psychiatric treatments to torture *sane* people for political, religious, or familial reasons. Mild forms of psychiatric torture have been used in the United States military against otherwise sane dissenting officers. Pharmacological torture uses psychotropic and/or other chemicals to induce pain

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<sup>16</sup> Wikipedia, The Online Encyclopedia

and cause compliance with torturer's goals<sup>17</sup>. While all the above forms of torture may be practiced in Zambia today, the two most prevalent forms are physical and psychological torture.

## **2.2 PHYSICAL AND PSYCHOLOGICAL TORTURE**

It is important to distinguish physical torture from psychological torture, although in practice these distinctions often become blurred. Physical torture is the inflicting of pain on the body, using physical means such as whips, rifles, electric shocks and so on. Usually these physical methods use force that leave physical marks or scars on the body. This is however not always the case as illustrated by a torture technique called the water drop treatment. This consists of hanging from a tree, a 200 litre drum filled with water. A small hole, the size of the tip of a pen is then made at the bottom and this allows water to escape a drop at a time. A suspect is placed under the drum and initially as the water drops on the victims head, nothing is felt. However, after about 15 minutes the victim begins to feel like a stone is being dropped onto his head every time a water drop hits his head. This is extremely painful but when the victim is examined there is no evidence that he has been tortured in any way.

In contrast, psychological torture is directed at the psyche with calculated violations of psychological needs, along with deep damage to psychological structures. This torture distorts beliefs underpinning normal sanity. Psychological torture also includes deliberate use of extreme stressors and situations such as mock executions and extended solitary confinement. A common example of this in Zambia is where a suspect

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<sup>17</sup> *ibid*

is blindfolded and his legs and hands are tied up. The suspect is then placed on the ground and a car is driven at high speed towards him but the tyres are in such a position that the car passes over him without touching his body. This is a very traumatising experience which leaves no physical marks and yet the psychological trauma will be there. As psychological torture needs no physical violence to be effective, it is possible to induce severe psychological pain, suffering and trauma with no externally visible effects.<sup>18</sup> Methods of confinement that take advantage of modern medical knowledge are also quite common. The prisoner—suitably bound to deter the expected range of reactive motion—may be connected to an electrical apparatus, where wires are wound around his fingers and toes and an electric probe is used to deliver current to his genitals. A signal generator and attached voltmeter precisely control the intensity of the pain so inflicted. Modern torturers also avail themselves of pharmacological techniques that were unavailable in the past: an example is the injection of drugs that heighten the human brain's perception of, and reaction to, pain *before* any physical torture is actually employed<sup>19</sup>.

### **2.3 INCIDENTS OF TORTURE**

There are several articles, journals and reports, which highlight the occurrence of torture in Zambia. These include the Zambia Human Rights Reports<sup>20</sup> as well as the LRF News, which is a publication of the Legal Resource Foundation.

In one incident, police tortured an innocent Mansa resident after they arrested him on suspicion of having stolen a mattress. According to the victim, Matthews Mwaseba of

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<sup>18</sup>Wikipedia, the online encyclopedia.

<sup>19</sup> Ibid.

<sup>20</sup> Produced by Afronet but no longer in print.

house No F9 Suburbs Compound, he was on January 31 2003 picked up from his house by some people who accused him of stealing a mattress. Matthews stated that he was taken to his father's house to check for the missing mattress in the company of a police officer and some men from the neighbourhood watch group. However, the search yielded nothing. Matthews said when he was taken back to the police station; he was brutally beaten by some police officers and neighbourhood watch members. As a result of the beating, he sustained a deep cut on his buttocks. Matthews was released unconditionally after it was learnt that he was not in any way connected to the theft of the mattress. Upon his release from custody, he was admitted to the hospital where he was operated on and remained in the surgical ward for more than 30 days for observation. This is only one of several instances of torture by police officers.

It is a tragedy that in some cases the torture ends up in the death of a suspect and in several instances it has been known for the police to claim that a death is as a result of suicide. To highlight this is the case of Billy Chanda, a 17 year old who was accused by his employer of stealing shoes.<sup>21</sup> On July 3, 2005, Billy was detained on the above allegation. The following day, Billy's mother Mrs. Chanda went to Kantanshi police station to make a follow up of the case, she found police officers arguing over Billy's case. Upon hearing the mention of her son's name, Mrs. Chanda asked the officers for information about her son. The Criminal Investigations Officer only known as Sichilima confirmed to Mrs. Chanda that Billy had committed an offence. Some officers later accompanied Mrs. Chanda to her house and two of her relatives were asked to accompany her back to the police station. At the police station, Mrs. Chanda was asked

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<sup>21</sup> The LRF News of June 2006

questions relating to her son and was later informed that the reason she was being interviewed was because her son had committed suicide in the cells using the lining from inside his trousers. According to Mrs. Chanda, who was taken to the scene and found her son hanging, it was not possible for Billy to hang himself as he was found hanging in the middle of the room where it was not possible for him to have climbed.

Mrs. Chanda further argues that the room was too wide with slippery walls and Billy could not have managed to climb using the same walls since there was no stool, chair, table or stone that he could have used to climb. She said the nylon material that is alleged to have been used by Billy was too strong to be cut or torn by Billy unless he had used a knife or razor blade, things which he did not have as suspects are searched for such dangerous items before they are put in cells. The postmortem showed that Billy had died as a result of severe bruises caused by being beaten.

Prisoners are not spared the anguish of torture despite them already paying for their crimes in prison. One of several incidents of torture occurred in Mansa Central Prison.<sup>22</sup> A named prison warder at the Mansa Central Prison allegedly beat up an ailing convict for requesting to be taken to the hospital. According to the victim's elder brother, Ntemba was severely beaten by the supervising prison warder when he approached him for permission to seek medical attention at the hospital. Ntemba allegedly sustained a broken arm and a fractured backbone from the beating. The prison warder reportedly then ordered for the prisoner to be returned to the prison and refused to provide him with a medical report form in order for him to seek treatment at the hospital. The incident happened on December 25, 2004 when the victim fell ill while working on a prison farm

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<sup>22</sup> The LRF News of January 2005.



with other prisoners at the Mungulube Open Prison, situated along the Mansa/Chembe Road. He explained that the prison warder totally refused to grant permission to Ntemba but instead ordered him to continue working even when he allegedly knew the prisoner was unwell. A quarrel then ensued between Ntemba and the prison warder who reportedly used a steel hoe handle to hit him, especially on the limbs, until he lost strength. Friendly prisoners later negotiated with the hospital for the victim to be treated without a police medical report, after noticing that his wounds were getting worse and that his health was deteriorating. Ntemba had an X-ray taken at the hospital and a plaster of Paris was applied to his left arm.

News of an attempted Coup d'etat, on October 28, 1997 sent a lot of fear and panic in many people's lives in Zambia. The failed coup was aimed at over throwing the government of Second Republican President Fredrick Chiluba. From the time of their arrest, the suspects complained of severe violation of their human rights, such as physical and mental torture. The complaints compelled the government under President Chiluba to set up a commission of inquiry that would investigate and establish the alleged human rights violations. The commission headed by Justice Japhet Banda made several findings on the nature and pattern of torture.<sup>23</sup>

The Commission established among other things, that suspects were subjected to both physical and mental torture in various forms.

*“Physical torture usually took the form of beatings, burning, deprivation, electric shock, sexual harassment and suffocation. It also took the form of simulated execution, solitary*

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<sup>23</sup> A report of the Commission of Inquiry Into the Allegations of Torture, Abuse or violation of Human rights on the persons Suspected of Involvement in the attempted Coup of 28<sup>th</sup> October 1997.

*confinement, degradation, insults, threats, witnessing torture and exposure when on the toilet,”* stated the report. A cross check of the evidence submitted by the victims to the Commission, showed a regular pattern of torture.

*“First, the suspect was asked to make a statement on what he knew about the October 28 attempted coup. If there was no incriminating information in the statement, the suspect was threatened with torture and told to tell the officers ‘what they wanted him to tell them.’ After the threats, the suspect was asked to make another statement and if the officers were still not satisfied, the suspect was subjected to torture,”* the report said in part. According to the report, a suspect was asked to make another statement and the cycle would continue until the suspect made an incriminating statement or agreed to sign the statement written by investigating officers.

The Commission established that some of the acts of torture carried out by the police and other security officers were so severe that they destroyed the dignity and impaired the capability of the victims to continue with their normal lives and activities.

The above and other findings of torture left the Commission with no option but to recommend that compensation be awarded to the 79 suspects, who in the view of the Commission, deserved to be compensated. The total amount for compensation is K650, 500,000.00 (six hundred and fifty million and five hundred thousand kwacha), which was to be paid to individuals ranging from K500, 000.00 for the lowest to K25 million for the highest award. Among those implicated and tortured in the coup were various opposition leaders such as Dr. Kenneth Kaunda, the late Dean Mung’omba and Princess Nakatindi Wina. This has not been the only incident of torture being used on opposition leaders.

A horrifying episode of torture was seen in the torture and subsequent death of Cuthbert Nguni, a member of parliament in the opposition. Among the many methods of torture that the late member of parliament went through is that he was driven to a bush, stripped naked and beaten up; the next thing the torturer did was to handcuff him, tie a big stone to his legs and put him in a pond where water reached his chin. They kept him there for a long time and only took him out when his knees gave in and he began to drown.<sup>24</sup> Nguni explained that the police had tricked him into leaving prison under the pretext that his lawyers wanted to see him. He spent five days in the bush and throughout the ordeal he was kept completely naked, blindfolded and without food or water, but all the while undergoing numerous forms of torture. The police dug a trench and buried Ng'uni in it up to his neck. They then put a tin over his head, which they stoned and beat to make him talk<sup>25</sup>.

His wife Mary-Ann Ng'uni provided further details of Ng'uni's torture. She narrated that her late husband explained to her how his interrogators first pushed him in a pool of water, fished him out and swung him over a raging fire causing extensive damage to his skin. This led to the development of very ugly spots all over his skin, which never disappeared.

#### **2.4. TORTURE BY THE POLICE**

A common motivation to torture would be the desire by police officers to make their work easier. It is trite law that the police work under terrible conditions. They lack

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<sup>24</sup> Times of Zambia issue of April 29, 1993

<sup>25</sup> *ibid*

the equipment needed to solve crimes and ensure that justice is done. This is further exacerbated by the fact that they receive paltry salaries from the government despite the risks involved in their work and other tasks that they are expected to undertake. It is then so much easier for them to take out their frustrations on suspects and make their work easier by torturing suspects.

While legally acts of mob justice cannot be considered to be torture, mob justice aggravates the perpetration of torture because if ordinary people severally beat up suspected thieves or rapists, it is accepted and even expected for the police to torture suspects. It is also not uncommon to hear cases where suspected thieves have been taken to the police station in order for confessions to be beaten out of them. An example of this was the case of Billy Chanda cited earlier in the chapter. This also applies to parents who take their notorious children to the police station for the police to ‘discipline’ them. It can then be said that acts of torture are accepted and encouraged by the people such that when torture is committed by the police, it is seen to be done in the name of getting justice. It seems that for the people, it does not matter what means are used as long as at the end of the day, justice is served in that a crime is solved or a lesson has been learnt. It can, therefore, be safely said that society contributes to the perpetuation of torture because they have given the police the ‘mandate’ to carry out such acts.

## **2.5.SUMMARY OF THE CHAPTER**

It has been observed that torture occurs to many cases to people in various spheres of life. While the value systems of men have changed over the years resulting in the

abolition of torture, torture still continues to happen to this day, in some cases showing a replica of torture methods used in ancient times.

The above has shown how torture can be used not only to intimidate and extract confessions from people but also the physical and psychological forms of torture used by perpetrators of torture. Torture continues to this day not just because the police keep on committing acts of torture but also because society has accepted torture as a norm which is expected and in some cases encouraged. This has contributed to the perpetuation of torture. There is, therefore, need to change society's attitude towards torture.

## **CHAPTER THREE**

### **EFFICACY OF THE LAW AGAINST TORTURE IN ZAMBIA**

#### **3.0 INTRODUCTION**

The aim of this chapter is to highlight the laws in Zambia that deal with torture, cruel and inhuman treatment or punishment. This chapter and essay generally, will primarily deal with torture that is committed by the police. The chapter will begin by focusing on the law pertaining to arrest and interrogation as it is at these stages that torture occurs. As regards legislation, the chapter will focus on the Judges Rules as well as various other pieces of legislation that relate to confessions. All this will be done in the hope of showing the loopholes that exist in Zambian law that lead to the perpetuation of torture.

As stated in the earlier chapters, several early civilisations including late Roman law recognised the concept of torture as an aid to fact finding in criminal investigation and trial<sup>26</sup>. In respect of torture it seems the past extends deep into the present. Torture continues to be used as a means of extracting confessions, intimidating opponents and punishing those accused of having committed an offence.<sup>27</sup> It would be interesting to note that very little consideration is paid to the tension between the theories of due process or rule of law, and crime control. More emphasis is placed on crime control. At one extreme is the fear of government abusing their power, and at the other extreme is the need to control crime. In a comparison of crime control and rule of law, there are concerns of society's needs versus fair procedure, and presumption of guilt versus presumption of innocence respectively. Zambia relies heavily on the theory of crime control. To illustrate

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<sup>26</sup> Bassiouni, M. C. (1992) Crimes against humanity in international Criminal Law. P. 255

<sup>27</sup> Kulusika, S. E. (1999) Zambia Law Journal. The Legal Validity of the Universal Prohibition of Torture.

this is the fact that during a spate of armed robberies that rocked the capital, the police Inspector General blatantly announced that his men were embarking on a shoot to kill policy. It is, therefore, quite difficult, even though the Criminal Procedure Code allows for presumption of innocence, for the police to work using this theory. There is a balance that needs to be struck between the two theories.

It would seem a bit odd that anyone would want to defend the rights of a suspect or accused. However, considering that everyone is presumed innocent until proven guilty, it is imperative that everyone is given protection starting from the time of arrest, all the way through trial and if convicted, throughout the sentence. The goal of criminal procedure is to protect the criminal defendant against police misconduct and prosecutorial abuses, as well as to secure a fair trial for the defendant<sup>28</sup>.

### **3.1 ARREST**

The first stage at which torture is likely to occur is during arrest. While the police are given power under the Criminal Procedure Code (CPC) to arrest people with or without warrant<sup>29</sup>, this power does not extend to injuring or causing harm to the suspect or accused. In order to make an arrest, the police officer or other person making the same must actually touch or confine the body of the person to be arrested, unless, the person concerned has submitted to custody by word or action. If the person to be arrested forcibly resists, the police should use only reasonable force necessary to effect the arrest. In practice it is not uncommon to see police officers assaulting suspects in public even

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<sup>28</sup> Chanda, A. W. (1998) Human Rights for Law Enforcement Officers.

<sup>29</sup> Section 18 and 80.

when such suspects are not resisting arrest<sup>30</sup>. The mere fact that they have been arrested warrants, it seems, a good beating or anything that the arresting officer deems fit. This definitely contributes to intimidating, punishing and extracting confessions from the suspect.

### **3.2 INTERROGATION**

Police are entitled to question any person, including persons who may become suspects, in order to determine whether there are reasonable grounds to suspect any person or persons of complicity. But the persons questioned are under no duty to answer, still less to attend at a police station<sup>31</sup>. Considering that the vast majority of those arrested are the poor and/or illiterate, and have no knowledge of their right to remain silent or freedom from self incrimination, they usually submit to the police officers and answer their questions in the hope that they may somehow exculpate themselves. Further, those who refuse to be intimidated by the police are usually dealt with physically, that is, by beatings or other devices such as the commonly used swing or 'kampelwa'. The police are not in any way empowered to use force to extract statements from a suspect or a defendant. The law in theory requires the prosecution to prove their case without recourse to the accused, who may not be obliged to answer questions<sup>32</sup>.

Interrogations are governed by the Judges Rules. They lay down an elaborate set of cautions to be given by the police at various stages of the interrogation. Their purpose is not so much to inform the accused of his right to silence as to provide an administrative code that if followed, will result in the defendant's statements being admissible against him at trial. Breach of the Judges Rules, however, does not necessarily render a statement

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<sup>30</sup> Op cit

<sup>31</sup> ibid

<sup>32</sup> ibid



inadmissible. The Rules require the police to inform the accused of his right to silence and that anything he says may be used in evidence in a court of law. The Judges Rules are supplemented by the American case of *Miranda V. Arizona*.<sup>33</sup>

### **3.2.1. MIRANDA V. ARIZONA**

In one of the most famous cases in the US Supreme Court history, *Miranda V. Arizona*, the Court decided police have to give suspects in custody four warnings before they interrogate them: (1) you have a right to remain silent;

(2) anything you say will be used against you;

(3) you have a right to a lawyer; and,

(4) if you cannot afford a lawyer one will be provided for you.

The complexity of interrogation under the Miranda principle lies in three facets. First, the police do not have to warn suspects unless they do two things: take them into custody (almost always at the police station) *and* interrogate them. Second, most suspects talk even when they have been warned. Third, police coercion has to cause suspects to incriminate themselves. It is unfortunate that the Zambian laws do not provide an explicit Act to govern interrogations. It is for this reason that most acts of torture occur during interrogations.

Probably among the greatest concerns of both the police and the public would be that if suspects knew they had a right to remain silent, they would make a mockery of the system by taunting the police with their rights. In this case the public would be invited to hate not just the suspect but also the system that gives rights to such suspects.

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<sup>33</sup> (1996)

A society that would rather entertain torture, rather than uphold the law is merely reflective of the crime control theory. The author would like to believe that it is more vital to protect the inherent dignity of man, any man even if this means making the police officer's work a little more difficult. What is important is that the law must be upheld and respected. In any case, as will be shown shortly, the fact that the police will be forced to use non-violent methods to obtain evidence will result in their gaining experience in interrogation techniques.

The Judges Rules also provide that every person at any stage of the investigation should be able to communicate and to consult privately with a lawyer even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or to the administration of justice by his doing so<sup>34</sup>. The absence of a lawyer at the interrogation of the accused encourages mistreatment of the accused by the police. Unhappily, the Judges Rules are widely disregarded in Zambia and the torture of suspects is the rule rather than the exception. In the vast majority of cases, lawyers are not present during interrogations and the suspect is left at the complete mercy of the police.

There are several views on whether interrogation is good or bad. Supporters of interrogation believe a safe society depends on questioning suspects. Critics argue a free society does not convict people with evidence out of their own mouths. Supporters of interrogation reply that interrogation does not just convict the guilty, it frees the innocent too.<sup>35</sup>

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<sup>34</sup> *ibid*

<sup>35</sup> Joel Samaha. Criminal Justice. 2003. Wadsworth, USA

US Supreme Court Chief Justice, Earl Warren, an experienced prosecutor states, *‘interrogation takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room’*<sup>36</sup>. However, Sociologist Richard Leo discovered in research by spending time inside the interrogation rooms of major urban police departments and analysing video taped custodial interrogations from two other departments, that very few interrogations are coercive and that interrogators have become increasingly skilled in eliciting incriminating evidence during custodial interrogations. Drawing from this information, the author is in no doubt that if Zambian police officers actually took the time to interrogate suspects without recourse to torture, cruel, inhuman and degrading treatment or punishment, they would develop interrogation skills that would enable them to incriminate suspects without the use of force and, convict suspects.

### **3.3 CONFESSIONS**

#### **3.3.1 Voluntariness of the confession**

At common law, confessions were subsumed under the general exception in favour of admissions. Some confessions made to persons in authority and categorised as ‘involuntary’ were nevertheless excluded. It is interesting to note that some early statutes refer to confessions being acceptable, only where the *‘party shall willingly without violence’* confess<sup>37</sup>. The origin of this rule is to be found in the mid-eighteenth century,

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<sup>36</sup> Ibid. P.101

<sup>37</sup> 1 Edw VI cl 2 s 22 (1547)

and achieved its first clear and authoritative formulation in the case of *R V.*

*Warickshall*<sup>38</sup> :

*'A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.'*

Therefore, in order to render a confession admissible in evidence, it must be perfectly voluntary: and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession, per baron Parke in *R V.*

*Baldry*<sup>39</sup>. This is the position taken in Zambia today. In *Baldry* the court was anxious to point out that involuntary confessions are not presumed to be false, but that it is nevertheless dangerous from the point of view of the administration of justice to admit them. This is particularly true in cases of torture. While it is admitted that confessions extorted out of someone by torture or cruel, inhuman and degrading treatment and punishment are not necessarily all false, it would be in the interests of justice not to admit any such confessions at all because to admit such confessions would result in suspects, who are otherwise innocent possibly being convicted because of their confession.

### **3.3.2 Trial within a trial**

The whole essence of asking the accused if he has any objection to the confession is to ascertain whether it was given freely and voluntarily. This must be decided as a preliminary issue by means of a trial within a trial. The onus is on the prosecution to prove beyond reasonable doubt that the confession was obtained voluntarily. It should

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<sup>38</sup> (1783) 1 Leach CC 263 at 263, 264.

<sup>39</sup> (1852) 2 Den 430 at 444

however be noted that voluntariness relates to the giving of the confession and not just to certain parts or statements of the confession that the accused alleges he did not make.

However, the absence of a trial within a trial, though an irregularity, is curable where there has been no prejudice to the accused. This principle was illustrated in *Tapisha v. the People*<sup>40</sup>. In this case a confession was made but there was no trial within a trial conducted. It was held by the court that failure to conduct a trial within a trial when such an inquiry should have been conducted is an irregularity, but is curable if there has been no prejudice to the accused. Where prejudice has resulted or may have resulted, the appellate court must ignore the confession. The following points came out clearly from the case:

- i) where there has been no trial within a trial, this is not fatal to a case as long there has been no prejudice on the accused.
- ii) where prejudice has resulted or may have resulted, the appellate court must ignore the confession.

It is, therefore, not automatic that where a trial within a trial has not taken place, the appellate court must ignore the confession. It is up to the court to determine whether or not the appellant was prejudiced as a result of this omission. The court also stated that prejudice to the accused may arise not so much because the content of the alleged confession is placed before the court before a decision on its admissibility has been made – the real prejudice arises because where a trial within a trial is held an accused is entitled to give evidence on the issue of voluntariness, without exposing himself to the danger that his evidence on that issue will be used in the trial of the general issues of the case. This does not create a very good picture for victims of torture because this apparent

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<sup>40</sup> (1973) ZR 222

loophole could lead to the suspect being convicted because of an involuntary confession. While it is argued that other evidence apart from the involuntary confession is also used to convict the accused, the fact still remains that involuntary confessions elicited by torture should not be used. The involuntary confession definitely has a bearing on the case.

### **3.3.3 Evidence as a result of torture**

Further, if the confession reveals evidence useful to the case, this evidence is still admissible by the court as valid evidence. In *Liswaniso v. The People*<sup>41</sup> the Supreme Court ruled that evidence obtained illegally, if relevant is admissible. Since the court is not concerned with how evidence is obtained but merely with how it is used by the prosecution at the trial, the judge has no discretion to exclude relevant admissible evidence merely because it was obtained by improper or unfair means. In this situation there is a conflict between the desire to protect the accused from unfair investigation and the interests of society in the conviction of those against whom there is reliable evidence of guilt.<sup>42</sup> However, in principal, the court should not accept this evidence because the means by which this evidence was obtained goes against the basic principles of human rights. *Liswaniso V. The People* illustrates the point that evidence acquired by torturing the suspect will nevertheless be relevant and admissible by the court. This evidence can be used to convict the suspect. This is a further blow to the efforts at eradicating torture as it negates the value of human rights in modern society.

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<sup>41</sup> (1970) ZR 22

<sup>42</sup> Chanda, A.W. (1998) P. 5

In the United States of America, such evidence cannot be used in the prosecution of any crime against the defendant or the following reasons, namely-

- i) it serves as a deterrent to police misconduct;
- ii) it is a device designed to enable the judiciary to avoid the taint of partnership in official lawlessness: and
- iii) it is intended to assure the people that the government would not profit from its own lawless behaviour.<sup>43</sup>

It is unfortunate, though, that the thrust of the above principles is more to deter improper police practices than to protect the rights of the accused. The British Criminal Law Revision Committee pointed this out. In *Wong Kam-Ming v. R*<sup>44</sup> Lord Hailsham stated:

*'any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions.'*

The generality and instrumentality of these words suggest that Lord Hailsham's principal concern was with the control of police behaviour.<sup>45</sup> Those who enforce the law must themselves respect it. Lord Diplock in *R v. Sang*<sup>46</sup> further supports this proposition:

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<sup>43</sup> *ibid*

<sup>44</sup> (1980) AC 247 at 261

<sup>45</sup> Sir Rupert Cross. *Cross on evidence*. 1985. London. Butterworth's.

<sup>46</sup> (1980) AC 247 at 251

*‘It is no part of a judge’s function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law: if it was obtained legally but in breach of the rules of conduct of the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial’.* The learned judge correctly stated that it is not for the judiciary to exercise disciplinary powers over the police or even to institute proceedings against them. It is unfortunate that this results in torture cases ending at this stage because the judge has no duty to follow up such a case to ensure the torturer is prosecuted. It would seem that the right course of action to be taken at this stage would be for the Director of Public Prosecutions to take up such a case. However, as torture is not a crime, the only remedy available is for the victim to commence civil proceedings for assault and battery, or petitioning the High Court under Article 28 of the Constitution.

### **3.4 REMEDIES FOR POLICE MISCONDUCT**

There are four possible remedies for police misconduct:

1. Criminal law: prosecute the officer.
2. Civil law: Sue the police officer.
3. Administrative law: Sue the government.
4. Procedural: throw illegally obtained evidence out of court.



Formally all four can be used in the same case. For example, the state can prosecute a police officer illegally extracting a confession by torturing the suspect. The victim can sue the police officer for damages. The police department can fire or suspend the officer. Finally if the suspect is prosecuted, the court can throw out any evidence the officer found during the illegal search. However, in practice, it is rare to see all of these remedies pursued in the same case.

### **3.4.1 Criminal punishment**

It is unfortunate that in Zambia torture is not a crime under the Penal Code<sup>47</sup>. The Criminal Procedure Code of the Laws of Zambia state that no one can be charged of a criminal offence unless the act is criminalised under the Penal Code<sup>48</sup>. As a result a police officer cannot be charged with the crime of torture. So at present, in Zambia there is no redress under criminal law for torture. The closest that there is to redress is to charge the police officer with assault or grievous bodily harm – offences which attract only minimal punishment compared to the gravity of the offence of torture.

### **3.4.2 Civil law**

Torture consists in most cases of private injury (tort). Plaintiffs can go into a state court to sue individual officers to recover money (damages) to compensate them for their injuries. However the suspect can also sue the officers for violation of their constitutional right. Article 15 of the Zambian constitution provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. Under Article 28 of

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<sup>47</sup> Chapter 87 of the Laws of Zambia

<sup>48</sup> S.3 of the Penal Code.

the Constitution, a person who has been a victim of torture may petition the High Court of Zambia for redress. Article 28 reads in part:

*‘... if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court which shall hear and determine any such application...’*

### **3.4.3 Administrative Law**

It has been said that the root cause of the increasing number of torture cases in the country is as a result of the lack of seriousness by higher authorities who are supposed to discipline their juniors once cases are reported. Usually what happens is that when an officer is implicated in a case, he is either transferred or a deaf ear is paid until the matter is ‘swept under the carpet’. This is wrong because by doing so, they are not correcting anything but adding to the trend. One could bring an action for judicial review to compel the higher authorities to discipline their officers but as it has been stated earlier, most victims of torture are those who are poor and illiterate. It would be too costly for them to bring such an action before the courts.

As for procedural law, this has been discussed earlier and so it suffices to say that the courts should not, under any circumstances, accept evidence that has been obtained through torture.

### **3.5 SUMMARY OF THE CHAPTER**

There is the argument that respect for human rights is somehow opposed to effective law enforcement, and that in order to enforce the law, to capture the criminal and secure his or her conviction, it is necessary to bend the rules a little. In actual fact, violations of human rights by the police only make the already challenging task of law enforcement more difficult. When the law enforcer becomes the lawbreaker, the result is an assault on human dignity and on the law itself and on all institutions of public authority.<sup>49</sup> Zambian Law tries to protect the rights of accused persons, but there are clearly loopholes that exist that allow for ‘bending of the rules’ by the police officers. While this does not result in negating the overall effect of the protection of the rights of the accused it leaves just enough room for an unfortunate accused person to be left without the protection that ought to be provided by the law.

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<sup>49</sup> Human Rights and Law Enforcement-A Training Guide on Human Rights for the Police. 2002. UN. New York and Geneva.

## **CHAPTER FOUR**

### **EFFECTS OF TORTURE ON VICTIMS, THE TORTURERS AND SOCIETY.**

#### **4.0 INTRODUCTION**

The effects of torture have in the past been underestimated. This is largely due to the fact that it has been taken for granted that there are only physical wounds, which eventually heal and the victim can then go on with his or her life. However, the physical and psychological effects of torture can endure for several years and may be irreversible affecting not only the victim but also his relatives and torturers<sup>50</sup>. Torture involves not only physical but also psychological effects sometimes with long-term sequelae. The chapter will begin by showing both the physical and psychological effects of torture. This chapter will also attempt to show that the effects of torture should not be underestimated. The chapter will look at the effects of torture not only on the victim, his family and friends but also on the torturer himself. The chapter will end by assessing how torture affects the development of a country, particularly the development of a third world country like Zambia.

#### **4.1 EFFECT OF TORTURE ON VICTIMS**

For survivors, torture often leads to lasting mental and physical health problems. Physical problems can be wide-ranging, such as musculo-skeletal problems, brain injury, post-traumatic epilepsy and dementia or chronic pain syndromes. Mental health problems

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<sup>50</sup> Human Rights - Quarterly Review 1997/1998.

are equally wide-ranging. The common ones are post-traumatic stress disorder, depression and anxiety disorder.

#### **4.1.2 Physical effects of torture**

The most commonly occurring form of torture is the physical kind where the victim is left with scars or disabilities for the rest of his life. The effects of torture are wide-ranging, and may be multiple and long-term in nature. Physical effects may include brain damage, loss of vision or hearing, atrophy or paralysis of muscles, scarring, and injury to internal organs, including the reproductive organs. Survivors may experience chronic pain or find it difficult or impossible to undertake certain activities. It is unfortunate that in many instances torture frequently results in horrific mutilation or death.

Despite the fact that physical torture produces physical effects that can be seen, it is not in all instances that the victim is left with physical scars. Since torture, in general, is not accepted in modern times, professional torturers in some countries tend to use techniques such as electrical shock, asphyxiation, heat, cold, noise, and sleep deprivation which leave little or no physical evidence. This makes it difficult for the victim to tell others of his experience because of the unlikelihood of them believing him. In the aftermath of torture, the victims feel helpless and powerless. This is often exacerbated by the disbelief many torture subjects encounter, especially if they are unable to produce scars, or other "objective" proof of their ordeal. Language cannot communicate such an intensely private experience as pain.

A renowned psychologist Shirley Spitz observes:

*"Pain is also unsharable in that it is resistant to language ... All our interior states of consciousness: emotional, perceptual, cognitive and somatic can be described as having an object in the external world ... This affirms our capacity to move beyond the boundaries of our body into the external, sharable world. This is the space in which we interact and communicate with our environment. But when we explore the interior state of physical pain we find that there is no object "out there"—no external, referential content. Pain is not of, or for, anything. Pain is. And it draws us away from the space of interaction, the sharable world, inwards. It draws us into the boundaries of our body."*

Shirley Spitz offered a powerful overview of the contradictory nature of torture in a seminar titled 'The Psychology of Torture' in 1989. She stated that, torture is an obscenity in that it joins what is most private with what is most public. Torture entails all the isolation and extreme solitude of privacy with none of the usual security embodied therein. Torture entails at the same time all the self exposure of the utterly public with none of its possibilities for camaraderie or shared experience.

#### **4.1.3 Psychological effects of torture**

The psychological effects of torture include major depression, anxiety, and the constellation of symptoms known as Post-Traumatic Stress Disorder (PTSD). Survivors of torture and trauma may also experience feelings of shame, guilt, powerlessness or worthlessness, an inability to visualize the future, and difficulty connecting to other people. It is unfortunate that in Zambia there is very little documented evidence of the psychological effects of torture. As a result the victim goes on with his or her life and has to deal with the psychological effects alone. This is exacerbated by the fact that the

victim, who is usually the object of police illegality, is often a criminal himself. To expose his feelings as a result of the torture would invariably lead him to exposing himself as a criminal. There is a presumption that the public, the prosecutor or even the judge, will rarely side with a criminal over police officers who are, after all, 'only trying to do their job.'<sup>51</sup>

Psychologically, torture often creates a state where the mind works against the best interests of the individual, due to the inducement of such emotions as shame, worthlessness, dependency, and a feeling of lacking uniqueness. Cunning torturers often induce pandered pride, specious worthiness, false favoritism, and grandiose specialness to further fool the subject. These and other responses can lead to a mutated, fragmented, or discredited personality and belief structure. Even the subject's normal bodily needs and functions (for example, sleep, sustenance, excretion.) can be changed and made to be construed as self-degrading, animalistic, and dehumanizing<sup>52</sup>. They can feel alienated—unable to communicate, relate, attach, or empathise with others. Post-torture psychological effects of torture in Zambia are as stated earlier, usually dealt with by the victim alone. In extreme cases, they are sent to mental institutions and abandoned by their friends and family members.

For torture subjects who are not badly affected by the torture, they nevertheless often suffer from a post-traumatic stress disorder (PTSD). Often times they suffer this without even realising it. Their strong feelings of hate, rage, terror, guilt, shame, and sorrow are also typical of subjects of mobbing, childhood abuse, domestic violence,

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<sup>51</sup> Samaha, J. (2003) Criminal Justice. P.107

<sup>52</sup> Wikipedia Online Encyclopedia

domestic vice, rape and incest, all contexts which contain chronic torture too. They feel anxious because the perpetrator's behavior is seemingly arbitrary and unpredictable—or mechanically and inhumanly regular. They feel guilty and disgraced because, to restore a semblance of order to their shattered world and a modicum of dominion over their chaotic life, they need to transform themselves into the cause of their own degradation and the accomplices of their tormentors<sup>53</sup>. As a result society ends up with individuals who are bitter with and even hateful of the justice system.

The purpose of torture is often as much to force acquiescence on an enemy, or destroy a person psychologically from within, as it is to gain information, and its effects endure long after the torture itself has ended. In this sense the effects of torture are often described by survivors as 'never ending'. Although the effects of torture, indeed, *seem* forever, it is possible to transform such terrible suffering. Torture subjects do take back their identities after even the most terrible tortures. Torture subjects do remember their horrible memories, do release their reasonable rages and do restore their original wholeness. Victimhood is a stage, not a destination. No torture subject need indulge in victimhood, forever, with no hope. Some torture subjects do overcome the associated psychological pain, suffering and trauma of torture.

Torture is often difficult to prove, particularly when some time has passed between the torture, and a medical examination. Many torturers around the world use methods designed to have a maximum psychological impact while leaving only minimal physical traces. Medical and Human Rights Organizations worldwide have collaborated to produce the Istanbul Protocol, a document designed to outline common torture

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<sup>53</sup> Wikipedia On line Encyclopedia



methods, consequences of torture and medico-legal examination techniques<sup>54</sup>. Typically deaths due to torture are shown in autopsy as being due to "natural causes" like heart attack, inflammation or embolism due to extreme stress. It is unfortunate though that in Zambia, medical reports do state the causes of injuries but the barriers in the law prevent the prosecution of the torturers. A setback is that the psychological effects of torture are not documented in these medical reports as they are not considered to be essential. What the medical reports focus on, are the physical effects of torture, probably because they are perceived to be more 'real' than psychological effects. Once again, distinctions are not always clear-cut: the links between the physical and psychological effects of torture can be inseparable.

#### **4.1.4. Effect of torture on the victim at trial**

The effects of torture, both physical and mental can lead to a victim of torture being reluctant to testify against the torturer. This is because the victim is reluctant to re-live such an experience particularly when he knows that he will be subject to cross examination where his experience may be undermined by counsel. In addition, due to the psychological effects of torture, the victim may not be able to clearly remember what happened to him or may not be able to clearly express the pain that he felt. This could result in the victim being frustrated and eventually becoming reluctant to testify at all.

The use of torture has been criticised not only on humanitarian and moral grounds, but on the grounds that evidence extracted by torture tends to be extremely unreliable and that the use of torture corrupts institutions which tolerate it. One well documented effect of

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<sup>54</sup> Wikipedia online encyclopedia.

torture is that with rare exceptions people will say or do anything to escape the situation, including untrue "confessions" and implication of others without genuine knowledge, who may well then be tortured in turn.

## **4.2 EFFECT OF TORTURE ON THE TORTURERS**

### **4.2.1 Motivation to torture**

It was long thought that "good" people would not torture and only "bad" ones would, under normal circumstances. Research over the past 50 years suggests a disquieting alternative view, that under the right circumstances and with the appropriate encouragement and setting, most people can be encouraged to actively torture others<sup>55</sup>. Police officers do not just join the police service and immediately begin to torture suspects. It is a gradual process which consists of various stages and depends on a great deal of factors. The initial stage is reluctant or peripheral participation. Many people upon beginning a new job will follow the direction of an authority figure (such as a superior officer) in an official setting (especially if presented as mandatory), even if they have personal uncertainty. It is presumed that upon joining the police service every police officer has a desire to serve the public and to solve crimes while upholding the principles of justice. However, as time goes by, the frustrations that the police face, such as non-availability of equipment, tend to override their initial policies of upholding justice. This is exacerbated by the fact that police officers deal with not very nice people in a day's work. Of course, officers would like to deal with 'stable, well dressed, normal, and unthreatening' people<sup>56</sup>. Unfortunately, the reality is that during their work they are

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<sup>55</sup> ibid

<sup>56</sup> Samaha. P.56

highly likely to run into unstable, badly dressed, threatening and all-around not very nice people.<sup>57</sup> and eventually sometimes look at the criminal justice system as hopeless. It becomes easier to solve crimes by beating confessions out of suspects.

Further, new police recruits find an already established system where suspects are tortured and are reluctant to deviate from the status quo. The main motivations for this appear to be fear of loss of status or respect, and the desire to be seen as a 'good subordinate'. Another factor that contributes is peer encouragement, where torture is accepted as necessary, acceptable or deserved, or to comply from a wish to not reject peer group beliefs. This is more pronounced in Zambia because of the high rates of unemployment. So the police conform to the laid down 'standards' just so they can have job security and be accepted in the workplace.

#### **4.2.2 Effects of torture on the police**

When looking at the issue of torture it is all too easy to put the blame on the police, considering that they choose to commit these acts willingly and enjoy them. As a result there is little or no sympathy shown to them for the acts that they commit. This is true in the sense that we cannot write off the cause of the perpetration of torture as simply being due to poor working conditions of the police. As individuals we should be able to speak out and stand against things that we believe are wrong. However, the aforesaid must be taken into account, namely, that there are external factors to which they must conform. In view of this, the effects of torture on the police should not be underestimated. To illustrate this point, there have been cases reported where victims of torture have

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<sup>57</sup> While this should not be an excuse, this is illustrative of the kind of people that the police usually deal with.

themselves been forced to commit acts of torture on their fellow victims. In some cases no acts of torture are committed on these victims, they are just made to commit acts of torture on fellow suspects or prisoners. These victims suffer in the same way as those who have actually been physical or psychologically tortured by the police. It is for this reason that the effects of torture on the police should be studied and treated. There is no reason why a policeman just because he is the one who inflicted the torture cannot suffer the same psychological effects as a victim who is made to commit acts of torture. It would then be safe to assert that police officers who torture others are also prone to the psychological effects of torture, such as Post Traumatic Stress Disorder (PTSD) which is also exhibited in victims of torture. This invariably affects the police service as a whole and tends to lower police morale. Further the police officers are not likely to speak about how the torture affects them.<sup>58</sup> The culmination of the effects of torture on the police as well as on the community could have adverse effects leading to an unbalanced society in which everyone suffers as a result.

#### **4.3. TORTURE AND DEVELOPMENT**

There are connections that exist between levels of development and local standards and practices of human rights. The High Commissioner for Human Rights stated in Copenhagen in June of 1994 that ending torture is the beginning of true respect for the most basic of all human rights: the intrinsic dignity and value of each individual<sup>59</sup>.

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<sup>58</sup> The police build a wall and so tend not to empathise with victims resulting in them having no remorse for their actions.

<sup>59</sup> Human Rights- A Quarterly Review of the Office of the United Nations High Commissioner for Human Rights.

Human rights and development are related aspects of each other's accomplishment and as such remain mutually conditioning factors.

This is because of the close links that human rights and development have to the past. When colonialism was overturned, high aspirations existed, both in Africa and the international community as a whole. Without the deadening weight of colonialism, so the general belief ran, individuals standards of living would improve, political freedoms and opportunities would increase, cultural development would occur unskewed by eternal constraints and the 'authentic' African personality could flower. Obviously, the higher the initial expectations, the more caustic the subsequent judgments<sup>60</sup>. African leaders – like many other leaders in the third world – increasingly stressed, development as a need to be satisfied prior to the implementation of full civil and political rights. African leaders were influenced by the mixed heritage of colonialism, which brought authoritarian and bureaucratic forms of government as well as constitutional and legal frameworks with which rights could be protected. They responded in varying degrees to the imperatives of economic, social and political development and de-colonisation and acted as do leaders everywhere to protect what they perceived as both the national interest of their states and the personal interests they hold in office<sup>61</sup>. Zambia was no exception to this and the government of the time led by the then President, Dr. Kenneth Kaunda, embarked on a path that prioritised development of the country squarely in terms of improving the economy and infrastructure.

However, there has been a huge oversight in this type of reasoning. When the landmark international human rights instruments were being promulgated, a common

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<sup>60</sup> Human rights and Development in Africa. J R Welch. 1984. New York

<sup>61</sup> *ibid*

feature among them was the recognition of the inherent dignity of every man. This is evidenced by the preambles of these documents. For example the Universal Declaration of Human Rights (1948) states, '*Whereas recognition of the inherent dignity and of the equal and inalienable rights of members of the human family is the foundation of freedom, justice and peace in the world....*' This is recognition that freedom, justice and peace cannot be achieved without affirming the inherent dignity of man. It goes further to acknowledge this fact in its next paragraph '*whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind*' It is only after one has recognised man as an individual with inherent dignity, that these other rights such as social and economic rights, civil and political rights will follow. To illustrate. If I, as an individual, am not recognised, as one who has inherent dignity it will be very easy for me to be mistreated because the basic essence of my being is not recognised. As such, it only follows that I am not entitled to other basic rights and it would not be a priority for my leaders to endow me with such rights as civil and political rights and social and economic rights.

It is unfortunate that the current leaders are proceeding on the same footing as the early leaders. Their focus is on achieving great economic gain when it should be on recognizing the most basic of all rights. As a result citizens are lacking in several areas of their lives because their inherent dignity as rights of an individual are not being recognised.

Low levels of economic development may impede but do not preclude vigorous governmental efforts to protect civil and political rights. On the other hand, it is frequently asserted that such low levels seriously affect the achievement of basic needs

and of economic and social goals. This should not mean that governments should sit back and do nothing about the situation. There is still hope that the recognition by everyone, of the most basic of all human rights could be achieved with concerted efforts by both the government and society at large.

Governments are obliged both to adopt legislation to 'give effect' to the political and civil rights and to provide 'effective remedy' to persons whose rights are violated. Until the Zambian government begins to recognize inherent dignity and inalienable rights of man, it, along with many others will continue to fail to provide their nationals with the much dreamed of standards of living that ought to be guaranteed by the country's recognition of civil, political, economic and social rights.

#### **4.4 SUMMARY OF THE CHAPTER**

This chapter has attempted to focus on the effects of torture on the victims, that is, the physical and psychological effects which tend to last long after the torture has occurred. While there is encouragement that the pain need not be everlasting, the sad reality is that in Zambia, the effects of torture are never really dealt with or even recognised, particularly the psychological effects. This chapter also dealt with the effects of torture on the torturer, in this case, the police. The police officers have long been seen as culprits who deserve no sympathy and yet they also suffer from torture. While it may not be so much of physical suffering, it is in most cases mental or psychological pain. The effects of torture on both the tortured and the torturer culminate in an unbalanced society that is not able to develop or function well. The final issue that the chapter dealt with is the fact that torture is closely related to development of a country, albeit

indirectly. This is because the abolishment of torture, both on paper and on the ground is recognition of the dignity of all men. This in turn, is the foundation of the recognition of all other rights that lead to the development of a country. It has thus been observed that the effects of torture are far reaching and never benefit anyone in any way.



## **CHAPTER FIVE**

### **SUMMARY AND RECOMMENDATIONS**

#### **5.0 INTRODUCTION**

This chapter will be a summary of the chapters in this essay. This will also make recommendation of what ought to be done in attempting to completely curb the vice of torture from all institutions, whether official or private.

Chapter One introduced the concept of torture by tracing its history from medieval times where it was seen as a necessary means of obtaining confessions and other means necessary for the prosecution of criminals and heretics. Torture was institutionalised when the church decided to adopt it as a means of punishing those who had offended the church and shortly afterwards, this action was adopted by the state where torture was promulgated into legislation. With time, however, as the values of man changed and people began to realize and recognize the intrinsic dignity of man, torture began to be frowned upon and was eventually abolished in most countries of the world. It was noted that despite the abolition of torture, it still continues to be practiced in several countries. The chapter also looked at the various definitions of torture which tend to limit those who can be prosecuted.

Chapter Two looked at the various forms of torture that exist. The chapter began by citing torture techniques from ancient times and then proceeded to look at the forms of torture that exist today. It was noted that the nature of torture has evolved from mostly physical forms to psychological forms, which leave little or no marks on the body of the

victim. The Chapter went on to cite cases of torture that have occurred in Zambia. These acts were often committed on the poor and illiterate as well as politicians who were against the ruling regime.

Chapter Three analysed the efficacy of the laws that attempt to reduce the scourge of torture. These relate to arrest, interrogations and confessions. It was noted that although these laws on the face of it, tend to discourage torture, these laws have loopholes which can be used to evade or altogether ignore allegations of torture. It was thought that a factor that contributes to the perpetuation of torture is the lack of harmonization of the above mentioned laws.

Chapter Four was an analysis of the effects of torture on those affected by torture. Those concerned include the victims, the police, and society as a whole. It was observed that in most cases what is recognized are the physical effects on the victims because these are visible and cannot be ignored. However there are also psychological effects of torture, which affect not only the victims but also the torturers. In most cases these effects are ignored. The Chapter also looked at the implications involved in ignoring this basic right, on the other rights that are owed to man.

In Zambia torture is a scourge that is recognized as something that should not be tolerated. This is reflected by the fact that torture is abolished in the Constitution. However there seems to be an acceptance of the status quo, by the government and society at large. This has led to adverse effects on the development of the country as several rights that are supposed to be recognized and provided by the government are blatantly set aside or provided in such poor quality. An example of this is education and health.

While it is acknowledged that torture has been abolished in Zambia, going by the aforesaid, this scourge continues to be perpetrated unabated. If anything, torture is on the increase.

## **5.1 LEGISLATION**

It is recognized that appeals for torture to be criminalised have continually been raised almost to the point of becoming tiresome, but it should be recognized that without these calls for the criminalization of torture, the government would not heed urgency of this situation. It is in this vein that the author has decided to add to the litany of those who call for the criminalisation of torture. The criminalisation of torture is the first step that can be taken to ensure that torture is totally abolished both in law and in fact (section 15 of the Constitution of Zambia notwithstanding). Further, torture should not only be criminalised but the duration of imprisonment should be for a long period of time so that would-be offenders are deterred. Torture should not only be criminalised, but the officers who commit the torture should be the ones to pay the compensation to the victims, as this will make them responsible for their action.

Interrogations should be taped so that whatever goes on in the interrogation rooms are monitored and if torture does occur, it would be easy to get evidence from the taped interrogation. This would also act as a deterrent to police officers, who may be tempted to torture the suspect. It is also recommended that legislation pertaining to interrogations should be made into one Act. Currently there are several pieces of legislation that are in different Acts or are mere principles of the Common Law. The enactment of specific

legislation dealing with how an interrogation should be conducted will act as a basic guide for the police and will hopefully lead to the reduction or cessation of torture.

It should also be recognized that new technologies have opened the way for new forms of crime or old ones with anew twist and torture may no longer be a sufficient means of acquiring information from suspects. The proliferation of computer networks for example, has expanded the policies for fraud and of so-called 'white collar crime'. In view of this, the government ought to pay more attention to the police service. They ought to provide the police with proper equipment such as fingerprint detecting equipment and forensic equipment that will help in solving crimes. This would help in creating employment for thousands of biochemists and microbiologists who are currently limited (in terms of employment) to the food and medical industries.

## **5.2. SENSITISATION PROGRAMS**

There is need for the awareness of society at large that torture is a scourge affecting the very core of the community and as such, there is need for sensitization programs to be undertaken. The Human Rights Commission last year, in commemoration of International Human Rights Day, which falls on 10<sup>th</sup> December, undertook sensitisation activities such as drama performances on torture in high density areas and the distribution of posters and badges on fighting torture. This was unfortunately a one off event as this was the theme for the year. While this was a commendable effort, such programs should not be done once in a while. Government ought to take the step to actively inform people of their rights on a continuous basis so that it becomes ingrained in them that they are worthy individuals who ought to be respected. Government also needs to create an agency that deals with torture. The Human Rights Commission deals

with human rights violations generally and therefore, cannot focus its attention on the eradication of torture. In view of this, it is recognized that politicians also need to be sensitised on this issue. Without the respect for the inherent dignity of an individual, it is next to impossible to achieve the recognition of other basic rights. It is imperative that politicians are sensitised as they often use torture to achieve intimidation of opposition members. As such they contribute to the perpetration of torture because they 'institutionalise' torture.

The police also ought to be sensitised on the need to abstain from resorting to torture in any circumstance. Those who are already in the police service should undertake compulsory human rights classes so that they are aware that people ought to be respected. Those who are still undergoing training ought to be trained in accordance with the regulations laid down by the United Nations Handbook for Law Enforcement Officers so that from the outset they recognize the importance of upholding human rights. This handbook teaches law enforcement with a bias towards the respect for human rights.

It is also recommended that Miranda Rules (from the case of *Miranda V. Arizona*) be applied in the Zambia Police Service. This is to ensure that people, from the outset know that they have a right to remain silent and the police ought to take it up as their duty to inform suspects of this right. Adopting these rules would ensure compliance with the recognition of several rights.

### **5.3. REHABILITATION**

It has been recognized that torture not only affects the victims but also the torturers as well. All victims of torture should have free access to psychiatric treatment as torture affects them all even though they may not openly speak about it. The treatment

would help in the prosecution of offenders as the psychiatric therapy will offer the individual a means of dealing with the ordeal in a manner that does not aggravate him or her. Further, the victims will be able to achieve their lost sense of dignity and will be able to be integrated back into society with little or no ill convictions of the police and society at large. Family members and those who are close to the victims should also be encouraged to attend therapy sessions in order for them to recognize and appreciate what the victim went through and also how best to deal with the victims. There should be also psychiatric treatment or counseling sessions for police officers as they are also invariably affected by torture. This should be encouraged and if possible, be done in private so that police officers do not feel intimidated.

Medical reports should also state the psychological effects of torture suffered. This would help in prosecuting offenders who carry out psychological torture which leave little or no physical marks on the body of the victim. By citing this in the medical reports, it would help the victim to ‘substantiate’ his claim of having been tortured.

In order to ensure that this is done, government needs to create an agency or department to specifically deal with this. This could be done in collaboration with mental health institutions such as Chainama Hospital and others dealing with such problems.

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