Article

The Death Penalty in Malawi: An Assessment against Regional and International Human-rights Standards

Esther Gumboh
http://orcid.org/0000-0002-9286-6869
Researcher, Centre for Applied Legal Studies, University of the Witwatersrand
Esther.Gumboh@wits.ac.za

Abstract

Despite the global trend towards the abolition of the death penalty, Malawi has no plans to do so. However, the country is under an obligation to ensure that the use of the death penalty is restricted in line with regional and international human-rights law. A survey of the application of the death penalty in Malawi reveals that while there are some restrictions on its use, the law and practice are not fully aligned with the regional and international standards. This is particularly the case with the scope of capital crimes, the right to seek mercy and the death row phenomenon. Malawi needs to address these shortfalls and move progressively towards the abolition of the death penalty. The task of this article is to make known some findings on how Malawi fares in this regard. The paper first discusses the regional and international human rights standards for the death penalty then it considers the Malawian Constitution and the restrictions on the death penalty under Malawian law. It concludes with an assessment of the extent to which Malawi conforms to international law insofar as the death penalty is concerned.

Keywords: death penalty; death row; abolition; punishment; capital crimes; fair trial; pardon; Malawi

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Introduction

There is an unmissable global trend towards the abolition of the death penalty.[1] In line with this decline, in 2007 Malawi outlawed the mandatory death penalty for murder in *Kafantayeni v Attorney General*.[2] While the death penalty remains on the statute books, Malawi is a de facto abolitionist state with a twenty four-year unbroken record of no executions; however, it is unlikely that the death penalty will be abolished in the near future. Indeed, Malawi 'has no intentions or immediate plans' to abolish the death penalty altogether anytime soon[3] and has therefore not signed the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.[4] Moreover, the government of Malawi maintains that public opinion remains in favour of the death penalty.[5]

Therefore, the immediate challenge is to ensure that the use of death sentences is restrained and in line with international and regional human rights standards. The task of this article is to make known some findings on how Malawi fares in this regard. The paper first discusses the regional and international human rights standards for the death penalty. It then considers the Malawian Constitution and the restrictions on the death penalty under Malawian law. The paper concludes with an assessment of the extent to which Malawi conforms to international law in as far as the death penalty is concerned. It is imperative, though, to first indicate the relevance of international law to Malawi.

Relevance of International Law in Malawi

The relevance of international law to Malawi cannot be gainsaid. International law serves as a general guide to governance[6] and can be used in interpreting the Constitution.[7] Section 11(2)(*c*) of the Constitution requires that in appropriate cases

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1 For a discussion of developments in Africa, see Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya' (2012) 45 Suffolk University Law Review 285; Andrew Novak, 'The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda' (2009) 1 Loyola Journal of Public International Law 19.

2 *Kafantayeni v Attorney General* [2007] MWHC 1 (HC).

3 See Malawi Human Rights Commission, 'Annual Report 2013' (2014) 30; Malawi Human Rights Commission, 'Mid-term Progress Report on the Implementation of the United Nations' (2013) 1; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Malawi' UN Doc A/HRC/16/4 (4 January 2011) para 105.

4 1642 UNTS 414, 15 December 1989 (hereafter 'ICCPR').

5 Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' UN Doc CCPR/C/MWI/Q/1/Add.2 (25 June 2014) para 14; Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' UN Doc CCPR/C/MWI/1 (13 July 2012) para 18.

6 Section 13(*k*) of the Constitution.

7 Danwood Chirwa, 'A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005) 49 (2) Journal of African Law 233.

courts must consider international law and comparable foreign case law when interpreting the Constitution. Courts are also required to have regard to international human-rights standards in determining whether a limitation on a right is justifiable.[8] Courts can have recourse to international-law standards, regardless of whether they are binding on or have been ratified by Malawi, including soft-law norms as contained in general comments, international declarations and charters.[9] In addition, courts may have regard to jurisprudence emerging from such instruments.[10] The Constitution also stresses the application of international standards in prison-related matters. Indeed, the Inspectorate of Prisons, which monitors the conditions, administration and general functioning of penal institutions,[11] is enjoined to take 'due account of applicable international standards' in exercising its powers.[12]

International law is also a source of law in domestic courts. Customary international law is automatically binding on Malawi, subject only to the Constitution and Acts of Parliament.[13] Once domesticated, international treaty law is as good as statutory law.[14] The Universal Declaration of Human Rights,[15] the Convention on the Rights of the Child[16] and all agreements entered into before 1994 have domestic force in Malawi.[17] This includes the African Charter on Human and Peoples' Rights,[18] the International Covenant on Civil and Political Rights,[19] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[20] and the African Charter on

8 Section 44(1) of the Constitution.

9 Chirwa (n 7) 233.

10 Danwood Chirwa, *Human Rights under the Malawian Constitution* (Juta 2011) 27.

11 Section 169(3)(*a*) of the Constitution.

12 Section 169(1) of the Constitution.

13 Section 211(3) of the Constitution reads: 'Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic.'

14 Section 211(1). See, generally, Tiyanjana Maluwa, 'The Role of International Law in the Protection of Human Rights under the Malawian Constitution of 1995' in African Association of International Law, *African Yearbook of International Law* (Brill 1995) 53.

15 GA Res 217A (III), UN Doc A/810 (1948) (hereafter 'UDHR').

16 GA Res 44/25 (1989) (hereafter 'CRC').

17 See *Moyo v Attorney General* [2009] MWHC 83 (HC) 6; *Malawi Telecommunications Ltd v Makande and Omar* MSCA Civil Appeal No 2 of 2006 (unreported) (HC); *Kalinda v Limbe Leaf* Civil Cause No 542 of 1995 (unreported) (HC); Thomas Hansen, 'Implementation of International Human Rights Standards through the National Courts in Malawi' (2002) 31 (1) Journal of African Law 46.

18 OAU Doc CAB/LEG/67/3 Rev 5 (1981) (hereafter 'African Charter').

19 GA Res 217A (III), UN Doc A/6316 (1966) (hereafter 'ICCPR'). Malawi has declined to sign the Second Optional Protocol to the ICCPR (GA Res 44/128, UN Doc A/44/49 (1989)), which calls for the abolition of the death penalty. UDHR provisions now form part of customary international law (see *Filártiga v Peña-Irala*, 630 F2d 876 (1980)) and hence automatically binding on Malawi: see Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi' (2010) 10 (1) African Human Rights Law Journal 79.

20 GA Res 39/46, UN Doc A/39/51 (1984) (hereafter 'CAT').

the Rights and Welfare of the Child.[21] They can, therefore, be used to complement gaps in the Constitution and legislation. This is important because these instruments and several others contain important international standards for punishment, including the death penalty, most of which have attained the status of customary international law.

International Standards on the Death Penalty

Scope of Capital Crimes

The first restriction on the use of the death penalty relates to the category of offences that may attract a death sentence. The UN General Assembly has affirmed that in order to protect the right to life fully, the number of capital offences needs to be restricted progressively 'with a view to the desirability of abolishing this punishment in all countries.'[22] Article 6(2) of the ICCPR states that the death penalty must be applied only for the 'most serious offences'.[23]

Although this limitation is an established principle of international law, it is quite controversial because international law does not provide a specific list of offences that may not be punished by death.[24] According to the Human Rights Committee (HRC), the restriction of the death penalty to the 'most serious offences' means that the death penalty must be used as 'a quite exceptional measure'.[25] The HRC has further stated that Article 6 of the ICCPR will be violated where the death penalty is used for 'offences which cannot be characterized as the most serious, including apostasy, committing a third homosexual act, illicit sex, embezzlement by officials, and theft by force.'[26] According to the HRC, other offences which do not warrant the death penalty include robbery, trafficking in toxic and dangerous wastes, abetting suicide, property offences, corruption and non-homicidal offences.[27] Expanding on this, paragraph 1 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty[28] provides that capital offences 'should not go beyond intentional crimes, with lethal or extremely grave consequences.' In addition, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that the death penalty should be eliminated for economic crimes, drug-related offences, victimless offences and acts

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21 OAU Doc CAB/LEG/24.9/49 (1990) (hereafter 'African Children's Charter').

22 Capital Punishment, GA Res 2857 (XXVI) of 20 December 1971.

23 Article 6(2) of the ICCPR; Article 4(2) of the American Convention on Human Rights (hereafter 'American Convention').

24 William Schabas, *The Abolition of the Death Penalty in International Law* (CUP 2002) 273.

25 Human Rights Committee General Comment No 6 (16) 'The Right to Life (Art 6)' (1982) para 7.

26 Human Rights Committee 'Concluding Comments on Sudan' (1997) UN Doc CCPR/C/79/Add.85, para 8.

27 See Chirwa (n 10) 99, citing Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases and Materials, and Commentary* (OUP 2000) 119–120.

28 ECOSOC Res E/RES/1984/50 (1984) (hereafter 'ECOSOC Safeguards').

relating to moral values, including adultery, prostitution and sexual orientation.[29] Article 4(4) of the American Convention on Human Rights[30] excludes the use of the death penalty for political offences or related common crimes.

Exempted Offenders

The second restriction relates to the categories of offenders who can be sentenced to death. It is noteworthy that some instruments prohibit the imposition of the death penalty altogether, while others prohibit only its execution on certain offenders. Article 6(5) of the ICCPR prohibits the use of the death penalty for offences committed by persons below the age of 18 years and the execution of pregnant women. Similar prohibitions are also contained in other international and regional human-rights instruments such as Article 37(*a*) of the CRC, Article 4(5) of the American Convention, Article 30(1)(*e*) of the African Charter, and Article 5(3) of the African Children's Charter (as read with Article 2 of the African Children's Charter).

The distinction between prohibitions of the imposition and the execution of the death penalty is particularly important in the African context. Article 30(1)(*e*) of the African Children's Charter prohibits the imposition of the death penalty on not only pregnant women but also 'mothers of infants and young children'. Elaborating on this provision, the African Committee of Experts on the Rights and Welfare of the Child notes that this provision will be violated where the law merely provides for a delay in execution until shortly after birth.[31] However, echoing Article 6(5) of the ICCPR, Article 4(2)(*j*) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[32] directs states 'not to carry out death sentences on pregnant or nursing women.' This permits the imposition of the death penalty on these women and only prohibits its execution during pregnancy and nursing.

A further observation on the restrictions on offenders is that it is only the African human rights system which extends protection to mothers of nursing and young children (a generous interpretation of these instruments can also accommodate primary caregivers). A challenge in this regard is that the instruments do not provide a definition of a 'young' child. Furthermore, an offender will not be in a position to care for a young child in prison, which is the likely place such an offender would end up if the death penalty is reserved for serious offences.[33] Release on parole may come at a time when an

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29 Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc E/CN/4.2000/3, 5 January 2000.

30 OAS Treaty Series No 36 (1978).

31 General Comment No 1 '(Article 30 of the African Charter on the Rights and Welfare of the Child) on Children of Incarcerated and Imprisoned Parents and Primary Caregivers' ACERWC/GC/01 (2013) para 56.

32 Adopted 11 July 200 (hereafter 'Maputo Protocol').

33 The African Children's Charter urges that non-custodial punishment should be the first option in sentencing pregnant women and mothers with nursing or young children: see Article 30(*a*).

offender's child is mature and has, after all, grown accustomed to a life without the primary care of their biological mother.

The ECOSOC Safeguards further prohibit the use of the death penalty on offenders with mental disabilities, including those who develop a mental condition while on death row.[34] States are also urged to prescribe a maximum age beyond which the death penalty may not be imposed or executed.[35] It is notable that Article 4(5) of the American Convention prohibits the imposition of the death penalty on persons who are above the age of seventy years.

Procedural Safeguards

The third restriction on the death penalty is that procedural safeguards must be followed in all capital cases. This restriction is inherent in the proscription of the 'arbitrary' deprivation of life. The death penalty may be imposed only after a trial that complies with the right to a fair trial and other international human rights norms. Article 6(2) of the ICCPR specifically states that the death penalty may not be imposed retroactively or in a manner inconsistent with the ICCPR or the Convention on the Prevention and Punishment of the Crime of Genocide.[36] Regional human rights instruments also embody various procedural safeguards against imposing the death penalty that echo the provisions of the ICCPR. For instance, Article 4(2) and (6) of the American Convention prohibits the retroactive application of the death penalty and guarantees the right to apply for amnesty, pardon or commutation of sentence. Procedural safeguards against the use of the death penalty are also reiterated in the ECOSOC Safeguards and other UN resolutions.

The HRC has held that the death penalty may be imposed only after a fair trial that observes all the provisions of the ICCPR.[37] In General Comment No 6, it noted that Article 6 of the ICCPR requires that the procedural guarantees in the ICCPR relating to a fair trial must be observed. In *Reid v Jamaica*,[38] the HRC stressed that the imposition of the death penalty following a trial that has not complied with the provisions of the ICCPR would violate Article 6 of the ICCPR.[39] Parallel observations have also been made by the European Court of Human Rights (hereafter 'ECtHR') and the African Commission on Human and Peoples' Rights (hereafter 'African Commission')

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34 ECOSOC Safeguards, para 3.

35 See para 1c of the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN ECOSOC Res 1989/64 (1989).

36 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 299 (1948).

37 *Lubuto v Zambia* Communication No 390/1990, CCPR /C/55/D/390/1990 (1995); *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae and Application in Intervention of Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Tribunal: 8 February 2007).

38 *Reid v Jamaica* Communication No 250/1987 UN Doc CCPR/C/51/D/355/1989 (1994).

39 ibid para 11.5.

regarding the lawfulness of the death penalty under the European Convention on Human Rights (hereafter 'ECHR') and African Charter respectively. For instance, the ECtHR has held that the imposition of the death penalty following an unfair trial 'must be considered, in itself, to amount to a form of inhuman treatment.'[40] For its part, the African Commission has held that execution after an unfair trial amounts to an arbitrary deprivation of life.[41]

Procedural safeguards must also include the right to seek mercy (amnesty, pardon or commutation of sentence).[42] International human-rights law requires that the prerogative of mercy must be more than an act of mercy that is not subject to legal scrutiny. For the right to seek mercy to be realised, states must adopt legislative and other measures that establish certain procedural guarantees for prisoners on death row. This position is clear from the jurisprudence of international human-rights bodies. For instance, the Inter-American Commission held in *Baptiste v Grenada*[43] and in *Knights v Grenada*[44] that the right to seek pardon, amnesty or commutation of sentence encompasses certain minimum procedural guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed. These rights include the right to submit a request for amnesty, pardon or commutation of sentence; to be informed of when the competent authority will consider the offender's case; to make representations, in person or by counsel, to the competent authority (such as an advisory committee on the prerogative of mercy); to receive a decision from that authority within a reasonable period of time prior to his execution, and not to have capital punishment executed when such a petition is pending decision by the competent authority. Thus, in *Lallion v Grenada*,[45] the Commission found that the applicant's rights under Article 4(6) of the American Convention had been violated by the state's failure to guarantee him the rights to apply for pardon, amnesty or commutation of sentence; to make representations to the Advisory Committee on the Prerogative of Mercy, and to receive a decision on his application a reasonable time before his execution. In *Edwards v Bahamas*,[46] the Commission again found a violation of Article 4(6) of the American Convention in the

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40 *Ocalan v Turkey* Application No 46221/99, Judgement of 12 May 2005, para 169.

41 *Amnesty International (on behalf of Orton and Vera) v Malawi* Communications No 68/92 and 78/92 (2000) AHRLR 144 (right to enter defence and to legal representation); *Amnesty International v Sudan* Communications No 48/90, 50/91, 52/91, 89/93; *Constitutional Rights Project (in respect of Akamu) v Nigeria* (2000) AHRLR 191 (ACHPR 1998). For a discussion of other cases dealing with rights to a fair trial and the death penalty, see Lilian Chenwi, 'Taking the Death Penalty Debate Further: the African Commission on Human and Peoples' Rights' in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Routledge 2008) 75 at 89–94; Lilian Chenwi, 'Fair Trial Rights and their Relation to the Death Penalty in Africa' (2006) 55 (3) International and Comparative Law Quarterly 609.

42 See, for instance, Article 6(4) of the ICCPR.

43 Case No 11/743, IACHR Report No 38/00 (13 April 2000) 760–776.

44 Case No 12/028, IACHR Report No 47/01 (4 April 2001) 878–882.

45 Case No 11/765, IACHR Report No 55/02 (21 October 2002) paras 75–81.

46 Case No 12/067, IACHR Report No 48/01 (4 April 2001) paras 167–174.

light of the state's failure, among other things, to prescribe a procedure for applying for pardon, to provide the criteria for the exercise of the powers of the Advisory Committee on the Prerogative of Mercy and to inform the applicant of the details of when his application would be considered. The Commission also faulted the state for failing to afford the applicant the right to receive and challenge evidence presented to the Committee.

Other Human-rights Concerns about the Death Penalty

The death penalty raises a number of other human-rights concerns. For example, there are concerns about the compatibility of the death penalty with the right to human dignity and the prohibition of torture and cruel, inhuman and degrading punishment.[47]

Attention has also been drawn to the death row phenomenon and the methods of execution.[48] There is no consensus on the precise definition of the death row phenomenon. However, most scholars and courts recognise it to include prolonged delays in executing the death sentence, the harsh conditions of death row and the resulting emotional trauma.[49] Prolonged delay in execution can, in certain circumstances, amount to torture and cruel, inhuman and degrading punishment and therefore delegitimise the death penalty.[50] Prison conditions on death row must comply with the minimum international standards set out in the ICCPR and other regional and international instruments. Under Article 10(1) of the ICCPR, all persons deprived of liberty have the right to live in conditions that are consistent with the right to human dignity. Part 1 of the Standard Minimum Rules for the Treatment of Prisoners[51] provides for minimum basic standards in respect of accommodation, hygiene, exercise, medical treatment, religious services and library facilities for prisoners.

In the European region, the ECtHR held in *Soering v United Kingdom*[52] that while the death penalty itself may not infringe the ECHR, the circumstances relating to the death penalty may raise issues that render it contrary to Article 3 of the ECHR. The court pointed out that, among other factors, 'the manner in which it is imposed or executed,

47 See, for instance, *S v Makwanyane* 1995 (3) SA 391 (CC).

48 For a discussion on methods of execution, see Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (PULP 2007) 138–146.

49 For a discussion of the death-row phenomenon, see Kealeboga Bojosi, 'The Death Row Phenomenon and the Prohibition against Torture and Cruel, Inhuman or Degrading Treatment' (2004) 4 (2) African Human Rights Law Journal 30; David Sadoff, 'International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon' (2008) 17 Tulane Journal of International and Comparative Law 82; Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (3 edn, OUP 2015) 203; Chenwi (n 48) 110–138.

50 See Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' (2000) 11 (4) European Journal of International Law 835.

51 UN Doc A/RES/70/175 (17 December 2015) Annex (hereafter 'the Mandela Rules').

52 *Soering v United Kingdom* (1989) 11 EHRR 439.

the personal circumstances of the condemned person and the disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, may bring the death penalty under Article 3 of the ECHR.[53]

Although the methods of execution are not regulated by human rights instruments, executions must be carried out in a manner that causes the least possible suffering.[54] Various methods have been found to be unacceptable. For instance, the HRC has found that the use of gas chambers violate the prohibition of cruel, inhuman and degrading treatment.[55]

Death Penalty in Malawi

Restrictions

There are a number of restrictions on the use of death sentences in Malawi. First, it may be imposed only for twelve offences. The Penal Code has eight capital offences, namely treason, piracy, rape, genocide, robbery, burglary, housebreaking and murder.[56] In addition, the Defence Force Act (DFA)[57] prescribes death for aiding the enemy, communication with the enemy, mutiny, failure to suppress mutiny, treason and murder.[58] Since 1995, death sentences have been passed for murder only.[59] Since a discretionary death sentence gives a court power to impose a lesser sentence, including life imprisonment, it is peculiar that at present, with the exception of treason and mutiny, all capital crimes are punishable by 'death or imprisonment for life'.[60] It appears that the reason for this is to ensure that life imprisonment is also available to offenders convicted of these crimes.[61] Treason is a strictly capital offence, whereas mutiny is punishable by 'death or any other punishment'.[62]

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53 ibid para 104.

54 Para 9 of the 1984 ECOSOC Safeguards.

55 *Ng v Canada Communication* No 469/1991 UN Doc CCPR/C/49/C/49/D/469/1991 [1994] para 16(3), holding that gassing may cause 'prolonged suffering and agony and does not result in death as swiftly as possible, as it may take over 10 minutes.'

56 See ss 38, 63, 133, 209, 217A(2)(*a*), 301(2) and 309 of the Penal Code, Chapter 7:01 of the Laws of Malawi.

57 Defence Force Act, Chapter 12:01 of the Laws of Malawi, as amended by Act No 11 of 2004.

58 Sections 34, 33, 40(1), 41 and 80(3) of the DFA. An attempt to commit a capital offence is punishable by 'any greater punishment than imprisonment': see s 76 of the Act.

59 The Advocates for Human Rights and World Coalition against the Death Penalty, 'Malawi: 22nd Session of the Working Group on the Universal Periodic Review—United Nations Human Rights Council, April 2015–May 2015' (September 2014) para 3.

60 See ss 38(1) and 210 of the Penal Code. See also ss 33(1), 34(1), 40(1), 41(*a*) and 80(3)(*a*) of the DFA.

61 See Malawi Law Commission, *Report of the Law Commission on the Review of the Criminal Procedure and Evidence Code* (2007) 57 (hereafter 'CPEC Review Report').

62 Section 40(1) of the DFA.

The second restriction relates to the categories of offenders who may be sentenced to death. The law states that persons who are mentally ill are not criminally responsible for their actions[63] and that in cases of diminished responsibility a conviction of manslaughter and not murder must be recorded. In the latter scenario, an offender would face a maximum of life imprisonment only.[64] In addition, section 72(2) of the Prisons Act[65] stipulates that where an offender is 'adjudged to be a mentally disordered or defective person' while on death row and his 'sentence has not, at the time he is certified to be of sound mind, been commuted to a term of imprisonment, the Minister[66] shall report the matter to the President.' This is obviously done so that the president is able to consider the offender concerned for mercy.

The law also excludes the imposition of death sentences on pregnant women[67] and on persons who were under eigtheen years of age at the time of the commission of the offence.[68] In the latter case, in terms of section 141(1) of the Child Care, Protection and Justice Act (CCPJA), as read with Schedule Six of the Act, all children found liable for capital offences must be detained at a reformatory centre. Section 141(1) directs that

> [w]here a child is found responsible for offences listed in the Sixth Schedule, the court shall order him to be detained at a reformatory centre for such period as may be specified in the order.

Section 146(2) then provides that a reformatory centre order shall not be made unless 'there is no fit person willing to undertake the care of the child' or 'the court is satisfied that the child cannot suitably be dealt with otherwise.' However, this provision is applicable only where the child offender is below the age of 14.[69] Since the CCPJA assumes supremacy over other laws insofar as child matters are concerned,[70] section

63 Section 12 of the Penal Code.

64 Section 214A of the Penal Code. The onus is on the state to show that that an offender satisfies the requirements for diminished responsibility and is therefore entitled to a conviction of manslaughter: see s 214A(2).

65 Chapter 9:02 of the Laws of Malawi.

66 This refers to the Minister of Home Affairs and Internal Security.

67 Section 26(4) of the Penal Code; ss 327(4) and 328 of the Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi (hereafter 'CPEC').

68 See s 26(2) of the Penal Code and s 141 of the Child Care, Protection and Justice Act No 22 of 2010 (hereafter 'CCPJA').

69 Section 146(2).

70 For instance, s 146, which stipulates the powers of a court upon proof of an offence against a child and states that the powers provided thereunder are 'in addition to any other powers exercisable by virtue of this Act or any other written law, in so far as such law is consistent with [the] Act.'

141(1) trumps section 26(2) of the Penal Code, which prescribes that children guilty of capital offences should be sentenced to detention at the pleasure of the president.[71]

With respect to pregnant offenders convicted of a capital offence, section 26(4) of the Penal Code details that 'the sentence to be passed on her shall be a sentence of imprisonment for life instead of death.'[72] This position is reiterated in sections 327(4) and 328 of the CPEC.[73] A court has an obligation to establish whether a woman convicted of a capital offence is pregnant.[74] If the offender responds in the affirmative or the court 'thinks it fit to order', pregnancy must be proved or disproved through evidence.[75] Section 327(3) creates a rebuttable presumption against pregnancy which may be overcome only when the fact of pregnancy 'is proved affirmatively to [the court's] satisfaction'. A finding that a woman is not pregnant may be challenged on appeal and, if successful, the death sentence imposed on the offender must be substituted with life imprisonment in terms of section 327(4) of the CPEC.

The third restriction on the death penalty in Malawi relates to procedural safeguards. The death penalty has constitutional recognition through section 16 of the Constitution, which states:

> Every person has the right to life and no person shall be arbitrarily deprived of his or her life. Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.

The wording of this provision indicates that there are instances in which deprivations of life would not infringe the right to life. The courts have not defined the meaning of 'arbitrariness' in this provision.[76] According to Chirwa,[77] the prohibition against the

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71 Detention at the pleasure of the president involves the detention of children until the president orders their release on the advice of the Child Case Review Board. In practice, this resulted in prolonged periods of detention for children akin to life imprisonment due to a lapse in the administrative aspects of the sentence. The constitutionality of this penalty was unsuccessfully challenged in *Moyo* (n 17). For more on this penalty, see Jamil Mujuzi, 'Sentencing of Children to Life Imprisonment and/or to be Detained at the President's Pleasure in Eastern and Southern Africa' (2010) 6 (2) International Journal of Punishment and Sentencing 49; see also Godfrey Odhiambo, 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context' (LLD thesis, University of the Western Cape 2005) 387–388.

72 Section 26(4) of the Penal Code. See also ss 327(4) and 328 of the CPEC.

73 These provisions deal with the treatment of pregnant capital offenders.

74 Section 327(1) of the CPEC.

75 Section 327(2) and (3) of the CPEC.

76 In *Kafantayeni* (n 2), the mandatory death penalty was challenged on the ground, inter alia, that it amounted to arbitrary deprivation of life in that its 'imposition is without regard to the circumstances of the crime and is thus arbitrary.' However, the High Court did not make a finding on this ground.

77 Chirwa (n 10) 92.

arbitrary deprivation of life means that 'the state must refrain from killing people without justification.' He also asserts, based on *Malawi Congress Party & Others v Attorney General & Another*,[78] that the term 'arbitrary deprivation of life' means the deprivation of life without due process or respect for the right to a fair trial.[79] This meaning is consistent with section 16, which states that the execution of the death penalty does not amount to an arbitrary deprivation of life if it satisfies three conditions. The first is that it must be imposed by a 'competent' tribunal that is established by law, independent and impartial,[80] and has the jurisdiction and expertise to try capital crimes.[81] Secondly, the death penalty may be imposed only for crimes that are recognised under the laws of Malawi. Thirdly, an offender must have been convicted of an offence.

Additional procedural safeguards can be derived from a number of other constitutional rights such as the rights to a fair trial and human dignity. *Kafantayeni* confirmed that the right to a fair trial extends to sentencing.[82] This right, as defined under section 42, entitles detained and sentenced prisoners to a wide constellation of rights, including the rights to be sentenced within a reasonable time after conviction; to be provided with legal aid at state expense when the interests of justice so require; to be detained in humane conditions that are consistent with human dignity; and to appeal.[83]

The right to human dignity in section 19(1) of the Constitution also projects further restrictions on the death penalty. Specifically, the provision requires that human dignity must be respected in all judicial proceedings or any proceedings before any organ of state and during the enforcement of a penalty[84] and prohibits corporal punishment, torture and cruel, inhuman and degrading treatment or punishment.[85] These provisions have significant implications for the application of the death penalty in Malawi. For instance, they restrict this sentence to scenarios where its application does not violate the right to human dignity. With *Kafantayeni* holding that proportionality lies at the heart of the prohibition of cruel, inhuman and degrading treatment, the Constitution indirectly calls for limiting the use of death sentences to offences and situations where it can be said to be a proportionate punishment.

A further procedural safeguard lies in the automatic right to appeal death sentences. Whereas Malawi has no automatic review or appeal process for death sentences, every offender sentenced to death has a right to appeal the sentence to the Supreme Court of

78 [1996] MLR 244 (HC) 292–295.
79 Chirwa (n 10) 93.
80 Section 42(2)(*f*)(i) provides all accused persons with a right 'to public trial before an independent and impartial court of law.'
81 Chirwa (n 10) 98.
82 *Kafantayeni* (n 2).
83 Sections 42(2)(*f*)(v),(viii) and (x).
84 Section 19(2).
85 Section 19(3).

Appeal. Section 18(1) of the Supreme Court of Appeal Act[86] stipulates an automatic stay of execution of death sentences until the thirty-day period for filing notice of intention to appeal has expired. Should an offender file such notice, the stay automatically extends to the finalisation or abandonment of the appeal.[87] The filing of a notice of intention to appeal triggers an automatic stay of execution. To bolster this position, section 326(1) of the CPEC permits the judiciary to initiate the automatic presidential pardon or confirmation process only if no appeal is preferred or the sentence has been confirmed on appeal. This process is explained further below.

Offenders sentenced to death under the DFA also have an automatic right to appeal the sentence.[88] Further, execution of such offenders may only take place with the approval of the president.[89] In other words, the president must exercise his prerogative of mercy in relation to death sentences imposed under the DFA. However, the right to appeal and approval by the president are inapplicable where death is imposed on an active member of the Defence Force.[90] In this case, section 150 of the DFA requires that the Defence Council confirms and certifies that 'it is essential in the interests of discipline and for the purposes of securing the safety of the [Defence] Force … that the sentence should be carried out forthwith.'

The last restriction on death sentences in Malawi is that an execution may be performed only on the authority of a death warrant signed by the president. This restriction is double-edged in that procedurally the process acts as an automatic presidential pardon or confirmation process, providing an avenue for all death-row prisoners to be considered for mercy. The process is initiated by the judiciary under section 326 of the CPEC. This provision requires that every case in which a death sentence is imposed must be sent to the president for consideration for mercy under section 89(2) of the Constitution.[91] The judge must forward the court record and his recommendations or observations regarding the case to the president '[a]s soon as conveniently may be' after the sentence has been passed.[92] In response, the president has three options, namely issue a death warrant, commute the sentence or grant a pardon.[93] In the case of a pardon,

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86 Section 17 of the Supreme Court of Appeal Act, Chapter 3:01 of the Laws of Malawi (hereafter 'SCAA').

87 Section 18(1)*b* of the SCAA.

88 Section 150 of the DFA.

89 Section 112 of the DFA. The president has a general power to review the findings and sentences of courts-martial: see s 113 of the DFA.

90 See the proviso to s 150 of the DFA.

91 See s 326 of the Penal Code.

92 Section 326(1) of the CPEC.

93 Section 326(3) of the CPEC.

the pardon should specify whether it is free or conditional.[94] This procedure ensures that all prisoners on death row are considered for mercy.

Assessment

General Observations

The moratorium on the death penalty in Malawi is consistent with the global trend towards the abolition of the death penalty. Even though the death penalty may not be outlawed any time soon, it is clear that the restrictions on the death penalty in Malawi reflect a number of international standards. For example, the law prohibits the imposition of the death penalty for offences committed by persons below the age of eighteen. Further, the exclusion of pregnant women from the application of the death penalty in section 26(4) of the Penal Code and section 328 of the CPEC resonates with international standards such as Article 30(1)(*e*) of the African Children's Charter. With regard to procedural safeguards, the Constitution itself proscribes the arbitrary deprivation of life. This entails that it would be unlawful to impose a death sentence without compliance with a fair trial. In addition, death sentences are automatically considered for mercy through section 326 of the CPEC. Further, the abolition of mandatory death sentences in Malawi is a milestone in restricting the application of the death penalty in Malawi. However, there are several problems with the application of the death penalty in Malawi.

Scope of Capital Crimes

The scope of capital crimes in Malawian law exceeds the bounds of international standards. Therefore, it cannot be said that death sentences are an 'exceptional measure'. When applied to non-serious offences, the death penalty can be deemed to be an inherently grossly disproportionate measure amounting to a cruel and inhuman punishment.[95]

By international standards, of the fourteen capital crimes, only genocide and murder can be classified as serious crimes. Even then, genocide, regardless of whether killing is involved, is not a capital crime in international criminal law. This puts the imposition of the death penalty for genocide in Malawi at odds with the Statute of the International Criminal Court (Rome Statute)[96] to which Malawi has been a party since 2002.[97]

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94 Section 326(6) of the CPEC.

95 See, for instance, *Kennedy v Louisiana* 554 US 407 (2008); *Coker v Georgia* 433 US 584 (1977).

96 Rome Statute of the International Criminal Court (Rome Statute) 1998.

97 The Rome Statute does not have domestic force in Malawi: see Mwiza J Nkhata, 'Implementation of the Rome Statute in Malawi and Zambia: Progress, Challenges and Prospects' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (PULP 2011) 277.

Paradoxically, since murder is a capital crime in Malawi, the scheme of the Penal Code would be questionable if genocide involving killing were not punishable by death.

A further issue arises with prescribing the mandatory death sentence for treason. *Kafantayeni* makes it abundantly clear that the judgment was restricted to the mandatory death penalty for murder. While there is optimism that the judgment easily transcends this limitation to all absolute mandatory sentences, there remains cause for concern that the courts may hold otherwise.[98]

Another problem with the scope of capital crimes in Malawi stems from the fact that with the exception of treason all capital offences are punishable by 'death or imprisonment for life'. This means that they are both capital and non-capital offences. However, the law does not stipulate the circumstances in which the same offence may be a capital or a non-capital crime; it simply provides for death or, in the alternative, life imprisonment. In other words, there is no guidance as to when the same offence should be considered a capital crime and when it should be seen as attracting a maximum of life imprisonment. Robbery, for instance, attracts a sentence of fourteen years' imprisonment.[99] However, it will attract 'death or imprisonment for life' if

> the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person.[100]

While this provision specifies the circumstances in which robbery attracts either death or life imprisonment, it falls short of distinguishing capital from non-capital robbery, let alone the circumstances in which robbery should attract life imprisonment. The same can be said of murder, genocide[101] and all other capital crimes under the Penal Code. The DFA does not fare any better. Mutiny is punishable by 'death or any other punishment'.[102] Failure to suppress mutiny is punishable by life imprisonment[103] but attracts 'death or life imprisonment' if it 'was committed with intent to assist the enemy.'[104] Similarly, communication with the enemy 'with intent to assist the enemy'

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98 For example, the Malawi Supreme Court of Appeal (hereafter 'MSCA') has held that the mandatory sentences for theft by public servants remain unaffected by *Kafantayeni:* see *Mussa v Rep* Criminal Appeal No 2 of 2011 (unreported) (SCA), overturning *Rep v Mussa* Criminal Appeal No 43 of 2009 (unreported) (HC) largely on technical grounds.

99 Section 301(1) of the Penal Code.

100 Section 301(2) of the Penal Code.

101 Genocide which involves killing attracts twenty-one years but is punishable by death or life imprisonment: see s 217A(2)(*a*) and (*b*) of the Penal Code].

102 Section 40(1) of the DFA.

103 Section 41(*b*) of the DFA.

104 Section 41(*a*) of the DFA.

is punishable by 'death or life [imprisonment]'.[105] Consequently, the courts have too much discretion in deciding whether a case warrants a death sentence.

The absence of legislative or judicial guidance on the circumstances in which an offence is a capital crime, coupled with the fact that the courts are not diligent or aware of the problem with this dichotomy,[106] means that an offender does not really know whether he is facing a death sentence or life imprisonment. The fact that the courts have sentencing discretion and therefore weigh up aggravating and mitigating factors when deciding on a sentence does not cure the legislative gap. The issue here is that the law clamps together death and life imprisonment—both of them severe sentences—as possible sentences for an offence without clarifying when death is not an option available for the offence in question. This is why murder is routinely seen as a capital offence and in cases where life imprisonment is imposed it is often seen as a lenient penalty imposed in lieu of the death penalty when in fact life imprisonment is a maximum penalty for murder in its own right.

Actually, there appears to be no jurisprudence which guides the application of penal provisions that prescribe 'death or imprisonment for life'. For instance, guidance is lacking on when a court should consider life imprisonment an inappropriate sentence for murder such that death becomes an option. This can be sharply contrasted with

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105 Section 34(1) of the DFA.

106 Although, the law now provides for two maxima for murder: life imprisonment and the death penalty. The courts seem to assume that the law has merely abolished the mandatory death penalty. Indeed, it has been said that death has never been imposed for rape because 'though the ultimate sentence [for rape] is death … section 133 of the Penal Code … mentions both the death penalty and life imprisonment. This is unlike [the] penalty in murder cases which only mentions death' (see *Rep v Mulinganiza & Another* Criminal Case No 306 of 2010 (unreported) (HC) at 5). This misses the fact that life imprisonment is specifically prescribed for murder. It may also indicate that the courts believe death sentences are only justifiable in murder cases. The courts stress the availability of the death penalty only in murder cases yet overlook it for rape, burglary and robbery.
The lack of clarification on when murder is a capital offence and when it is not creates inconsistency in sentencing because it gives a court too much discretion. It also generates confusion and results in offenders not being sentenced on the same footings. For example, housebreaking and burglary were said to carry *a* maximum sentence of 'death or life' in *Rep v William* Confirmation Case No 195 of 2004 (unreported) (HC), while *Rep v Hassan* Criminal Appeal No 102 of 2005 (unreported) (HC) cited death as 'the' maximum. In *Nyangu v Rep* Criminal Appeal No 173 of 2005 (unreported) (HC), robbery was said to carry a maximum of life imprisonment, completely ignoring death as a prescribed penalty. According to *Rep v Chinguwo* Criminal Case No 53 of 2008 (unreported) (HC), '[l]ike manslaughter, both burglary/housebreaking and robbery carry life imprisonment as punishment, although death is the maximum for the first two.' Moreover, confusion is evident in *Rep v Mawaya* Confirmation Case No 794 of 2000 (unreported) (HC), where the High Court asserted: 'It is trite law that rape is a capital offence which carries a maximum sentence of death or life'!

considerable case law dealing with how the courts should construe penal provisions that prescribe a fine and imprisonment for the same offence.[107]

Exempted Offenders

It is commendable that Malawi excludes children and pregnant women from the ambit of the death penalty, reflecting the stance of the African Children's Charter in the latter regard. However, the law does not provide for nursing mothers. Furthermore, the alternatives for children and pregnant women found guilty of capital crimes are not immune from criticism. For instance, for persons between fourteen and eighteen years of age, the CCPJA, perhaps inadvertently, subjects them to a mandatory detention order upon proof that a serious crime has been committed by such a child. This is clear from the wording of section 141(1), which directs that

> [w]here a child is found responsible for offences listed in the Sixth Schedule, the court *shall* order him to be detained at a reformatory centre for such period as may be specified in the order.[108]

As noted earlier, section 146(2), which provides for factors that a court should consider before imposing a reformatory order, is applicable only to children below fourteen years of age. The mandatory detention of children between fourteen and eighteen years raises a number of constitutional concerns, the full consideration of which is beyond the scope of this paper. It is sufficient to point out that this penalty is inconsistent with the

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[107] Where an offence attracts both a fine and imprisonment without clarity on when the one applies and the other does not, the courts are urged to first consider the propriety of imposing the lesser punishment of a fine. Case law attempts to guide courts on the circumstances in which it would be justifiable to overlook the fine and impose imprisonment. The principle is that, except in exceptional circumstances, felonies and serious misdemeanours must be punished with immediate imprisonment and not fines. See, for instance, *Rep v Moffat & Others* Confirmation Case No 123 of 1998 (unreported) (HC) (it should be 'unoften' that a felony is punished with a fine). See also *Rep v Napolo & Others* Confirmation Case No 932 of 1999 (unreported) (HC) (escape from lawful custody to attract immediate imprisonment to express court's opprobrium, fine to be imposed rarely); *Rep v Chilenje* (1996) MLR 361 (HC) at 363 (imposing a fine for a serious offence from which the offender has or may have reaped a financial benefit is 'clawback on illegal opulence, supposed or real'); *Banda v Rep* Criminal Appeal No 134 of 1996 (unreported) (HC) ('to impose a fine for serious offences is tantamount to creating the impression that grave moral turpitude can be purged by payment of money'); *Masambo v Rep* 11 MLR 384 (SCA); *Rep v Namatika* [1971–1972] 6 ALR Mal 166 (HC); *Rep v Mpando* [1971–1972] 6 ALR Mal 326 (HC); *DPP v Katsabola* [1973–1974] 7 ALR Mal 69 (SCA). Only strong mitigating factors in serious cases can justify a fine being imposed. For instance, the fact that the offender is a first offender is not sufficient to impose a fine for rape: see *Rep v Mthali* [1971-1972] 6 ALR Mal 289 (HC). Where the maximum is life imprisonment, reasons for a fine must be very strong: see *Rep v Katsabola* [1971–1972] 6 ALR Mal 200 (HC) (no fine for manslaughter). Cf *Rep v Solomon & Another* Confirmation Case No 123 of 1998 (unreported) (HC) (fine rare for felony even if extenuating circumstances exist).

[108] [Emphasis added].

principle of restraint in the use of custodial sentences for children which advocates detention only as a last resort.[109]

With regard to pregnant women, the overall impression to be gained from section 26(4) of the Penal Code and sections 327(4)[110] and 328 of the CPEC is that life imprisonment is mandatory for pregnant women convicted of capital offences where a death sentence would otherwise be imposed. This mandatory nature of the alternative life sentence breaches the principle of proportionality and therefore violates the right to a fair trial, specifically the right to appeal and review a sentence by a higher court and the right of access to justice.[111] It also infringes the right to human dignity by precluding a court from considering the personal circumstances of the offender and the circumstances of the offence.[112] The mandatory life sentences for pregnant women also violate regional standards such as Article 30 of the African Children's Charter, which calls on states to prioritise non-custodial sanctions for pregnant women and mothers with young children. Malawi also falls short of these standards because it does not provide for alternatives to detention for nursing mothers and those with young children.

In its review of the Penal Code in 1999, the Malawi Law Commission expresses a general concern with mandatory sentences and consistently recommends discretionary sentences, including those for murder.[113] However, the alternative mandatory sentences for offenders exempted from the death penalty were overlooked. Unsurprisingly, whereas the subsequent Penal Code Amendment Bill proposed the removal of the mandatory death penalty for murder and its substitution with a discretionary death sentence and life imprisonment,[114] it was silent on the alternative mandatory sentences in section 26(2) for children and (4)[115] pregnant women. From a different perspective, in its later review of the CPEC, the Commission notes its concern with section 327(4), finding it

> discriminatory between a pregnant woman and other women convicted of the same offence. The pregnant woman may get away with life imprisonment after giving birth [whereas] the other women who may give birth before sentencing [are] not afforded the same treatment.[116]

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109 The detention of children at the president's pleasure runs into similar difficulties.

110 Section 327(4) of the CPEC states that the MSCA 'shall' substitute a death sentence with life imprisonment where it is found that an appellant is pregnant at the time of sentencing.

111 See *Kafantayeni* (n 2). Section 41(2) of the Constitution reads: 'Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal disputes.'

112 See *Kafantayeni* (n 2).

113 Malawi Law Commission, *Report of the Law Commission on the Review of the Penal Code* (1999) 58.

114 Clause 122 of the 1999 Penal Code Amendment Bill.

115 At the time, section 26(2) provided for mandatory detention at the pleasure of the president for children convicted of capital offences.

116 Malawi Law Commission (n 61) 157.

Admittedly, the Commission's hands were largely tied in proposing changes to section 327(4) because it was dealing with procedural law and had no mandate to tamper with the exemption itself as this is the purview of the Penal Code. Therefore, it found solace in the 1999 Penal Code Amendment Bill, which by then had been stagnant for almost a decade. The Commission stressed that what is now section 327(4) would need to be amended should the recommendation on the removal of mandatory death sentences be passed.[117] The Commission's expectation was that should the Bill be adopted, life imprisonment would be available to all women depending on the circumstances of each case.[118] This, in the Commission's view, would resolve the problem inherent in the restriction of life imprisonment to pregnant capital offenders. This is not entirely correct.

Possibly owing to the fact that in practice only murder attracts the death penalty, the Commission overlooked the fact that section 327 applies to '[e]very case where a woman is convicted of an offence punishable with death.'[119] Beyond the mandatory death sentence scenario, the automatic imposition of life sentences on pregnant women would be indefensible. The wording of the relevant provisions in the Penal Code and CPEC should therefore be amended to reflect their narrow application to mandatory death sentences. The Commission's hope of having all mandatory death sentences abolished has not materialised since the Penal Code has retained the mandatory death penalty for treason. This does not mean that there is no compelling reason to amend section 327(4). Even if all mandatory death sentences were abolished such that life imprisonment remained open to all women and indeed all offenders, the integrally discriminatory nature of section 26(4) of the Penal Code and section 327(4) and 328 of the CPEC would not be resolved. The core argument is that pregnant women are unjustifiably favoured by the law. This argument turns on the realisation that it is the discriminatory exposure to the death penalty that is unjustifiable and not necessarily the fact that the alternative of life imprisonment is not available to all offenders, male or female, convicted of capital crimes. Therefore, the fact that life imprisonment is now a competent penalty for murder does not resolve the matter, because unless an offender is a pregnant woman at the time of sentencing, the death penalty may be imposed on him or her. This will be the case for all capital crimes.

A further issue which arises with regard to the exclusion of pregnant women from the application of the death penalty is how the MSCA must proceed where it finds that an appellant was pregnant at the time of sentencing in the trial court but is not pregnant at the time of appeal. Should the death penalty exemption apply in such cases? It would appear that there would be no reasons to save an appellant in such cases. In fact, section 327(4) assumes that an appellant is still pregnant at the time of sentencing and requires

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117 ibid.

118 ibid.

119 See ss 327(1) and 328 of the CPEC; s 26(4) of the Penal Code.

that the MSCA must set aside the death penalty if it finds that 'the woman *is* pregnant'.[120]

The issue here is that pregnancy does not appear to be a justifiable reason for excluding women from the death penalty *in toto*. Indeed, as the Commission itself points out,

> even the argument that the law seeks to protect the life of the unborn child and to afford a pregnant woman a chance to take care of her child cannot justify this disparity.[121]

After all, a child born before sentencing would also need care, depending on its age. Mindful that the Affiliation Act[122] required that a child should be maintained up to the age of 16 years, the Commission also added that the real issue is whether 'a mother is expected to look after the child while in prison.'[123] The answer to this is obviously in the negative, since a child is allowed in prison only until it is weaned.[124] Moreover, prisons are not safe places for pregnant women, let alone babies or young children, and it is undesirable to separate babies and young children from their mother.[125] It becomes increasingly evident, then, that the rationale for proscribing the imposition of the death penalty on pregnant women loses its force in the face of such pronouncements.

One might argue that the Commission was in a difficult position because removing the protection afforded to pregnant women would have meant expanding the scope of the death penalty in Malawi. However, a restriction that is ultimately discriminatory is undesirable. Accordingly, short of the abolition of the death penalty, the exclusion of pregnant women from execution alone as provided for in Article 6(5) of the ICCPR and Article 4(2)(*j*) of the Maputo Protocol is preferable.

A further instance of falling short of international standards on the death penalty is that Malawian law does not have a maximum age for offenders who may be sentenced to death. There are also reports that some death row inmates were sentenced to death for murders committed before they attained the age of eighteen years.[126] In addition, while

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120 [Emphasis added]. It is evident that s 327(4) was wrongly drafted in the 2010 CPEC; the words 'should be set aside' in the fourth line should not have been included in the provision: see s 234(*c*) of the 2007 Criminal Procedure and Evidence Code Bill.

121 Malawi Law Commission (n 61) 157.

122 Affiliation Act, Chapter 26:02 of the Laws of Malawi, repealed by the CCPJA.

123 Malawi Law Commission (n 61) 157 fn 93.

124 Section 60 of the Prisons Act. Section 19(1) of the 2003 Prisons Bill proposes that a female prisoner may be permitted to stay with her child in prison until the child is five years old.

125 *Rep v Moyo & 10 Others* Criminal Case No 2 of 2011 (unreported) (HC) 6–7; African Commission on Human and Peoples' Rights, 'Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi—Report on a Visit, 17 to 28 June 2001' (2001) 36.

126 Sandra Babcock and Ellen W McLaughlin, 'Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of *Kafantayeni v Attorney General*' in Peter Hodgkinson (ed), *Capital Punishment: New Perspectives* (Routledge 2013) 182.

mentally ill offenders are not criminally responsible for their actions and those with diminished responsibility may be convicted only of manslaughter (and therefore suffer life imprisonment at worst), the law does not explicitly prohibit the imposition of the death penalty on offenders with mental illness if the condition develops after commission of the crime. Furthermore, the principle of diminished responsibility, as codified in section 214A of the Penal Code, applies only to murder suspects. Other offenders with diminished responsibility remain at risk of a death sentence. Indeed, there are reports of mentally ill prisoners on death row,[127] although it is unclear whether their conditions arose before or after sentencing. With only one state psychiatrist,[128] the availability of psychiatric reports on the mental state of an offender remains a big challenge in Malawi.

Procedural Safeguards

Fair Trial Rights and Death-row Conditions

Practice also casts serious doubt on Malawi's compliance with respect for fair trial rights in capital trials. For instance, lengthy pre-trial and post-trial detention in despicable prison conditions and the insufficiency and ineffectiveness of legal aid services[129] are inconsistent with international standards on the death penalty and also with section 19 of the Constitution. Legal aid is in general available only in murder trials in the court of first instance.[130] In addition, prison conditions are unspeakable and have been held to amount to cruel, inhuman and degrading punishment.[131] Despite a court order to improve prison conditions,[132] they remain unacceptably poor.[133] Some prisoners spend between one month and two years on death row before their sentences are commuted to life.[134] Prisoners under sentence of death are kept 'literally in the shadow of the gallows' at Zomba Central Prison.[135] In line with the Prisons Act, they are segregated from other prisoners and, ordinarily, may have access only to prison officers, a visiting justice and

127 ibid.

128 Not so long ago, Malawi had three qualified psychiatrists, of which only one is a state psychiatrist*:* see David Hayward, Tom White and Felix Kauye, 'Review of the Forensic Psychiatry Service at Zomba Mental Hospital and a Comparison of Forensic Psychiatry Services in Malawi and Scotland' (2010) 50 (2) Medical Science Law 67.

129 See Advocates for Human Rights (n 59) para 18; M Dudgeon and P Gopalan, 'The Homicide Case Backlog 2009/10 in Malawi: Trial Issues and Recommendations for Improvement' in Centre for Capital Punishment Studies, *Intern Report* (2010) 32–35. As at September 2014, Malawi had only eleven legal-aid lawyers, the majority of whom were recent law graduates.

130 Advocates for Human Rights (n 59) para 8.

131 See *Masangano v Attorney General* [2009] MWHC 31 (HC).

132 ibid.

133 See *Rep v Moyo and 10 Others* Criminal Case No 2 of 2011 (unreported) (HC) 6.

134 See Aron Rollin, 'Legal Aid Department, Lilongwe, Malawi: 4 August – 19 September 2003' in Centre for Capital Punishment Studies, *Intern Reports* (2003) 5.

135 Babcock and McLaughlin (n 126) 181, who note that some cells have a direct view of the gallows.

a religious minister.[136] Access to a lawyer, relatives and friends is subject to the approval of and conditions set by the Commissioner of Prisons (Commissioner).[137] These restrictions reflect the law in 1968, which cannot pass constitutional muster in view of the right to dignity and a fair trial entrenched in the Constitution. These circumstances render the application of the death penalty arbitrary.

The arbitrary application of the death penalty may also be highlighted by the changing attitudes of judicial officers towards it. As noted earlier, some judges have openly stated their opposition to the death penalty. Needless to say, judges who are not in favour of it rule it out as a competent sentence for capital crimes. Of course, as Terblanche tells us, the personal and philosophical differences of judicial officers are 'an inevitable yet unfortunate' factor in sentencing which 'is unfair and unjust' because it has nothing do with the crime and infringes the right to equality.[138] Few can dispute that magistrates also hold diverse views regarding the justifiability of the death penalty. Consequently, when faced with the capital crimes of rape, robbery, burglary or housebreaking, they will pass sentence differently. In addition, since magistrates cannot impose a death sentence, the referral of cases to the High Court under section 14(6) of the CPEC for sentencing where death is considered to be an appropriate penalty will most likely be made only by magistrates who are not opposed to the death sentence. Ultimately, offenders sentenced by magistrates opposed to the death penalty, and whose sentences are not remitted for sentencing to the High Court, will irreversibly be saved from the death penalty because an appellate or reviewing court's penal jurisdiction is limited to that of the trial court. The thrust of this argument is that the differing views of judicial officers serve to amplify the arbitrariness of the death penalty because its imposition may be determined by chance. While the perceptions of judicial officers regarding punishment influence their use of almost all forms of punishment, it is particularly worrying when such perceptions are openly held and allowed to determine whether an offender lives or dies. This is supported by Chaskalson P, when he said in *S v Makwanyane*:[139]

> [T]here cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol when others similarly placed may be acquitted or receive non-custodial sentences. But death is different, and the question is, whether this is acceptable when the difference is between life and death. Unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated; but the killing of an innocent person is irremediable.

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136 Sections 104 and 105 of the Prisons Act.

137 Section 105 of the Prisons Act.

138 Stephan Terblanche, *A Guide to Sentencing in South Africa* (LexisNexis 2007) 118–119.

139 *Makwanyane* (n 47) para 54.

In the same case, Sachs J observed that

> [a] level of arbitrariness and the possibilities of mistake that might be inescapable and therefore tolerable in relation to other forms of punishment, burst the parameters of constitutionality when they impact on the deliberate taking of life.[140]

It must be concluded, then, that just as the constitutional sanction in section 16 does not permit mandatory death sentences, it also does not permit the arbitrariness that would manifest where the risk that offenders may be sentenced to death rests on the identity of the judge who tries and sentences them. It is therefore worth considering whether a judge who is openly opposed to the death penalty should in fact preside over capital offences.

The death penalty in Malawi is also susceptible to arbitrariness because of the 'death or life imprisonment' dichotomy explained earlier.

Right to Seek Mercy

There are also several problems with the right to seek mercy. The dictates of section 326 of the CPEC, which require the referral of every death sentence to the president, are not borne out in practice. Incredibly, court clerks and judges alike are unaware of their duties under this provision.[141] The Law Commission believes that the non-compliance with this provision is also partly attributable to the moratorium on the death penalty and the automatic commutation of all death sentences to life imprisonment which 'makes the whole exercise fruitless'.[142] Notwithstanding this, even if section 326 were complied with to the letter, problems would still abound. For instance, it does not require that prisoners on death row must be informed of the procedure; it does not give them any role in the process; it does not make the judge's recommendations available to prisoners; and it fails to prescribe the timeframes that dictate when the record must be forwarded to the president and when the president must make a decision. This falls short of the international standards by a large margin. Ultimately, arbitrariness cannot be excluded from the death penalty in Malawi because of the manner in which the prerogative of mercy is exercised.[143]

This is at least partly because Malawi has no legal framework that prescribes a procedure for applying for pardon, let alone establishes procedural guarantees for prisoners on death row to exercise their right to mercy. None of the criteria set out in the '2005 Amended Guidelines for the Exercise of the Prerogative of Mercy Adopted

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140 ibid para 351.

141 Malawi Law Commission (n 61) 156.

142 ibid.

143 For an examination of the pardon process in Malawi, see Esther Gumboh, 'A Critical Analysis of Life Imprisonment in Malawi' (2017) 60 (3) Journal of African Law 460–465.

by the Advisory Committee on the Granting of Pardon' (Pardon Committee Guidelines)[144] apply to death row prisoners. According to the Guidelines, pardon 'shall generally be reserved for cases of miscarriage of justice after the matter has been thoroughly exhausted through the judicial system.' This condition obviously does not apply to death row prisoners who do not claim that they have suffered a miscarriage of justice. The second criterion is that prisoners 'must have served at least half of their sentences to be eligible for presidential remission or reduction of sentence',[145] a condition at odds with the very nature of a death sentence. The clear rejection of prisoners sentenced to death is found in clause 3 of the Guidelines. Clause 3 stipulates that offenders convicted of 'murder, violent offences such as robbery and burglary; serious sexual offences such as rape and defilement; and grand corruption' should not benefit from mercy. A departure from this stance can be triggered only by terminal illness or if 'for the sake of promoting peace, tolerance and harmony in society' a victim or his close relative petitions the president for mercy.[146] These grounds are too narrow to afford prisoners on death row a meaningful right to mercy.[147] There are also broader challenges to the pardon process in general, such as the independence of the Pardon Committee and the transparency of its work.[148] It can be said, then, that Malawi lacks the procedural safeguards dictated by international standards to realise the right to seek mercy.

While section 326 of the Penal Code may be commended for ensuring that all death sentences are considered for mercy, the fact that the mandatory death penalty is no longer applicable detracts from the propriety of this provision. This is because, unlike mandatory sentences which are imposed in spite of what a court deems to be the right sentence, discretionary sentences are imposed after careful examination of the circumstances of the case as whole. As such, a death sentence may now be imposed only where a judge is satisfied that it is the appropriate penalty. It is therefore difficult to require a judge to then make recommendations to inform the exercise of the prerogative of mercy. After all, with the suspension of jury trials in Malawi,[149] judges are unlikely to form a different view of a case from that which is on record. Therefore, a better position would be simply to require that a copy of the record should be sent to the president.

With regard to offenders sentenced to death under the DFA, the exception to the right to appeal death sentences and seek mercy in section 150 of the DFA is undesirable for

144 Unpublished (on file with the author).

145 Clause 3 of the Guidelines.

146 Clauses 4 and 6 of the Guidelines.

147 For a detailed critique of these grounds, see Gumboh (n 143) 462–465.

148 See Gumboh (n 143) 463.

149 As a result of case backlogs and a lack of funds, Malawi has suspended jury trials at various times since 1996 and in 2008 issued an indefinite suspension, which remains in force: see Criminal Procedure (Trial without Jury) (Amendment) Order, 2008.

a number of reasons. For example, it is inconsistent with the right to seek mercy recognised in international human-rights law. Secondly, it also deprives an offender of the right to appeal and therefore violates the right to appeal and to access to justice. Furthermore, this deprivation can be regarded as an unconstitutional limitation on the pardon power of the president. On a different note, the DFA does not provide a mechanism through which death sentences may be referred to the president in accordance with section 112 of the Act.[150] This raises uncertainty as regards how offenders sentenced under the DFA may be considered for mercy.

Since 1992, death sentences have been routinely commuted to life imprisonment and no executions of prisoners on death row have occurred.[151] Chirwa rightly argues that the automatic commutation of death sentences to life imprisonment is unconstitutional because the president does not have the power to substitute one form of punishment with another and that it amounts to a mandatory imposition of life sentences, apparently since there is no individualised consideration of the circumstances of the offenders concerned during the commutation process.[152] This argument gains more credence when one considers the actual wording of section 89(2), which provides for the prerogative of mercy. Even more worrisome is the fact that life imprisonment in Malawi falls foul of the Constitution and international human-rights law.[153] The legality of the now automatic commutation of death sentences to life imprisonment is also called into question by the fact that neither the Advisory Committee on the Granting of Pardon Act[154] nor the Pardon Committee Guidelines provide any procedure for such commutations.

Conclusion

Overall, Malawian law ensures that the application of the death penalty is restricted. However, the restrictions fall short of international human-rights standards. Whereas Malawi respects restrictions such as the prohibition of the death penalty on children, its range of capital offences does not sit well with regional and international standards. The

150 Section 109 of the DFA and Rule 100(2) of the Rules of Procedure (Defence Force) give offenders a general right to petition the president against any finding within six months of the finding. However, this is different from an automatic right to seek mercy because it is a general provision for requesting the president to review any finding or sentence in exercise of this powers under s 113 of the DFA. Indeed, s 112 is mandatory and cannot therefore be subject to the will of an offender. In any case, the prescribed petition forms set out in the Seventh Schedule to the Rules makes no mention of mercy or approval on the part of the president.

151 Amnesty International, 'Malawi: Amnesty International Welcomes Suspension of Executions and Commutation of Death Sentences' AI Index: AFR 36/03/97 (1997) 1.

152 Chirwa (n 10) 134.

153 See, generally, Gumboh (n 143).

154 Advisory Committee on the Granting of Pardon Act, Chapter 9:05 of the Laws of Malawi (Pardon Committee Act).

country also fails effectively to protect the right to seek mercy and the right of prisoners on death row to be detained in conditions that respect the right to human dignity.

Despite these problematic features of the death penalty in Malawi, it is heartening that the country has maintained an unbroken moratorium on executions for the past twenty-two years. However, given that the moratorium is unofficial and survives only on the political will and religious convictions of the president, there is a real danger of a resumption of executions.

Furthermore, it is as a result of the death penalty that most prisoners are serving life sentences in Malawi through the prerogative of mercy. The retention of the death penalty in Malawi now hangs on mere public opinion and it is doubtful whether public opinion may change any time soon. However, this justification for the retention of the death penalty is conspicuously questionable. Surely, if public opinion is in favour of the death penalty, it cannot also be in favour of the moratorium on executions? For some reason, the public opinion in favour of the death penalty has not been cited as a reason for resuming executions. In any case, in a constitutional democracy, the basis for deciding whether a person lives or dies cannot rest on public opinion. Malawi should consider a de jure moratorium on the death penalty and other progressive steps towards its abolition.

Therefore, it is recommended that Malawi should narrow its scope of capital crimes to the most serious crimes such as aggravated forms of murder and genocide involving killing. The circumstances in which offences that attract death should be regarded as non-capital crimes must also be set out clearly in the law. This will ensure that the courts reserve the death penalty for the worst instances of capital crime and promote consistency in sentencing, since the law would stipulate the broad circumstances that should escalate an offence to a capital crime.

It is also recommended that the right to seek pardon for death row prisoners should be made more effective by amending the legal framework for pardons and repealing the proviso to section 150 of the DFA which curtails this right with respect to active members of the Defence Force. Malawi should also commit more resources to the improvement of its prison conditions to fulfil the constitutional injunction of providing humane conditions of detention to all prisoners.

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