

## **THE DEATH PENALTY IN AFRICA** – *Protecting vulnerable groups: examples from international, regional and domestic jurisprudence*

When it comes to the death penalty, the African continent appears to be moving in a promising direction. There are a total of 18 abolitionist countries across Africa and a further 16 African countries have had a moratorium on executions for over 20 years.<sup>1</sup> Of the 19 countries in Commonwealth Africa, only Botswana executed someone in 2018.<sup>2</sup>

In light of this, some might wonder ‘with all the challenges countries in the African Commonwealth are facing, why is the death penalty even an important issue for human rights lawyers?’ – the death penalty remains important because of how it continues to affect the still relatively large number of people who are sentenced to death each year and held in often extremely harsh prison conditions, particularly in countries which retain the mandatory death penalty.<sup>3</sup>

In my years of working on this subject, I have met multiple clients in countries like Tanzania, who wake up every day fearing for their lives. Tanzania has not executed anyone since 1994<sup>4</sup> but many of the prisoners do not know this or cannot have faith that this situation will continue. Some have said they would rather be executed and get it over with and others have said that they wonder every day whether today is their turn. I cannot promise them it won’t be. The fragility of moratoria is well documented across the world, including in African countries. Following a period of 27 years without a single execution, the Gambia executed 9 individuals without notice in 2012.<sup>5</sup> The executions were carried out within three days of the decision to resume executions being made public.<sup>6</sup> The Gambia has since re-joined the Commonwealth<sup>7</sup> and is committed to working towards abolition of the death penalty.<sup>8</sup>

Another reason why the death penalty in Africa remains an important topic is the way in which it affects particularly vulnerable communities. But the continent has also made big strides in advancing the protection of these vulnerable individuals and it is important that we recognize and apply these rules, which are influenced by and continue to shape international standards.

General Comment No 3 on the Right to Life in the African Charter on Human and Peoples’ Rights states

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<sup>1</sup> <https://www.amnesty.org/en/documents/act50/9870/2019/en/>

<sup>2</sup> <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/>

<sup>3</sup> In the African Commonwealth only Nigeria, Tanzania and Zambia definitively have a mandatory death penalty, although the latter two have not carried out an execution since 1994 and 1997 respectively (see <https://www.amnesty.org/en/documents/act50/9870/2019/en/>). Additionally, there is evidence that the death penalty may be mandatory in certain circumstances in the following Commonwealth countries: Botswana, Ghana and Kenya (although in the latter the Court of Appeal and then the Supreme Court rejected it as unconstitutional): <http://www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm>; <http://www.worldcoalition.org/The-Supreme-Court-of-Kenya-declares-the-mandatory-death-penalty-unconstitutional.html>

<sup>4</sup> <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Tanzania>

<sup>5</sup> <https://www.amnesty.org/download/Documents/8000/act500012013en.pdf>

<sup>6</sup> <https://www.voanews.com/a/gambia-executions/1496805.html>

<sup>7</sup> <https://www.gov.uk/government/news/the-gambia-rejoins-the-commonwealth>

<sup>8</sup> <https://www.theguardian.com/world/2018/feb/19/gambia-suspends-death-penalty-abolition>

*Whatever the offence or circumstances of the trial, the execution of pregnant or nursing women, children, elderly persons or persons with psycho-social or intellectual disabilities, will always amount to a violation of the right to life.*<sup>9</sup>

It also states that

*In no circumstances shall the imposition of the death penalty be mandatory for an offence. The death penalty shall not be imposed for crimes committed by children, and the burden of proof rests upon the State to prove the age of the defendant.*<sup>10</sup>

It is therefore important to note that international and regional law provides for protections of vulnerable individuals both at the sentencing stage and with regards to execution. Issues such as age, mental health and intellectual disabilities may bar a death sentence or execution entirely, or they may be considered a mitigating circumstance, making detailed investigation into the offender's background and the circumstances of the offence vital.

No one may ever be sentenced to death for a crime committed as a child. In *Maiumuna Abdulumini v Federal Republic of Nigeria et al*, the ECOWAS Court found that “Whereas the applicant sought for an order for injunction to restrain the defendants from executing the death sentence pronounced on the applicants and whereas this Court was influenced by Article 6(5) of the [ICCPR...] and also Article 5(3) of the African Charter on the Rights and Welfare of the Child that: death sentence shall not be pronounced for crimes committed by children” and found Article 5(3) to apply in this case. Maiumuna, a child bride, had been sentenced to death in Nigeria for allegedly killing her abusive husband at the age of 13. The ECOWAS Court ordered reparations for her in the case and she was released from death row in 2016.<sup>11</sup>

Further, Courts will also consider young and old age a mitigating factor in capital cases. In relation to capital sentencing, the High Court in Malawi pronounced “Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. Young and old offenders are preferred to receive shorter sentences.”<sup>12</sup>

Even those who may not support the full abolition of the death penalty will usually support the idea that children should not be executed. Things are slightly more challenging when it comes to individuals with complex mental health needs. Severe mental health issues may not be immediately apparent and can negatively impact interpersonal relationships. Severe trauma can make it very difficult for the prisoner to trust and share information with her lawyer. Intellectual disabilities can often be hard to diagnose, even on frequent meetings with the client, and can have a huge impact on the prisoner's ability to instruct counsel and participate in the proceedings.

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<sup>9</sup> [http://www.achpr.org/files/instruments/general-comments-right-to-life/general\\_comment\\_no\\_3\\_english.pdf](http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf) at D.25

<sup>10</sup> [http://www.achpr.org/files/instruments/general-comments-right-to-life/general\\_comment\\_no\\_3\\_english.pdf](http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf) at D.24

<sup>11</sup> <https://www.pressreader.com> (Maimuna the Child Bride in Katsina Finally Released from Death Row)

<sup>12</sup> *Republic vs Margaret Nadzi Makolija*, Case No 12 of 2015.

It is partly for this reason, that international customary law prohibits the execution of defendants presenting with severe mental health problems or intellectual disability. The US Supreme Court codified this international standard in *Atkins v Virginia*: “[...] defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes that they did not commit, their lesser ability to give their counsel meaningful assistance and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes.”<sup>13</sup> It is important to note that the prohibition on executions for people with mental health issues applies even if these were developed in prison, after sentencing. This is particularly relevant where people have spent a significant amount of time awaiting execution - over the last two decades, a rich body of jurisprudence has developed in support of the notion that prolonged incarceration on death row (also known as "death row phenomenon") constitutes cruel, inhuman, or degrading punishment, which can lead to a deterioration in mental health.<sup>14</sup>

The protections for vulnerable defendants at different stages of pre and post-conviction necessitate detailed fact and life history investigation in every capital case. Defense counsel should familiarize themselves with the background of the accused and the circumstances of the offense. Working with partners and counsel in East Africa, Reprieve has come across cases in which missing records, such as birth certificates, meant juveniles were facing capital punishment. There have also been cases in which mothers were brewing alcohol for a living during their pregnancies. Part of the process of brewing the alcohol involved trying it and this meant that some mothers would continue drinking throughout their pregnancies. We therefore encountered numerous cases of fetal alcohol syndrome. We also came across cases of brain damage related to cerebral malaria and other illnesses specific to the region.

A big problem in the context of investigation is the resource question. In relation to juvenility and mental health it is therefore important to note that the burden of proof with regards to age lies with the State.<sup>15</sup> The State is also responsible for full mental health assessments both before sentencing and before a possible execution.

However, further investigation into the clients’ lives is highly valuable to their defense. Record collection for documents such as medical and school records can be difficult in some rural areas and even cities. In these cases, interviews with family and community members become critical. Affidavits by prison guards can be helpful to emphasize a prisoner’s good behavior and capacity for reintegration into the community.

The resource problem is not to be ignored and is something that lawyers in the region struggle with in non-capital cases as well. It is therefore important to note again that heightened standards apply in capital cases, where a person’s life is on the line. Law societies, the State, and other relevant actors should come together in their various jurisdictions to try and address these problems to ensure support for appropriate legal representation at all stages in capital cases.

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<sup>13</sup> 526 US 304 (2002).

<sup>14</sup> Pratt and Morgan v. Jamaica (Nos 210/1986 and 225/1987), UN Doc. A/44/40 222 (1989), at [13.6]; and Kindler v. Canada (No. 470/1991), UN Doc. CCPR/C/48/D/470/1991 (1993), at [15.3]; Pratt and Morgan [1994] 2 A.C. 1, at p.33(e); and Shatrughan Chauhan & Anr v. Union of India & Ors (2014) 3 SCC 1

<sup>15</sup> [http://www.achpr.org/files/instruments/general-comments-right-to-life/general\\_comment\\_no\\_3\\_english.pdf](http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf) at D.24

An example of the positive results when all the above-mentioned issues are taken into consideration and parties work together to ensure a just legal system is Malawi. Following the abolition of the mandatory death penalty there in 2007,<sup>16</sup> Malawi launched a resentencing project in 2014, in which all prisoners who had been unconstitutionally sentenced to death were eligible for a new sentence, which took into consideration mitigating information.<sup>17</sup> The resentencing project brought together all relevant stakeholders and involved the Malawi Human Rights Commission, the Paralegal Advisory Service Institute, the Centre for Human Rights Education, Advice and Assistance, the Legal Aid Bureau, the Director of Public Prosecutions, the judiciary, the prisoner service, Chancellor College, the Malawi Law Society, the Cornell Center on the Death Penalty Worldwide and Reprieve.

With the support of the Tilitonse Fund, lawyers and judges were trained in topics such as mental health and trauma. Psychiatrists from the United States and South Africa trained Malawian mental health workers in the administration of a non-verbal test to screen for intellectual disability. At the same time, working with the judiciary, the project proposed creative strategies to streamline the re-sentencing process and conserve resources. Lawyers and paralegals worked together in investigating prisoners' backgrounds. Another important issue in the Malawi resentencing project was that victims were involved in the process and interviewed for the re-sentencings and their information was shared with the prosecuting officers when appropriate. Many cases concerned crimes committed within families and having the death penalty imposed for a crime created further hurt and torment, rather than bringing any feeling of justice or relief.

To facilitate the reintegration of prisoners, paralegals conducted "community sensitization" sessions with villagers to educate them about the resentencing project. Village and community leaders were consulted about the reception that each prisoner would likely receive in their village. The most vulnerable prisoners were provided training and counseling at Malawi's sole halfway house. The engagement of the community in the resentencing project is unique to Malawi, and has reduced the risk of recidivism. To date, to our knowledge none of the prisoners has re-offended.

The results of the Malawi Resentencing Project speak for themselves. To date, the courts have held 158 resentencing hearings – over 90% of the cases. After hearing the life stories of those prisoners and weighing the circumstances of the offences, the courts reduced the sentences of every single prisoner. None were resentenced to death. A total of 138 prisoners have been released into the care of their families and communities. One of those prisoners is now a group village headman—a position of leadership that reflects the trust and respect of his community.

Kenya recently also abolished the mandatory death penalty.<sup>18</sup> Over 4000 prisoners may become eligible for resentencing hearings in the country. We hope that the opportunities in the African Commonwealth to positively influence the global jurisprudence on the death penalty in a way that goes beyond just the specific country or the region will continue to be realized – they assist all of us working on the issue of the death penalty and capital cases anywhere in the world.

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<sup>16</sup> in *Kafantayeni v Attorney General*

<sup>17</sup> <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi>

<sup>18</sup> <https://www.nation.co.ke/news/Supreme-Court-declares-mandatory-death-sentence-unconstitutional/1056-4228260-f1krmcz/index.html>