

**A CRITICAL ANALYSIS OF THE IMPACT OF
THE BILL OF RIGHTS ON PUNISHMENT IN
MALAWI**

by

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DECLARATION

I, Esther Gumboh, hereby declare that *A critical analysis of the impact of the Bill of Rights on punishment in Malawi* is my own work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University of Cape Town to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signed at Cape Town this 15th day of February 2015

Esther Gumboh

For my beloved uncle

Dr Reuben Makayiko Chirambo

(3 June 1963 – 6 October 2011)

You were one of a kind.

If the needs of the society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain.

Tambala J in *National Consultative Council v The Attorney General of Malawi*, 1994.

The quality of our civilization is also gauged by how we treat those whom we define as wrongdoers ... [S]ince punishment is, after all, the deliberate imposition of pain and deprivation by the state on individuals, it behoves society to ensure that this imposition is kept within proper limits, and is inflicted only for proper purposes.

Barbara A Hudson *Understanding justice: An introduction to the ideas, perspectives and controversies in modern penal theory*, 1996.

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May God bless you all abundantly.

ABSTRACT

Malawi's penal regime has a long history of retributive and deterrent punishment and unfair trials. In the absence of a constitutional set up that recognised human rights and driven by the need to maintain colonial authority, punishment during the colonial period was largely premised on retribution and deterrence. The one-party regime that took over after independence was characterised by gross violation of human rights. The adoption of the Constitution in 1994 ushered in a more humane regime of punishment premised on human rights. Complemented by international law, the Bill of Rights has several provisions which clearly intend to create a penal system that is consistent with international standards.

This study examines the extent to which punishment in Malawi reflects international and constitutional standards regarding the aims of punishment, the forms of punishment, and post-sentencing procedures. In answering this question, the study investigates whether, over 20 years after the adoption of the Constitution, Malawi has realised the promises of the Bill of Rights for punishment. It therefore analyses the aims of punishment, the forms of punishment, and release procedures to determine if they comply with Constitution.

The findings of this thesis reveal that while some progress has been made in aligning the penal regime with constitutional and international standards, there are some aspects of punishment that are in conflict with these standards. The study proposes some solutions to address these gaps.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Constitutional Court of South Africa
CCPJA	Child Care, Protection and Justice Act
CPA	Criminal Procedure Act, South Africa
CPEC	Criminal Procedure and Evidence Code
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Committee for the Prevention of Torture)
CRC	Convention of the Rights of the Child
CSAC	Classification and Security Assessment Committee
DFA	Defence Force Act
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
EComHR	European Commission of Human Rights
ECOSC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
MSCA	Malawi Supreme Court of Appeal
MWHC	Malawi High Court
NM	Namibia High Court
NmS	Namibia Supreme Court of Appeal
SCA	South African Supreme Court of Appeal
SCC	Supreme Court of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SRTC	Southern Region Traditional Court
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council

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CHAPTER 1

INTRODUCTION

1 PROBLEM STATEMENT

Before 1994, the constitutional set up in Malawi paid scant attention to human rights, let alone the rights of offenders in the penal regime. The 1964 Constitution of Malawi contained a Bill of Rights with a number of civil and political rights but this was soon substituted with ‘fundamental principles’ of government in 1966. Among other things, these principles provided that Malawi would recognise the Universal Declaration of Human Rights and adhere to the Law of Nations.¹ However, this was superseded by section 2(2) of the 1966 Constitution which stipulated that they could be limited by any law that was ‘reasonably required in the interests of defence, public safety, public order or the national economy’, a provision which was often abused.

On 16 May 1994, Malawi adopted a democratic Constitution which came into full force on 18 May 1995. The Bill of Rights contained in Chapter IV of the Constitution guarantees several rights that lay the foundation for fundamental changes to the penal regime and indeed the criminal justice system as a whole. For instance, it provides for the right to dignity,² outlaws corporal punishment,³ torture⁴ and cruel, inhuman or degrading punishment or treatment.⁵ Section 16 of the Constitution restricts the application of the death penalty. The Constitution also has special provisions for sentencing children. For instance, it prohibits the imposition of life imprisonment

¹ Section 2(1)(iii).

² Section 19.

³ Section 19(4).

⁴ Section 19(3).

⁵ Section 19(3).

without the possibility of parole on person below the age of 18 years.⁶ Imprisonment of children may only be used as a last resort and for the shortest time consistent with justice and public protection.⁷ The Constitution also provides for the right liberty⁸ and a wide range of rights for arrested, detained and sentenced persons.⁹ For instance, it protects the right to be detained in humane conditions,¹⁰ to challenge the lawfulness of one's detention¹¹ and to be released from unlawful detention.¹² These provisions indicate that the Constitution envisages significant changes to punishment in Malawi.

The Constitution also embraces international law. For example, customary international law is automatically binding on Malawi and its application is subject to the Constitution and Acts of Parliament.¹³ International law can be used as a source of law in domestic courts.¹⁴ This means that various international standards for punishment contained in major international and regional human rights instruments are binding on Malawi and that they must be reflected in the penal regime. Moreover, section 11(2)(c) of the Constitution enjoins courts to 'have regard to current norms of public international law and comparable foreign case law' when interpreting constitutional provisions. Further, in deciding whether a limitation of a right is constitutionally permissible, one of the

⁶ Section 42(2)(g)(i).

⁷ Section 42(2)(g)(ii).

⁸ Section 18.

⁹ Section 42.

¹⁰ Section 42(1)(b).

¹¹ Section 42(1)(e).

¹² Section 42(1)(f).

¹³ Section 211(3).

¹⁴ Section 211(1).

factors to be considered by the court is whether it is recognised in international human rights standards.¹⁵

2 RESEARCH QUESTIONS

The provisions in the Bill of Rights suggest far-reaching changes to punishment and sentencing. They have implications for the theoretical underpinnings of punishment which in turn inform the forms of punishment and post-sentencing procedures. These changes inevitably affect the sentencing practices and applicable principles, including post-sentencing procedures. This study considers whether 20 years after the adoption of the Constitution, punishment in Malawi conforms to constitutional and international standards, examining the situation in the country as of September 2014.

The central research question of this study is: to what extent does punishment in Malawi reflect international and constitutional standards regarding the aims of punishment, the forms of punishment, and post-sentencing procedures? In answering this question, the study seeks to investigate the following questions: what are the theoretical justifications for punishment? What should be the relationship between them? What is the position of international human rights law regarding the aims and forms of punishment, and post-sentencing procedures? What is the exact nature of the changes that the 1994 Constitution sought to bring on theories of punishment, forms of punishment, and post-sentencing procedures? Do the current law reforms and sentencing practices since 1994 reflect these changes?

In an effort to achieve a more focussed study, emphasis will be placed on the death penalty, imprisonment and early release procedures. The death penalty has been selected

¹⁵ Section 44(2) of the Constitution.

because it is the most severe punishment in Malawi and has witnessed major reform since 1994. The choice of imprisonment is based on the fact that it is the most common form of punishment in Malawi. The study is mainly limited to the punishment of adult offenders; it does not give a detailed examination of the punishment of children in Malawi except for some general observations where necessary.

3 JUSTIFICATION OF THE STUDY

Sentencing is one of the most neglected aspect of a criminal trial.¹⁶ The punishment of offenders is left to correction officials and society rarely regards offenders as deserving of the full protection of human rights. This reasoning has infiltrated the debate on the death penalty in Malawi as evidenced recently by the Malawi Law Commission's assertion that abolishing the death penalty would be seen as condoning murder and other capital crimes.¹⁷ The Constitution is the supreme law in Malawi¹⁸ hence is the yardstick against which to evaluate any law or practice. Therefore, it is important to have a full understanding of what benchmarks it posits in order to ensure that all individuals, including those who find themselves in conflict with the law, enjoy its benefits. This is particularly important in respect of penal law and policy since suspects and offenders are a vulnerable group in society who run the risk of facing the wrath of society for their wrongful actions.

Since 1994, there has been reform in the criminal justice system in accordance with the Constitution. The Special Law Commission on Criminal Justice Reform has reviewed major statutes pertinent to criminal justice including the Police Act,¹⁹ the Penal Code,²⁰

¹⁶ Terblanche (2007) 1.

¹⁷ Malawi Law Commission (2007) *Report of the Law Commission on the review of the Constitution* 27.

¹⁸ Sections 5 and 199 of the Constitution.

¹⁹ Chapter 3:01 of the Laws of Malawi.

the Criminal Procedure and Evidence Code (CPEC),²¹ and the Children and Young Persons Act (CYPA)²² which was replaced by the Child Care, Protection and Justice Act (CCPJA).²³ In 2003, the Prisons Bill was drafted to replace the Prisons Act.²⁴ This study is significant in that it examines some of the legal reforms that are relevant to punishment. It will identify potential problematic areas and therefore provide a useful critique of case law and the law which may inform further reforms. Furthermore, in view of the relevance of international law in Malawi, the study is significant in that it will highlight whether the country fulfils its obligation to uphold international standards for punishment.

4 LITERATURE REVIEW

Punishment has attracted a relatively substantial number of publications, which have examined various issues such as its origins, philosophical foundations and how it is or must be imposed by the courts.²⁵ Scholars have also written about the impact of human rights on punishment and debated whether certain forms of punishment, particularly the death penalty²⁶ and life imprisonment,²⁷ are acceptable in today's world. While there is a

²⁰ See Malawi Law Commission *Report of the Law Commission on the review of the Penal Code* (2000), hereafter *Penal Code review report*.

²¹ See Malawi Law Commission *Report of the Law Commission on the review of the Criminal Procedure and Evidence Code* (2007), hereafter *CPEC review report*.

²² Chapter 26:03 of the Laws of Malawi. See Malawi Law Commission *Report of the Law Commission on the review of the Children and Young Persons Act* (2005), hereafter *CYPA review report*.

²³ Child Care, Protection and Justice Act 22 of 2010.

²⁴ Chapter 9:02 of the Laws of Malawi.

²⁵ Ashworth (2010); Bagaric (2010); Carlen (2002); Tonry (2010); Von Hirsch and Ashworth (1998); Terblanche (2007); Garland (1993); Tunick (1992); Van der Merwe (1991).

²⁶ Yorke (2008); Walker (2008); Chenwi (2007); Council of Europe (2004); Trunskett (2003-2004); Meister (2003); Nowak (2000); Slama (2001); International Commission of Jurists (2000); Van Zyl Smit (1994).

lot of literature on punishment in general, only a few scholars have focussed their studies on Malawi.²⁸ In his book that covers the entire Malawian Bill of Rights, Chirwa devotes two chapters to the significance of the Bill on punishment.²⁹ He aptly notes that the Bill of Rights and human dignity in particular 'has created a new blueprint for the administration of justice'.³⁰ He states that the right to human dignity demands that fair punishments must be imposed and that they be enforced in a humane manner.³¹ Chirwa further questions the constitutionality of the automatic commutation of death sentences to life imprisonment by the President in exercise of his power to pardon.³² The Malawi Law Commission has produced a number of reports aimed at reforming the criminal justice system.³³ However, these studies were specifically aimed at effecting legislative changes; they do not systematically address issues relating to punishment, whether the penal regime is consistent with international law, or how it has changed since 1994.

Unlike the available literature on punishment, this research will be a sustained study that will specifically investigate the extent to which the penal regime in Malawi has incorporated constitutional and international standards as envisaged by the Constitution. There appears to be no comprehensive study that has specifically tackled this issue. Therefore, this study will contribute to the discourse on punishment in Malawi.

²⁷ Van Zyl Smit (2006); Du Toit 2006); De Beco (2005); Paluch *et al* (2003); Van Zyl Smit (2002); Van Zyl Smit (1999).

²⁸ Most of these writings focus on the death penalty. See Hynd (2011); Chigawa (2009); Novak (2009); Hynd (2008); Hynd (2008); Nkhata (2007); Hynd (2007). See also Ng'ong'ola (1988).

²⁹ Mainly chapters 7 and 11 which deal with the right to human dignity and children's rights respectively.

³⁰ Chirwa (2011) 126.

³¹ Chirwa (2011) 127.

³² Chirwa (2011) 133-135.

³³ See the *CPEC review report*; the *CYPA review report*; the *Penal Code review report*.

5 METHODOLOGY

This study will draw from Malawian law, mainly the Constitution, statutes and case law to determine the relevant sentencing laws and standards. It will rely on textbooks and journal articles in examining the theories of punishment (namely deterrence, rehabilitation, retribution and incapacitation) and their impact on aims and forms of punishment, and post-sentencing procedures. Provisions in the Bill of Rights will be considered to determine their significance on theoretical underpinnings of punishment. The thesis will consult international and regional human rights instruments and jurisprudence to identify international standards for punishment.

In order to establish the forms of punishment and sentencing principles, the study relies on the relevant legislation, case law and sentencing guidelines. A critical analysis of cases from the High Court and Malawi Supreme Court of Appeal (MSCA) will be done in order to determine the courts' understanding of the aims of punishment, how they interact with each other and how sentencing decisions have used the Constitution and international law. Although magistrate courts handle the bulk of criminal matters, they are not courts of record. Cases decided in these courts must be confirmed by the High Court. Confirmed cases are binding on the magistrate courts. Most of the time, judges incorporate sentencing guidelines when confirming or overturning a case from the lower court. In addition, the confirmed cases are reported in the Malawi Law Reports hence providing easier access. Law reform initiatives relevant to punishment will be critically analysed to determine whether and to what extent the changes envisaged by the Bill of Rights have been implemented by legislation.

6 OUTLINE OF THE STUDY

This study is divided into eight chapters. Chapter two discusses the traditional theories of punishment, namely, retribution and utilitarianism. The latter includes deterrence, incapacitation and rehabilitation. In this chapter, the study explores the philosophical underpinnings of punishment and how they are reflected in sentencing practices. Chapter three examines international standards for punishment. It scrutinises various international and regional instruments including treaties and soft law in order to understand the international human rights law framework for the aims and forms of punishment, and early release procedures.

Chapter four provides a brief background to punishment in Malawi with a view to understanding the significance of the 1994 Constitution. It also explores some of the significant developments relating to punishment that culminated in the adoption of the Constitution in 1994. In addition, the chapter gives a brief overview of the relevant constitutional provisions that have an impact on punishment. Chapter five is devoted to the forms of punishment in Malawi. It describes the available sentencing options and broadly notes the circumstances in which they are imposed. Placing particular emphasis on the death penalty and life imprisonment, the chapter investigates whether the forms of punishment are consistent with constitutional and international standards

Chapter six then focuses on the aims of punishment in Malawi. It considers sentencing decisions to understand how courts have justified punishment and determine whether they reflect the constitutional and international standards. Chapter seven considers the framework for early release in Malawi and the extent to which it is in line with the Constitution and international human rights law. Chapter eight outlines the main

findings of the study and makes some recommendations on how some of the problematic issues identified in chapters five to seven could be addressed.

CHAPTER 2

THEORIES OF PUNISHMENT

1 INTRODUCTION

The aim of this chapter is to examine the relevance and role of theories of punishment in a criminal justice system. This will provide the philosophical framework which will be used in analysing the sentencing practices in Malawi. In the context of this study, it is important to examine the justifications for punishment because they are of judicial and legislative relevance and have important policy implications.¹ They not only inform sentencing principles and practices but also determine the nature and severity of sentences.² The goals of punishment are also relevant in the execution of sentences and therefore affect post-sentence procedures such as parole.

The justification for punishment invokes three key questions: why punish? Who should be punished? How much? Theories of punishment fall into two groups: utilitarian and retributivist.³ Utilitarian theories are more concerned with preventing future crime while retributivist theories focus on the past; that is, punishment as being deserved by offenders. Utilitarian theories include deterrence, incapacitation and rehabilitation. The chapter will examine the core of each theory and examine its major criticisms.

¹ See Spohn (2008) 23-30.

² D'Ascoli (2011) 33.

³ Hudson (1996) 1.

2 RETRIBUTION

2.1 Definition and justification

As noted above, the main difference between retribution and utilitarianism is that the latter is forward looking as it justifies punishment by the benefits that can come out of it, while the former is backward looking, justifying punishment by the fact that an offender has committed an offence. Retribution does not focus on the benefit that can be derived from punishment.

Although there are various versions of retribution,⁴ the theory of retribution is generally based on four basic claims: the principle of wilful wrongdoing, the principle of proportionality, the principle of necessity, and the principle of inherent justice. The principle of blameworthiness or wilful wrongdoing is based on the notion of individual autonomy which recognises that human beings are rational moral agents. This principle holds that the justification for punishment is the blameworthiness of an offender who willingly commits an offence. Therefore, guilt is a prerequisite for punishment: offenders deserve to be punished for their wrongdoing. By implication, the innocent should not to be punished.

The second retributive principle is the principle of proportionality. Proportionality is an essential consequence of the theory of retribution as it is based on the principle of just deserts. It demands that punishment must fit the crime; that is, the quantum of suffering inflicted on the offender should be proportional to the gravity of the crime. In determining the severity of punishment, a court must look to the moral culpability of

⁴ Retribution includes the repayment theory, desert theory, penalty theory, minimalism, satisfaction theory, fair play theory, placation theory, annulment theory and denunciation theory: see Cottingham (1979); Walker (1999).

the offender and the seriousness of the offence. Serious offences should be punished more severely than minor offences so as to reflect the moral gravity of the offences.⁵ The gravity of an offence can be gleaned from the harm it causes and the moral culpability of the offender. Considerations external to the offence should have a minimal role, if any, in determining the punishment. Therefore, factors such as the prospect of rehabilitation, a plea of guilt, character, cooperation with the state, and prior convictions should not be major considerations in sentencing. The severity of a punishment, on the other hand, is determined by ‘the degree to which [it interferes] with people’s interests The more important the interests intruded upon by a penalty are ... the more severe the penalty should be considered’.⁶ Kant invoked the principle of just desert as the only principle that can ensure proportionality in sentencing and should be the basis for punishment.⁷

The third principle of retribution is the intrinsic goodness of punishment. Punishment is seen as justified in itself. The fact that the criminal has wilfully done wrong is in itself a justification for inflicting him with harm.⁸ Central to retribution is the Kantian principle of the moral worth or dignity of a person which frowns upon the imposition of punishment for other purposes:

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed

⁵ Hart (1968) 234.

⁶ Von Hirsch (1998) 185-189.

⁷ Kant (2010) 32. The principle of *lex talionis* or ‘an eye for an eye’ has been attacked as a ‘barbaric law of retaliation in kind’. However, this criticism is based on a mistaken understanding that the principle demands that an offender should suffer the same harm that he has caused the victim, a conclusion that can understandably be drawn from a literal reading of the principle. Kant did not use the principle in this literal sense: see Fish (2008).

⁸ See Anderson (1997).

only because the individual on whom it is inflicted *has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even though he may be condemned to lose his civil personality ... The principle of punishment is a categorical imperative, and woe unto him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises.⁹

This is not to say that benefits should not be derived from punishment. As Packer observes, the principle is that while other goods may be derived from punishment, they must not be pursued for their own sake.¹⁰

The fourth retributive principle is that of necessity. This principle stipulates that punishment is obligatory and that a state has a right to punish offenders. Moore claims that the moral culpability of an offender gives rise to a ‘duty to punish’ on the part of society such that ‘we have an obligation to set up institutions so that retribution is achieved’.¹¹

2.2 Critical appraisal of retribution

Retribution is correct to claim that the catalyst for punishment is really the fact that a person has wilfully committed a wrong and that punishment must be proportional to the gravity of the crime. The principle of proportionality is recognised as a central concept in sentencing that has been embraced in several international instruments and national constitutions. It ‘is rooted in the rule of law, legal safeguards and guarantees

⁹ Kant (2010) 31-32. Emphasis in original.

¹⁰ Packer (1973) 184.

¹¹ Moore (1998) 150. The right to punish is also based on individual autonomy: Duff (1986) 70; Gardner (2008) 480.

against the excessive use of force' that effectively prohibit misuse and arbitrariness of punishments.¹² Retribution does however have its difficulties.

Retribution can be criticised to the extent that it fails to take into account social factors that influence criminal behaviour. It advocates the view that we are morally free to exercise equal choice in deciding whether to commit a crime regardless of our position in the social order. This fails to account for the problem of just deserts in an unjust world. As a result, retribution ignores the external factors that account for criminality such as poverty, disadvantage and discrimination, upbringing and unemployment.

The second criticism of retribution relates to its claim that those who commit crimes deserve to be punished. Cavadino and Dignan rightly argue that from a moral point of view, the desire to punish wrongdoers could be an emotion to be suppressed rather than indulged.¹³ In fact, as will be discussed in chapter five,¹⁴ there are situations where a court may decide not to convict let alone impose punishment despite the fact that an offence has been proved. Hart¹⁵ and Jacobs¹⁶ have argued that retribution does not provide a general justifying aim for punishment but only its distributive principles; namely that only the guilty should be punished, and only in proportion to the gravity of their crime.

A further criticism of retribution is its rejection of the consequences of punishment as a crucial part of the justification for punishment. This leads to an untenable position, in that punishment would be justifiable even if it increased the crime rate.¹⁷ While it is

¹² Lappi-Seppälä (2010) 240.

¹³ Cavadino and Dignan (2002) 42.

¹⁴ See section 4.3 of chapter five.

¹⁵ Hart (2010) 202-203.

¹⁶ Jacobs (1999).

¹⁷ Bagaric (2001) 59.

important to ensure that punishment is kept within the limits of the principle of proportionality, there is a legitimate public interest in state punishment. This is not only because the criminal justice system is funded by the public but also because it can hardly be denied that the goal of crime prevention can benefit society as a whole by making it safer. The challenge is how this goal can be achieved with due respect to the rights of offenders including the right to human dignity. In this regard, Kant's observation that offenders must not be used merely as a means to an end is instructive. It entails that the severity of punishment must not be detached from the gravity of the offence; that punishment must not be imposed simply to achieve some benefit such as community protection or deterrence. This is consistent with the right to human dignity and, to some extent, the right to liberty in cases where imprisonment or any punishment that involves restriction of liberty is imposed.

Retribution has also been criticised for its failure to clearly define proportionality. As noted by Frase, 'excessiveness and disproportionality are meaningless concepts in the absence of a clearly defined and defensible normative framework'.¹⁸ In order to understand the principle of proportionality 'it is necessary to determine the factors that are relevant to the seriousness of the offence and how offence severity should be gauged'.¹⁹ A further challenge to proportionality is the inconsistent treatment of aggravating and mitigating factors in sentencing. The legislature and the courts should strive to treat these factors consistently and to develop standards as to when particular forms of punishment may or may not be imposed. For instance, imprisonment, despite its duration, is generally regarded as a severe form of punishment. Minor offences should not attract imprisonment.

¹⁸ Frase (2008) 40.

¹⁹ Bagaric (2001) 164.

In summary, it cannot be disputed that what triggers crime is the commission of an offence. Therefore, retribution lays the foundation for punishment. It also provides the distributive principles of punishment through the principle of proportionality. This limits the extent of punishment that can be imposed on an offender and guards against the objectification of an offender as means to an end. However, retribution can only achieve justice in an ideal society. This is because it does not pay attention to social factors that may influence criminal behaviour. Further, retribution can never deal with crime in light of its rejection of the consequences of punishment; punishment cannot be pursued for its own sake without any consideration as to how its impact on society. As will be shown in the section immediately below, utilitarian theories are attractive for recognising that punishment must result in the general betterment of society.

3 UTILITARIAN THEORIES OF PUNISHMENT

Utilitarian theories of punishment are rooted in the general theory of utilitarianism. This discussion will be limited to the general principles that underpin the theory of utilitarianism.²⁰ The first part of this section will define utilitarianism. Thereafter, the section will look at the utilitarian theories of punishment namely deterrence, incapacitation, rehabilitation and restoration.

3.1 Definition of utilitarianism

Utilitarianism is a moral theory that states that the ultimate good of society is to achieve happiness or pleasure and to avoid pain. It judges conduct by its ability to increase happiness or reduce pain. Utilitarianism is governed mainly by the principle of utility, or, as Mill called it, 'the greatest happiness principle'.²¹ According to Bentham, who is

²⁰ A detailed discussion of the various forms of utilitarianism is beyond the scope of this paper.

²¹ Mill (1863) 257.

regarded as the main founder of utilitarian philosophy, this principle ‘approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness’.²² An action is morally reasonable and defensible if it produces ‘the greatest happiness to the greatest number’ of people. A fundamental problem in utilitarianism is how to measure happiness. In the context of curbing crime, individuals may desire to see more arrests, others more convictions and others harsher punishments.²³ However, in each case, the desired result is ultimately a reduction or elimination of crime.

In terms of punishment, utilitarianists admit that it is, in itself, evil as it causes unhappiness to an offender. Indeed, Bentham declared that ‘all punishment is mischief; all punishment is in itself evil’.²⁴ However, utilitarianism justifies punishment by its future consequences: crime reduction or prevention. Crime is regarded as a source of pain that reduces aggregate happiness of the society because it causes many societal problems, suffering to its victims and makes society unsafe. Punishment is designed to reduce the incidence of crime in society.²⁵ While bringing unhappiness to the punished, punishment leads to a greater good: it will increase the general happiness of society as it reduces or eliminates crime. This happiness will be experienced through a more secure and orderly society. The pain of punishment is justifiable only if it has the result of increasing the total happiness of a community through crime prevention.²⁶ This means that from a utilitarian point of view, punishment is a means to an end. However,

²² Bentham (1982) 11-12.

²³ Van den Haag (1982) 795.

²⁴ Bentham (1982) 158.

²⁵ Wasik (1998) 45.

²⁶ Bentham (1982) 158, 168.

Beccaria opined that punishment should be ‘necessary; the least possible in the case given’.²⁷ Similarly, Bentham believed that punishment should be used as sparingly as possible and not in circumstances where the end sought can be achieved by milder means.²⁸

There is an underlying assumption in utilitarianism that potential offenders are rational actors who carefully weigh the advantages and disadvantages of punishment before deciding to commit a crime. Just punishment is thus that which does not exceed the degree of intensity required to deter others.²⁹

3.2 Critical appraisal of utilitarianism

Unlike, retribution, utilitarianism does not ignore the consequences of punishment. Therefore, it may be relevant in assessing harsh punishment that satisfies retribution but has no benefit on society. This would be vital in assessing the acceptability of some forms of punishment. However, utilitarianism also has its problems which disqualify it from being a dominant penal theory.

The first criticism of utilitarianism is that it instrumentalises offenders as a means of crime prevention. Utilitarianism regards the happiness of the community as more important than that of the individual. As noted above, this is in direct conflict with Kantian philosophy which underlies the concept of human dignity and views man as an end in himself and not merely a means to an end. As will be discussed in chapter three, the right to human dignity must not be overridden in the punishment of an offender.

²⁷ Beccaria (1971) 117, 128.

²⁸ Bentham (1982).

²⁹ Archer *et al* (1983) 992.

The second shortfall of utilitarianism is that it overemphasises the positive consequences of crime on society and fails to pay adequate attention to the offence and the offender. As a result, the individuation of punishment becomes problematic. In addition, ignoring the offence makes it difficult to ensure that just punishment is imposed, making equality of punishment elusive. Ultimately, utilitarianism fails to give any guidance as to the quantum of punishment. This is not to say that utilitarianism does not embrace proportionality. In fact, Bentham postulated that ‘the evil of the punishment should not exceed the evil of the offence’ and that serious offences that cause greater harm to society should be punished more severely than minor offences so as to motivate offenders to stop at the lesser crime.³⁰ Beccaria also embraced proportionality as a measure of punishment.³¹ However, these principles remain vague in as far as proportionality is concerned. In the absence of the retributive principle of just desert, utilitarianism fails to dictate how much punishment would be just in any given case, except requiring that the punishment should be sufficient to have a deterrent effect.³²

This leads to a third weakness of utilitarianism, namely that it encourages severe or harsh sentences. Indeed, utilitarianism holds that proportionality is not an absolute principle; it may be violated where this will increase happiness.³³ It is worth noting, in this regard, that the principle of proportionality is closely linked to the principle of parsimony which is acknowledged in utilitarianism. This principle dictates that the least restrictive or least punitive punishment necessary to achieve defined purposes’ should

³⁰ Bentham (1982) 158, 168.

³¹ Maestro (1973) 26, 30.

³² Lewis (2010) 117.

³³ Bagaric (2001) 187.

be imposed.³⁴ As noted above, both Bentham and Beccaria stressed that punishment must be used sparingly and in a manner that does not bring unnecessary unhappiness to an offender. In practice, this entails, for example, that imprisonment must not be imposed on offenders when other less restrictive means can be used. It may therefore be argued that this allays concerns that utilitarianism justifies the use of stiff punishment. However, repeat offenders may attract stiffer punishment than that justified by the severity of the instant offence. To this extent, the harshness of the punishment may be justified on the basis of utilitarianism.

Lastly, it can be argued that utilitarianism ignores societal issues beyond the victim. The structure and stratification of society must change if happiness is to be increased for every member of society.

In conclusion, utilitarianism views punishment as a collective good whose relevance is questionable if it does not bring about societal good through reducing or preventing crime. This is a noble goal. In fact, punishment may be seen as irrelevant even if retributive sentences were imposed but had no positive outcome on society. Abandoning utilitarian theories altogether will make punishment futile as it will bring no benefit to society. Punishment must not be so lenient that their deterrent effect is negligible. However, if left unchecked, utilitarianism can lead to harsh punishments that are justified only by their ability to prevent or reduce crime. Therefore, crime prevention must be pursued within the confines of the principle of proportionality.

The next section will discuss the three utilitarian justifications for punishment: deterrence, incapacitation and rehabilitation.

³⁴ Morris (1974) 60-61, 75, 78; Morris and Tonry (1990) 90-92.

3.3 Deterrence

3.3.1 Definition and justification

The theory of deterrence is a utilitarian theory of punishment that justifies it by its ability to prevent future crime in society. The punishment of an offender, though unpleasant and bringing unhappiness to him, is justified by its overall benefit of increasing societal happiness through crime prevention. Deterrence is mainly attributed to the early works of philosophers such as Thomas Hobbes, Cesare Beccaria and Jeremy Bentham.

Deterrence occurs when a person refrains from an action because of the fear of the possible unpleasant consequences of that action. In terms of punishment, it entails that offenders or potential offenders will not commit further offences for fear of being punished. In order to achieve this, the punishment must be sufficient to outweigh the profit of the offence.³⁵ Deterrence can be specific or general. Specific deterrence aims to discourage the punished offender from re-offending by instilling fear in the offender of being punished again.³⁶ On the other hand, general deterrence aims at preventing potential offenders from committing crimes. It depends on the frightening effect of punishment emanating from the risk of discovery and punishment outweighing the temptation to commit an offence.³⁷

Severity and certainty of punishment are key concepts in deterrence.³⁸ Both Beccaria and Bentham were of the view that punishment must exceed the benefits derived from the crime committed. By severity is meant not only the quantum but also the nature of

³⁵ Bentham (1982) 166.

³⁶ Cavadino and Dignan (2002) 34.

³⁷ Andenaes (1974) 7.

³⁸ Apel and Nagin (2011) 411, 412.

punishment. Unjust punishments are those which exceed the quantum that was necessary to achieve deterrence. The quantum of punishment must rise with the profit of the offence.³⁹ Beccaria regarded the certainty of arrest and punishment as more fundamental to the preventive force of punishment than severity.⁴⁰ Severe punishment must be coupled with the certainty of not only being caught but also convicted; otherwise, the punishment remains a threat on paper. In addition, punishment must be swift. Beccaria posits that '[t]he more immediately after the commission of a crime a punishment is inflicted, the more just and useful it will be'; that is, the immediacy of punishment is crucial in that it ensures that punishment is seen as the inevitable consequence of crime.⁴¹ This implies that the swiftness of punishment will add to its deterrent effect.⁴² Beccaria regarded the prerogative of mercy and other forms of early release or reduction of sentences based on mitigating factors as detrimental to the certainty of punishment. He writes:

To show mankind that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression. The prince in pardoning gives up the public security in favour of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity.⁴³

The underlying assumption of deterrence is that human beings are rational actors. As such, they will weigh the profit of crime against its cost including the applicable punishment. Proponents of deterrence therefore accept that deterrence is an inappropriate consideration for the mentally ill, young or those who committed the

³⁹ Bentham (1982) 167.

⁴⁰ Maestro (1973) 29.

⁴¹ Beccaria (1971) 117, 128.

⁴² Maestro (1973) 29.

⁴³ Beccaria (1971) 117, 131.

offence while provoked.⁴⁴ On the other hand, severe, swift, certain punishment will act as a deterrent for rational beings. This means that, in addition to severity and certainty, the citizenry must be adequately informed about the applicable punishment and those meted out.⁴⁵ This is particularly important for general deterrence.⁴⁶ Bentham stated that punishment is inefficacious where the ‘the penal provision, though established, is *not conveyed* to the notice of the person on whom it seems intended that it should operate’.⁴⁷ The public must also have sufficient details about the crime.⁴⁸

3.3.2 Critical appraisal of deterrence

Deterrence reiterates both the merits and demerits of utilitarianism discussed earlier. The first criticism of deterrence is that it runs the danger of justifying excessive punishment on the basis of its perceived positive consequences. Consequently, it dehumanises an offender, failing to recognise man as an end in himself. This is contrary to the principle put forward by Kant that human beings are ends in themselves and should not be treated as means to an end. In the South African case of *S v Makwanyane*⁴⁹ the Constitutional Court held that deterrence ‘instrumentalises the offender for state policy’ and ‘dehumanises ... and objectifies him ... as a tool for crime control. This objectification ... strips the offender of his ... human dignity’.⁵⁰ However, this criticism is only valid where, for purposes of deterrence, the punishment imposed on an offender is increased beyond that which is otherwise proportional to the offence committed.

⁴⁴ Fox and Freiberg (2001) 211.

⁴⁵ Christopher (2002) 856.

⁴⁶ Zimring (1971) 76.

⁴⁷ Bentham (1982) 160.

⁴⁸ Geerken and Gove (1975) 507.

⁴⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁵⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 313 and 316.

Another weakness with deterrence is that it is used to justify stiffer sentences. Any penal policy that increases the length or nature of punishment applicable is generally based on deterrence.⁵¹ There has been a shift in modern times from the certainty of punishment to its severity. The problem is that like utilitarianism in general, deterrence fails to provide a measure for the quantum of punishment. If penalties must be ‘sufficiently’ severe, then the prevalence of an offence will mean that a punishment has not achieved general or specific deterrence which in turn will be taken to mean that the punishment is too lenient. Therefore, severer upon severer sentences may be imposed if the desired effect is not achieved.⁵² In some cases, the law may even resort to mandatory and minimum sentences. These sentences run the risk of disproportionality because they restrict or rule out a court’s sentencing discretion and therefore ignore the circumstances of an offender.

The preceding paragraph shows that like utilitarianism, deterrence focusses mainly on whether the punishment is sufficiently severe to act as a deterrent; thereby trivialising the circumstance of the offence and the offender. In addition, it ignores other factors that lead to criminality and systemic factors that may be relevant to punishment. Therefore, a penal system based solely on deterrence will only achieve skewed justice. Ignoring the individual means that deterrence is not prepared to accept reformation and early release. This undermines the individual even further. Early release mechanisms are integral to imprisonment and, in some cases, the failure to release an offender can violate the rights of the offender concerned and amount to cruel, inhumane and degrading punishment.⁵³

⁵¹ Apel and Nagin (2011) 412.

⁵² Wasik (1998) 46.

⁵³ See sections 3.2.2 and 4 of chapter three.

Lastly, there are questions about whether deterrence works in practice and whether stiffer punishments help to reduce crime. There is no doubt that penalties do have a general deterrent effect.⁵⁴ Indeed, few would argue that people would refrain from committing crimes if criminal activity attracted a reward. However, the relation between the severity of punishment and its deterrent effect is a complicated one. Proponents of deterrence like Andenaes state that this complication arises because the fear of punishment is not the only factor that serves as a disincentive to committing crimes; the state of mind of the public and the intensity of policing are also important.⁵⁵ More importantly, some people are deterred by moral considerations or fear of disapproval from those close to them, regardless of the severity of the punishment or knowledge of it.⁵⁶ Admittedly, the nature and severity of punishment is the easiest factor to regulate.

In summary, deterrence aims to prevent crime through the threat of punishment. This would necessitate that factors like prevalence of the crime should be taken into account when sentencing an offender. Although there is no conclusive evidence as to how far deterrence works, deterrence can play a limited role in punishment: people may learn from punishment, thus it may provide a disincentive to crime. However, as noted above, a purely deterrence-based policy can result in harsh sentences. Proportionality considerations must therefore play a role in deciding the severity of punishment. Further, in light of the inconclusive evidence regarding the relation between severity of punishment and its deterrent effect, the legislature and the courts should be wary of

⁵⁴ Van Den Haag (1982) 1034.

⁵⁵ Andenaes (1974) 22.

⁵⁶ Cavadino and Dignan (2002) 36.

increasing punishment as though deterrence were ‘an article of faith’.⁵⁷ The personal circumstances of the offender should also be considered.

Lastly, by requiring that the law and punishment must be communicated to the public, deterrence reinforces the principle of legality which stipulates that criminal laws must be clear so that ordinary people must know the proscribed conduct and its punishment. This will make punishment a proactive, as opposed to a reactive, measure against crime.

3.4 Incapacitation

3.4.1 Definition and justification

Incapacitation (or community protection) involves rendering an offender incapable of committing further offences by his temporary or permanent removal from society. As a utilitarian theory, incapacitation justifies punishment if it reduces or prevents the further harm that would have been caused to the community by the future crimes that would have been committed by the punished offender. This means that punishment is justified by the risk that the offender is believed to pose to society in the future. Therefore, the utilitarian value of incapacitation is that it promotes community protection and thereby increases the happiness of members in a community. The theory of incapacitation advocates for imprisonment as the most useful form of punishment.⁵⁸ Other methods include the death penalty, dismemberment, probation, disqualification from driving, and other measures that limit the physical ability of offenders to commit further offences.

The incapacitative model maintains that sentencing on the basis of the offence does not satisfactorily guarantee public protection. Incapacitation can be general (collective) or specific. General incapacitation involves the imprisonment of offenders irrespective of

⁵⁷ Fox and Freiberg (2001) 210.

⁵⁸ See Champion (1994) 76; Miceli (2009) 2.

the aim of imprisonment or the risk posed by individual offenders.⁵⁹ It can be pursued by adopting a ‘tougher on crime’ policy. On the other hand, specific incapacitation refers to the imprisonment of certain offenders identified as having a high risk of reoffending. It is usually invoked for serious offences, habitual offenders and those deemed to be dangerous. This may justify the use of indeterminate or preventive sentences on the basis of future risk. Specific incapacitation is based on the presumption that recidivism or dangerousness can be predicted accurately from an offender’s personality or characteristics, such as drug use and criminal history. Bottoms and Brownsword claim that where an offender poses a ‘vivid danger’ of seriously harming other people, it would be justified to impose a longer than deserved sentence on the fact of his dangerousness since there is a substantial and immediate likelihood of serious injury occurring.⁶⁰

Incapacitation also plays a role in post-sentence procedures concerning early release such as parole in that early release from prison may be denied on the ground that an applicant is a dangerous person with a high risk of re-offending if released into the community.

3.4.2 Critical appraisal of incapacitation

As a utilitarian theory, incapacitation is prone to criticism advanced earlier against utilitarianism. It objectifies an offender in that punishment is primarily aimed at incapacitating an offender to secure community protection. General incapacitation is particularly problematic in the light of the right to liberty since it may justify the imprisonment of an offender even where he does not pose a threat to society. Specific

⁵⁹ Greenberg (1975) 542.

⁶⁰ Bottoms and Brownsword (1998) 105-106.

incapacitation ignores the conduct of an offender and looks at his future actions. This fundamentally violates the whole idea of crime and criminal responsibility which is incompatible with allocation of blame for future conduct. Criminal responsibility can only ensue from past behaviour; that is, offenders must be punished for what they have actually done and not what they may do in the future. Therefore, justifying punishment by predictions as to future criminal behaviour may place the principle of proportionality and the presumption of innocence in jeopardy. Proportionality dictates that punishment should be based on the blameworthiness of an offender and the seriousness of the crime.

Incapacitation can be used to justify the imposition of harsh sentences since it does not pay sufficient attention to the offence committed.⁶¹ This may ignore the rehabilitative potential of an offender and social factors that may contribute to criminal behaviour. Selective incapacitation relies on the characteristics of an offender which have no bearing on the blameworthiness of the offender. The presumption of innocence requires that a person should only be punished for the crime he has committed, not for anticipated offences. Selective incapacitation effectively punishes offenders for crimes not yet committed. In this regard, there is strong argument against indeterminate sentences and predictions of future dangerousness. Indeterminate sentences are imposed on the basis of future risk, 'not on the need for punishment for the offence'.⁶² This means that they are punishments for crimes not yet committed or indeed which may never be committed. This infringes the right to liberty and security of the person. Indeterminate sentences also lack the element of proportionality essential in a humane

⁶¹ For instance, in *Ewing v California* 583 US 11 [2003] the Supreme Court of America upheld a life sentence imposed for the theft of three golf clubs under the three-strikes laws. The court held that the punishment was justified on the grounds of incapacitation and deterrence.

⁶² Troninas (2011) 731.

punishment. Further, the presumption of innocence is also breached since an offender is punished on the basis of a prediction that he poses a risk to society and is therefore adjudged guilty of future misconduct based on 'judicial intuition'.⁶³ This directly contradicts the overall purpose of sentencing which is to punish an individual for the offence he has committed.⁶⁴

A further criticism of incapacitation is that by focussing on past offences in predicting future criminality, it may violate the principle of double jeopardy which states that a person must not be punished twice for the same offence. This is because an offender with a previous conviction may be punished more severely on the basis of his record. This is evident in cases involving preventive sentences where the law may prescribe that an offender who has a certain number of convictions may be liable to preventive imprisonment. Such a sentence often entails that an offender will be punished more severely than if he were a first offender. In such cases, the offender is essentially punished for previous offences in respect of which punishment was already served.

Another problem with incapacitation is related to the prediction of future behaviour, which invariably requires an assessment of the likelihood of reoffending and the rehabilitative potential of an offender. As Van Zyl Smit rightly observes, predictions of future dangerousness are 'notoriously hard to make'.⁶⁵ Experience and research has shown that future behaviour cannot be accurately predicted so as to determine who will reoffend.⁶⁶ Even in the case of habitual offenders, where proof of past criminal behaviour is available, it cannot be said with certainty that they will commit further

⁶³ See Henham (1997) 47, 55 -56; Fawcett (1987) 42; Nowak (1993) 133.

⁶⁴ Hessick and Hessick (2011) 71-72.

⁶⁵ Van Zyl Smit (2002) 194. See also Shute (2007) 27, noting that risk assessment is a 'notoriously difficult business'.

⁶⁶ Levi (1997) 841. See generally Brown (2000) 91.

offences. Mistaken predictions will lead to injustice and disproportionate sentences where a convict is held for longer solely on the basis of the prediction when the sentence would have been less in the absence of the prediction.⁶⁷ Poignantly, it can hardly be argued that accurate predictions can be made; this is because unless an offender in fact commits an offence as predicted, the accuracy of the prediction remains unproven.

Lastly, incapacitation can be seen as a shortcut to fighting crime. Predispositions to crime are at the core of incapacitation and yet they hint at problems which if dealt with may contribute to making society safer. However, instead of fixing the problems, incapacitation uses them to justify the removal of an offender from society. This neglects the fact that despite his wrongdoing, an offender remains a member of the community. Furthermore, as Wilson points out:

Incapacitation cannot be the sole purpose of the criminal justice system; if it were, we would put everybody who has committed one or two offences in prison until they were too old to commit another. And if we thought prison too costly, we would simply cut off their hands or their heads. Justice, humanity and proportionality, among other goals, must also be served by the courts.⁶⁸

In other words, incapacitation does not seek to redress the underlying causes of crime in attempt to provide, if possible, a long-lasting solution to crime. As such, an offender may be prevented from engaging in certain criminal activity while in custody but upon his release go back to crime. This would be undesirable and in cases where the likelihood of recidivism is detected, life imprisonment may be imposed. Therefore,

⁶⁷ Von Hirsch (1998) 100.

⁶⁸ Wilson (1998).

other aims of punishment such as rehabilitation should play a role in the sentencing process.

Despite these criticisms, the need to protect the community is a noble goal. However, incapacitation cannot form the sole basis of punishment. This would lead to the use of harsh forms of punishment such as castration which are now generally considered cruel. Another undesirable result would be the use of long prison sentences and, especially where general incapacitation is employed, an overall overuse of imprisonment with its attendant problems such as overcrowding. This would be not only expensive but also, where unwarranted, lead to unnecessary disruption to the family life of the offender. Incapacitation should therefore have a very limited role in punishment. Indeed, a penal system founded on incapacitation alone would be counterproductive to international standards on punishment which promote restraint in the use of imprisonment.⁶⁹

In conclusion, the theory of incapacitation emphasises the need to promote community protection through punishment. Some of the challenges that incapacitation faces include the prediction of predicting future behaviour and how this is reconcilable with criminal responsibility. Further, the incapacitative model provides justification for harsh sentences. Nevertheless, incapacitation can play a limited role in punishment, especially where serious serial offenders are involved and public safety has been compromised. It is argued, however, that in cases involving serial offenders, the punishment should not be based on their criminal record but the instant offence they have committed. For instance, a serial rapist should not be sentenced to life imprisonment on a conviction for theft simply because of his criminal record. On the whole, except for instances in which the death penalty is imposed, incapacitation only provides a quick but short-term

⁶⁹ See section 3.2.1 of chapter three.

solution to crime by removing offenders from society. This ignores the underlying causes of crime. It is this very weakness that is the strength of rehabilitative model.

3.5 Rehabilitation

3.5.1 Definition and justification

Rehabilitation is a theory of punishment that aims at preventing future offending by reforming the offender. It focuses on reducing or eliminating the perceived underlying causes of crimes through correctional interventions.⁷⁰ The aim of rehabilitation is to reform and train the offender so that he returns to society as a law abiding citizen. From a utilitarian point of view, rehabilitation justifies the punishment of offenders by its outcome: reforming offenders into law abiding citizens will reduce their propensity to commit crimes; this will reduce the incidence of crime in society and thus increase the overall happiness of its members. Rehabilitation also increases the happiness of the offender's life by enabling him to live a crime-free life. Therefore, rehabilitation can also enhance public safety. While incapacitation attempts to achieve public safety by removing an offender from society, rehabilitation attempts to do so by reforming the offender. Rehabilitation therefore entrenches the view that an offender remains part of the community.

The underlying assumption of rehabilitation is that by dealing with the factors, such as the social and personal circumstances of offenders that lead to criminal activity, offenders can become responsible law abiding citizens. In other words, not all individuals exercise choice in deciding whether to commit a crime regardless of their

⁷⁰ Welch (1995).

position in the social order.⁷¹ Rehabilitation involves the participation of offenders in various rehabilitative programmes aimed at reformation of the offender. These programmes may include drug and alcohol programmes or anger management sessions. Rehabilitation is also the object of programmes aimed at equipping offenders for a better life in the community such as vocational or educational skills, counselling, psychological assistance and support.

Duff argues that to attempt to reform an individual is to treat him with great concern and as an end in himself.⁷² Similarly, Cullen asserts that rehabilitation reinforces the human dignity of offenders by demanding that they reflect on their lives and take necessary steps to free themselves from the things that lead them into crime.⁷³ A fundamental problem that remains unanswered is how to determine the period of time necessary for an effective rehabilitative process to take place. Rehabilitationists have traditionally supported preventive detention and indeterminate prison sentences.⁷⁴

Rehabilitation may at times require that an offender should be imprisoned in order to avail himself for rehabilitative programmes. Short sentences are seen as more conducive to rehabilitation. Such sentences may be combined with other forms of punishment such as community service or probation. Where a long sentence is imposed, it may be combined with a suspended sentence to ensure that an offender does not spend a long time in prison.⁷⁵

⁷¹ Cullen and Gilbert (1998) 21.

⁷² Duff (1986) 242-266.

⁷³ Cullen (2010).

⁷⁴ Dubber (1998) 129-130.

⁷⁵ Rotman (1990) 148.

3.5.2 Critical appraisal of rehabilitation

Rehabilitation is fundamentally different from deterrence and incapacitation in that it seeks to redress the factors that induce crime. It therefore places emphasis on the offender by seeking to reduce his predisposition to criminal behaviour. This is a unique benefit of rehabilitation in that it has the potential to simultaneously benefit the offender and the society. Indeed, improving an offender's life is necessary to reduce crime.⁷⁶ As Cullen and Gilbert rightly observe,

[S]ocial and personal circumstances often constrain, if not compel, people to violate the law and unless efforts are made to enable offenders escape these criminogenic constraints, little relief in the crime rate can be anticipated. Policies that insist on a vengeful posture toward offenders promise to succeed only in fostering hardships that will, if anything, deepen the resentment that many inmates find it difficult to suppress upon release back into society.⁷⁷

In addition, rehabilitation promotes the idea that an offender continues to be a part of the community since it makes the re-integration of an offender into society easier. Successful rehabilitation is more likely to be realised where measures of long-term adjustment are in place such as family support or a job. However, rehabilitation has some challenges.

Firstly, rehabilitation is not based on the criminal action but the ability of an offender to rehabilitate. This raises concern in relation to how rehabilitation can ensure the equality and individuation of punishment.⁷⁸ As a result, the use of longer and indeterminate

⁷⁶ Cf Von Hirsch and Maher (1998) 27, who argue that claiming that rehabilitation is humane 'confuses humanitarian concerns with treatment-as-crime-prevention' because although it may improve the life of the offender, the ultimate goal is to reduce recidivism.

⁷⁷ Cullen and Gilbert (1998) 23.

⁷⁸ Lewis (2010), who argues that rehabilitation removes the concept of desert from punishment thus breaks the only connection between punishment and justice.

sentences may be justified even for child offenders. This requires that proper consideration should be given to how rehabilitation is implemented. Imprisonment being in essence a deprivation of liberty, its duration cannot be determined unilaterally by the potential of an offender to rehabilitation.

Secondly, rehabilitation may be associated with stigma as it labels offenders as sick and in need of treatment.⁷⁹ Allen further states that rehabilitation disregards the principles of consent and voluntarism of an offender to treatment since an offender has no choice on how his rehabilitation should be achieved as it is imposed by a court.⁸⁰ Dubber argues that rehabilitation fosters the view that offenders are incapable of rational self-determination.⁸¹ These criticisms do not dispel the fact that rehabilitation may improve the life of an offender. Arguments that rehabilitation stigmatises an offender become tenuous when it is recalled that offenders are already stigmatised and labelled by a criminal conviction. The aim of rehabilitation is not to entrench such stigma but to correct the situation by attempting to redress the underlying causes that led to the stigma in the first place. Concerns that rehabilitative measures are forced on offenders are more applicable to remedial measures that are so intrusive that the offender's consent is reasonably required. In practice, very few offenders can object to positive measures such as capacity building skills or counselling. Further, it may be necessary to establish a good rapport between offenders and prison officials or professionals.

⁷⁹ See Brody (1998) 11, arguing that rehabilitation assumes that there is 'a lingering equation between crime and psychopathology'.

⁸⁰ Allen (1998) 15.

⁸¹ Dubber (1998) 127.

Beyond that, one should not lose sight of the fact that punishment cannot always be negotiated.⁸²

It must also be mentioned that rehabilitation can prove to be complex and expensive. Rehabilitation works in some cases but, unfortunately, rehabilitationists are yet to come up with appropriate treatments for each offender.⁸³ Rehabilitation is costly in that the success of the rehabilitative programmes depends on the availability of human and financial resources. Therefore, it remains a challenging objective for penal systems in developing countries. However, it may also be argued that rehabilitation promotes the need for humane conditions in prisons.⁸⁴ Further, even without rehabilitative programmes, imprisonment is expensive. It may therefore be desirable that offenders are not sent to prison for its own sake but with the aim of improving their lives so that their proclivity to commit crime is substantially reduced or eliminated altogether. This may ensure that prisoners do not return to prison.

In summary, rehabilitation has moral value in recognising that criminals can become better persons. It is internationally accepted that rehabilitation must have primacy in dealing with child offenders. If crime is largely explainable by upbringing and social and psychological conditions, rehabilitation should be very relevant if implemented properly. Most of the concerns raised above can be adequately addressed and, in any case, do not

⁸² As shown in sections 3.3 and 4.2 of chapter five, there are some of penalties such as community service and periodic imprisonment where an offender's consent is required by law. However, it can hardly be said that the court engages the offender in a dialogue. As Bagaric points out, 'a dialogue requires approximately equal parties in order that there is a meaningful opportunity for a genuine exchange of views': see Bagaric (2001) 76.

⁸³ Von Hirsch and Maher (1998) 27; Packer (1968) 56.

⁸⁴ Cf Bagaric (2001) 157, who argues that rehabilitation is an incentive to commit crime because it takes away the pain of punishment by emphasising the interests of the offender. This criticism ignores the fact that a criminal conviction is a precondition for accessing rehabilitation programmes and that criminal convictions usually entail stigma and damage to a person's reputation.

discredit the core function of rehabilitation. Focussing on rehabilitation during imprisonment can make prison life more humane and promote the need for humane conditions of detention. In terms of sentencing, the rehabilitative model encourages a court to take into account the personal circumstances of an offender including his background. Further, rehabilitation is inherently opposed to whole life sentences as it emphasises the reintegration of the offender into society at some point. This is consistent with international human rights law which recognises rehabilitation as the major aim of punishment.⁸⁵

3.6 Conclusion on utilitarian theories

Utilitarian theories of punishment justify punishment by its perceived future benefits. Deterrence seeks to prevent future offending by the threat of punishment; incapacitation aims at reducing crime by removing the offender from society; and rehabilitation seeks to prevent reoffending by reforming the offender. These theories have a common goal of community protection. Rehabilitation is a particularly attractive theory as it attempts to redress the underlying causes of crime and emphasises the reintegration of the offender into society. It should therefore play a greater role in punishment.

4 CONCLUSION

This chapter has discussed two main theories of punishment, namely retribution and utilitarianism, in order to establish the philosophical underpinnings of punishment and how they are reflected in sentencing practices. Retribution is retrospective as it considers punishment to be deserved by offenders. It emphasises that punishment must fit the gravity of the crime; this is an important principle. However, retribution does not give

⁸⁵ See section 2 of chapter three.

sufficient attention to social factors that may contribute to criminal behaviour. More importantly, it can be faulted for failing to consider the outcome of punishment as necessary; there is a legitimate public interest in the punishment of offenders. Therefore, retribution fails to provide a convincing general justifying aim for the existence of punishment as an institution or practice. Retribution must be relegated to a distributive principle of punishment, whereby it acts as a guide on the quantum of punishment; punishment must at the least reflect the gravity of an offence and the circumstances of an offender. This is based on an understanding that perceives the principle of proportionality as a limiting principle, providing for an upper limit on punishment while leaving room for judicial discretion in determining the actual sentence imposed in each case. This allows a court to take into account other considerations when sentencing while at the same time being restrained on the maximum punishment it can impose.⁸⁶

Utilitarian theories like deterrence, incapacitation and rehabilitation are prospective as they justify punishment by its ability to prevent future criminality or reduce reoffending. Generally, utilitarianism provides a strong general justification for punishment in that it looks at its positive consequences on society; namely the general betterment of society through crime prevention and reduction. This gives punishment a useful role in society and creates a framework against which the relevance of certain forms of punishment such as the death penalty and lengthy prison sentences may be questioned. Deterrence draws attention to the impact of crime on society while incapacitation highlights the importance of community protection. Incapacitation may be particularly relevant in cases where the safety of the community has been greatly compromised and in extreme

⁸⁶ See Morris (1998) 184: 'The concept of desert defines relationships between crime and punishments on a continuum between the unduly lenient and the excessively punitive within which the just sentence may on other grounds be determined'.

cases of serious serial offenders where rehabilitation is not possible. This means that general incapacitation should not be employed. This will ensure that imprisonment is used with restraint and the principle of parsimony will also be promoted in that other less severe forms of punishment will be imposed in cases that do not justify imprisonment. However, both deterrence and incapacitation run the risk of harsh sentences and objectifying offenders in the pursuit of crime prevention largely because they tend to overlook the offence, the offender and factors that affect criminality. It is here that retribution would provide a ceiling on the acceptable quantum of punishment by reference to the gravity of the offence committed. At the same time, the law needs to ensure that rehabilitation efforts are not ruled out altogether.

Rehabilitation seems to be a more generally relevant theory. In its pursuit of crime reduction or prevention, rehabilitation focusses on reducing an offender's tendency to commit crime by redressing factors that may induce crime. Rehabilitation should therefore play a greater role on punishment since it questions and tackles the underlying causes of crime in order to reform an offender and promote his reintegration into society. This approach entrenches the right to human dignity and the requirement of humane detention conditions. However, its implementation must be properly managed. As shown in the following chapter, the right to dignity demands that rehabilitation must be an integral part of punishment. Even in cases involving serious offenders, the potential for rehabilitation must not be ignored. Accordingly, incapacitation cannot justify a once-off decision that such offenders must be locked away for the rest of their lives.

International law also stresses that rehabilitation must be the essential aim of punishment. In the next chapter, the thesis will discuss key international standards for the aims and forms of punishment, and release mechanisms for prisoners.

CHAPTER 3

INTERNATIONAL STANDARDS FOR PUNISHMENT

1 INTRODUCTION

The previous chapter has shown that both retributive and utilitarian theories have a role to play in punishment. It concluded that rehabilitation is an attractive theory of punishment because it aims to achieve crime prevention through the rehabilitation of offenders and therefore has the potential to assist them live crime free lives. The aim of this chapter is to discuss the standards for punishment and sentencing in international human rights law. An examination of international law on punishment is important to this study because international law has a crucial role to play in Malawi. Section 11(2)(c) of the Constitution provides that courts of law ‘shall have regard to current norms of public international law and comparable foreign case law’ where it is ‘applicable’ in interpreting the Constitution. International law is also a source of law in terms of section 211 of the Constitution. Further, section 44(2) of the Constitution, provides that permissible limitations to rights must be ‘recognised by international human rights standards’.¹

The source of international standards for punishment and sentencing is mainly international human rights instruments and guidelines. This chapter will draw on various international human rights instruments under the United Nations (UN) and regional systems and relevant case law emanating from these instruments. The first section will analyse the international human rights law position on the aims of punishment. Thereafter, the chapter will look at the position of international law with regard to selected forms of punishment. In particular, it will look at the international standards on

¹ The relevance of international law in Malawi is discussed in greater detail in section 4.2.1 of chapter four.

the death penalty, imprisonment and briefly non-custodial forms of punishment. The chapter dwells on death sentences and imprisonment because they are the most common forms of punishment that have been addressed in international law. In addition, the main focus of the thesis is on imprisonment and death sentences because of the situation in Malawi where the latter is the most severe punishment while the former is the most commonly imposed. The final section of the chapter will examine international standards for early release.

2 THE AIMS OF PUNISHMENT

International treaties rarely make reference to the objectives of punishment. Indeed, of the three main justifications of punishment (deterrence, retribution and rehabilitation), it is only rehabilitation that is mentioned at treaty level. Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR)² provides that the penitentiary system shall have as its essential aim the reformation and social rehabilitation of prisoners. A similar provision is contained article 5(6) of the American Convention on Human Rights (American Convention)³ which states that imprisonment must have ‘as an essential aim the reform and social readaptation of the prisoners’. The Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has observed, in relation to article 10(3) of the ICCPR, that ‘[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner’.⁴ In General Comment 21, the HRC placed significance on the specific measures applied during detention in order to ascertain whether article 10(3) has been

² International Covenant on Civil and Political Rights, GA Res 217A (III), UN Doc A/6316 (1966).

³ American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123, entered into force 18 July 1978.

⁴ HRC General Comment No 21 ‘Article 10 (Humane treatment of persons deprived of their liberty)’ UN Doc HRI/GEN/1/Rev1, 33 (1994) para 10.

complied with. These measures include education, vocational guidance and training, work programmes for prisoners, categorisation of offenders, the disciplinary system, solitary confinement, contact with family, and provision of assistance post-release.⁵ In *Hankle v Jamaica*,⁶ the author claimed that his life sentence for murder which included a non-parole period of 20 years was inconsistent with article 10(3) of the ICCPR. The HRC found the complaint inadmissible. In her dissenting opinion, Ms Christine Chanet found that article 10(3)

should have prompted the Committee to admit the communication and examine on its merits the compatibility of a mandatory penalty of 20 years with a text stipulating that the aim of that penalty is to rehabilitate the offender. The question to be argued should have been the following: does not the inability to modify the penalty for such a long period constitute an obstacle to the social rehabilitation of the prisoner?⁷

This reasoning indicates that lengthy imprisonment and mandatory sentences may be inconsistent with rehabilitation.

The emphasis on rehabilitation is also evident in regional human rights systems. In the European region, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR)⁸ does not have a provision that corresponds to article 10(3) of the ICCPR. However, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has affirmed that rehabilitation is consistent with human dignity and that prisoners serving life sentences must be provided with activities

⁵ HRC General Comment No 21 ‘Article 10 (Humane treatment of persons deprived of their liberty)’ UN Doc HRI/GEN/1/Rev1, 33 (1994) paras 10-12.

⁶ *Hankle v Jamaica* Communication No 710/1996.

⁷ *Hankle v Jamaica* Communication No 710/1996.

⁸ Strasbourg, 26.XI.1987 (1987).

that will help them improve themselves. In addition, various Council of Europe instruments point to rehabilitation and eventual social reintegration as the core aim of imprisonment. The European Court of Human Rights (ECtHR) has held that while punishment remains one of the purposes of imprisonment, ‘the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence’.⁹ In *Kafkaris v Cyprus*,¹⁰ Tulkens, Cabral Barreto, Fura-Sandström and Spielmann JJ of the ECtHR held that in the light of human rights, sentences must not only have a punitive purpose but ‘must also encourage the reform and social reintegration of those convicted’.¹¹ They considered that reintegration into society is a legitimate requirement of sentencing and that ‘questions may be asked as to whether a term of imprisonment that jeopardises that aim is not in itself capable of constituting inhuman and degrading treatment’.¹²

In the African region, the African Charter on Human and Peoples’ Rights (African Charter)¹³ is silent on the aims of punishment. However, several African instruments elevate rehabilitation and reintegration as a main aim of punishment, especially imprisonment. For instance, article 17(3) of the African Charter on the Rights and Welfare of the Child (the African Children’s Charter)¹⁴ states that the ‘essential aim’ of subjecting a child to the criminal justice system must be ‘his or her reformation, re-

⁹ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 115.

¹⁰ *Kafkaris v Cyprus* ECHR 21906/04.

¹¹ Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström and Spielmann in *Kafkaris v Cyprus* ECHR 21906/04 para 5.

¹² See the Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström and Spielmann in *Kafkaris v Cyprus* ECHR 21906/04 para 98.

¹³ African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/3 Rev 5, 21 (1986).

¹⁴ African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

integration into his or her family and social rehabilitation'. Further, article 30(1)(f) of the African Children's Charter provides that where expectant mothers, nursing mothers or mothers of young infants are imprisoned, 'the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation'. The 1996 Kampala Declaration on Prison Conditions in Africa, the main instrument in the African region on the rights of prisoners, recommends that 'prisoners should be given access to education and skills training in order to make it easier for them to reintegrate into society after their release'.¹⁵ These recommendations were also adopted in 2002 through the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa.¹⁶ Paragraph 5 of this declaration states that:

Greater effort should be made to make positive use of the period of imprisonment or other sanction to develop the potential of offenders and to empower them to lead a crime-free life in the future. This should include rehabilitative programmes focusing on the reintegration of offenders and contributing to their individual and social development.

These principles are also supported by article 14 of the 2002 Draft African Charter on Prisoners' Rights.¹⁷

The fact that rehabilitation features prominently in international law does not mean that it is the only recognised aim of punishment. Indeed, international human rights law supports deterrence, community protection and restoration as legitimate goals of punishment. For instance, the United Nations Standard Minimum Rules for Non-

¹⁵ Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström and Spielmann in *Kafkaris v Cyprus* ECHR 21906/04, para 7.

¹⁶ See Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, ACHPR/Res 64 (XXXIV) 03.

¹⁷ African Charter on Prisoners' Rights, adopted by the eleventh session of the Commission on Crime Prevention and Criminal Justice, Vienna, 16-25 April 2002.

custodial Measures (the Tokyo Rules)¹⁸ refer to public safety, just retribution, deterrence, social reintegration and rehabilitation.¹⁹ International instruments have linked rehabilitation and community protection or incapacitation. For instance, rule 58 of the UN Standard Minimum Rules for the Treatment of Prisoners²⁰ stipulates that the ultimate aim of imprisonment and any other measure derivative of liberty is community protection against crime, and that '[t]his end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life'. The Tokyo Rules make reference to incapacitation and deterrence by stating that a proper balance must be struck 'between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention'. The jurisprudence of the HRC also indicates that public protection and deterrence may be pursued by a criminal justice system through the imposition of imprisonment. On its part, the ECtHR has held that a state has a responsibility to protect the public from violent crime and that this is the justification of punitive sentences.²¹ Thus, in *T and V v United Kingdom*,²² the court justified the imposition of indeterminate sentences on children for retributive and deterrent purposes. As shown further below,²³ the case law of international human rights bodies generally endorse the imposition of life imprisonment and the continued detention of a prisoner on the basis of his dangerousness.

¹⁸ United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) UN Doc A/45/49 (1990).

¹⁹ See the preamble to and rule 8(1) of the Tokyo Rules.

²⁰ Minimum Rules for Treatment of Prisoners UN Doc ESC Res 663C (XXIV) 1957.

²¹ *T and V v United Kingdom* (2000) 30 EHRR 121, paras 92 -100 and 93 -101; *Weeks v United Kingdom* (1998) 10 EHRR para 47.

²² *T and V v United Kingdom* (2000) 30 EHRR 121.

²³ See section 3.2.2 below.

The traditional objectives of punishment are also recognised in international criminal law. The tribunals have pointed out that while rehabilitation should be one of the primary aims of punishment, it should not play a predominant role nor be given undue weight because of the gravity of the offences that come before them.²⁴ The tribunals consider that the main purposes of international sentencing are deterrence and retribution.²⁵ However, the tribunals have attempted to strike a balance between retribution and rehabilitation in sentencing an offender.²⁶ Some scholars have argued that deterrence, rehabilitation and reformation are not proper aims for offences as serious and of the magnitude as those that the tribunals deal with.²⁷ This indicates that while it remains a primary concern in sentencing, rehabilitation may not be an overriding consideration in very grave offences.

It is important to mention that the UN international criminal tribunals generally lack a definitive sentencing framework.²⁸ Scholars are also divided on what the aims of international sentencing should be. D'Ascoli, for instance, argues that 'there is an

²⁴ See for instance *Prosecutor v Delalić et al* Judgment Case No IT-96-21 16 November 1998 (ICTY); *Prosecutor v Aleksovski* Appeal Judgment, para 185.

²⁵ *Prosecutor v Delalić et al* Judgment Case No IT-96-21, 16 November 1998 (ICTY) para 806.; *Prosecutor v Anto Furundžija*, Judgment, Case No IT-95-17/1-T, 10 December 1998, para 288; *Prosecutor v Duško Tadić*, Sentencing Judgment, Case No IT-94-1-Tbis-R117, 11 November 1999, paras 7-9; *Prosecutor v Kupreškić* Judgment, Case No IT-95-16-T, 14 January 2000, para 848. For cases from the International Criminal Tribunal for Rwanda (ICTR) see *Prosecutor v Kambanda*, Judgment and Sentence, Case No ICTR-97-23-S, 4 September 1998, para 28; *Prosecutor v Akayesu*, Sentence, Case No ICTR-96-4-S, 2 October 1998, para 19; and *Prosecutor v Rutaganda*, Case No ICTR-96-3-T, 6 December 1999, para 456.

²⁶ Such as in *Prosecutor v Ruggiu* Judgment and Sentence Case No ICTR-97-32-I 1 June 2000 (ICTR) para 33; *Prosecutor v Erdemović* Case No IT-96-22-T, 29 November 1996 (ICTY) para 2; *Prosecutor v Furundžija* Sentencing Judgment, December 1998 (ICTY) para 291.

²⁷ See Ohlin (2009).

²⁸ See also Henham (2003) 66; Henham (2007).

absence of penological justification for international sentencing'.²⁹ Due to the lack of coherence on the aims of sentencing in international criminal law, coupled with the unique nature of the crimes it deals with, there is limited guidance that can be offered to national jurisdictions by the sentencing jurisprudence of the tribunals. However, it is noteworthy that despite the gravity of the crimes in international criminal law, the death penalty is not a competent penalty.³⁰

The above discussion shows that international human rights law favours rehabilitation as the major aim of imprisonment. This reflects the position adopted in chapter two that rehabilitation is an attractive aim of punishment in that it incorporates both the betterment of society through crime reduction and the life of the offender by improving his life. Rehabilitation is seen as a means to achieve community protection by reducing recidivism. There is also a clear link between rehabilitation and the eventual release from prison. As noted in chapter two,³¹ the aim of rehabilitation is to ensure that the offender is able to live a crime free life. This envisages the offender's release from prison at some point. Schabas has rightly pointed out that a legal regime which prevents the eventual release of a prisoner who has demonstrated 'reformation and social rehabilitation' would be inconsistent with article 10(3) of the ICCPR.³² As discussed below,³³ life imprisonment without the possibility of early release does not take rehabilitation seriously. Another important consequence of rehabilitation is that the conditions of

²⁹ D'Ascoli (2011) 135. Bassiouni argues that the primary goal of international sentencing must be the preservation of world peace: see Bassiouni (2004) 86. He also opines that the aim of internal criminal justice must be retribution and just deserts, discounting the propriety of rehabilitation and social reintegration in this sphere: see Bassiouni (2003). For more discussions on the aim of international sentencing, see Akhavan (2001) who emphasises deterrence.

³⁰ See section 3.1 below.

³¹ See section 3.5 of chapter two.

³² Schabas and Sax (2006) 9.

³³ Sees section 3.2.2 below.

imprisonment must be conducive to rehabilitation. In this regard, rehabilitation programmes are important. Rehabilitation also requires a move away from punitive measures that encourage long prison sentences based on retribution, incapacitation or deterrence alone. Further, mandatory minimum sentences may also be incompatible with rehabilitation as they ‘circumvent the goal of rehabilitation ... by requiring punishments that are more retributive and fail to take into account the individualized nature of the crime and the opportunity for rehabilitation’.³⁴

The international standards for the aims of punishment inform the position of international human rights on the forms of punishment.

3 FORMS OF PUNISHMENT

3.1 The death penalty

International law does not prohibit the death penalty per se. The major human rights instruments protect the right to life in a qualified fashion by proscribing the ‘arbitrary deprivation’ of life.³⁵ For example, article 6 of the ICCPR states that ‘[e]very human being has the inherent right to life ... No one shall be arbitrarily deprived of his life’. Guarantees for the right to life are also enshrined in a similar fashion under regional human rights instruments including the ECHR,³⁶ the American Convention³⁷ and the African Charter.³⁸ Although the application of the death penalty is permissible under international law, international law places a number of restrictions on its use.

³⁴ Centre for Law and Global Justice (2012) 46.

³⁵ Article 6(1).

³⁶ Article 2(1).

³⁷ Article 4(1).

³⁸ Article 4(1).

3.1.1 Restrictions on the death penalty

Article 6 of the ICCPR and several other international human rights instruments stipulate a number of restrictions on the use of the death penalty which have attained the status of customary international law. 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 fully protect the right to life, there is need to progressively restrict the number of capital offences ‘with a view to the desirability of abolishing this punishment in all countries’.³⁹ Article 6(2) of the ICCPR states that the death penalty must be applied only for the ‘most serious offences’.⁴⁰

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 with death.⁴¹ According to the 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’.⁴² 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’.⁴³ According to the HRC, other offences which do not warrant the death penalty include robbery, traffic in toxic and dangerous wastes, abetting suicide, property offences, corruption and non-homicidal offences.⁴⁴ Expanding on this, the UN Safeguards Guaranteeing Protection of

³⁹ ‘Capital punishment’ GA Res 2857 (XXVI) of 20 December 1971.

⁴⁰ Article 6(2) of the ICCPR; article 4(2) of the American Convention.

⁴¹ Schabas (2002)273.

⁴² HRC General Comment No 6 (16) ‘The right to life (Art 6)’ (1982) para 7.

⁴³ HRC Concluding Comments on Sudan (1997) UN Doc CCPR/C/79/Add.85, para 8.

⁴⁴ See Chirwa (2011) 99, citing Joseph (2000) 119-120.

the Rights of Those Facing the Death Penalty (ECOSOC Safeguards) provide that capital offences ‘should not go beyond intentional crimes, with lethal or extremely grave consequences’.⁴⁵ 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 actions relating to moral values including adultery, prostitution and sexual orientation.⁴⁶ Article 4(4) of the American Convention excludes the use of the death penalty for political offences or related common crimes.

The second restriction relates to the categories of offenders who can be sentenced to death. 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. This prohibition is also contained in other international 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). 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 70 years. Further, 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’. A similar provision is found in article 4(2)(g) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa⁴⁷ which establishes that the death penalty shall not be applied to

⁴⁵ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (ECOSOC Safeguards) ECOSOC Res E/RES/1984/50 (1984).

⁴⁶ Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc E/CN/4.2000/3, 5 January 2000.

⁴⁷ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

pregnant or nursing women. The ECOSOC Safeguards further prohibit the use of the death penalty on mentally retarded prisoners, including those who develop a mental disorder while on death row.⁴⁸ They also urge states to prescribe a maximum age beyond which the death penalty may not be imposed or executed.⁴⁹

A further observation that must be made with regard to the restriction 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.⁵⁰ Release on parole may come at a time when an offender's child is mature and has, after all, grown accustomed to a life without the primary care of his biological mother.

Furthermore, some instruments prohibit the *imposition* while others prohibit the *execution* of the death penalty on certain offenders. For instance, article 6(5) of the ICCPR states that the death penalty should not be carried out on pregnant women. This implies that a sentence of death may be passed on a pregnant woman but may not be carried out during the pregnancy. On the other hand, article 30(e) of the African Children's Charter prohibits the imposition of the death penalty on pregnant women and mothers of infants and young children. This means that a court must not sentence a pregnant

⁴⁸ ECOSOC Safeguards para 3.

⁴⁹ 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).

⁵⁰The African Children's Charter urges that the non-custodial punishment should be the first option in sentencing pregnant women and mothers with nursing or young children: see article 30(a).

woman to death thus saving her from the death penalty altogether. It can be argued that the exemption of pregnant women from the *imposition* of the death penalty position offends the right to equality.

Firstly, it allows for the differential treatment of offenders based on sex in an unjustifiable manner since men are automatically excluded. Secondly, it discriminates between not only women who are pregnant and those who are not, but also ultimately between fertile and barren women. In this regard, it must be emphasised that pregnancy does not affect an offender's culpability. In any case, pregnancy is determined at the time of sentencing. Thus, even where female offenders participate in a capital crime together, only those who are not pregnant at the time of sentencing are at risk of the death penalty. This differentiation places greater emphasis on the unborn child than one already born. For instance, a woman may be sentenced to death if she gives birth a day before the sentence is passed while a woman who gives birth a day after gets life. This problem is not farfetched since in practice sentencing decisions may be passed long after conviction. As such an offender who may have been pregnant at the sentencing hearing may no longer be pregnant when the sentence is passed. In such a case, such an offender is no better position than an offender who delivered her child shortly before the sentencing hearing and yet only the latter faces a potential death sentence. The reverse is also not implausible: an offender may become pregnant after the sentencing hearing but before sentence is passed. In other scenarios, an offender may already be a nursing mother at the time she is convicted of the crime and yet she may be sentenced to death while her co-accused who is pregnant at sentencing but miscarries later only faces life imprisonment at worst. Since for obvious reasons the time of sentencing is not fixed, it is arbitrary to let it determine whether an offender should be considered for

death or life. Therefore, short of abolishing the death penalty, the position under the ICCPR (which prohibits execution rather imposition) appears to be a more desirable position because it ensures that offenders convicted of capital crimes are treated equally.

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 only be imposed 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.⁵¹ Further, article 6(4) of the ICCPR requires that: ‘Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases’. Regional human rights instruments also embody various procedural safeguards for the imposition of the death penalty that echo the provisions of the ICCPR. For instance, articles 4(2) and (6) of the American Convention prohibit the retroactive application of the death penalty and guarantees the right to apply for amnesty, pardon or commutation of sentence. Procedural safeguards for the use of the death penalty have been reiterated in the ECOSOC Safeguards and other UN resolutions.

The HRC has held that the death penalty may only be imposed after a fair trial that observes all the provisions of the ICCPR.⁵² In General Comment No 6, it noted that

⁵¹ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 299 (1948).

⁵² *Lubuto v Zambia* Communication No 390/1990, CCPR /C/55/D/390/1990 (1995); L Arbour *In the Matter of Sentencing of Taba 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).

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*,⁵³ 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.⁵⁴ Observations parallel to those of the HRC have also been made by the ECtHR and the African Commission on Human and Peoples' Rights (African Commission) regarding the lawfulness of the death penalty under the 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'.⁵⁵ On its part, the African Commission has held that execution after an unfair trial amounts to an arbitrary deprivation of life.⁵⁶

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 *Rudolph Baptiste v Grenada*⁵⁷ and in *Donnason Knights v*

⁵³ *Reid v Jamaica* Communication No 250/1987 (20 July 1990) para 11.5; U.N. Doc. CCPR/C/51/D/355/1989 (1994).

⁵⁴ *Reid v Jamaica* Communication No 250/1987 (20 July 1990) para 11.5; U.N. Doc. CCPR/C/51/D/355/1989 (1994).

⁵⁵ *Ocalan v Turkey* Application No 46221/99, Judgement of 12 May 2005, para 169.

⁵⁶ *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 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 fair trial rights and the death penalty, see Chenwi (2008) 89 -94; Chenwi (2006).

⁵⁷ *Rudolph Baptiste v Grenada* IACHR, Report No 38/00, Case 11.743, April 13, 2000, 760-76.

*Grenada*⁵⁸ 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 imposed when such a petition is pending decision by the competent authority. Thus in *Paul Lallion v Grenada*,⁵⁹ the Commission found that the applicants 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 *Michael Edwards et al v The Bahamas*,⁶⁰ the Commission again found a violation of article 4(6) of the American Convention in light of the state's failure to, among other things, 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.

⁵⁸ *Donnason Knights v Grenada* IACHR, Report No 47/01, Case No 12.028, April 4, 2001, 878-882.

⁵⁹ *Paul Lallion v Grenada* Case 11/765, IACHR Report No 55/02, October 21, 2002, paras 75-81.

⁶⁰ *Michael Edwards et al v The Bahamas* Case 12/067, IACHR Report No 48/01, 4 April 2001, paras 167-174.

It is important to note that the death penalty raises a number of other human rights concerns. In particular, concerns have been raised about the compatibility of the death penalty with the right to human dignity and the prohibition of torture, cruel, inhuman and degrading punishment. Particular attention has been drawn to the conditions on death row, the death row phenomenon and the methods of execution. The conditions on death row refer to the prison conditions in which a prisoner is kept while awaiting execution. Prison conditions must comply with minimum international standards as set out in the ICCPR and other 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. The UN Standard Minimum Rules for the Treatment of Prisoners provide for minimum basic standards in respect of accommodation, hygiene, exercise, medical treatment, religious services and library facilities for prisoners.⁶¹

In the European region, the ECtHR held in *Soering v United Kingdom*⁶² 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. In particular, the court pointed out that among other factors, ‘the manner in which it is imposed or executed, 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.⁶³ 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

⁶¹ See Part 1 of the Rules.

⁶² *Soering v United Kingdom* (1989) 11 EHRR 439.

⁶³ *Soering v United Kingdom* (1989) 11 EHRR 439, para 104.

suffering.⁶⁴ 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.⁶⁵

In view of the many concerns with the death penalty, it is not surprising that there is growing support for its abolition.

3.1.2 The international trend towards abolition

There is a global trend towards abolition of the death penalty. The wording of article 6(6) of the ICCPR clearly indicates that abolition is favourable to a restricted use of the death penalty.⁶⁶ The HRC has stated that article 6 of the ICCPR ‘refers generally to abolition in terms which strongly ... suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life ...’⁶⁷ The conclusions of the HRC have been supported by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions who has called on states that still practice the death penalty to take steps towards its abolition.⁶⁸ The UN Commission on Human Rights has noted that ‘abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development

⁶⁴ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty ECOSOC Res E/RES/1984/50 (1984).

⁶⁵ *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’.

⁶⁶ Article 6(6) reads: Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant

⁶⁷ HRC General Comment No 6 ‘The right to life’ para 6.

⁶⁸ UN Doc E/CN.4/1997/60, para 79.

of human rights'.⁶⁹ The observations of the HRC have also had the support of the UN General Assembly and culminated in the 1989 adoption of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. The preamble to the protocol declares that the protocol is an international commitment to the abolition of the death penalty; that the 'abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights'; and that all measures towards abolition should be considered as progress in the enjoyment of the right to life. Accordingly, article 1 of the protocol prohibits state parties from applying the death penalty in their jurisdictions while article 2 commits them to taking steps towards its abolition. Article 3 of the protocol does not allow any state to make reservations except for the application of the death penalty in times of war.

In addition to the optional protocol, the UN General Assembly has adopted resolutions that urge states that maintain the death penalty to establish a moratorium on executions with a view to abolishing it.⁷⁰ These resolutions also call upon states to progressively restrict the use of the death penalty and to reduce the number of offences for which it may be imposed, as well as to refrain from reintroducing the death penalty once abolished. In its resolutions, the General Assembly has indicated that it is mindful that 'any miscarriage or failure of justice in the implementation of the death penalty is irreversible and irreparable' and that it is convinced that 'a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights', and is consistent with the fact that 'there is

⁶⁹ Resolution 1997/12 of 3 April 1997.

⁷⁰ See UN GA Res. 62/149 Moratorium on the Use of the Death Penalty, December 18, 2007; UN GA Res 63/168 Moratorium on the Use of the Death Penalty, December 18, 2008 and UN GA Res. 65/206, Moratorium on the Use of the Death Penalty, December 21, 2010.

no conclusive evidence of the deterrent value of the death penalty'. This gravitation towards abolition is also evident at regional level.

For instance, articles 4(2) and (3) of the American Convention prohibit the extension of the death penalty to new or additional crimes and the reestablishment of the death penalty in states that have abolished it. Further, in 1990, the OAS General Assembly adopted the Protocol to the American Convention to Abolish the Death Penalty. Like the Second Optional Protocol to the ICCPR, this protocol prohibits states parties from applying the death penalty, with a possible reservation for its application in times of war.⁷¹ The European human rights system has progressively moved from a position that allowed the restricted application of the death penalty to one that prohibits it in all circumstances. In the European region, the Council of Europe, in 1983, established the abolition of the death penalty except in times of war or imminent threat of war.⁷² In 2002, Protocol No 13 concerning the abolition of the death penalty in all circumstances was adopted. The preamble to this protocol notes that state parties are 'convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings'. Since membership into the Council of Europe requires the abolition of the death penalty, all member states have either abolished the death penalty or have put in place a moratorium on executions. In light of these developments, the ECtHR in *Al-Saadoon and Mufdhi v UK*,⁷³ recognised the right

⁷¹ *Al-Saadoon and Mufdhi v United Kingdom* Application No 61498/08, March 2, 2010.

⁷² Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty as amended by Protocol No 11, Strasbourg, 28.IV.1983.

⁷³ *Al-Saadoon and Mufdhi v United Kingdom* Application No 61498/08, 2 March 2010.

not to be subjected to the death penalty'. Elaborating on the nature of this right, the court stated:⁷⁴

Judicial execution involves the deliberate and premeditated destruction of a human being by the state authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the Member States of the Council of Europe.

In the African region, concern over the disregard for procedural safeguards in capital trials led the African Commission to adopt the 'Resolution Urging the State to Envisage a Moratorium on the Death Penalty' in 1999.⁷⁵ The resolution emphasises the right to life and calls on all state parties that still maintain the death penalty to: 'a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions of death penalty; and c) reflect on the possibility of abolishing death penalty'.⁷⁶ A similar resolution was adopted in 2008. In a 2013 statement, the Commission observed:⁷⁷

The death penalty, by its absolute and irreparable nature, is incompatible with any policy to reform offenders, is against any system based on respect for human beings, impedes the unity and reconciliation of people emerging from conflict or serious crimes, and jeopardises criminal justice by making it absolute whereas it has to remain attentive to possible errors.

⁷⁴ *Al-Saadoon and Mufilhi v United Kingdom* Application No 61498/08, March 2, 2010, para. 115.

⁷⁵ 'Resolution Urging the State to Envisage a Moratorium on the Death Penalty', ACHPR Res 42 (XXVI) 99 (1999).

⁷⁶ See Chenwi (2008) 82, 83.

⁷⁷ Statement by the African Commission on Human and Peoples' Rights on World Day against the Death Penalty, 10 October 2013.

The Commission has doubted the deterrent effect of the death penalty as compared to life imprisonment and urged states to commute death sentences to life imprisonment and to ratify the Second Optional Protocol to the ICCPR.⁷⁸

It is noteworthy that international criminal tribunals have also moved away from the use of the death penalty. While the Nuremberg and Tokyo tribunals created to try crimes committed during World War II applied the death penalty,⁷⁹ this is not the case with current international tribunals. Indeed, the maximum penalty available to the International Criminal Court is life imprisonment.⁸⁰ This is also the case with the special criminal tribunals in Yugoslavia,⁸¹ Rwanda,⁸² Sierra Leone⁸³ and Cambodia.⁸⁴ Lastly, the wave of abolition is also evident in the abolition of the mandatory death penalty and the death penalty itself in several jurisdictions across the world.⁸⁵

In conclusion, it can be said that international law on the death penalty permits its use within restricted circumstances with the aim of gradual restriction and eventual elimination. The European human rights system has progressively moved from a position that allowed the restricted application of the death penalty to one that prohibits it in all circumstances. In many cases, the abolition of the mandatory death penalty or the death penalty itself is replaced by mandatory or discretionary life sentences. The

⁷⁸ Statement by the African Commission on Human and Peoples' Rights on World Day against the Death Penalty, 10 October 2013.

⁷⁹ See article 27 of the Nuremberg International Military Tribunal Charter and article 27 of the Charter of the Tokyo Military Tribunal for the Trial of the Major War Criminals in the Far East (1946) 1589 TIAS 3.

⁸⁰ Article 77 of the Rome Statute.

⁸¹ Article 24(1) of the ICTY Statute.

⁸² Article 23(1) of the ICTR Statute.

⁸³ Article 19 of the Statute of the Special Court of Sierra Leone (2002).

⁸⁴ Article 3 of the Extraordinary Chambers in the Courts of Cambodia Law (2004).

⁸⁵ See for instance Nowak (2009).

following section considers the international law position on imprisonment and life imprisonment.

3.2 Imprisonment

3.2.1 General principles

Imprisonment is a severe form of punishment as it restricts the liberty of an offender.⁸⁶ It is therefore desirable to discuss the right to liberty in international law and its implications for imprisonment. The right to liberty is protected in all major human rights instruments. Article 9(1) of the ICCPR states that: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’. The right to liberty is also protected at regional level by article 5 of the ECHR, article 7 of the American Convention⁸⁷ and article 5 of the African Charter.⁸⁸

The prohibition of arbitrary detention is an important feature of the right to liberty. The HRC has noted that article 9(1) of the ICCPR applies to all forms of detention including imprisonment pursuant to a criminal conviction. Thus, the concept of non-arbitrariness applies to judicial decisions including the imposition of imprisonment. This requires that imprisonment pursuant to a conviction must also be justified. The right to liberty and the prohibition of the arbitrary deprivation of liberty requires that a court must give adequate reasons for sentences involving deprivation of liberty. The Council of Europe has recommended that while courts should generally give ‘concrete reasons’ for

⁸⁶ Van Zyl Smit and Snacken (2005) 94.

⁸⁷ Article 7.

⁸⁸ Article 6.

sentences imposed, ‘specific reasons should be given when a custodial sentence is imposed’.⁸⁹ The reasons must show the relation between ‘the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing’.⁹⁰ The Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas⁹¹ state that: ‘Orders of deprivation of liberty shall be duly reasoned’.

International law also has standards on the appropriate reasons for the deprivations of liberty. For instance, the preamble to the Tokyo Rules declares that ‘the restriction of liberty is justifiable only from the viewpoints of public safety, just retribution and deterrence’. In the European region, the 1992 European Rules on Community Sanctions and Measures encourage the restriction of imprisonment to serious offences and the use of non-custodial measures in dealing with offenders.⁹² In *Bouchet v France*,⁹³ ECtHR held that it is imperative that deprivations of liberty must be ‘strictly necessary’ since a state is bound to choose a measure that is least restrictive on the rights of a prisoner.⁹⁴ In the African region, the African Commission has adopted a number of recommendations

⁸⁹ Paragraph E of Recommendation R (92) 17 of the Committee of Ministers to Member States concerning consistency in sentencing (1992).

⁹⁰ Paragraph E of Recommendation R (92) 17 of the Committee of Ministers to Member States concerning consistency in sentencing (1992).

⁹¹ Inter-American Commission on Human Rights ‘Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas’ IACHR Resolution 1/08(2008).

⁹² See also paragraph A6 of Recommendation No R (92) 17 of the Committee of Ministers to Member States concerning *Consistency in Sentencing* (1992): ‘Sentencing rationales should be consistent with modern and humane crime policies, in particular in respect of reducing the use of imprisonment, expanding the use of community sanctions and measures, pursuing policies of decriminalisation, using measures of diversion such as mediation, and of ensuring compensation of victims’.

⁹³ *Bouchet v France* 20 March 2001, Application No 33591/96.

⁹⁴ Dissenting Opinion of Judges Tulkens, Loucaides and Bratza in *Bouchet v France* 20 March 2001, Application No 33591/96, para 1.

that urge state parties to consider non-custodial penalties.⁹⁵ For instance, the overuse of imprisonment is discouraged by the Kadoma Declaration on Community Service Orders⁹⁶ which endorses the use of imprisonment for community protection.⁹⁷ The African Commission has also encouraged states to adopt laws on alternative forms of punishment⁹⁸ and has recommended that states should adopt ‘[m]easures such as parole, judicial control, reductions of sentences, community service, diversion, mediation and permission to go out’.⁹⁹ The Special Rapporteur on Prisons and Conditions of Detention in Africa has noted that community sanctions can help to decongest prison and ensure that the social lives of minor offenders are not disrupted.¹⁰⁰

With respect to the right to liberty under article 9 of the ICCPR, the HRC has observed that detention should not continue beyond the period for which there is appropriate justification.¹⁰¹ Imprisonment may be lawful under national standards but unlawful or arbitrary under international standards. In *A v Australia*, the HRC held that ‘the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice’.¹⁰² The ECtHR has

⁹⁵ See generally Mujuzi (2008).

⁹⁶ Kadoma Declaration on Community Service Orders, ACHPR/Res 64 (XXXIV) 03.

⁹⁷ Para 1 of the Kadoma Declaration on Community Service Orders notes that: ‘The use of prison should be strictly limited as a measure of last resort. Prisons represent a waste of scarce resources and human potential. The majority of prisoners who occupy them pose no actual threat to society’

⁹⁸ See for instance *Mission to the Republic of South Africa*, above note 404, 38; *Mission Report to the Republic of Botswana* 14 - 18 May 2005, Recommendation on Corporal Punishment; *Report on the Promotional Mission to the Republic of Mauritius* August 2006, para 165.

⁹⁹ See *Prisons in Cameroon: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Report to the Government of the Republic of Cameroon on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2-15 September 2002)* ACHPR/37/OS/11/437.

¹⁰⁰ *Mission to the Republic of South Africa*, above note 404, 64; *Mission to Ethiopia*, above note 405, 45.

¹⁰¹ *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari* Communication No 1069/2002, para 9.2

¹⁰² *A v Australia* Communication No 560/1993.

stated that arbitrary detention will arise where liberty is deprived without restraint. In *Saadi v United Kingdom*,¹⁰³ the court said that arbitrariness

includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.¹⁰⁴

This passage indicates that the deprivation of liberty must be used with restraint in order to escape arbitrariness. It also shows that a sentencing court must pay attention to non-custodial sanctions in sentencing an offender. To be sure, the first sentencing option should not be imprisonment.

Article 9(4) of the ICCPR requires that mechanisms must be available for persons deprived of their liberty to challenge the lawfulness of their detention before a court of law. This provision is particularly important in cases of life and long-term imprisonment and preventive sentences imposed on the basis of an offender's dangerousness. As discussed further below, reviews of such sentences are necessary since every person has the potential to change and thus become less dangerous.¹⁰⁵

In *Rameka et al v New Zealand*,¹⁰⁶ the HRC had an opportunity to consider the consistency of preventive detention with article 9 of the ICCPR. The applicants had been found guilty of various serious offences¹⁰⁷ and sentenced to indefinite preventive

¹⁰³ *Saadi v United Kingdom* Application No 13229/03 (2008).

¹⁰⁴ *Saadi v United Kingdom* Application No 13229/03 (2008), para 70.

¹⁰⁵ *Rameka et al v New Zealand* No 1090/2002, Individual Opinion of Committee Member Mr Walter Kälin.

¹⁰⁶ *Rameka et al v New Zealand* Communication No 1090/2002.

¹⁰⁷ The first applicant was convicted of one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. The second was found guilty of 11 counts of sexual offences against a 12 year old boy. The third applicant was found guilty of sexual violation by rape, two charges of

sentences which were reviewable after 10 years by the Parole Board. The law upon which they were sentenced allowed for preventive sentences where the offender posed a 'substantial risk of re-offending'¹⁰⁸ and the sentences were 'expedient for the protection of the public'.¹⁰⁹ Based on psychiatric assessment reports, the sentencing courts had found that the applicants presented a substantial risk of offending and that in the case of the first applicant there was a 20% risk of committing further sexual offences. In sentencing the second applicant, the court had found that his case warranted a finite sentence of at least seven and a half years but opted to impose a preventive sentence because 'no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence'.¹¹⁰

The HRC held that preventive sentences are permissible in principle for purposes of public protection. However, where a preventive sentence has been imposed and the punitive part of the sentence has been served, the continued detention of the offender

must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for [public protection] continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.¹¹¹

sexual violation by unlawful sexual connection, indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building. Previously, he had committed multiple offences in three earlier incidents, involving breaking into homes and engaging in sexually-motivated violence, including two rapes.

¹⁰⁸ Section 75(3A)(b) of the Criminal Justice Act 1985, New Zealand.

¹⁰⁹ Section 75(2) of the Criminal Justice Act 1985, New Zealand.

¹¹⁰ *Rameka et al v New Zealand* Communication No 1090/2002, para 2.5.

¹¹¹ Sections 75(2) and 3A(b) of Criminal Justice Act 1985, New Zealand.

On the facts of the case, the HRC found that the preventive sentences imposed on the first and third applicants were not arbitrary. This was because they were reviewable by an independent and impartial parole board which could order their release and whose decisions were subject to judicial review.¹¹² In the case of the second applicant, the HRC noted that since the court had indicated that a seven and a half year sentence was warranted and parole could only be considered after 10 years in cases of preventive sentence, he would have to serve two and a half years for preventive purposes before he could be considered for release. It held that his detention for two and half years was in accordance with Australian law and not arbitrary. The HRC found, nevertheless, that the second applicant's situation to be inconsistent with article 9(4) of the ICCPR because he could not challenge the legality of his detention for two and a half years and would instead wait until he had served 10 years.¹¹³

However, nine committee members dissented.¹¹⁴ In a joint opinion, four members mainly took issue with the finding that preventive detention was not arbitrary. They questioned the adequacy of the assessment criteria for determining dangerousness or the possibility of commission of a repeat offence and challenged 'the very principle of detention based solely on potential dangerousness'.¹¹⁵ They found that the science underlying a finding such as a 20% risk was unsound and thus rendered the resulting detention arbitrary. The members held that preventive sentences are essentially an easy

¹¹² Para 7.3

¹¹³ Para 7.2. New Zealand had contended that since the Parole Board had a discretionary power to consider release before expiry of the 10 year period meant that the second applicant could be considered earlier in his sentence. This was rejected by the HRC on the basis that the Board had never invoked this discretionary power.

¹¹⁴ Messrs Bhagwati, Ahanhanzo, Yrigoyen and Ms Chanet.

¹¹⁵ See the Individual Opinion of Messrs Bhagwati, Ahanhanzo, Yrigoyen and Ms Chanet.

extension of the penalty of imprisonment and that the preventive part of such sentences is actually a penalty and not just a measure for public protection. By placing reliance on a prediction of dangerousness, the law had effectively replaced the presumption of innocence by that of guilt. As a result, the presumption of innocence in article 14(2) and the principle of legality in article 15(1) of the ICCPR had been violated.

Mr Lallah, another HRC member who dissented, found a breach of the ICCPR on a number of grounds. He faulted the majority for erroneously assuming that preventive sentences are consistent with the ICCPR. He noted that article 15(1) of the ICCPR prohibits not only *ex post facto* criminalisation of past conduct but also punishment for future crimes which may never be committed. In his view, the distinction between the ‘punitive’ and ‘preventive’ periods of preventive sentences has no significance since the offender remains in prison even after the ‘punitive’ period is served. This meant that the offender is effectively punished for acts which it is feared might occur in the future, and not past acts as required by article 15(1) of the ICCPR. He therefore found that preventive sentences are in principle not consistent with the ICCPR and suggested that a better option would be for states to adopt supervisory measures to monitor past offenders upon release where ‘there are reasonable and good grounds for apprehending their re-offending’.¹¹⁶

The requirement that deprivations of liberty must be properly justified is also reflected in the principle of restraint in the use of imprisonment. This principle requires that a criminal justice system must provide a wide range of non-custodial measures in dealing

¹¹⁶ See Individual Opinion of Lallah. Article 15(1) reads in part: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.’

with offenders and that imprisonment should be for the shortest time possible. The promotion of non-custodial sanctions is mainly aimed at the social reintegration of offenders.¹¹⁷ The principle of last resort is well-recognised in international and regional documents.¹¹⁸ Article 30(1)(a) of the African Children's Charter specifically provides that priority must be given to a non-custodial sentence when sentencing expectant mothers and mothers of infants and young children. This is a laudable development, propelled by the fact that in most parts of Africa mothers are the primary care takers of children.¹¹⁹ Although the provision makes specific reference to mothers, it is applicable to primary caregivers since its rationale is to ensure that children are cared for. Hence, fathers or guardians who are primary caregivers can all benefit from this provision. The African Commission has also encouraged states to adopt laws on alternative forms of punishment.¹²⁰ It has encouraged the use of non-custodial measures especially for minor offenders and has generally recommended the use of measures such as suspended sentence, conditional or early release, parole and remission of sentences to improve the rehabilitation of offenders.¹²¹

¹¹⁷ Preamble to the Tokyo Rules.

¹¹⁸ See for instance United Nations *Resolution VIII of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders* (1990) para 5; article 37(3)(b) of the CRC; preamble to the Tokyo Rules; rules 13 and 19 of the Beijing Rules; rule 2 of the Rules for the Protection of Juveniles Deprived of their Liberty; 1997 Kadoma Declaration on Community Service Orders; Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa.

¹¹⁹ Chirwa (2002)168.

¹²⁰ See for instance *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Mission to the Republic of South Africa* 14-30 June 2004, 38; *Mission Report to the Republic of Botswana* 14 - 18 May 2005, Recommendation on Corporal Punishment; *Report on the Promotional Mission to the Republic of Mauritius* August 2006, para 165.

¹²¹ See for instance *Prisons in Cameroon: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (Report to the Government of the Republic of Cameroon on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2-15 September 2002) ACHPR/37/OS/11/43.

In summary, international law proscribes the arbitrary deprivation of liberty. Any deprivation must be justifiable; it must be necessary to achieve the aim sought and must be used as a last resort. A court must carefully consider the propriety of non-custodial sanctions. In particular, imprisonment must only be imposed where it is strictly necessary for serious offences and in order to achieve deterrence, just retribution and community protection. Therefore, the seriousness of an offence would not in itself justify imprisonment. Further, a detainee must be given an opportunity to challenge the lawfulness of his detention before a court of law. These international standards for the use of imprisonment show that imprisonment is indeed a severe penalty. It is therefore understandable that life imprisonment, like the death penalty, continues to raise human rights concerns.

3.2.2 Life imprisonment

Life imprisonment can mean different things in different jurisdictions. It may mean that a prisoner will spend the rest of his life in prison or that he may be released or considered for release after serving a certain period of his sentence. In addition, the length of some sentences may be so long that they exceed the normal life span. Such sentences can be regarded as life sentences because a prisoner may spend the rest of his life in prison.¹²² While the death penalty is specifically referred to in the main international human rights instruments, life imprisonment has not attracted such prominence. Indeed, specific reference to life imprisonment at treaty level is only found in article 37a of the CRC. Although life imprisonment is permitted in international law, certain restrictions on its use must be observed.

¹²² Bernaz (2013).

Firstly, life imprisonment without the possibility of release should not be imposed for offences committed by persons below the age of 18 years.¹²³ Regional human rights bodies have affirmed this position in their jurisprudence.¹²⁴ Further restrictions on the use of life imprisonment have been derived from various rights under international human rights instruments. These include the rights to human dignity and liberty and the prohibition of cruel, inhumane and degrading punishment. The imposition of life imprisonment must comply with human rights. Thus, as is the case with every other sentence, life imprisonment may only be imposed where it is proportional to the offence and the offender. Since life imprisonment is a severe sentence, it must only be imposed for serious offences committed in aggravated circumstances and where it is warranted by community protection.

Article 77(1)(b) of the ICC Statute represents a desirous blend of these requirements by stating that life imprisonment may only be imposed ‘when justified by the extreme gravity of the crime and the individual circumstances of the convicted person’. A life sentence that is disproportionate to the offence committed would violate the right to human dignity and the prohibition of cruel, inhuman and degrading punishment. The 1994 UN Recommendations on Life Imprisonment¹²⁵ go as far as stating that certain international safeguards regarding the death penalty may be applicable to life imprisonment. For instance, life sentences must only be imposed where there is ‘clear

¹²³ Article 37a of the CRC; rule 2 of the Beijing Rules.

¹²⁴ See for instance decision by the ECtHR in *Weeks v United Kingdom* 10 EHRR 293; *Hussain v United Kingdom* 22 EHRR 1; *V and T v United Kingdom* 30 EHRR 121.

¹²⁵ UN Crime Prevention and Criminal Justice Branch ‘Life Imprisonment’ para 14.

and convincing evidence’ and only for ‘intentional crimes, with lethal or extremely grave consequences’.¹²⁶

Thirdly, there must be a realistic prospect of release for prisoners sentenced to life imprisonment. Although an explicit prohibition of life imprisonment without parole at treaty-level is only recognised in the CRC with respect to children, there is clear international law support for the proposition that all prisoners must be offered the possibility of rehabilitation and the prospect of release. Indeed, as noted earlier, article 10(3) of the ICCPR requires that the prison system must have as its essential aim the reintegration and social rehabilitation of an offender. This is in line with article 10(1) of the ICCPR which requires that persons deprived of their liberty must be treated with ‘humanity and respect for the inherent dignity of the human person’. The human dignity of prisoners is intricately related to their having the prospect of being reintegrated into society.¹²⁷

The need for the possibility of release is also echoed by various UN and regional instruments and the jurisprudence of international human rights bodies. In the European region, CPT has observed that it is inhuman to imprison a person for life without any realistic hope of release.¹²⁸ The Council of Europe has adopted a number of resolutions concerning life and long-term imprisonment that underline the desirability of the availability of early release. For example, it has adopted several recommendations on how to ‘increase and improve the possibilities for these prisoners to be successfully

¹²⁶ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (ECOSOC Safeguards) ECOSOC Res E/RES/1984/50 (1984).

¹²⁷ Van Zyl Smit and Snacken (2009) 8.

¹²⁸ CPT *Report on the visit to Bulgaria from 4 to 10 May 2012* CPT/Inf (2012) 4 December 2012, para 32; CPT *Report on the visit to Switzerland from 10 to 20 October 2011* CPT/Inf (2012) 25 October 2012, 26.

resettled in society and to lead a law-abiding life following their release'.¹²⁹ In addition, the 2003 Recommendation on Conditional Release (Parole) states that the law should provide for conditional release to all prisoners including those serving life sentences.¹³⁰ Similarly, the 2006 European Prison Rules emphasise that the regime for all sentenced prisoners should be 'designed to enable them to lead a responsible and crime-free life' and that mechanisms be put in place to prepare prisoners for release.¹³¹ This position is also found in the 1999 Recommendation concerning prison overcrowding, the 2003 Recommendation on conditional release, and the 2006 European Prison Rules. The ECtHR has held that there must be 'a real and tangible prospect' of release for prisoners sentenced to indeterminate sentences such as life imprisonment; otherwise such a sentence would amount to cruel, inhuman and degrading punishment.¹³² It has also held that compassionate release only for those who are terminally ill or close to death is not a sufficient prospect of release as it fails to provide any hope of release for life prisoners 'should they seek to demonstrate that their continued imprisonment was no longer justified on legitimate penological grounds and thus contrary to article 3 of the Convention'. In *Vinter and others v UK*¹³³ the court held that a life sentence must be reducible at the time of its imposition so that a prisoner is able to 'work towards his rehabilitation':

¹²⁹ See Recommendation Rec (2003)23 of the Committee of Ministers of the Council of Europe on the Management by Prison Administration of Life Sentence and other Long-term Prisoners.

¹³⁰ Recommendation Rec (2003)22 of the Committee of Ministers to Member States on Conditional Release (Parole) (24 September 2003) para 4a. See also Resolution (76) 2 of the Council of Europe's Committee of Ministers on the treatment of long-term prisoners.

¹³¹ See paras 102.1 and 103.2 of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.

¹³² *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) para 6 of the Joint Dissenting Judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

¹³³ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013.

[I]n cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.¹³⁴

This means that rehabilitation is linked to the prospect of release and that prisoners serving life sentences must be provided with rehabilitative programmes through which they may improve themselves in preparation for social reintegration.¹³⁵ The emphasis on rehabilitation entails that prisoners must, as of right, be offered rehabilitative programs whilst in prison in order to prepare them for reintegration into society.

Fourthly, the prospect of release must be accompanied by procedural safeguards. This requires that an adequate release mechanism must be in place. A decision on continued detention affects the liberty of an offender and thus requires that the review mechanism must comply with international safeguards.¹³⁶

The imposition of life imprisonment is usually based on the dangerousness of an offender. Dangerousness is susceptible to change¹³⁷ and it can hardly be argued that all lifers will always be a danger to society.¹³⁸ Since the length of imprisonment in itself can

¹³⁴ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 122.

¹³⁵ Van Zyl Smit *et al* (2014) 65-71.

¹³⁶ See section 4 below.

¹³⁷ *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666 para 76.

¹³⁸ Explanatory Memorandum to Recommendation R (2003) 22 on Conditional Release (Parole), para 4.

amount to inhuman and degrading treatment,¹³⁹ even in countries where there is no distinction between ‘penal’ (non-parole period) and ‘risk’ (parole period) elements of a life sentence, there is need to consider release:

The question whether conditional release should be granted in any individual case must ... principally depend on an assessment of whether the term of imprisonment already served satisfies the necessary element of punishment for the particular offence and, if so, whether the life prisoner poses a continuing danger to society [T]he determination of both questions should in principle be in the hands of an independent body, following procedures containing the necessary judicial safeguards, and not of an executive authority.¹⁴⁰

In fact, the need for release does not simply raise the question of whether a lifer can live a law-abiding life upon release, but whether it is abusive to detain him or her further.¹⁴¹ Once the tariff of a life sentence is served, the justification for continued detention becomes the offender’s dangerousness. Continued detention must thus be judicially reviewed at regular intervals to assess whether the prisoner still poses a danger to society.¹⁴² Although there is no fixed period of interval between sentence reviews, the law should be flexible enough to allow a prisoner serving life imprisonment to seek release earlier than the stipulated period on humanitarian or other grounds.¹⁴³

In summary, international law recognises that life imprisonment is a heavy penalty which should be used sparingly subject to certain limitations. These include that life sentences must be proportional to the offence, that there must be a realistic possibility

¹³⁹ See para 4 of the Dissenting Opinion of Judge Fura-Sandström in *Leger v France* 11 April 2006 (Application No 19324/02)

¹⁴⁰ *Kafkaris v Cyprus* ECHR 21906/04, Concurring Opinion of Judge Bratza. Cypriot law had no distinction between ‘penal’ and ‘risk’ elements of a life sentence.

¹⁴¹ *Van Zyl Smit* (1999) 34.

¹⁴² *Hussain v United Kingdom* (1996) 22 EHRR 1; *Singh v United Kingdom* No 23389/94 (1996). In *Hirst v United Kingdom* Application No 40787/98 it was held that a two year interval is too long.

¹⁴³ *Oldham v United Kingdom* No 36273/97 (2001), ECHR 2000-X, para 28-37.

of release and that the law must provide a review mechanism which guarantees due process. Without the possibility of release, life imprisonment amounts to a cruel, inhuman and degrading punishment. Further, since life imprisonment is used for community protection, the dangerousness of an offender is a key factor in its imposition. As such, there is need to consider from time to time whether the continued detention of a prisoner remains lawful in that he still poses a danger to society. If a prisoner ceases to be dangerous, he may be released. The following section considers the international standards for early release of prisoners in general.

4 EARLY RELEASE

Early release is the release of an offender from prison before the expiry of his sentence. It can take many forms such as remission, conditional or absolute release, parole and pardon. It reinforces the rights to human dignity and liberty. Early release also reinforces the theory of rehabilitation since it gives an offender a chance to live a crime-free life in society. This recognises that each offender has the potential for rehabilitation. Early release is also grounded in the right of persons deprived of their liberty to challenge the lawfulness of their detention. While article 37 of the CRC prohibits life imprisonment for children without the possibility of release, the UDHR or ICCPR do not make specific reference to the prospect of release for prisoners. Similarly, the American Convention, the African Charter and the ECHR also do not have specific provisions for early release.

However, a range of UN and regional declarations and resolutions require that prisoners must have a prospect of release. For instance, rule 80 of the Standard Minimum Rules for Treatment of Prisoners states that from the beginning of a prisoner's sentence consideration must be given to his future after release. Further, rule 61 states that

imprisonment should not emphasise the exclusion of prisoners from society but their continuing part in it. This is a clear indication that prisoners are expected to be released from prison at some point. In the European region, Resolution (76) 2 on the Treatment of Long-term Prisoners¹⁴⁴ encourages states to ensure that all prisoners are considered for release and states that ‘considerations of general prevention alone should not justify refusal of conditional release’.¹⁴⁵ Further, the Recommendation on Conditional Release (Parole) requires the introduction of early release legislation.¹⁴⁶ As stated earlier, the African Commission has recommended the use of conditional or early release, parole and remission of sentences to improve the rehabilitation of offenders.¹⁴⁷

It is worth noting that with the exception of the ICTR, the maximum sentence available to the UN tribunals is a life imprisonment with the possibility of release. For instance, article 110(3) of the Rome Statute makes a life sentence reviewable after 25 years of imprisonment. Considering that these tribunals deal with serious crimes like genocide, the recognition of early release for offenders is significant as it reinforces the view that every person is capable of becoming a better person with time and that the gravity of an offence should not cancel out the possibility of release.

The possibility of release is particularly important for prisoners serving life imprisonment and long prison terms. The ECtHR has held that the prohibition of cruel,

¹⁴⁴ Resolution (76) 2 on the Treatment of Long-term Prisoners, para 10 (now covered by Recommendation Rec(2003)23 on the Management of Life-Sentence and other Long-Term Prisoners).

¹⁴⁵ Resolution (76) 2 on the Treatment of Long-term Prisoners, para 10 (now covered by Recommendation Rec(2003)23 on the Management of Life-Sentence and other Long-Term Prisoners).

¹⁴⁶ See Recommendation Rec (2003) 22 of the Committee of Ministers to Member States on Conditional Release (Parole).

¹⁴⁷ See *Prisons in Cameroon: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Report to the Government of the Republic of Cameroon on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2-15 September 2002)* ACHPR/37/OS/11/437.

inhuman and degrading punishment will be violated where life sentences do not have a possibility of review and the prospect of release.¹⁴⁸ The court gave three reasons for this finding. The first reason is that since detention can only be justifiable if based on a penological ground (retribution, deterrence, rehabilitation and incapacitation), it is important to evaluate whether a life sentence remains justifiable after a number of years have been served. This is because with time, the balance between the justifications for a life sentence may shift and create the possibility that further detention is unnecessary.¹⁴⁹ The second reason is that a whole life sentence means that a prisoner will never atone for his offence:

[W]hatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes ... a poor guarantee of just and proportionate punishment.¹⁵⁰

The last reason given by the court for rejecting irreducible life sentences is that they are inconsistent with the right to human dignity because they deny an offender a chance of release. Approving the decision of the German Federal Constitutional Court in *Lebenslange Freiheitsstrafe*,¹⁵¹ the court held that respect for human dignity requires a rehabilitation-oriented approach to punishment and imposes a duty on ‘the prison authorities to work towards the rehabilitation of an offender and that rehabilitation was

¹⁴⁸ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 110.

¹⁴⁹ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 111.

¹⁵⁰ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 112.

¹⁵¹ *Lebenslange Freiheitsstrafe* 45 BVerfGE 187 (21 June 1977).

constitutionally required in any community that established human dignity as its centrepiece'.¹⁵² The court emphasised that these principles 'applied to all life prisoners, whatever the nature of their crimes, and that release only for those who were infirm or close to death was not sufficient'.¹⁵³

Therefore, whole life sentences are inconsistent with human rights. Similarly, the hope of release would be denied to long-term prisoners where the sentence imposed is beyond their life expectancy. Such sentences are de facto irreducible life sentences and should be treated the same way as life sentences. It can be argued then that lengthy imprisonment can amount to inhuman and degrading punishment.

International jurisprudence is to the effect that once the punitive element of a sentence is served, the continued detention remains lawful only as long as the rationale for its initial imposition exists.¹⁵⁴ Prolonged detention will become arbitrary if the offender no longer poses a dangerous risk to society.¹⁵⁵ If dangerousness is the basis for continued detention, it is paramount that the criteria used to determine whether the offender is still dangerous must be sound. Ideally, review should be made by professionals. As Stokes has observed, 'an uncritical appraisal of how risk and dangerousness are precisely defined and assessed can ... open the door to indefinite and arbitrary detention'.¹⁵⁶ Thus a change in circumstances that reduces the dangerousness of an offender, such as

¹⁵² *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 113.

¹⁵³ *Vinter and others v United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 113.

¹⁵⁴ *Van Droogenbroeck v Belgium* (1982) 4 EHRR 60 para 47.

¹⁵⁵ *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) Concurring opinion of Judge Bratza.

¹⁵⁶ Stokes (2008) 293.

advancement in age and sickness can be grounds for early release.¹⁵⁷ Imprisonment of such individuals is solely based on retribution and is therefore a violation of human dignity.¹⁵⁸

With regard to the body responsible for considering release, the HRC held in *Rameka et al v New Zealand*¹⁵⁹ that the possibility of release must be considered by an independent judicial body.¹⁶⁰ Similarly, in *Stafford v United Kingdom*,¹⁶¹ the ECtHR stated that consideration for release must be done by a judicial body (a ‘court’) that is impartial and that meets standards of due process.¹⁶² In other words, release procedures must not be at the mercy of the executive alone and must be procedurally fair.¹⁶³ Further, the body must actually have the power to order the release of the offender concerned and comply with procedural safeguards for the applicant;¹⁶⁴ an advisory panel will not suffice.¹⁶⁵ In *Kafkaris v Cyprus*,¹⁶⁶ the dissenting judges of the ECtHR found that on the facts of the case, the possibility of pardon did not offer ‘a real and tangible prospect’ of release. This was because:

¹⁵⁷ *Leger v France* 11 April 2006 (Application No 19324/02) Dissenting Opinion of Judge Fura-Sandström, para 15.

¹⁵⁸ De Beco (2005) 417.

¹⁵⁹ *Rameka et al v New Zealand* Communication No 1090/2002.

¹⁶⁰ *Rameka et al v New Zealand* Communication No 1090/2002.

¹⁶¹ *Stafford v United Kingdom* (2002) 35 EHRR 32. *Waite v United Kingdom* 53236/99, 10 December 2002.

¹⁶² See also *Waite v United Kingdom* 53236/99, 10 December 2002; Van Zyl Smit and Snacken (2009) 334

¹⁶³ *Wynne v United Kingdom* (1995) 19 EHRR 333; *Hussain v United Kingdom*, above note 372; *R v Secretary of State for the Home Department, ex parte Doodly, Pegg, Pierson and Smart* [1994] 1 AC 531.

¹⁶⁴ *X v United Kingdom* (Application No. 7215/75 (1981) para 61; *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 para 49-56; *Weeks v United Kingdom* (1988) 10 EHRR 293 para 58-68; *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666 para 79-80.

¹⁶⁵ *Weeks v United Kingdom* (1988) 10 EHRR 293 para 64-69; *Curley v United Kingdom* No 32340/96, 28 March 2000, para 32-34.

¹⁶⁶ *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) para 6 of the Joint Dissenting Judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

[T]here is no obligation to inform a prisoner of the Attorney-General's opinion on his application for early release or for the President to give reasons for refusing such an application. Nor is this the President's practice. In addition, there is no published procedure or criteria governing the operation of these provisions. Consequently, a life prisoner is not aware of the criteria applied or of the reasons for the refusal of his application. Lastly, a refusal to order a prisoner's early release is not amenable to judicial review. This lack of a fair, consistent and transparent procedure compounds the anguish and distress which are intrinsic in a life sentence and which, in the applicant's case, have been further aggravated by the uncertainty surrounding the practice relating to life imprisonment at the time.¹⁶⁷

This passage accurately reflects the pardon process in most countries. Due to the secrecy surrounding the granting of pardons which results in most prisoners not knowing what factors pardons are based on, the possibility of pardon is not a sufficient guarantee of release.¹⁶⁸

As noted above,¹⁶⁹ the UN has rightly suggested that the safeguards applicable to the death penalty may justifiably be applied to life imprisonment. Therefore, in light of the importance of the possibility of release to life sentences, it can be said that the standards applicable to the right to seek pardon in death penalty cases must be applied to the standard of early release mechanisms in cases of life and long-term imprisonment. As discussed earlier,¹⁷⁰ these standards include transparency in the pardon process, clear stipulation of pardon procedures and criteria and participatory rights for offenders.

The above discussion demonstrates that early release is well recognised in international human rights law as it is emphasised in several human rights instruments. Early release facilitates the rehabilitation and social reintegration of an offender. Early release is a

¹⁶⁷ *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) para 6 of the Joint Dissenting Judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

¹⁶⁸ Van Zyl Smit (2001) 302.

¹⁶⁹ See section 3.2.2 above.

¹⁷⁰ See section 3.1.1 above.

crucial part of imprisonment, especially for life and long sentences. These sentences must offer a real prospect of release and must be amenable to review. The importance of early release is underlined by the fact that a life sentence that denies an offender the chance of release infringes the right to human dignity. It also runs the risk of being a disproportionate sentence that would violate the prohibition of cruel, inhuman or degrading punishment. Whole life sentences might also amount to an arbitrary deprivation liberty if the continued detention of offender is no longer justifiable on penological grounds. Since the liberty of an offender is at stake in early release decisions, it is imperative that such decisions are made by an independent judicial body with the power to release the offender. In addition, the process of early release must comply with internationally accepted procedural safeguards.

5 CONCLUSION

This chapter has explored the international standards for punishment by examining the aims and forms of punishment, and early release. With respect to the aims of punishment, the chapter has explained that while international law recognises both utilitarian and retributive theories of punishment, it considers rehabilitation and social reintegration as essential aims of punishment. It has also explained that rehabilitation is consistent with the right to dignity. International law also links community protection to rehabilitation and requires that rehabilitative programmes must be available to prisoners so that they may equip themselves for reintegration into society.

In its analysis on forms of punishment, the chapter has observed that the death penalty remains permissible in international law. However, there is international consensus that the use of the death penalty must be restricted. For instance, it may only be imposed for the most serious offences; should not be applied to offences committed by children;

may not be executed on pregnant or nursing women; and must only be applied where following a fair trial. Further, offenders sentenced to death must have a right to seek pardon or commutation of the sentence. These restrictions on the use of the death penalty are part of a global trend towards its abolition.

The chapter has also noted that imprisonment is a severe form of punishment because it deprives an offender of his liberty. International law therefore requires that imprisonment should be used with restraint and only for serious offences, as a last resort and for community protection. Greater restraint is imposed on the use of life and long-term imprisonment. Prisoners serving such sentences must be given a chance to rehabilitate themselves during imprisonment and the law must provide for a realistic possibility of release. In addition, there must be an adequate release mechanism that complies with due process guarantees. This includes the requirement that prisoners must have participatory rights in the early release process and that early release must be administered by an independent judicial body with the power to order the release of an offender.

In view of the constitutional provisions on the role of international law, the penal regime in Malawi must reflect these international standards. It is apposite to first provide an overview of the evolution of the criminal justice system in Malawi before assessing whether the country's penal system is consistent with international standards.

CHAPTER 4

BACKGROUND TO THE CRIMINAL JUSTICE SYSTEM AND THE CONSTITUTION

1 INTRODUCTION

The thesis has so far demonstrated that while punishment may serve both retributive and utilitarian goals, rehabilitation offers a more generally attractive justification. This view is entrenched by international human rights law which requires that rehabilitation and the social reintegration of an offender should be the major aim of a penal regime. The aim of this chapter is to provide a historical evolution of punishment in Malawi from the pre-colonial era to 1994. Such a history will provide an important backdrop to understanding the reforms to punishment envisaged by the 1994 Constitution and the jurisprudence on sentencing that has emerged since 1994. In keeping with the aims of the study, the chapter attempts to trace the evolution of the criminal justice system in Malawi in respect of the aims, methods and enforcement of punishment. Particular emphasis will be placed on the developments during the colonial period because it has had a great influence in the making of the Malawian legal system today. The colonial period will be discussed in two parts. The first will outline the earlier years of colonialism from 1891 to 1936 which witnessed a repressive penal regime as the colonial government sought to establish its rule. The second part will look at the reform period from 1937 to 1964 which saw the introduction of several reforms in the criminal justice system aimed at creating a more rehabilitative system of punishment.

The chapter also provides a brief overview of the Constitution and the key features of the Bill of Rights. This will lay the background to the detailed analysis of the implications of these provisions for penal policy and practice in Malawi. In addition to its own human rights provisions, the new Constitution emphasises the significance of international law. Therefore, this

chapter will also highlight the relevance of international law in Malawi as a driver of legislative and legal practice reform.

2 BACKGROUND TO THE CRIMINAL JUSTICE SYSTEM

2.1 The pre-colonial era

Before colonisation, judicial power was exercised by traditional chiefs in conjunction with the traditional advisors of the traditional court.¹ There was no concept of separation of powers.² Cases were determined using unwritten rules of customary law applicable to the tribe concerned.³ There were various forms of punishment that exhibited different purposes.⁴ For instance, retributive elements were evident in the use of capital punishment⁵ and *mwabvi*.⁶ Writing on pre-colonial punishment in Central Africa, Clifford states that death and banishment were often imposed for offences that threatened community safety.⁷ This shows that during this era, public protection was seen as a justification for severe punishment. However, literature also indicates that restorative justice was a primary objective of punishment and that compensation was pursued even in serious cases such as murder and rape.⁸ Recourse to death or exile was only made if the offence also undermined public safety or compensation was not paid.⁹ Other forms of punishment at the time included slavery, mutilation, chastisement and outlawry.¹⁰ The form of

¹ Von Benda-Beckman (2007) 34.

² Nkhata (2010) 96.

³ Kanyongolo (2004) 197.

⁴ See Chanock (1970) 84 who notes that punishment during this period reflected retributive, utilitarian and restorative elements.

⁵ Death was executed by spear thrust, burning or drowning: see Flemming (1971).

⁶ The *mwabvi* ordeal involved the use of a poisonous drink concocted from the *mwabvi* tree (erythrophleum suaveolens) administered by a traditional medicine man. Anyone who died after drinking the concoction was believed to be guilty while those who vomited and survived were taken to be innocent: see Morris (1966) 186.

⁷ Clifford (1969) 241-242.

⁸ Pete (2008) 41-42.

⁹ Hynd (2011) 436.

¹⁰ Flemming (1971); Maliwa (1967).

punishment applied depended on whether the crime was committed within a family or between families; clemency was common in intra-family crimes.¹¹

During the pre-colonial era, the recognition and protections of human rights was limited to concepts of communal solidarity and patriarchy.¹² However, this does not mean that customary law at the time had no protections for accused persons. The notion of human dignity was recognised and, when trying criminal cases, the chiefs were aware of general notions of human rights such as ‘the safeguards relating to a fair and public trial, respect for physical and psychological integrity of the person, marriage and family rights, and group and individual property rights’.¹³ However, pre-colonial societies were also characterised by practices inconsistent with human rights such as discrimination against women and practices such as the administration of *mwabvi*.¹⁴

2.2 The colonial era, 1891 to 1964

2.2.1 A repressive beginning, 1891 to 1936

The Malawian criminal justice system has all the hallmarks of the English legal system due to British colonisation of the country (then called Nyasaland) from 1891 to 1964. The colonial government introduced several laws to govern their new territory. In 1902, the British Central Africa Order-in-Council¹⁵ introduced the concept of the separation of powers.¹⁶ It created the High Court with civil and criminal jurisdiction over all matters¹⁷ while the enactment of laws was

¹¹ Flemming (1977) 6.

¹² Nkhata (2010) 96.

¹³ Chirwa (2011) 2-3.

¹⁴ Mwambene (2008) 36-37.

¹⁵ Malawi was at the time known as British Central Africa. It was later named Nyasaland by the Preamble to the Nyasaland Order-in-Council in 1907.

¹⁶ Chigawa (2006).

¹⁷ Article 15(1) of the British-Central Africa Order in Council, 1902.

left to the Commissioner.¹⁸ It also introduced the English model of justice through article 15(2) that contained a reception clause for English law in Malawi. Customary law was only applicable to the extent that it was not ‘repugnant to the principles of justice and morality’ or ‘inconsistent with any law in force’.¹⁹ This principle was later strengthened by the 1907 Nyasaland Order-in-Council²⁰ which created the Legislative Council to pass legislation.

In the sphere of criminal justice, criminal law and procedure was governed by ‘the English common law, the doctrines of equity, and statutes of general application, supplemented by some local enactments’.²¹ In 1925, the Colonial Office in London decided to draft a model code for East Africa to be applied in a number of protectorates including Malawi.²² The Penal Code²³ and Criminal Procedure Code²⁴ were enacted five years later with local adaptations.²⁵ Giving effect to the then current English criminal law and procedure,²⁶ the Penal Code was (and remains) the main criminal law statute defining crimes and prescribing their punishments while the Criminal Procedure Code governed the conduct of criminal proceedings. The Penal Code created new crimes while in some cases traditional offences were modified and punished in new ways; some old punishments were abolished or their mode of execution changed.²⁷ For instance, the use of

¹⁸ See article 4 of the British-Central Africa Order in Council, 1902.

¹⁹ Article 20 of the Order-in-Council provided that: ‘In all cases, civil and criminal, to which natives are parties, every court shall (a) be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council or Ordinance and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay’.

²⁰ Nyasaland Order-in-Council, 1907.

²¹ Harris (1974) 18.

²² Harris (1974) 18.

²³ Penal Code Act No 22 of 1929, Laws of Nyasaland, 1929.

²⁴ Criminal Procedure Code, Laws of Nyasaland, 1929.

²⁵ Harris (1974) 18.

²⁶ For instance, the definition of some crimes like treason and piracy was determined by reference to the ‘law for the time being in force’ in England at the time the offence was committed: see Read (1963) 6.

²⁷ Chanock (1971).

mwabvi to detect and punish offenders was abolished,²⁸ death was now executed through hanging and the use of fines, corporal punishment and imprisonment was introduced. The government embarked on the construction of prisons, building at least 24 prisons by 1964. The conditions in most prisons soon became poor because they were underresourced, overcrowded and unsanitary.²⁹

In the early years of colonisation, the judicial functions of chiefs were not legally recognised.³⁰ However, they existed informally as chiefs continued to deal with both civil and criminal matters.³¹ In 1933, the Native Courts Ordinance was passed to allow for the establishment of native courts.³² These courts were presided over by chiefs and applied customary law subject to the repugnancy clause. Their jurisdiction was prescribed and only applicable to legal disputes between Africans. These courts could impose a sentence of up to six months and could not try offences punishable with death or life imprisonment.³³ The native courts slowly adopted corporal punishment and imprisonment as they found it more difficult to enforce their judgments and chiefs were accused of corruption.³⁴ As a result, English punishments were incorporated into customary justice.³⁵

With regard to punishment, the colonial government used criminal law to advance their own interests and maintain their authority. The death penalty was primarily aimed at deterrence; ‘rather than retribution against an individual, an execution was a didactic measure seeking to

²⁸ The use of *mwabvi* was regarded as repugnant to the principles of justice and therefore contrary to article 15(2) of the British Order in Council: see Forster (2001) 279.

²⁹ Milner (1969). See Bernault (2007) 55 for an overview of condition in colonial prisons;

³⁰ Von Benda-Beckman (2007) 38 notes that the legal recognition of traditional courts was possible in view of the District Administration (Native) Ordinances No 13 of 1912 and No 11 of 1924 which permitted the government to authorise chiefs to exercise certain judicial functions.

³¹ Von Benda-Beckman (2007) 39; Chimango (1977) 46.

³² Native courts were later named African courts by the African Courts Ordinance 17 of 1947.

³³ Chimango (1977) 46.

³⁴ Hynd (2011) 444.

³⁵ Hynd (2011) 444.

deter others from challenging colonial order'.³⁶ Death was a mandatory sentence for murder and treason but discretionary in rape cases.³⁷ The law prescribed mandatory life sentences for pregnant women convicted of crimes carrying a mandatory death sentence. Persons below the age of 18 in similar circumstances were to be detained at the Queen's pleasure.³⁸ In practice, death was often imposed for murder and, during political crises, treason; rape was rarely punished with death.³⁹ The final say on the death penalty lay with the Governor who could confirm the sentence or exercise mercy through executive clemency, pardon and commutation through the royal prerogative of mercy.⁴⁰

Curiously, although capital punishment was imposed as a mandatory sentence, death sentences were often commuted to life imprisonment or lesser terms of imprisonment.⁴¹ On the one hand, this practice minimised the retributive character or harshness of the penal regime. On the other hand, it rendered criminal punishment prone to political manipulation.⁴² The procedure for commutation entailed a review of the sentence by the Governor-General based on reports by the trial judge regarding the case and the sentence. This process mitigated the harshness of the mandatory death penalty.⁴³ In her studies on the history of the death penalty in British Africa, Hynd⁴⁴ suggests that although there were no written principles for the granting of mercy or reasons for mercy, 'the rationales behind mercy [could] be inferred from the case details, judges'

³⁶ Hynd (2008).

³⁷ Section 179 of the 1929 Penal Code and section 316-320 of the 1929 Criminal Procedure Code.

³⁸ Section 26 of the Penal Code.

³⁹ Hynd (2010) 544.

⁴⁰ Hynd (2008) 405.

⁴¹ Hynd (2010) 546. Over two thirds of prisoners sentenced to death benefitted from the prerogative of mercy in colonial Malawi: see Hynd (undated) 7.

⁴² Hynd (2010) 545.

⁴³ Nowak (2014) 81.

⁴⁴ Hynd (2012).

recommendations, and confidential reports prepared by district officers on the background to a case'.⁴⁵

In some cases, mercy was based on established and rational principles stipulating the crimes which deserved mercy and those which did not. In the light of the emphasis on deterrence, offences that threatened public order or colonial authority were punished more severely.⁴⁶ This reflected a skewed rationale for the death penalty as it then became a tool of political oppression. In principle, the governor often issued execution warrants in cases of murder involving 'deliberately and callously undertaken' killings committed by hired assassins or in furtherance of selfish objectives such as rape, robbery or theft.⁴⁷ According to Hynd, mercy was also exercised in favour of women, youth, and the elderly were generally saved from the death penalty even for violent offences.⁴⁸ She states that offenders who had committed murder in circumstances which reflected diminished responsibility (due to factors such as intoxication, insanity, provocation through insults, and killing of suspected witches) also benefitted from mercy. This, Hynd continues, was based on the belief that the fear of punishment would not prevent the commission of such crimes because they were not symptomatic of criminality.⁴⁹ Despite the mass commutations of death sentences to imprisonment, a proposal⁵⁰ to make the death penalty discretionary was rejected by the Colonial Office in 1922.

Where the death penalty was not commuted to a life sentence, it was executed through hanging and, to a lesser extent, by a firing squad.⁵¹ Contrary to the practice in England,⁵² executions were initially performed publicly purportedly to enhance the deterrent effect of the death penalty.

⁴⁵ Hynd (2011) 443.

⁴⁶ Hynd (2012) 87.

⁴⁷ Hynd (undated) 7-8.

⁴⁸ Hynd (2011) 443; Hynd (2007) 16.

⁴⁹ Hynd (2011) 443.

⁵⁰ See the Punishment of Murder (Natives) Ordinance, 1922.

⁵¹ Hynd (2008) 440.

⁵² Britain had abolished public executions in 1868.

African males and community members from the offender's village were ordered to witness these public executions.⁵³ However, the calmness or struggles of offenders as they were executed, coupled with botched executions, undermined the intended purpose of the death penalty and blurred the line between judicial killing and murder.⁵⁴ This forced the colonial government towards legal reform which among other things saw the move from public to private executions in prisons.⁵⁵ More specifically, two botched executions in 1924 compelled the government to centralise private executions in Malawi at Zomba Prison.⁵⁶ The practice of having witnesses during executions was also abandoned.⁵⁷ And although calls for the reintroduction of African witnesses in the cell executions were made in London in 1940, they were rejected on the basis that the practice was 'contrary to all principles of decency and decorum'.⁵⁸

During this early period of colonialism, imprisonment was generally reserved for serious offences and 'troublesome' offenders.⁵⁹ Life imprisonment was prescribed for a number of offences including manslaughter and robbery. In some cases, offenders could be sentenced to preventive imprisonment of up to 14 years for purposes of public protection.⁶⁰ According to Bernault,⁶¹ penal labour remained 'a hidden form of forced labour' throughout the colonial era in Africa and colonial prisons were known for producing cheap labour for settlers. All prisoners had to work unless they were sick or infirm. Prisoners, mostly first offenders, worked in prison farms to produce food and learn agriculture techniques, while others performed hard labour on

⁵³ Hynd (2011) 443.

⁵⁴ Hynd (2008) 409.

⁵⁵ Smith (1996) 236.

⁵⁶ Hynd (undated) 12.

⁵⁷ Hynd (2011) 443.

⁵⁸ Chief Justice Thomas 'Procedures to be followed in murder cases in Nyasaland, 1924-59' February 1940, National Archives of Malawi 4-4-8R 2952.

⁵⁹ Hynd (2008) 438.

⁶⁰ See for instance *Guzza v R* [1961-1963] 2 ALR Mal 136 (HC); *R v Daliyani* [1966-1968] 4 ALR Mal 370 (HC); *Crispin v R* [1961-1963] 2 ALR Mal 340 (HC); *R v Sinya* [1961-1963] 2 ALR Mal 223 (HC); *William v R* [1961-1963] 2 ALR Mal 104 (HC).

⁶¹ Bernault (2007).

public work projects. Prisoners serving long sentences were involved in skills training such as carpentry and tailoring. While this served the rehabilitative function, the conditions of imprisonment and hard labour were harsh. As a result, prisoners often escaped or attempted to do so and organised protests and riots.⁶²

Corporal punishment was also a widely used form of punishment. It was executed in public for deterrent and retributive purposes.⁶³ According to Chanock, Malawi had the highest use of corporal punishment in Africa at the time.⁶⁴ Corporal punishment was used for a wide range of offences and could be imposed alongside fines and imprisonment.⁶⁵ Fines were usually imposed in minor offences but also as collective punishment or in reparation for damage to property incurred during civil unrest.⁶⁶

While retribution and deterrence were the main aims of punishment of adult offenders, the sentencing policy regarding young offenders was characterised by mercy and exhibited elements of rehabilitation. Although young offenders were subjected to whipping,⁶⁷ the law and practice generally shielded them from extreme punishment such as imprisonment and the death penalty. As noted earlier, the Penal Code prohibited the imposition of the death penalty on persons below the age of 18 years and provided that they should be detained at Her Majesty's pleasure. Where an offence warranted imprisonment, young offenders were instead sent to Montfort Marist Mission at Likulesi.⁶⁸

⁶² Bernault (2007) 55-57.

⁶³ Hynd (2011) 443-444.

⁶⁴ Chanock (1985) 126.

⁶⁵ See section 28 of the Penal Code. The law prohibited the imposition of corporal punishment on females, males sentenced to death and males above 45 years: see section 28(2) of the Penal Code. In the case of adult offenders, imprisonment was a condition precedent for corporal punishment: see *R v Mpama* [1923-1960] 1 ALR Mal 40 (HC).

⁶⁶ Hynd (2011) 444-445.

⁶⁷ Hynd (2011) 444.

⁶⁸ *Prisons Department Report* (1944)

2.2.2 The reform period, 1937 to 1964

After 1937, there was a growing realisation that punishment ought to be humane and more geared towards the reformation of an offender.⁶⁹ Hence, in 1945, the Colonial Office urged a shift in sentencing policy in the colonies towards reformation of offenders. It noted that ‘the only effective method of protecting society from criminals who are again released into society is to introduce reformatory measures wherever practicable’ such as probation and the abolition of corporal punishment.⁷⁰ Efforts at penal reform in Malawi were notable in the prison service where the authorities introduced the provision of social activities such as football leagues, establishment of prison libraries, a probation service and after-care measures for released offenders.⁷¹ An effort was made regarding the reformation of female and young prisoners. Women were taught to read and write English, and offered skills training in cooking, knitting, sewing and hygiene to ensure that they were welcomed back into society upon release.⁷²

The shift in policy also resulted in the enactment of various penal laws including the Prisons Ordinance,⁷³ the Children and Young Persons Ordinance,⁷⁴ the Probation of Offenders Act,⁷⁵ and the Convicted Persons (Employment on Public Work) Act.⁷⁶ It is noteworthy that most of the statutes introduced after 1945 are still in force today.⁷⁷ The Prisons Ordinance (later called

⁶⁹ Roberts (1937) 93.

⁷⁰ Fry (1951) 90.

⁷¹ Nyasaland Protectorate *Annual Report on the Administration of the Prisons Department during the Year 1955*.

⁷² Nyasaland Protectorate *Annual Report on the Administration of the Prisons Department during the Year 1947*.

⁷³ Prisons Ordinance Act No 27 of 1945, which was later amended by Prisons Amendments Acts Nos 9 of 1955, 8 of 1957, 42 of 1959 and 26 of 1962.

⁷⁴ Children and Young Persons Ordinance, 1946. This law was based on the 1933 Children and Young Persons Act of England.

⁷⁵ Probation of Offenders Act No 10 of 1945, now Chapter 9:01 of the Laws of Malawi.

⁷⁶ Convicted Persons (Employment on Public Work) Act 16 of 1954, now Chapter 9:03 of the Laws of Malawi.

⁷⁷ These include the Prisons Act, Chapter 9:02 of the Laws of Malawi; Probation of Offenders Act, Chapter 9:01 of the Laws of Malawi; and the Convicted Persons (Employment on Public Work) Act, Chapter 9:03 of the Laws of Malawi.

the Prisons Act from 1955) restructured the prison service and formalised the treatment of prisoners including the management of prison labour and prison discipline, and the provision of remission of sentences, release on licence, release of seriously ill and long term prisoners including those serving life sentences.⁷⁸

The Children and Young Persons Ordinance was enacted to improve the treatment of young offenders, although the sentencing policy for young offenders was somewhat better than that for adults even before 1945. The centrality of rehabilitation and reformation to this Ordinance was clear from the words of the then Chief Justice who noted that the Ordinance

is designed to keep children (under the age of 12) and young persons (age 12 to 16) who have offended out of prison as far as possible and out of association with adult offenders. These juvenile offenders are required to be tried in a juvenile court which should be in a different building or room from that of the Magistrate's ordinary court; special investigation is made into the home life of the offender; and special punishments, alternative to imprisonment which latter should be used only as a last resort, are set out in the Ordinance. Probation and detention in an approved school are important forms of punishment, both having reform as their object.⁷⁹

Among other things, the Ordinance prohibited the imprisonment of a child and permitted the imprisonment of young persons only upon proof that he was 'so unruly or of so depraved a character' that he was not a fit person to be detained in an approved school or home.⁸⁰ Section 4 recognised the principle of the best interests of the child by requiring that a court must have due regard to the welfare of the child. The Ordinance provided for a wide range of non-custodial alternatives in dealing with young offenders.⁸¹ In addition to probation services, the Ordinance also made provision for the probation of young offenders and the establishment of reformatory institutions which would act as places of detention for children with the main object of

⁷⁸ See Parts XVIII to XXI of the Prisons Act as amended by Act 26 of 1962; section 35 of the Prison Regulations.

⁷⁹ Quoted in Degabriele (2001) 10-11.

⁸⁰ Section 10 of the Ordinance.

⁸¹ See section 16(1) of the Ordinance.

reformation.⁸² According to Degabriele,⁸³ reformatory schools offered moral talks, prayers and various training in agriculture, bricklaying, tailoring, carpentry and joinery, and leather work to child offenders and street children; with time, the schools also concentrated on academic matters.

The latter years of colonisation also saw a change in the structure of the local courts. In 1962, the Local Courts Ordinance extended the jurisdiction of local courts to disputes between Africans and non-Africans.⁸⁴ This ordinance also relinquished the judicial power of chiefs and instead endowed Commissioners to establish such local courts as they thought fit. This system was not part of the High Court system as appeals from the native courts were first heard by the Native Commissioners before being taken to the High Court.⁸⁵ Thus, Malawi now had a two-tiered court system.

In summary, it can be observed that with the exception of young offenders, punishment during the early years of colonial rule was shaped by the theories of retribution and deterrence. For instance, offenders were subjected to public executions and flogging and the criminal law sometimes used as a means of political control and manipulation. The treatment of women and children was much better, but the general criminal justice system was cruel. However, efforts were made to reform criminal justice in the later years of colonisation resulting in the enactment of laws that sought to make reformation as one of the goals of punishment. These reforms improved the treatment of women and children and introduced some procedural safeguards. However, they did not completely dismantle the retributive and deterrence structure of punishment. Thus, the death penalty continued to be used and the right to a fair trial was not given constitutional protection.

⁸² Section 16 of the Children and Young Persons Ordinance.

⁸³ Degabriele (2001) 13.

⁸⁴ Ordinance 8 of 1962.

⁸⁵ LJ Chimango 'Tradition and the traditional courts in Malawi' (1977) *CILSA* 39, 46.

2.3 The post-colonial era, 1964-1994

The dawn of independence in 1964 under the leadership of Dr Kamuzu Banda and a new constitution did little to improve the criminal justice system in Malawi. On the contrary, it marked the beginning of a 30-year dictatorial rule by ‘one of the most repressive regimes in Africa’.⁸⁶

At the beginning, the regime gave the impression that it was interested in respecting and promoting human rights. Thus, in October 1966, President Banda established a commission to review criminal justice in Malawi with the aim of simplifying the practice, procedure and rules of evidence and improvising the efficiency and consistency of administration of justice.⁸⁷ The commission made various recommendations to improve the administration of criminal justice in general. However, the commission did not pay much attention to punishment and its aims.⁸⁸ Surprisingly, some of its recommendations urged stricter administration of punishment such as increasing the working hours of prisoners and sought to exclude any consideration of time spent on remand during sentencing unless the offender concerned had opted to hard labour while awaiting trial.⁸⁹ These recommendations were not adopted when the Criminal Procedure Code was amended in 1967.⁹⁰

With minor amendments to the existing law, the government continued using most of the criminal justice laws from the colonial period, including the Penal Code⁹¹ and the Criminal Procedure Code (renamed the Criminal Procedure and Evidence Code (CPEC))⁹² and the 1946

⁸⁶ Meinhardt and Patel (undated) 3.

⁸⁷ Baker (1967).

⁸⁸ See *Report of the Presidential Commission on Criminal Justice in Malawi* February 1967.

⁸⁹ Baker (1967) 150, citing the *Report of the Presidential Commission on Criminal Justice in Malawi* (February 1967).

⁹⁰ See the Criminal Procedure and Evidence Code, Act 36 of 1967.

⁹¹ Chapter 7:01 of the Laws of Malawi.

⁹² Chapter 8:01 of the Laws of Malawi. The amendments to the Criminal Procedure Code were mainly aimed at consolidating the procedural and evidential aspects of criminal proceedings, and simplifying it to make it more efficient and easier to understand: see Baker(1967) 149; Criminal Procedure and Evidence Code, Act 36 of 1967.

Children and Young Persons Ordinance (renamed the Children and Young Persons Act (CYPA)).⁹³ The CYPA was amended to widen the protection of young offenders from imprisonment by defining children as persons below the age of 14 years and young persons as those between 14 and 18 years.⁹⁴ Section 16(1) of the Act widened the non-custodial alternatives when sentencing young offenders. Furthermore, the list of punishments had to be read in ascending order of seriousness from the least to the most punitive: it was the duty of the court to give priority to the least punitive punishment first such that custodial sentences were at the far end of sentencing options.⁹⁵ Section 11(1) of the CYPA continued to prescribe mandatory detention of young offenders at the President's pleasure in cases of murder. The Board of Visitors met at least three times a year to consider the progress of young offenders towards reform.⁹⁶ DeGabriele⁹⁷ states that although the CYPA still emphasised reformation and social reintegration in the treatment of young offenders, the government focussed more on reform and behavioural treatment than social reintegration. The result was that successful reintegration into society was compromised since young offenders spent long periods in reformatory institutions until the authorities decided that the offender had been reformed and could therefore be released in to society.⁹⁸ To worsen matters, young offenders could be sent to prison upon attaining the age of 18 years in a reformatory institution.⁹⁹

Significant changes in criminal justice during the post-colonial period included the creation of a traditional court system that was parallel to and exercised concurrent jurisdiction with the High

⁹³ Children and Young Persons Act, Chapter 26: 03 of the Laws of Malawi. The government also introduced new laws that were generally regarded as repressive such as the Forfeiture Act, Chapter 14:06 of the Laws of Malawi; the Decency in Dress Act, Chapter 7:04 of the Laws of Malawi; Preservation of Public Security Act, Chapter 14:02 of the Laws of Malawi.

⁹⁴ Section 2 of the CYPA.

⁹⁵ See *Rep v Mwenda* [1999] MLR 356 (HC).

⁹⁶ Degabriele (2001) 42.

⁹⁷ Degabriele (2001).

⁹⁸ Degabriele (2001) 18, 19, 20.

⁹⁹ Degabriele (2001) 20.

Court in 1969.¹⁰⁰ Traditional courts were later allowed to try murder and treason and to pass the death sentence, a move which would be instrumental in facilitating the government's desire to clamp down on political opponents.¹⁰¹ This was very problematic for a number of reasons: unlike the High Court, presiding officers in the traditional courts were unqualified, procedural safeguards such as the presumption of innocence were not fully observed and legal representation was essentially prohibited. These courts mainly tried political opponents and in some cases imposed death sentences after unfair trials that did not comply with human rights standards such as the right to legal representation.¹⁰² The third change occurred in 1967 with the introduction of mandatory sentences relative to the amounts misappropriated, and reverse onus provisions to curb the prevalence of theft by public servants.¹⁰³ Another change was the introduction of discretionary death sentences for armed robbery and burglary in 1970.¹⁰⁴

The forms of punishment remained largely the same throughout the one-party regime. Corporal punishment was imposed on young and old offenders alike. Imprisonment remained a common form of punishment. The mandatory death penalty was maintained for murder and treason¹⁰⁵ while rape continued to attract a discretionary death sentence. Children and pregnant women continued to be excluded from the application of the death penalty. Following in the footsteps of the colonial government, the government maintained general deterrence as the justification for public executions.¹⁰⁶

¹⁰⁰ See the Local Courts Amendment Act, 1969. The traditional court system consisted of the National Traditional Appeal Court (NTAC) at its apex, then the Regional Traditional Court of Appeal (RTCA), the District Traditional Court of Appeal (DTCA), the District Traditional Court, and Grade A and Grade B traditional courts. The NTAC was the final court in the traditional court system, hearing appeals from all the other courts.

¹⁰¹ Most political opponents were tried in traditional courts: see Meinhardt and Patel (undated) 4.

¹⁰² See Human Rights Watch (1994); Amnesty International (1993).

¹⁰³ Section 286 of the Penal Code. For a detailed discussion of this amendment, see Ng'ong'ola (1988) 72.

¹⁰⁴ Penal Code Amendment Act 44 of 1970; sections 301 and 309 of the Penal Code.

¹⁰⁵ The mode of execution for treason was now at the discretion of the Minister of justice. A post held by President Banda himself: see section 26(1) of the 1969 Penal Code.

¹⁰⁶ Baker (2001) 265.

The prerogative of mercy was still available to prisoners including those on death row. After Malawi became a republic in 1966, the final say on the death penalty lay with the President.¹⁰⁷ The presidential pardon was exercised in consultation with an Advisory Committee whose members were appointed by the President himself.¹⁰⁸ Amnesty international reports that Banda rarely exercised mercy and that there were at least 30 executions a year, mostly of political opponents.¹⁰⁹

In general, the 1966 Constitution paid scant attention to the protection of human rights. The one-party regime did not do much to improve the situation. In fact, throughout that period, the country was in ‘a perpetual state of emergency’,¹¹⁰ ‘characterised by oppression, intolerance and a lack of respect for human rights, the rule of law and constitutionalism’.¹¹¹ Criminal trials were conducted under procedures which did not meet international human rights standards. Prisoners, especially political opponents, were treated with contempt and subjected to torture and cruel treatment.¹¹² Arbitrary detentions without trial, facilitated by the Preservation of Public Security Act,¹¹³ were the order of the day and left several political detainees in prison for long periods of time. Prison conditions were appalling.¹¹⁴ In some cases repeat convicts were subjected to a ‘hard core’ program upon expiry of their sentences. Under this program, prisoners were sent to Nsanje

¹⁰⁷ The President had the power to pardon ‘any person concerned in or convicted of any offence either free or subject to lawful conditions’ and ‘substitute a less severe form of punishment’ than the one imposed by a court: see sections 60(a) and (c) of the 1966 Constitution.

¹⁰⁸ Except in cases dealing with death sentences. Sections 61(2) to (4) of the 1966 Constitution. The President was not bound to seek the advice of the committee in pardoning non-convicted persons: see section 61(2).

¹⁰⁹ Amnesty International (1993) 19; Nowak (2014) 48.

¹¹⁰ *Banda v Attorney General* (1996) MLR 445 (HC) 461.

¹¹¹ Chirwa (2011) 4.

¹¹² See *Gonthi v Attorney General* (1996) MLR 48 (HC) 52-53.

¹¹³ Preservation of Public Security Act, Chapter 14:02 of the Laws of Malawi.

¹¹⁴ Human Rights Watch (1990) 42-43.

Prison or Dzaleka Prison where they would be ‘stripped naked, chained to the floor of their cells and either denied food or ... given quarter-rations. Many are reported to have died as a result’.¹¹⁵

As calls for change were getting louder in the early 1990s, it was clear that the criminal justice would form an area of attention in the constitutional talks. Indeed, even before the new constitution was adopted in 1994, several important legal reforms were agreed upon. In 1993, Malawi acceded to the International Covenant on Civil and Political Rights (ICCPR)¹¹⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹⁷ Traditional courts were suspended and a moratorium was placed on death penalty executions (saving about 120 people from the gallows).¹¹⁸ In addition, international observers were allowed to inspect prisons, some repressive laws were repealed¹¹⁹ and 229 political prisoners were released.¹²⁰ Parliament passed the General Amnesty Act¹²¹ which declared a general amnesty to create a conducive environment for the return of Malawian exiles. To crown it all, the new Constitution containing a detailed Bill of Rights was adopted. It came into provisional force on 18 May 1994 and full force on 18 May 1995.

3 STRUCTURE AND JURISDICTION OF THE COURTS

It is useful to give a brief description of the current structure and criminal jurisdiction of courts in Malawi. The Supreme Court sits at the apex of the court system, exercising appellate

¹¹⁵ Human Rights Watch (1990) 44.

¹¹⁶ International Covenant on Civil and Political Rights GA Res 2200A (XXI), UN DOC A/6316 (1966) acceded to on 22 December 1993.

¹¹⁷ International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI), UN Doc A/6316 (1966) acceded to on 22 December 1993.

¹¹⁸ Amnesty International (1994)3.

¹¹⁹ These include the Forfeiture Act, Chapter 14:06 of the Laws of Malawi; the Decency in Dress Act, Chapter 7:04 of the Laws of Malawi; and sections allowing detention without trial under the Preservation of Public Security Act, Chapter 14:02 of the Laws of Malawi.

¹²⁰ Amnesty International (1994) 3.

¹²¹ Chapter 14:05 of the Laws of Malawi.

jurisdiction over cases from the High Court.¹²² The second highest court is the High Court which has both appellate and original criminal jurisdiction.¹²³ It has the power to try any offence under the Penal Code,¹²⁴ hear appeals,¹²⁵ review cases from subordinate courts,¹²⁶ and pass any sentence as provided by law.¹²⁷

Subordinate courts are established under section 110 of the Constitution and include magistrate courts, the Industrial Relations Court, traditional or local courts and the courts martial. The bulk of criminal cases is tried by magistrate's courts which are divided into five categories: resident magistrates, first grade magistrates, second grade magistrates, third grade magistrates, and fourth grade magistrates. Resident magistrate's courts are presided over by professional magistrates with a minimum of a law degree while lay magistrates with basic legal training or a law diploma preside over courts of the first to fourth grade magistrate. Resident, first grade and second grade magistrates may try any offence except treason, concealment of treason, piracy, manslaughter, murder and genocide or attempts to commit or aiding, abetting, counseling or procuring the commission of any of these offences.¹²⁸ The criminal jurisdiction of second grade magistrate's court is further limited by section 13(2) of the Penal Code which states that they cannot try rape, attempted rape and defilement. Meanwhile, third and fourth grade magistrates may only try

¹²² Sections 104(1) and (2) of the Constitution.

¹²³ Section 108 of the Constitution.

¹²⁴ Section 7 of the CPEC.

¹²⁵ Section 346(1) of the CPEC.

¹²⁶ Section 15(1) of the CPEC.

¹²⁷ Section 10 of the CPEC.

¹²⁸ See section 13 of the CPEC. In practice, resident magistrate's courts are further divided into chief resident magistrate's courts, principal resident magistrate's courts and senior resident magistrate's courts. These designations refer only to seniority of the magistrate; they have no bearing on the jurisdiction of the court. All resident magistrates have the same civil and criminal jurisdiction.

offences whose maximum penalties do not exceed their penal jurisdiction of three years and one year respectively.¹²⁹ The penal jurisdiction of courts in Malawi can be illustrated as follows:¹³⁰

Table 1: Jurisdiction of courts

Court	Type of sentence				
	Death	Imprisonment (maximum sentence)	Preventive sentences	Fines	Other penalties ¹³¹
High Court	Yes	Life	Yes	No limit	All
Resident Magistrate	No	21 years	Yes	No limit	All
First Grade Magistrate	No	14 years	Yes	No limit	All
Second Grade Magistrate	No	10 years	No	K 200 000	All
Third Grade Magistrate	No	3 years	No	K 150 000	All
Fourth Grade Magistrate	No	1 year	No	K 100 000	All
Local courts	No	1 year	No	K 5 000 ¹³²	Compensation, forfeiture, dismissal, community service

¹²⁹ See sections 13(3) and (4) of the CPEC; *R v Sarif* Confirmation Case No 109 of 2012 (third grade magistrates have no jurisdiction to try housebreaking since the maximum penalty is death or life imprisonment); *R v Msonoya* Confirmation Case No 332 of 2011.

¹³⁰ The table is drawn from sections 10, 11, 13 and 14 of the CPEC and sections 23 and 24 of the Local Courts Act.

¹³¹ This refers to community service, police supervision, public work, attendance centre orders, dismissal, discharge, probation, and binding over.

¹³² Or K 20,000 in contempt of court cases: see section 38(1)(c) of the Local Courts Act.

The above discussion indicates that the relationship between the jurisdiction of the courts and punishment is quite complex. The severity of the punishment is not the determinative factor. Indeed, while third and fourth grade magistrates cannot try offences that exceed their penal jurisdiction, this is not the case with resident and first grade magistrates who can try capital offences such as rape, robbery and burglary although they cannot impose death or life imprisonment which are the maximum penalties for these offences. Furthermore, resident and magistrate courts cannot try manslaughter, which is a non-capital offence, nor other capital offences such as murder and genocide. Interestingly, second grade magistrates can try burglary but not rape, yet both are capital offences.

It seems therefore that the jurisdiction of the courts in Malawi is based more on the quest for justice than the severity of the applicable punishment. Cases which are assumed to be more complex are reserved for higher courts. The margin of error widens as the experience or expertise of the court diminishes. Therefore, a second grade magistrate is more likely to err in its judgment than a first grade magistrate. This is also evident when one considers the fact that convictions by second grade magistrates do not render an offender liable to preventive imprisonment even if the other criteria in section 11 of the CPEC are met.¹³³ The emphasis on justice is also the rationale for the automatic review procedure in that the length of imprisonment that entitles an offender to automatic review of his case increases as the level of the court decreases.¹³⁴ The explanation for giving resident and first grade magistrates the same

¹³³ Only convictions by the High Court, resident and first grade magistrates are taken into account: see section 11 of the CPEC. Preventive imprisonment is discussed in section 3.3 of chapter five.

¹³⁴ Section 15(1)(b) of the CPEC requires automatic review of every case where a subordinate court imposes a fine exceeding K 1, 000; or two years in the case of a resident magistrate's court; one year in the case of a first or second grade magistrate's court; or six months in the case of a third or fourth grade magistrate's court. Section 15(3) of the CPEC provides that a failure to review sentences subject to automatic review entitles the offender concerned to immediate release at the expiration of the periods prescribed in section 15(1). In *Rep v Isaaki* Confirmation Case No 410 of 2005, 2, NyaKaunda Kamanga J observed that section 15(3) ensures that there is no prolonged confinement of prisoners in the face of the risk of an unfair trial arising from a disproportionate sentence.

jurisdiction in terms of which offences they may try could be that in practice, the latter are often experienced magistrates although they do not have law degrees like the former. However, this argument makes it difficult to explain the seven-year difference in their penal jurisdiction.

4 A BRIEF OVERVIEW OF THE KEY CONSTITUTIONAL REFORMS

Unlike its predecessors, the 1994 Constitution contains numerous provisions that are particularly relevant to the administration of criminal justice and punishment. These provisions relate to the fundamental principles of government, the Bill of Rights and the relevance of international law to the Malawian judicial system.

4.1 Fundamental principles

The Constitution elaborates a number of fundamental principles that underpin its framework and serve as a guide to state action. Of these the entrenchment of the supremacy of the Constitution is probably most noteworthy.¹³⁵ According to section 5 of the Constitution, every law or act of government that is inconsistent with the provisions of the Constitution shall be invalid to the extent of any such inconsistency. This provision is important because most of the laws that apply to punishment in Malawi predate the Constitution. It calls for the examination of every law, practice and procedure concerning punishment in the light of the new Constitution.

The Constitution also enshrines the principle of the separation of powers.¹³⁶ In vesting legislative powers in parliament,¹³⁷ the power to initiate and implement policies and laws in the executive,¹³⁸ and the enforcement and interpretation of laws in the judiciary,¹³⁹ the Constitution seeks to create a division of powers in the area of punishment as a means of curbing the abuse of the

¹³⁵ Section 199 of the Constitution reads: ‘This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution?’.

¹³⁶ Sections 7, 8 and 9 provide for separate duties and functions of the executive, the legislature and the judiciary respectively.

¹³⁷ Section 8.

¹³⁸ Section 7.

¹³⁹ Section 9.

rights of accused and convicted persons and maintaining a humane system of punishment. Thus, the Constitution expressly requires the state to ‘promote law and order ... through the humane application and enforcement of laws and policing standards’.¹⁴⁰ Importantly, the criminal jurisdiction has been reserved for the high court system, leaving little room for the re-emergence of traditional courts with competing jurisdiction in this field.

Since the new Constitution was adopted, death sentences have been routinely commuted to life imprisonment and no executions of prisoners on death row have occurred.¹⁴¹ The government has also initiated several legal reforms in the criminal justice system, culminating in the adoption of amendments to the Penal Code, the CPEC and the Police Act.¹⁴² The CYPA was repealed and replaced by the Child Care, Protection and Justice Act (CCPJA).¹⁴³ In 2003, the Prisons Bill was drafted with a view to replace the Prisons Act. All these reforms are aimed at bringing the punishment regime into compliance with the Constitution and international standards.

4.2 Key features of the Bill of Rights

The Bill of Rights contained in Chapter IV of the Constitution heralds fundamental changes to the administration of punishment in Malawi, at both substantive and procedural levels. Among other things, the Constitution protects the right to life in section 16 which states that ‘no person shall be arbitrarily deprived of his or her 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.¹⁴⁴ According to Chirwa,¹⁴⁵ the

¹⁴⁰ Section 13(m). Although this principle is not justiciable, courts are enjoined to have regard to it not only when applying and interpreting the Constitution and legislation but also when reviewing decisions by the executive: see *Masangano v Attorney General* Constitutional Case No 15 of 2007, 34-35 and 44-45.

¹⁴¹ Amnesty International (1997) 1.

¹⁴² Chapter 3:01 of the Laws of Malawi.

¹⁴³ Act 22 of 2010.

¹⁴⁴ In *Kafantayeni v Attorney General* Constitutional Case No 25 of 2005, 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

prohibition against the arbitrary deprivation of life means that ‘the state must refrain from killing people without justification’. He also asserts, based on *Malawi Congress Party and Others v Attorney General and Another*,¹⁴⁶ that the term ‘arbitrary deprivation of life’ means the deprivation of life without due process or respect for the right to a fair trial.¹⁴⁷ 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’ court that is established by law, independent and impartial, and has the jurisdiction and expertise to try capital crimes.¹⁴⁸ Secondly, the death penalty may only be imposed for crimes that are recognised under the laws of Malawi. Thirdly, an offender must have been convicted of an offence.

The Constitution protects the right to equal and effective protection under the law¹⁴⁹ and prohibits discrimination on the grounds of ‘race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status’.¹⁵⁰ The right to equality entails that all persons, including offenders, should be treated equally. In *Masangano v Attorney General and Others*,¹⁵¹ the High Court said that despite the fact that prisoners are lawfully deprived of their liberty through imprisonment, they remain equally entitled to fundamental rights. Therefore, prisoners are entitled to all rights guaranteed to ‘every person’ subject to necessary limitations on account of their imprisonment. Secondly, the Constitution enshrines the right to human dignity in section 19(1). Specifically, it requires that human dignity must be

the circumstances of the crime and is thus arbitrary’. However, the High Court did not make a finding on this ground.

¹⁴⁵ Chirwa (2011) 92.

¹⁴⁶ *Malawi Congress Party and Others v Attorney General and Another* [1996] MLR 244 (HC) 292-295.

¹⁴⁷ Chirwa (2011) 93.

¹⁴⁸ Chirwa (2011) 98.

¹⁴⁹ Section 20(1).

¹⁵⁰ Section 20(1).

¹⁵¹ *Masangano v Attorney General* Constitutional Case No 15 of 2007, 37.

respected in all judicial proceedings or any proceedings before any organ of state and during the enforcement of a penalty¹⁵² and prohibits corporal punishment, torture, cruel, inhuman and degrading treatment or punishment.¹⁵³ These provisions have significant implications for the aims and severity of criminal punishment and the manner in which it is enforced.

The Constitution also recognises a range of rights that seek to protect the liberty of persons. The right to personal liberty is expressly protected under section 18 of the Constitution. In *Re Chizombwe*¹⁵⁴ it was stated that liberty must be given due respect and should not be unduly interfered with. In buttressing the protection of liberty, the Constitution protects several other specific rights. These include the right to be promptly informed of the reason for one's detention,¹⁵⁵ the right to be brought before a court of law within 48 hours,¹⁵⁶ and the right to be released from detention with or without bail.¹⁵⁷ The Constitution also guarantees the right to challenge the lawfulness of one's detention and to be released immediately if such detention is unlawful.¹⁵⁸ The fact that this right is guaranteed to 'sentenced' prisoners is significant. It creates the foundation for a challenge to a sentence of imprisonment even after a final order has been made by the Malawi Supreme Court of Appeal (MSCA). Section 42(1)(e) can also be used to challenge the continued detention of prisoners sentenced to long-term and life imprisonment. The wording of section 42(1) encompasses 'every' sentenced prisoner regardless of the length of his sentence. The Constitution also protects the right to be detained in conditions that are consistent with human dignity.¹⁵⁹ Section 42(1)(b) state that humane conditions include 'at least

¹⁵² Section 19(2).

¹⁵³ Section 19(3).

¹⁵⁴ *In re Chizombwe* [1991] 14 MLR 482 (HC) 486.

¹⁵⁵ Section 42(2)(a).

¹⁵⁶ Section 42(2)(b).

¹⁵⁷ Section 42(2)(e).

¹⁵⁸ Section 42(1)(e) and (f).

¹⁵⁹ Section 42(1)(b).

the provision of reading and writing materials, adequate nutrition and medical treatment at state expense’.

Although the CPEC has codified some procedural guarantees in criminal trials, by specifically recognising the right to a fair trial in section 42, the Constitution sought to build a human right based criminal justice system. *Kafantayeni v Attorney General*¹⁶⁰ confirmed that the right to a fair trial extends to sentencing.¹⁶¹ The right to a fair trial as defined under section 42 includes the rights to be sentenced within a reasonable time after conviction¹⁶² and not to be sentenced to a more severe punishment than that prescribed at the time of the commission of the offence.¹⁶³ It also includes the right ‘not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted’.¹⁶⁴ Commonly known as double jeopardy, this principle does not only relate to cases where an accused is tried twice for the same offence but also to the consideration of substantive elements of one offence in punishing another.¹⁶⁵ Double jeopardy may also result from taking into account previous convictions where this leads to the punishment of an offender for a crime he was already punished for.

An essential element of the right to a fair trial is the presumption of innocence. This right is provided for in section 42(2)(f)(iii) of the Constitution. The presumption of innocence does not apply in the traditional sense to the sentencing phase of a trial. However, it has been argued that the prosecution bears the burden to prove disputed facts that may have a major impact on the

¹⁶⁰ *Kafantayeni v Attorney General* Constitutional Case No 25 of 2005.

¹⁶¹ *Kafantayeni v Attorney General* Constitutional Case No 25 of 2005.

¹⁶² Section 42(2)(f)(x).

¹⁶³ Section 42(2)(f)(vi).

¹⁶⁴ Section 42(2)(f)(vii).

¹⁶⁵ *Rep v Dzinjama* Confirmation Case No 133 of 2002. This also makes sense in light of the guideline that a sentence for burglary must not to be unduly influenced by the amount of good stolen since burglary serious based on the trespass involved. An offender must not escape punishment simply because the felony intended was not committed or little was stolen. *Rep v Kachingwe* Confirmation Case No 85 of 2007.

sentence imposed.¹⁶⁶ The Supreme Court of Canada has held that an offender must ‘be granted the protection of the reasonable doubt rule’ during sentencing which is the ‘vital juncture’ of the criminal process that ‘poses the ultimate jeopardy to an individual’.¹⁶⁷ It has also been suggested that the presumption of innocence prohibits a court from punishing the offender for offences he has not been convicted of. It is on this basis that the minority in *Rameka et al v New Zealand*,¹⁶⁸ discussed in chapter three,¹⁶⁹ were of the view that preventive sentences and indeed sentences based on the future risk posed by the offender infringe the presumption of innocence. The right to a fair trial includes the right ‘to have recourse by way of appeal or review to a higher court than the court of first instance’.¹⁷⁰ This right provides a means through which an accused can seek a more favourable outcome to a decision of a lower court. The appellate process is also an important check on lower courts that can promote consistency and fairness in the administration of justice.¹⁷¹

The Constitution also contains additional provisions for children who are defined as persons under the age of 18 years.¹⁷² For instance, it requires that they must be treated in a manner that promotes their ‘reintegration into society to assume a constructive role’.¹⁷³ Further, children may only be imprisoned as ‘a last resort and for the shortest period of time consistent with justice and public protection’.¹⁷⁴ The imposition of life imprisonment without the possibility of release on children is specifically prohibited by section 42(2)(g)(i).

¹⁶⁶ Schwikkard (1999) 64-65.

¹⁶⁷ *R v Gardiner* [1982] 2 SCR 368 (SCC) 415, citing *Olah* (1980) 121.

¹⁶⁸ *Rameka et al v New Zealand* Communication No 1090/2002.

¹⁶⁹ See section 3.2.1 of chapter three.

¹⁷⁰ Section 42(2)(f)(viii). Prisoners who were sentenced before the adoption of the Constitution are at liberty to appeal their sentences if new grounds exist: see section 205 of the Constitution.

¹⁷¹ Trechsel and Summers (2005) 362.

¹⁷² Section 42(2)(g).

¹⁷³ Section 42(2)(g)(v).

¹⁷⁴ Section 42(2)(g)(ii).

To avoid the wanton limitation of rights, section 44 of the Constitution carefully stipulates conditions which must be met in order for a limitation to be justifiable. The limitation must be prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society.¹⁷⁵ Section 44(3) further provides that the limitation should not negate the essential content of the right and must be of general application.¹⁷⁶ These requirements are conjunctive¹⁷⁷ and the onus of proving that a limitation is justifiable rests on the party who seeks to rely on the limitation.¹⁷⁸ In determining whether a limitation is reasonable, it must be shown through evidence that it is not arbitrary and that there is a rational connection between the limitation and the objective it seeks to achieve. Further, the objective itself must be of sufficient importance and it must be proved that the means adopted will in fact achieve it. In addition, reasonableness requires that the limitation must be proportional to the objective it seeks to achieve; that is, the limitation must be the least restrictive means to achieve the purpose. It was held in *John Tembo and Another v the Attorney General*,¹⁷⁹ that ‘for a limitation to pass muster it has to pursue a legitimate aim and secondly there has to be a reasonable relationship of proportionality between the means employed to limit the right and the aim sought to be achieved’. Proportionality is central to the determination of whether a limitation is ‘necessary in an open and democratic society’. This requirement entails that the limitation must serve ‘a legitimate purpose or a compelling public purpose *that is necessary in an open and democratic society*’.¹⁸⁰ A limitation will be necessary if it is the least restrictive means to achieve the objective. Chirwa notes that in determining whether a limitation is necessary in an open and democratic society, courts have considered whether the limitation fosters the underlying principles of the

¹⁷⁵ Section 44(2) of the Constitution.

¹⁷⁶ Section 44(3) of the Constitution.

¹⁷⁷ See Chirwa (2011) 45, citing Chikopa J in *Wavunduka Mwenitete v Fishani K Mkandawire* Civil Appeal Case No 29 of 2000 (unreported).

¹⁷⁸ *Friday A Jumbe and Humphrey C Mvula v Attorney General* Constitutional Cases Nos 1 and 2 of 2005.

¹⁷⁹ *John Tembo and Another v Attorney General* Civil Cause No 50 of 2003.

¹⁸⁰ Chirwa (2011) 49. Emphasis in original

Constitution and the principles of national policy contained in sections 12 and 13 of the Constitution respectively.

4.2.1 The relevance of international law

Unlike the previous constitution's vague and ambiguous references to international law, the current Constitution commits Malawi to respecting international law.¹⁸¹ As was seen in chapter three, this body of law contains a wide range of principles that are relevant to criminal punishment.

According to the Constitution, international law serves as a general guide to governance. One of the principles of national policy enshrined in section 13(k) of the Constitution urges the government 'to govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs'. International law can also be used as a source of law in domestic courts. Customary international law is automatically binding on Malawi and its application is subject to the Constitution and Acts of Parliament.¹⁸² However, Malawi is dualist¹⁸³ in as far as international treaty law is concerned and section 211(1) requires that legislation must be passed before a treaty becomes part of domestic law. Once domesticated, international treaty law is as good as statutory law and is subject only to the Constitution¹⁸⁴ and repeal by Parliament.¹⁸⁵ In *Malawi Telecommunications Ltd v Makande and Omar*,¹⁸⁶ the MSCA held that the Universal Declaration of Human Rights (UDHR)¹⁸⁷ is part of the laws of Malawi and that under the 1966 Constitution there was no need for the

¹⁸¹ Chirwa *et al* (undated) 27.

¹⁸² Section 211(3) of the Constitution which reads: 'Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic'.

¹⁸³ See Maluwa (1995) 31.

¹⁸⁴ Chirwa (2011) 30. Statutory law has primacy over all laws except the Constitution: see section 48(2) of the Constitution.

¹⁸⁵ See section 211(2) of the Constitution.

¹⁸⁶ *Malawi Telecommunications Ltd v Makande and Omar* MSCA Civil Appeal No 2 of 2006.

¹⁸⁷ Universal Declaration of Human Rights GA Res 217A (III), UN Doc A/810 (1948).

domestication of international treaties. This means that all agreements entered into before 1994 have domestic force in Malawi.¹⁸⁸ This is important because Malawi ratified key treaties before 1994 including the African Charter on Human and Peoples' Rights (African Charter),¹⁸⁹ the ICCPR,¹⁹⁰ the Convention on the Rights of the Child (CRC),¹⁹¹ the ICESCR¹⁹² the Convention Against Torture (CAT),¹⁹³ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹⁹⁴ In *Moyo v Attorney General*,¹⁹⁵ the High Court affirmed that the CRC has domestic force in Malawi.¹⁹⁶ Apart from the ICESCR, these instruments contain important international standards for punishment and indeed the criminal justice system as a whole as discussed in chapter three. Their domestic application in Malawi is a victory for human rights in general and the criminal justice system in particular. This is because these instruments can be used to complement gaps in the Constitution and legislation. A good example is that since the Constitution does not clearly stipulate the general aims of punishment, the gap is easily filled by article 10(3) of the ICCPR which states that reformation and social reintegration must be the essential aims of any penitentiary system.

Apart from being a source of law, international law can also be used in interpreting the Constitution.¹⁹⁷ Section 11(2)(c) of the Constitution requires that in interpreting the Constitution,

¹⁸⁸ See also *Kalinda v Limbe Leaf* Civil Cause No 542 of 1995, (unreported); Hansen (2002) 46(1) 31.

¹⁸⁹ Ratified by Malawi in 1989.

¹⁹⁰ Ratified by Malawi in 1993. 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 Mwambene, above note 29, 79.

¹⁹¹ Ratified by Malawi in 1991.

¹⁹² Ratified by Malawi in 1993.

¹⁹³ Ratified by Malawi in 1996.

¹⁹⁴ OAU Doc CAB/LEG/24.9/49 (1990).

¹⁹⁵ *Moyo v Attorney General* Constitutional Case No 12 of 2007.

¹⁹⁶ *Moyo v Attorney General* Constitutional Case No 12 of 2007.

¹⁹⁷ Chirwa (2005) 233. The use of international law and jurisprudence from foreign jurisdictions is a common feature of most domestic courts, especially in the determination of human rights issues: see McCrudden (2003) 2.

courts must take into account, where applicable, international law and comparable foreign case law. Courts are also required to have regard to international human rights standards in determining whether a limitation to a right is justifiable.¹⁹⁸ Courts can have recourse to international law standards, regardless of whether they are binding on or ratified by Malawi or not, including soft-law norms as contained in general comments, international declarations, and charters.¹⁹⁹ In addition, courts may have regard to jurisprudence emerging from such instruments.²⁰⁰ 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,²⁰¹ is enjoined to take ‘due account of applicable international standards’ in the exercise of its powers.²⁰²

This discussion clearly shows that the Constitution aims at establishing a criminal justice system that is consistent with international human rights.

5 CONCLUSION

This chapter has shown that from 1891 to 1994 criminal law and punishment largely focussed on retribution and deterrence and were often used as political tools. Looking back at the colonial period, it can be said that for the most part, while some notable strides were subsequently made to establish a more humane framework for criminal justice in Malawi, little was done to protect the rights of offenders in as far as punishment was concerned. The forms of punishment were largely punitive in nature, save for where young offenders were treated with some leniency and subjected to rehabilitation-oriented punishment. The attainment of independence in 1964 did little to improve the criminal justice system. The human rights of accused persons, let alone

¹⁹⁸ Section under section 44(1) of the Constitution.

¹⁹⁹ Chirwa (2005) 233.

²⁰⁰ Chirwa (2011) 27.

²⁰¹ Section 169(3)(a) of the Constitution.

²⁰² See section 169(1) of the Constitution.

those of convicted prisoners, were neither given legal protection nor respected in practice. The government continued to apply colonial laws which were often amended to increase the severity of the applicable punishments.

The 1994 Constitution heralds radical changes to the criminal justice system in general and to punishment in particular. It has several provisions that are relevant to the punishment of offenders including fundamental rights such as the rights to life, dignity and liberty and the prohibition of cruel and inhumane punishment. The domestication of international treaties such as the ICCPR augments the constitutional guarantees for accused and convicted persons. It is therefore not surprising that the Constitution has triggered significant law reform initiatives in the criminal justice system.

The crucial question remains whether, over 20 years after its adoption, the promises of the Constitution concerning punishment have been fulfilled. In the next three chapters, the thesis considers this question by examining the forms and aims of punishment, and the early release system in Malawi.

CHAPTER 5

THE FORMS OF PUNISHMENT IN MALAWI

1 INTRODUCTION

The previous chapter has argued that the 1994 Constitution of Malawi envisages significant changes to punishment in Malawi and places certain restrictions on the forms of punishment. The study has also demonstrated that international standards endorse rehabilitation as the essential aim of punishment and also restricts the application of certain forms of punishment such as the death penalty and life imprisonment. The aim of this chapter is to examine the extent to which the forms of punishment in Malawi conform to the Constitution and international standards and to identify the aims of punishment that influence the imposition of the forms of punishment discussed. The discussion in this chapter is limited to a discussion of the following penalties listed in section 25 of the Penal Code:¹

- a. Death
- b. Imprisonment: This may take three forms: periodic imprisonment; suspended imprisonment; preventive imprisonment; and life imprisonment.
- c. Financial penalties: These include fines; compensation; forfeiture
- d. Community/supervisory sentences: These include community service; police supervision; public work; attendance centre orders; and
- e. Orders in lieu of punishment: These include dismissal, discharge, probation, and binding over.

¹ Section 25(a) to (p) of the Penal Code, Chapter 7:01 of the Laws of Malawi as amended by Penal Code Amendment Act 1 of 2011.

The main reason for selecting these punishments is that the Penal Code is the main penal statute in Malawi. The chapter will put more emphasis on the death penalty and imprisonment because, as stated in chapter one, the death penalty is the most severe punishment in Malawi while imprisonment is the most common form of punishment. Secondly death and imprisonment, particularly life and preventive sentences, raise constitutional concerns regarding the rights to life, liberty and the prohibition of cruel, inhumane or degrading punishment. The purpose for considering non-custodial penalties is to give a more rounded representation of the sentencing options and to note the new forms of punishment introduced after 1994. The chapter will therefore not dwell much on these penalties.

The first part of this chapter describes the forms of punishment then the second analyses them against the Constitution and international standards. The chapter will first consider the death penalty before looking at imprisonment and non-custodial punishments. The discussion in this chapter reflects the position in Malawi as of September 2014 when research for this thesis was concluded.

2 THE DEATH PENALTY

2.1 Introduction

There has been a de facto moratorium on executions in Malawi since 1992, effected at a time when the country was undergoing a political transition from one party rule to democracy. In 2000, the Malawi Law Commission (the Commission) made some recommendations regarding death sentences. For example, it recommended that all mandatory sentences including the death penalty for murder and treason should be

abolished.² It also recommended that the procedure for executions must be uniform to avoid any abuse of the discretion and any ‘discrimination’ in the execution of the death penalty.³

Until 2007, death was a mandatory sentence for murder and treason. 200 mandatory death sentences were handed down between 1995 and 2007 for murder.⁴ However, by 2007, 169 of these sentences had been commuted to life imprisonment.⁵ As of June 2014, there were 29 prisoners on death row.⁶ Parliament had not yet considered the Commission’s recommendations by the time the mandatory death penalty for murder was successfully challenged in 2007.⁷ When the Penal Code was finally amended in 2011,⁸ most of the Commission’s recommendations were adopted: murder now attracts a discretionary sentence of ‘death or imprisonment for life’⁹ and all death sentences must be executed by hanging within the precincts of the prison in which an offender is

² Malawi Law Commission *Report of the Law Commission on the Review of the Penal Code* (2000) 21, hereafter *Penal Code Review Report*. This was in keeping with the Commission’s recommendation in favour of retaining judicial discretion in sentencing for offences: see *Penal Code Review Report* 28.

³ Malawi Law Commission *Report of the Law Commission on the Review of the Penal Code* (2000) 21, hereafter *Penal Code Review Report*. See also section 27 of the Penal Code Amendment Bill, 1999. Similar recommendations were later made by the Commission in its report on the review of the CPEC: see Malawi Law Commission (2003) *Report of the Law Commission on the Review of the Criminal Procedure and Evidence Code* 27, hereafter *CPEC Review Report*.

⁴ Centre for International Human Rights (2010).

⁵ Babcock and McLaughlin (2013) 182.

⁶ United Nations Human Rights Committee ‘Consideration of reports submitted by States parties under article 40 of the Covenant’ CCPR/C/MWI/Q/1/Add.2 (25 June 2014) para 15. It is unclear whether these prisoners are yet to be considered for commutation or the President has declined to commute their sentences.

⁷ *Kafantayeni and others v Attorney General* Constitutional Case No 12 of 2005 (HC) (hereafter *Kafantayeni*).

⁸ Penal Code Amendment Act No 1 of 2011.

⁹ See section 210 of the Penal Code.

detained.¹⁰ However, the mandatory death sentence for treason was retained.¹¹ This leaves treason by a civilian¹² as the only offence that attracts a mandatory death sentence in Malawi.

The following section considers the restrictions on the use of the death penalty before discussing the High Court's decision that struck down the mandatory death penalty for murder and the circumstances in which death is imposed.

2.2 Restrictions on the death penalty

There are a number of restrictions on the use of death sentences in Malawi. Firstly, it may only be imposed for 12 offences. The Penal Code has eight capital offences, namely treason, piracy, rape, genocide, robbery, burglary, housebreaking and murder.¹³ In addition, the Defence Force Act (DFA)¹⁴ prescribes death for aiding the enemy, communication with the enemy, mutiny, failure to suppress mutiny, treason and murder.¹⁵ From 1995, death sentences have only been passed for murder.¹⁶ 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

¹⁰ Section 26(1) of the Penal Code.

¹¹ See section 38 of the Penal Code.

¹² Treason attracts a discretionary death sentence under section 80(3) of Defence Force Act, Chapter 12:01 of the Laws of Malawi, as amended by Act No 11 of 2004 (DFA).

¹³ See sections 38, 63, 133, 209, 217A(2)(a), 301(2) and 309 of the Penal Code.

¹⁴ Defence Force Act, Chapter 12:01 of the Laws of Malawi, as amended by Act No 11 of 2004.

¹⁵ Section 34, 33, 40(1), 41 and 80(3) of the DFA. An attempt to commit a capital offence is punishable with 'any greater punishment than imprisonment': see section 76 of the Act.

¹⁶ 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.

mutiny,¹⁷ all capital crimes are punishable with ‘death or imprisonment for life’.¹⁸ It appears that the reason for this is to ensure that life imprisonment is also available to offenders convicted of these crimes.¹⁹ As explained further below,²⁰ the absence of statutory or judicial guidance as to when murder should attract death and when it should attract life raises some perturbing anomalies.

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 the actions²¹ and that in cases of diminished responsibility, a conviction of manslaughter and not murder must be recorded. In the latter scenario, an offender would only face a maximum of life imprisonment.²² Additionally, section 72(2) of the Prisons Act²³ 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 Minister²⁴ shall report the matter to the President’. This is obviously done so that the President considers the offender concerned for mercy.

¹⁷ Mutiny is punishable with ‘death or any other punishment’ under section 40(1) of the DFA.

¹⁸ See sections 38(1) and 210 of the Penal Code. See also section 33(1), 34(1), 40(1), 41(a) and 80(3)(a) of the DFA.

¹⁹ See *CPEC Review Report* 157.

²⁰ See section 2.4.2 below.

²¹ Section 12 of the Penal Code.

²² 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 section 214A(2).

²³ Chapter 9:02 of the Laws of Malawi.

²⁴ This refers to the Minister of Home Affairs and Internal Security under whose ministry the Malawi Prisons Service falls.

The law also excludes the imposition of death sentences on pregnant women²⁵ and on persons who were under 18 years of age at the time of the commission of the offence.²⁶ In the latter case, section 26(2) of the Penal Code states that an offender should be sentenced to detention at the pleasure of the President on the advice of the Board of Visitors appointed under the Children and Young Persons Act (CYPA).²⁷ With respect to pregnant offenders convicted of a capital offence, a court ‘shall’ sentence her to life imprisonment ‘instead of’ death.²⁸ Section 327(1) of the CPEC requires that in all cases where a woman is convicted of a capital offence, a court must inquire as to whether she is pregnant. If the offender responds in the affirmative or the court ‘thinks it fit to order’, pregnancy must be proved or disproved through evidence.²⁹ Section 327(3) creates a rebuttable presumption against pregnancy which may only be overcome 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 the court must set aside the death penalty and pass a sentence of life imprisonment in accordance with section 327(4) of the CPEC.

The third restriction on the death penalty in Malawi relates to procedural safeguards, including the right to a fair trial, which must be adhered to before and after the

²⁵ Section 26(4) of the Penal Code; sections 328 of the CPEC.

²⁶ See sections 26(2) of the Penal Code and section 141 of the Child Care, Protection and Justice Act 22 of 2010 (CCPJA).

²⁷ Children and Young Persons Act, Chapter 26:03 of the Laws of Malawi. This statute has since been repealed by the CCPJA. The reference to the CYPA in section 26(2) of the Penal Code should therefore have been made to the Child Case Review Board established under Part VII of the CCPJA. Section 141(1) of the CCPJA mandates this Board to make recommendations to the President on the release of child offenders.

²⁸ Section 26(4) of the Penal Code. See also sections 327(4) and 328 of the CPEC.

²⁹ Sections 327(2) and (3) of the CPEC.

imposition of the death penalty. As stated in the previous chapter, the death penalty has constitutional recognition through section 16 of the Constitution which states that the execution of the death penalty does not amount to an arbitrary deprivation of life. This is subject to the condition that the penalty is imposed by a competent court following a conviction of an offence under Malawian law.³⁰ As noted in chapter four,³¹ detained and sentenced prisoners are entitled to a wide constellation of rights including legal aid, detention in humane conditions that are consistent with human dignity, and appeal.

The last restriction on death sentences is that an execution may only be performed on the authority of an execution warrant signed by the President. Section 326 of the CPEC 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.³² 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.³³ In response, the President must issue a death warrant, commute the sentence or grant a pardon.³⁴ In the case of a pardon, the pardon should specify whether it is free or conditional.³⁵ This procedure ensures that all prisoners on death row are considered for mercy.

³⁰ Section 16 of the Constitution.

³¹ See section 4.2 of chapter four.

³² See section 326 of the Penal Code.

³³ Section 326(1) of the CPEC.

³⁴ Section 326(3) of the CPEC.

³⁵ Section 326(6) of the CPEC.

While there is no general automatic right to appeal a death sentence, offenders sentenced to death under the DFA have an automatic right to appeal the sentence.³⁶ Further, execution of such offenders may only take place with the approval of the President.³⁷ 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 and 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’.³⁸

Overall, Malawian law ensures that the application of the death penalty is restricted. As explained in chapter three, restrictions on death sentences are part of a global trend towards the abolition of the death penalty. Unfortunately, ‘Malawi has no intentions and immediate plans³⁹ to abolish the death penalty or ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.⁴⁰ The country has also rejected calls to put in place a de jure moratorium on the death penalty with a view to its final abolition.⁴¹ The official reason for retaining the death penalty is public opinion.⁴²

³⁶ Section 150 of the DFA.

³⁷ Section 112 of the DFA. The President has a general power to review findings and sentences of courts-martial: see section 113 of the DFA.

³⁸ See the proviso to section 150 of the DFA.

³⁹ United Nations Human Rights Committee (2012) para 18. See also United Nations Human Rights Committee (2014) para 14.

⁴⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1642 UNTS 414, 15 December 1989.

⁴¹ See Malawi Human Rights Commission (2013) 1; Malawi Human rights Commission (2014) 30; Human Rights Council (2011) para 105.

⁴² See United Nations Human Rights Committee (2012) para 18: ‘Section 8 of the Constitution stipulates that the legislature when enacting laws shall reflect, in its deliberations, the interests of all the people of

On a positive note, Malawi has made some strides towards abolition, most notably the de facto moratorium on executions which has been observed for almost two decades now and the ground-breaking ruling that the mandatory death penalty is unconstitutional in 2007.

2.3 The demise of the mandatory death penalty

Until 2007, Malawi prescribed mandatory death sentences in cases of murder and treason. In practice, courts were often hesitant to enter pleas of guilt for murder charges because of the automatic death sentence applicable.⁴³ In *Kafantayeni v Attorney General*,⁴⁴ the High Court had to determine the constitutionality of the mandatory imposition of the death penalty in murder cases as provided in section 210 of the Penal Code. The six petitioners premised the challenge on the grounds that the mandatory death penalty: a) amounted to an arbitrary deprivation of life in violation of section 16 of the Constitution; b) was inhuman and degrading in violation of section 19(3) of the Constitution; c) violated the right to a fair trial by denying judicial discretion in sentencing; and d) violated the principle of separation of powers.⁴⁵

In its determination, the court observed that while the death penalty is sanctioned by section 16 of the Constitution in the proviso to the right to life, it did not save its mandatory requirement.⁴⁶ With regard to the ground that the mandatory death penalty for murder amounted to inhuman and degrading punishment, the High Court stated

Malawi and shall further the values explicit and implicit in the Constitution. Malawi will continue to listen to the voices of its people regarding the issue of death penalty’.

⁴³ See Rollin (2003) 5.

⁴⁴ *Kafantayeni v Attorney General* Constitutional Case No 12 of 2005 (HC), hereafter *Kafantayeni*.

⁴⁵ See sections 7, 8 and 9 of the Constitution.

⁴⁶ *Kafantayeni*, 6.

that proportionality is a relevant factor in deciding whether a punishment is cruel, inhuman and degrading.⁴⁷ Citing with approval the dictum of Bryon CJ in *Reyes v The Queen*,⁴⁸ the court said:⁴⁹

The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of the mitigating factors relative to the offence itself and the offender.

The court further noted that because there may be varying degrees of factors such as criminal culpability, participation, and heinousness, not all murders are the same and therefore it is not proper to impose the same punishment for all murders. The court reasoned that the mandatory death penalty violated the right to human dignity as it precluded a court from considering the personal circumstances of the offender and the circumstances of the offence.⁵⁰ Applying section 19(2) of the Constitution,⁵¹ the court held that the right to human dignity requires that a court must consider the circumstances of the offence and the offender before a death sentence can be imposed.⁵² Thus, the court held that the mandatory death penalty was unconstitutional because it did not allow for the consideration of the personal circumstances of the offence and the offender:

⁴⁷ *Kafantayeni*, 11, quoting Chaskalson JP in *S v Makwanyane* 1995 (3) SA 391 (CC) para 94.

⁴⁸ *Reyes v The Queen* [2002] 2 AC 235, 249.

⁴⁹ *Kafantayeni*, 11.

⁵⁰ *Kafantayeni*, 9-11.

⁵¹ Section 19(2) states: In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

⁵² *Kafantayeni*, 10.

[A] sentencing regime which imposes a mandatory sentence of death on all murderers, or murderers within specified categories, is inhuman and degrading because it requires sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability.⁵³

Relating to the right to a fair trial, the court affirmed that this right extends to sentencing and thus 'the principle of "fair trial" requires fairness of the trial at all stages of the trial including sentencing'.⁵⁴ The court conceded the contention of the applicants that section 210 stifled the sentencing jurisdiction of a court because it in essence prohibited a court from passing a sentence and limited its power to the determination of the guilt or innocence of an offender. The court therefore found that the mandatory death sentence violated the right to a fair trial in that it was inconsistent with the right to appeal and review of a sentence by a higher court.⁵⁵ In addition, section 210 was held to unjustifiably infringe the right of access to justice.⁵⁶

The court therefore found that section 210 was unconstitutional to the extent of the 'mandatory requirement for the death sentence for the offence of murder' and ordered that the applicants must be brought before the trial court for 'proper' sentencing.⁵⁷ The court was quick to point out that it did not outlaw the death penalty *per se*.⁵⁸

⁵³ *Kafantayeni*, 7-8, citing *Reyes v The Queen* [2002] 2 AC 235, 247.

⁵⁴ *Kafantayeni*, 13.

⁵⁵ *Kafantayeni*, 13.

⁵⁶ Section 41(2) reads: 'Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal disputes'.

⁵⁷ *Kafantayeni*, 15.

⁵⁸ *Kafantayeni*, 15.

Kafantayeni has been approved by the MSCA in several decisions.⁵⁹ It is a landmark decision for sentencing policy in Malawi. It is a good example of the impact of the Bill of Rights on punishment. *Kafantayeni* reiterates that constitutional values should be respected in the imposition of punishment. Courts have a duty, flowing from the prohibition of torture, cruel, inhuman and degrading treatment or punishment and the right to dignity, to mete out sentences that are proportional to the offence.⁶⁰

Kafantayeni is also an affirmation of the court's authority in the area of sentencing and reflects the judiciary's opposition to mandatory sentences in general. *Kafantayeni* is therefore significant for mandatory sentences in general.⁶¹ It is worth noting in this regard that Malawi has had a fair share of mandatory sentences. Previously, the law provided for mandatory sentences for the offences of murder, treason,⁶² armed robbery,⁶³ burglary,⁶⁴ rape,⁶⁵ theft by servant and theft by public servant.⁶⁶ By 1994, only murder, treason and theft by public servant retained mandatory sentences. In 1995, mandatory minimum sentences were introduced for official corruption⁶⁷ and other

⁵⁹ See, for instance, *Namizinga v Rep* MSCA Criminal Appeal No 18 of 2007; *Jacob v Rep* Criminal Appeal No 16 of 2006; *Manda v Rep* Criminal Appeal No 15 of 2007; *Thife v Rep* Criminal Appeal No 19 of 2007; *Alumeta v Rep* Criminal Appeal No 31 of 2001; *Namboya v Rep* Criminal Appeal No 14 of 2005; *Ngulube and another v Rep* Criminal Appeal No 35 of 2006; *Khomba v Rep* MSCA Criminal Appeal No 6 of 2007; *Uladi v Rep* MSCA Criminal Appeal No 5 of 2008; *Khmalala v Rep* Criminal Appeal No 3 of 2008. The call for resentencing hearings was also made in *Yasin v Rep* MSCA Criminal Appeal No 25 of 2005.

⁶⁰ See Nkhata (2007)110.

⁶¹ See Nkhata (2007)109.

⁶² Section 38 of the Penal Code.

⁶³ Section 301 of the Penal Code prescribed a mandatory death penalty.

⁶⁴ Section 133 of the Penal Code.

⁶⁵ Section 309 of the Penal Code.

⁶⁶ Section 283(4) of the Penal Code. For a detailed discussion of the mandatory sentences for this offence, see Ng'ongola (1988).

⁶⁷ See sections 90, 91 and 92 of the Penal Code as amended by Penal Code Amendment Act 21 of 1995.

corrupt practices⁶⁸ but were later abandoned in 2004⁶⁹ and 2011⁷⁰ respectively upon recommendation of the Law Commission.⁷¹ At present, only treason and theft by public servant⁷² attract mandatory sentences.

The usual justification for mandatory sentences remains prevalence of the offence and deterrence.⁷³ The mandatory sentences for theft by public servant are the most frequently applied. They were first prescribed in the form of a scale introduced in 1973⁷⁴ and last revised in 1996⁷⁵ which stated minimum prison sentences for specified amounts of money stolen subject to maximum of life imprisonment.⁷⁶ The minimum sentences could only be departed from if the accused made full and voluntary restitution or the amount stolen was below K500.⁷⁷ Courts have long expressed opposition to the mandatory sentences for theft by public servant from as early as 1975.⁷⁸ The main criticism was that the mandatory sentences resulted in heavier punishment than that

⁶⁸ See section 34 of the Corrupt Practices Act 18 of 1995.

⁶⁹ See sections 56-58 of the Penal Code Amendment Act 1 of 2011.

⁷⁰ See section 17 of the Corrupt Practices Act 17 of 2004.

⁷¹ See *Penal Code Review Report* 34; section 58 of the Penal Code Amendment Bill, 2009.

⁷² The mandatory sentences were prescribed in the form of a scale which stated minimum prison sentences for specified amounts of Act 21 of 1996.

⁷³ See for instance Msowoya (2006) 66, who notes that prevalence of corrupt practices was the basis for mandatory sentences in the Corrupt Practices Act; Malawi Law Commission *Report of the Law Commission on the Review of the Corrupt Practices Act* (2002) 6.

⁷⁴ Penal Code Amendment Act 20 of 1973.

⁷⁵ See section 286(4) as amended by Penal Code Amendment Act 21 of 1996.

⁷⁶ Section 283(5) of the Penal Code as amended by Penal Code Amendment Act 21 of 1996.

⁷⁷ Section 283(4). See for instance *Rep v Foster* Confirmation Case No 1690 of 2005. See also *Rep v Tembo* Confirmation Case No 187 of 2013.

⁷⁸ Ng'ongola (1988) 85-87. In some cases, courts would acquit accused persons in order to evade the mandatory sentences: see Malawi Law Commission *Report of the Law Commission on the Review of the Corrupt Practices Act* (2002) 36.

warranted by the offence⁷⁹ and were unduly oppressive in light of depreciation of the Malawian currency.⁸⁰ In *Rep v Kotamu*,⁸¹ it was held, obiter, that the sentences were excessive and ‘even with the best of intentions, could be degrading, cruel and inhuman treatment or punishment’.⁸² In *Rep v Mussa*,⁸³ the High Court, on its own motion, applied the reasoning in *Kafantayeni* and held that mandatory sentences for theft by public servant prescribed in section 283(4) of the Penal Code were arbitrary at law and therefore unconstitutional. However, this decision was later overruled on appeal.⁸⁴

The MSCA held that *Kafantayeni* was limited to the mandatory death penalty and could not be extended to other mandatory penalties under the Penal Code.⁸⁵ It can be argued that the MSCA failed to correctly apply the underlying principles advanced in *Kafantayeni* and affirmed by the MSCA in several decisions. The reasons given by the High Court for declaring the mandatory death sentence unconstitutional apply to mandatory sentences in general. While the court emphasised the irrevocable nature of the death penalty, its reasoning easily transcends this limitation. The court stressed that proportionality and the individuation of punishment are integral elements of acceptable punishment that complies with the prohibition of cruel, inhuman and degrading punishment. The court also endorsed the centrality of proportionality to this prohibition. The bottom line in *Kafantayeni* is that offenders must be afforded a chance

⁷⁹ See for instance *Mkomba v Rep* Criminal Appeal No 121 of 1975.

⁸⁰ See *Mkata v Rep* Criminal Appeal No 10 of 1995, cited in Chirwa (2011) 136.

⁸¹ *Rep v Kotamu* Confirmation Case No 180 of 2012.

⁸² *Rep v Kotamu* Confirmation Case No 180 of 2012, 4. The court made the comments in the process of issuing sentencing guidelines for offences involving dishonesty. Although the court inadvertently cited section 283(4) as it read before its amendment in 2010, the comments cannot be faulted.

⁸³ *Rep v Mussa* Criminal Appeal No 43 of 2009 (hereafter *Mussa*).

⁸⁴ *Mussa v Rep* Criminal Appeal No 2 of 2011.

⁸⁵ *Mussa v Rep* Criminal Appeal No 2 of 2011, 8.

to present mitigating evidence during sentencing and that courts must retain sentencing discretion.

It can hardly be said that these principles are only applicable to the mandatory imposition of the death penalty. Indeed, in striking down the mandatory death sentence for murder in Kenya, the Supreme Court of Appeal doubted if different arguments could be sustained in respect of mandatory sentences for other capital offences.⁸⁶ In Uganda, the court struck down all mandatory death sentences.⁸⁷ The decision in *Mussa* indicates a wholly retributive and deterrent approach to sentencing which is a setback to the progressive jurisprudence embodied in *Kafantayeni*. The sentencing scale for theft by public servant was finally abandoned in 2011 only to be replaced with a general minimum sentence of two years imprisonment and a maximum of life imprisonment.⁸⁸ In the light of *Kafantayeni*, not even the mandatory death penalty for treason can pass constitutional muster.⁸⁹

Kafantayeni is also significant in as far as theories of punishment are concerned. As explained in chapter two, retribution emphasises punishment as just deserts while

⁸⁶ See *Mutiso v R* Criminal Appeal 17 of 2008 (30 July 2010) (Kenya Court of Appeal). See also *Gichane v R* Criminal Appeal No 277 of 2007 (abolishing the mandatory death penalty for attempted robbery with violence in Kenya).

⁸⁷ See *Attorney-General v Kigula* [2009] UGSC 6 (Constitutional Appeal No 6 of 2003).

⁸⁸ See section 283(4) of the Penal Code as amended by Penal Code Amendment Act 1 of 2011. This amendment had already been passed by the time the MSCA made its ruling. It is unclear why the court did not take cognisance of this fact. The old section 283(4) was also applied in the 2013 case of *Rep v Isaac Moyo and 10 Others* Criminal Case No 2 of 2011, 6-7 where a series of 14 year sentences were imposed. The new penal provision is more punitive than its predecessor because it makes no provision for departure in any circumstances. The minimum sentence of two years is applicable without exception in respect of petty amounts of money stolen or full restitution.

⁸⁹ Cf United Nations Human Rights Committee (2014) para 19.

deterrence focusses on how punishment acts as a deterrent to future criminality.⁹⁰ It was pointed out in that chapter that one of the major problems with both retribution and deterrence is that these theories do not consider social and other factors that influence criminal behaviour.⁹¹ Further, the chapter noted that deterrence is the main justification for mandatory sentences.⁹² Indeed, as stated in chapter four, the main justification for the mandatory death penalty in Malawi was retribution and deterrence.⁹³ It can be observed then that by striking down the mandatory death penalty and highlighting the importance of proportionality in sentencing, *Kafantayeni* moves away from a wholly retributive or deterrent justification for punishment.

Lastly, *Kafantayeni* is a crucial step towards the abolition of the death penalty in Malawi. Between 1995 and 2007, all death sentences were imposed as a result of their mandatory imposition in murder cases. *Kafantayeni* was the only basis for not imposing mandatory sentences for murder between 2007 and 2011. After *Kafantayeni*, the High Court has only imposed one death sentence.⁹⁴ This indicates that courts have been reluctant to impose death sentences for any of the other capital crimes. In some cases, judges have expressed their opposition to the death penalty and rejected it altogether on the basis that it is a cruel, inhuman and degrading punishment.⁹⁵ In *Rep v Sukali and another*,⁹⁶ Mwase J held that death would not be appropriate even where the murder ‘was the most heinous, barbaric, brutal, cruel act that [went] against the civility of mankind ... To repay

⁹⁰ See sections 2.1 and 3.3 of chapter two.

⁹¹ See section 2.2 and 3.3.2 of chapter two.

⁹² See section 3.3.2 of chapter two.

⁹³ See section 2.2.1 of chapter four.

⁹⁴ The MSCA has upheld 13 death sentences imposed under the mandatory death penalty regime: see The Advocates for Human Rights and World Coalition against the Death Penalty (2014) para 13

⁹⁵ See for instance *Rep v Sukali and another* Criminal Appeal No 21 of 2011.

⁹⁶ *Rep v Sukali and another* Criminal Appeal No 21 of 2011.

life for life would mean two lives lost. Death as it were is cruel, degrading and inhuman punishment'.⁹⁷

Kafantayeni entitled over 180 prisoners to resentencing hearings. Research indicates that most of the prisoners on death row have spent over 15 years in prison and their cases have potentially mitigating factors such as provocation, diminished capacity, capacity to reform and lack of criminal records which may tilt their sentences against the death penalty.⁹⁸ However, there have been unreasonable delays in the resentencing process. Over seven years later, five of the petitioners in *Kafantayeni* have not been resentenced.⁹⁹ It was not until February 2014 that the Malawi Human Rights Commission (MHRC) in conjunction with the Directorate of Public Prosecutions and Legal Aid Bureau embarked on a project to commence resentencing hearings.¹⁰⁰ As of September 2014, only one person had been granted a resentencing hearing by the High Court while the MSCA had upheld 13 of the 18 death sentences it has reviewed on appeal.¹⁰¹

Another issue relates to the position of the 169 prisoners whose death sentences had already been commuted to life at the time *Kafantayeni* was decided. These prisoners are also entitled to resentencing hearings because the commutations were based on an unconstitutionally imposed death sentence.¹⁰² The fall of the mandatory death penalty

⁹⁷ See also *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 6, noting that Namibia has 'justifiably' abolished the death penalty; *Rep v Chenka and others* Criminal Case No 73 of 2008, 51, stating that the proviso to section 16 permitting the death sentence as limitation to the right to life was outlawed in *Kafantayeni* made it 'clear that the right to life is inviolable'!

⁹⁸ Babcock and McLaughlin (2013) 182.

⁹⁹ The Advocates for Human Rights and World Coalition against the Death Penalty (2014) para 13.

¹⁰⁰ United Nations Human Rights Committee (2014) para 15; Malawi Human Rights Commission (2013) 47.

¹⁰¹ The Advocates for Human Rights and World Coalition against the Death Penalty (2014) para 13.

¹⁰² Cf *Obwoke v R* Criminal Appeal No 164 of 2000 (KSC).

has prompted courts to look more closely at the circumstances in which death may be imposed. There have been several cases in which murder has been punished with fixed prison sentences.

2.4 Circumstances justifying the death penalty

2.4.1 Guidance from case law

In practice, the death penalty is only imposed in murder cases.¹⁰³ Since *Kafantayeni*, courts are generally wary of imposing death sentences. As of June 2014, there were 29 offenders (all male) on death row, out of which only one offender has been sentenced to death after *Kafantayeni*.¹⁰⁴ In keeping with the general principle that maximum penalties must only be imposed for the worst instance of a crime,¹⁰⁵ courts have repeatedly stressed that the death penalty must be reserved for the worst cases of murder. For example, *Rep v Malizani*¹⁰⁶ held that death for murder is only justified if an offender ‘fits into the exceptions that come into play when a maximum sentence must be imposed’.¹⁰⁷ According to *Rep v Mulinganiza and another*¹⁰⁸ murder should be punished with a death sentence ‘only in rare, very rare circumstances’ and that the onus is on the prosecution to justify its imposition. The court essentially held that there is a rebuttable

¹⁰³ There have been no treason convictions in Malawi since 1994.

¹⁰⁴ See United Nations Human Rights Committee (2014) para 15. This assertion is only correct if taken to mean cases in which the High Court has actually imposed a death sentence and not to include cases in which the MSCA has upheld death sentences imposed before 2007.

¹⁰⁵ See *Ayami v Rep* [1990] 13 MLR 19; *Chikakuda and others v Rep* [1997] 2 MLR 288 (HC) 293-294; *Rep v Chimeto and others* Confirmation Case No 919 of 1997.

¹⁰⁶ *Rep v Malizani* Criminal Case No 219 of 2010, 5.

¹⁰⁷ See also *Jacob v Rep* MSCA Criminal Appeal No 18 of 2006; *Rep v Matimati* Criminal Case No 18 of 2007; *Ngulube and another v Rep* Criminal Appeal No 35 of 2006 MSCA; *Rep v Masula and others* Criminal Case No 62 of 2008; *Uladi v Rep* MSCA Criminal Appeal No 5 of 2008.

¹⁰⁸ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 4 (hereafter *Mulinganiza*).

presumption in favour of life. This position is impressive because it recognises that an offender remains entitled to the right to life and that there is a presumption against the death penalty. Unfortunately, this standard is not observed in imposing the death penalty, more so since the courts do not often pay attention to the burden of proof during sentencing.

In *Chimenya v Rep*,¹⁰⁹ the MSCA stated that ‘courts will certainly wait for appropriate circumstances before imposing the death penalty’.¹¹⁰ It emphasised that it would be undesirable to have an ‘assemblage of factual particulars’ that will justify the imposition of death because each case must be determined on its own facts and that even in similar cases, the appropriate sentence may differ ‘depending on the situation of the offender, the victim and the community at large’.¹¹¹ The court held that the relevant factors to consider include ‘the manner in which the murder was committed, the means used to commit the offence, the personal circumstance of the victim, the personal circumstances of the accused and what might have motivated in the commission of the crime’.¹¹² Citing with approval the case of *Prasad v State of Uttar Pradesh*,¹¹³ the MSCA held that the death penalty must only be imposed

for special reasons which have direct nexus with the necessity for hanging the murderer by law ... [T]hat one stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing or pathetic the situation, unless the inherent testimony oozing from ... the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or

¹⁰⁹ *Chimenya v Rep* MSCA Criminal Appeal No 8 of 2006 (hereafter *Chimenya*).

¹¹⁰ *Chimenya*, 4.

¹¹¹ *Chimenya*, 4-5.

¹¹² *Chimenya*, 5.

¹¹³ *Prasad v State of Uttar Pradesh* (1979) AIR 916 (SC).

in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a blood thirsty tiger, he is to quit his territorial tenancy.¹¹⁴

This provides authority for the principle that the gravity of a murder cannot in itself justify a death sentence. In addition, the possibility of reform, and the adequacy of a fixed sentence and life imprisonment must all seriously be considered before death is imposed. Ultimately, the passage indicates that community protection should be the justification for a death sentence; that is, death would be justified if the offender is ‘an irredeemable murderer’ who cannot ever safely be released into the community or kept in prison. This test establishes a high standard for the imposition of the death penalty because community protection can be ensured through life imprisonment.¹¹⁵ However, courts are yet to establish a test for determining the capacity for reform¹¹⁶ and the test established in *Chimanya* is not adhered to in sentencing.

Indeed, even in *Chimanya*, the MSCA did not apply its own test. In casu, there were frequent illnesses and deaths in the accused’s family. The accused then consulted about 15 witchdoctors who all informed him that the deceased, his elderly aunt, was responsible for all the illnesses and deaths. He then bought a gun and shot the deceased. The court found that the accused ‘*probably* was motivated by his *wild* belief that the lady was a witch’ but that ‘this belief was not available to [him] as a mitigating factor’.¹¹⁷ It concluded that the accused deserved the death penalty because he had planned his crime and had killed an unsuspecting old woman ‘in cold blood and in the most brutal

¹¹⁴ *Chimanya*, 4.

¹¹⁵ See *Trimingham v The Queen* Privy Council Appeal No 67 of 2007, para 23, holding that execution is not necessary to remove an offender from society since life imprisonment can achieve the same objective.

¹¹⁶ See section 3.4.3 below.

¹¹⁷ *Chimanya*, 5. Emphasis added.

circumstances'.¹¹⁸ This finding does not accord with the test explained earlier. For instance, the accused could hardly be described as 'an irredeemable murderer' such that society would not be protected from him through imprisonment. The accused was a first offender and his character was not questioned. These circumstances should have militated against a death sentence because they point to the prospect of rehabilitation.¹¹⁹ Moreover, the murder was clearly motivated by his belief in witchcraft, a factor which indicated that the offender was not a hardened criminal.

Courts have at times proffered reasons for the death penalty that strongly suggest an 'an eye for an eye' approach. For instance, the MSCA in *Khorima v Rep*¹²⁰ upheld the death sentence because the appellant and his accomplice 'had assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was inexcusable'.¹²¹ There was no mention of the circumstances of the accused. In *Chinkango v Rep*,¹²² the court also upheld the death penalty on the basis that the accused 'appears to be a violent and evil person' and therefore did not deserve leniency.¹²³

In general, murder has been punished with death where the killing was brutal, gruesome, or committed in cold blood;¹²⁴ unprovoked;¹²⁵ for outrageous motives such as the

¹¹⁸ *Chimenya*, 5.

¹¹⁹ See *Rep v Glasten* Criminal Case No 104 of 2008, 6.

¹²⁰ *Khorima v Rep* MSCA Criminal Appeal No 6 of 2007, 3.

¹²¹ *Khorima v Rep* MSCA Criminal Appeal No 6 of 2007, 3.

¹²² *Chinkango v Rep* MSCA Criminal Appeal No 7 of 2009.

¹²³ *Chinkango v Rep* MSCA Criminal Appeal No 7 of 2009, 7.

¹²⁴ *Jacob v Rep* Criminal Appeal No 16 of 2006 (MSCA); *Manda v Rep* MSCA Criminal Appeal No 15 of 2007 (MSCA); *Mawondo v Rep* MSCA Criminal Case No 8 of 2008.

¹²⁵ *Khwalala v Rep* Criminal Appeal No 3 of 2008.

removal of body parts;¹²⁶ committed during or to facilitate a felony.¹²⁷ In *Khwalala v Rep*,¹²⁸ the accused, described as a ‘hardened criminal’,¹²⁹ was sentenced to death for murdering a fellow prisoner while serving a sentence of death.

In other cases, however, courts have demonstrated a mitigated approach to death sentences where imprisonment has been imposed even though the murder was committed in a gruesome and brutal manner. In *Rep v Matimati*,¹³⁰ the defendants were sentenced to life imprisonment for the murder of two victims who had been hacked to death and one of the bodies burnt. Similarly, in *Rep v Masula and others*,¹³¹ the court refrained from imposing the death penalty although the murders were planned, ‘unprovoked’, ‘senseless’, and committed in concert and in the course of committing felonies. Similarly, in *State v Silumbu and others*,¹³² the accused killed the deceased and sold his skin for witchcraft rituals. He was sentenced to 30 years for the murder. Imprisonment has also been imposed where the murder was committed during an argument.

Courts have also found the absence of a dangerous weapon as a mitigating factor.¹³³ In *Rep v Tembo*,¹³⁴ 15 years were imposed for the murder of the deceased using a panga

¹²⁶ *Thife v Rep* MSCA Criminal appeal Case No 19 of 2007.

¹²⁷ *Alumeta v Rep* MSCA Criminal Appeal Case No 46 of 2002; *Mawondo v Rep* MSCA Criminal Case No 8 of 2008.

¹²⁸ *Khwalala v Rep* Criminal Appeal No 3 of 2008.

¹²⁹ *Khwalala v Rep* Criminal Appeal No 3 of 2008, 3.

¹³⁰ *Rep v Matimati* Criminal Case No 18 of 2007.

¹³¹ *Rep v Masula and others* Criminal Case No 65 of 2008.

¹³² See for instance *State v Silumbu and others* Criminal Case No 39 of 2009.

¹³³ See for instance *Uladi v Rep* MSCA Criminal Appeal No 5 of 2008.

¹³⁴ See for instance *Rep v Tembo* Criminal Case No 12 of 2008.

knife during an argument. In *State v Namwayi*,¹³⁵ the accused was sentenced to 12 years for the murder of her husband using a sickle following family disputes. In *Ngulube and another v Rep*,¹³⁶ the MSCA set aside the death penalty and imposed 20 years for murder. The court found it mitigating that the killing occurred after a quarrel influenced by alcohol; the weapon used was not a dangerous one; the accused no criminal record and there was no evidence of bad character; there was no clear motive; and the severity of the injuries could not be determined.¹³⁷ In *Rep v Mwenendeka*,¹³⁸ the court imposed 15 years for the murder of the deceased who had died as a result of a concoction made and administered by the accused as part of a witch-hunting exercise.

Other grounds that have been found mitigating include poor health,¹³⁹ youth¹⁴⁰ and the lack of a criminal record.¹⁴¹ In *Rep v Malizani*,¹⁴² a 35 year old first offender was sentenced to 27 years for murder. In *Namizinga and another v Rep*,¹⁴³ the accused was sentenced to 25 years for the murder of a security guard whom he gagged and tied him up in order to facilitate a burglary. The MSCA noted that although the offence had been committed in concert and in the course of committing a felony, the offender was a young (22 years) and first offender who had pleaded guilty to the offence. Another mitigating factor was that the accused were ‘heedless of the possibility of actually killing

¹³⁵ *State v Namwayi* Criminal Case No 12 of 2009.

¹³⁶ *Ngulube and another v Rep* MSCA Criminal Appeal No 35 of 2006.

¹³⁷ The deceased died two days after the incident.

¹³⁸ *Rep v Mwenendeka* Criminal Case Number 17 of 2009.

¹³⁹ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010.

¹⁴⁰ *Namizinga and another v Rep* MSCA Criminal Appeal No 18 of 2007.

¹⁴¹ *Ngulube and another v Rep* Criminal Appeal No 35 of 2006; *Namboya v Rep* MSCA Criminal Appeal No 14 of 2005; *Rep v Ganizani and another* Criminal Appeal No 261 of 2010.

¹⁴² *Rep v Malizani* Criminal Case No 219 of 2010.

¹⁴³ *Namizinga and another v Rep* MSCA Criminal Appeal No 18 of 2007.

the deceased' as 'their minds were focussed on the burglary'.¹⁴⁴ The court found that these 'circumstances could not be described as the worst and deserving of the maximum penalty'.¹⁴⁵ Accordingly, the death sentence was substituted with a 25 year sentence.¹⁴⁶

The emotional state of an offender may also be a favourable factor. In *Namboya v Rep*,¹⁴⁷ death was reduced to 15 years. The appellant was frustrated with the harassment she was suffering at the hands of her ex-husband and father of one of her children. The ex-husband often came to the appellant's home and took away property. One night, he took away almost all her property. The appellant, convinced that she was being harassed because of the child she had with her ex-husband, then resolved to kill the child by administering an insecticide. Writing on behalf of the court, Nyirenda JA strongly condemned the appellant's actions then remarked:

However, we do not [entirely] ignore the oppression that the poor woman was going through ... [T]he appellant is a first offender and she is a fairly young lady. She was only 28 years old at the time she committed the offence.¹⁴⁸

Other cases have advocated for a more stringent approach to circumstances justifying the death penalty. In *Mulinganiza*, Kamwambe J held that in murder cases, 'courts should be more inclined to impose a life sentence ... than [a] death sentence unless the state

¹⁴⁴ *Namizinga and another v Rep* MSCA Criminal Appeal No 18 of 2007, 3. The remarks of the court regarding the intention of the accused suggest that the proper offence should have been that of manslaughter and not murder.

¹⁴⁵ *Namizinga and another v Rep* MSCA Criminal Appeal No 18 of 2007.

¹⁴⁶ See *Namizinga and another v Rep* MSCA Criminal Appeal No 18 of 2007.

¹⁴⁷ *Namboya v Rep* MSCA Criminal Appeal No 14 of 2005.

¹⁴⁸ *Namboya v Rep* MSCA Criminal Appeal No 14 of 2005 (SCA) 4.

convinces the court otherwise'.¹⁴⁹ This position partly reflects the settled sentencing practice that where there are two alternative penalties, a court must impose the lighter sentence unless there are reasons for the heavier one to be imposed. However, in the absence of proper sentencing guidelines as to when death is a justifiable sentence, it is quite vague to restrict death sentences to cases where the state has convinced the court that a case calls for the death penalty. The real question is: what circumstances should convince a court that an offender deserves the death penalty? On another note, *Mulinganiza* reflects a purely retributive approach to sentencing which, as discussed in chapter two, is undesirable. Further, contrary to section 210 of the Penal Code, it suggests a mandatory life sentence for murder which would be unconstitutional. *Mulinganiza* is a classic example of the problems with prescribing death and life as alternative sentences.

2.4.2 The problem with alternative death and life sentences

It is important to stress that, with the exception of treason, all other capital offences are punishable with '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 non-capital crime; it simply provides for death or life imprisonment in the alternative. 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

¹⁴⁹ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 5. Cf *Rep v Sukali and another* Criminal Appeal No 21 of 2011: 'The appropriate sentence for the worst form of murder would be a life sentence with possibility of ... release'.

as attracting a maximum of life imprisonment. Robbery, for instance, attracts 14 years.¹⁵⁰

However, it will attract ‘death or imprisonment for life’

[i]f 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.¹⁵¹

While this provision specifies the circumstances in which robbery attracts 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 genocide¹⁵² and all other capital crimes under the Penal Code. The DFA does not fare any better. For instance, failure to suppress mutiny is punishable with life imprisonment¹⁵³ but attracts ‘death or life imprisonment’ if it ‘was committed with intent to assist the enemy’.¹⁵⁴ Similarly, communication with the enemy is punishable with life imprisonment if committed ‘without authority’¹⁵⁵ but where ‘it is committed ‘with intent to assist the enemy’, an offender is liable to ‘death or life’.¹⁵⁶

The lack of clarification in the penal provisions for capital crimes can be contrasted with several provisions which provide different penalties for the same offence depending on the circumstances in which the offence is committed. Theft provides a good example. It

¹⁵⁰ Section 301(1) of the Penal Code.

¹⁵¹ Section 301(2) of the Penal Code.

¹⁵² Genocide attracts 21 years but is punishable with death or life imprisonment where it the killing of any person has occurred: see sections 217A(2)(a) and (b) of the Penal Code.

¹⁵³ Section 41(b) of the DFA.

¹⁵⁴ Section 41(a) of the DFA.

¹⁵⁵ Section 34(2) of the DFA.

¹⁵⁶ Section 34(1) of the DFA.

is generally punishable with five years' imprisonment¹⁵⁷ but the law specifies aggravating circumstances in which theft attracts 10 or 14 years.¹⁵⁸ Further, theft by public servant is punishable with a mandatory minimum term of two years and a maximum of life imprisonment.¹⁵⁹ Similarly, sexual activity with a child is punishable with 14 years¹⁶⁰ but attracts 21 years when committed in 'circumstances of aggravation' which are outlined.¹⁶¹

The prescription of 'death or life' as a maximum alternative sentences is regrettable for several reasons. Murder, for example, is routinely regarded as a capital offence. Courts are yet to attach any significance to the fact that murder carries a maximum of both life and death. This shows that sentences imposed are rarely, if ever, determined from the view that life imprisonment is the maximum sentence. It is not surprising then that the amendment of section 210 has had no practical impact on sentencing in murder cases, more so since it was made after the mandatory death penalty was outlawed in *Kafantayeni*. 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'.¹⁶² This misses the fact that life

¹⁵⁷ Section 278 of the Penal Code.

¹⁵⁸ Theft carries 10 years if the thing stolen is a will, postal matter, vessel, vehicle, aircraft or draught: see sections 279, 280, 282(h) and (i) of the Penal Code. A similar punishment is applicable for theft of a thing in transit, or from the person of another, a dwelling-house, a public office, or a vessel: see sections 282(a)(b)(c)(f) and (e). Further, theft of livestock is punishable with 14 years under section 281.

¹⁵⁹ Section 283(5) of the Penal Code.

¹⁶⁰ Section 160B(1) of the Penal Code.

¹⁶¹ See sections 160B(2) and (3) of the Penal Code.

¹⁶² *Rep v Mulinganiya and another* Criminal Case No 306 of 2010, 5. Emphasis supplied.

imprisonment is specifically prescribed for murder. It may also indicate that courts believe death sentences are only justifiable in murder cases. Indeed, courts stress the availability of the death penalty only in murder cases yet overlook it for rape, burglary and robbery.

Second, the lack of clarification 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*,¹⁶³ while *Rep v Hassan*¹⁶⁴ cited death as the maximum. In *Nyangu v Rep*,¹⁶⁵ robbery was said to carry a maximum of life imprisonment, completely ignoring death as a prescribed penalty. According to *Rep v Chinguwo*,¹⁶⁶ ‘[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*¹⁶⁷ where the High Court asserted: ‘It is trite law that rape is a capital offence which carries a maximum sentence of death or life’!¹⁶⁸

These pronouncements are significant because the maximum penalty obviously determines the punishment imposed by a court; the higher the maximum penalty, the

¹⁶³ *Rep v William* Confirmation Case No 195 of 2004. See also *Rep v Sarif* Confirmation Case No 109 of 2012; *Rep v Mussa* Criminal Appeal No 44 of 1995; *Rep v Misomali* Confirmation Case No 738 of 2000; *R v Namasita and another* Confirmation Case No. 309 of 2000; *Rep v Nangviya* Confirmation Case No 608 of 1997; *Rep v Mawaya and others* Confirmation Case No 794 of 2000 (rape said to carry maximum sentence of ‘death or life imprisonment’).

¹⁶⁴ *Rep v Hassan* Criminal Appeal No 102 of 2005; *Rep v Nkhoma* Confirmation Case No 554 of 1996.

¹⁶⁵ *Nyangu v Rep* Criminal Appeal No 173 of 2005.

¹⁶⁶ *Rep v Chinguwo* Criminal Case No 53 of 2008.

¹⁶⁷ See in *Rep v Mawaya and others* Confirmation Case No 794 of 2000.

¹⁶⁸ See in *Rep v Mawaya and others* Confirmation Case No 794 of 2000.

higher the range of sentences a court may impose.¹⁶⁹ A sentence based on life as a maximum sentence will likely to result in a lesser sentence than one premised on a maximum of death.¹⁷⁰ On the one hand, recognising ‘death or life’ as a maximum sentence is inherently problematic because it cannot be the case that both death and life imprisonment are maximum sentences for the same offence without qualification. As ultimate penalties, both life and death must be reserved for the worst instance of murder, rape and other capital crimes. This principle cannot be applied if both death and life are regarded as maximum penalties without further elaboration. The emphasis on death as the maximum penalty for murder gives the impression that the imposition of life imprisonment is seen as a lenient penalty imposed in lieu of the death penalty when in fact life imprisonment is a maximum penalty in its own right. On the other hand, recognising death as the maximum ignores the specific mention of life imprisonment as a competent penalty. The same applies to the recognition of life imprisonment as the maximum. Fixed prison sentences would be passed more easily where life imprisonment is regarded as a maximum unlike where death is considered to be the ultimate penalty. Indeed, manslaughter is routinely punished with fixed prison sentences because it attracts a maximum of life.

It cannot be doubted that a life sentence or indeed any other prison term is a competent penalty where a discretionary death sentence is prescribed. It is therefore peculiar that despite this fact, the law specifically mentions life imprisonment. Courts seem unsure of and are yet to grapple with the rationale for the provision for death and life as

¹⁶⁹ *Rep v Iddi* Confirmation Case No 48 of 1998.

¹⁷⁰ See for instance, *Rep v Jordan* Criminal Case No 74 of 2008, citing *Rep v Matimati* Criminal Case No 18 of 2007 (‘a capital offence like murder should not be punished like manslaughter which carries a maximum of life imprisonment’).

alternative sentences for the same offence. In the context of rape, Kamwambe J has remarked that the law refers to both death and life ultimate ‘for unknown reasons’.¹⁷¹ This lack of appreciation is also evidenced in that courts have not established any guidelines for the punishment of offences that attract both life and death. Such guidelines exist in cases where a fine and/or imprisonment are provided for the same offence. A fine can always be imposed in substitution of imprisonment in accordance with section 27(3) of the Penal Code.¹⁷² Section 29(1)(b) of the Penal Code states that a court has discretion to impose either penalty where the law provides for both imprisonment and a fine.¹⁷³ Courts have made several pronouncements on how this discretion must be exercised. It is settled sentencing practice that, as a general rule, where both a fine and/or imprisonment are prescribed, an offender is entitled to a fine unless the circumstances dictate that imprisonment would be the most appropriate penalty.¹⁷⁴ The duty to consider a fine seems to arise only where a fine is specifically mentioned in the penal provision itself; a court cannot easily be faulted for not imposing a fine where only imprisonment is provided. The general principle that emerges is that where a penal provision provides for more than one penalty, a court must impose the lesser penalty unless the heavier penalty is justified.

From this analogy, it can be said that in the context of death and life sentences, a court cannot simply decide whether to impose life or death. Such an approach would not

¹⁷¹ *Rep v Muliganiza and another* Criminal Case No 306 of 2010, 5.

¹⁷² Section 27(3) of the Penal Code.

¹⁷³ See *Rep v Pitasoni* Confirmation Case No 1143 of 2001; *Rep v Mdala and another* Confirmation Case No 403 of 2000; *R v Zagna* [1923-1960] 1 ALR Mal 415; *Rep v Jongwe* Confirmation Case No 1211 of 1995; *Rep v Akimu* Revision Case No 9 of 2003, where it was held that where the penalty is ‘fine and imprisonment’, it must be read disjunctively as ‘fine or imprisonment’.

¹⁷⁴ Section 27(3) of the Penal Code.

reflect the specific mention of life imprisonment. Life imprisonment must be carefully considered before the death penalty is imposed. This does not mean that a court must simply ask, as a starting point, whether life imprisonment is an appropriate penalty. Rather, as a starting point, life imprisonment must be deemed as the maximum sentence such that a court must only resort to death if this maximum is found wanting. This is where the approach to the 'death or life' provisions becomes complicated: how can a maximum sentence be considered inadequate? If, as a maximum penalty, life imprisonment would be appropriate only for the worst instance of an offence, justifying recourse to the death penalty would be an uphill battle. After all, the worst offender is yet to come before the courts.¹⁷⁵

Therefore, in view of the wording of the penal provisions for capital offences in Malawi, it is insufficient for courts to simply say that death must be reserved for the worst instance of murder. This begs the question: at what point is life imprisonment rendered inappropriate? Since life imprisonment is as much a maximum penalty for murder as is a death sentence, neither penalty should be imposed unless a court is convinced that the facts of the case render it a worst instance of murder. This is particularly important in light of the real possibility, deduced from practice, that a life sentence effectively means spending the rest of one's life in prison. In the result, the death penalty must only be imposed if life imprisonment is not a suitable punishment.¹⁷⁶ In turn, life imprisonment may only be imposed if all other options including a shorter term are not appropriate. This should make the death penalty an extremely rare sentence. This position is in

¹⁷⁵ In exercising restraint on the use of maximum sentences, courts often state that the worst offence is yet to occur: see, for instance, *Rep v Chimeto and others* [1997] 1 MLR 90 (HC) 92.

¹⁷⁶ It is assumed here that a death sentence is a more severe sentence than life. However, there are suggestions that life imprisonment is a harsher penalty than death especially where the prison conditions are intolerable.

tandem with the principle of legality which requires, *inter alia*, that, as far as possible, penal provisions must be construed restrictively in favour of an accused.

Ultimately, unlike penalties such as fixed imprisonment and fines, it is undesirable to provide for life imprisonment and death as alternative maximum sentences for a crime. This is because life and death are severe forms of punishment and yet the difference between them is a matter of life and death. The options that come with a discretionary life sentence serve to show that there is big difference between life and death sentences. Indeed, life imprisonment may be substituted with a fixed term, a fine, compensation and other non-custodial sentences and orders that may be imposed in substitution of imprisonment.¹⁷⁷ Moreover, though unlikely in practice, life imprisonment may be suspended.¹⁷⁸ None of these options are available for death sentences.

In the absence of statutory or judicial guidance as to when an offence is a capital or non-capital crime attracting life imprisonment, section 210 and other similar provisions¹⁷⁹ fail to ensure equal treatment of offenders during sentencing. This is because a court may approach the sentencing process regarding the same crime as a capital offence or one that carries a life sentence. The provisions are fraught with uncertainty and inconsistent with the principle of legality and, by implication, violate the right to a fair trial. An offender who is charged with offences like murder and rape is left guessing as to whether the crime he has committed carries death or life.

¹⁷⁷ See sections 27(1) and (2) of the Penal Code; sections 4.1 and 4.2 below.

¹⁷⁸ See sections 339 and 340 of the CPEC. Suspended sentences are explained in section 3.2 below.

¹⁷⁹ See sections 38, 133, 301(2), 309(1) and 309(2) of the Penal Code which provide for similar penalties for treason, rape, armed robbery, housebreaking and burglary respectively.

3 IMPRISONMENT

3.1 Introduction

The aim of this section is to provide an overview of the forms of imprisonment in Malawi. Apart from immediate fixed sentences, there are four forms of imprisonment; namely, suspended sentences, periodic imprisonment, preventive imprisonment, and life imprisonment. This section will focus more on preventive and life sentences and the circumstances in which they are imposed because of the issues that they raise.

It is notable that section 140 of the CCPJA prohibits the imprisonment of children for any offence. Section 2 of the Act defines a child as a person below the age of 16 years. This definition was held unconstitutional in *State and others ex parte Kashuga*¹⁸⁰ on the basis that it is inconsistent with section 42(2)(g) of the Constitution which provides special protection for persons below the age of 18 in the criminal justice system.¹⁸¹ Under the CCPJA, the only custodial sanction applicable to child offenders is a reformatory order¹⁸² which is reserved for serious crimes as stipulated in Schedule Six of the CCPJA.¹⁸³ Section 140, and indeed the whole scheme of the CCPJA, portrays a clear

¹⁸⁰ *State and others ex parte Kashuga* Miscellaneous Application No 129 of 2012.

¹⁸¹ *State and others ex parte Kashuga* Miscellaneous Application No 129 of 2012, 15-16. In casu, the applicant, who was 16 years at the material time, was sentenced to two years for burglary by a second grade magistrate's court. This was apparently based on the fact that the CCPJA defines a child as a person below the age of 16 years and therefore the applicant was treated as an adult. The applicant argued, among other things, that since section 42(2)(g) of the Constitution defines a child as a person below the age of 18 years, the definition of a child under the CCPJA was unconstitutional and that he should have been treated as a child. As such he should have benefitted from section 140 of the CCPJA which prohibits the imprisonment of a child for any offence.

¹⁸² In terms of section 146(1)(h) of the CCPJA.

¹⁸³ The list includes punishable by death, attempting to murder, attempting to murder by convict, accessory after the fact to murder, written threats to murder, conspiracy to murder, aiding suicide, disabling in order to commit felony or misdemeanour, stupefying in order to commit felony or

shift from a punitive to a more rehabilitative and restorative approach in the punishment of children.

3.2 Suspended and periodic imprisonment

Imprisonment may be suspended on conditions for up to three years¹⁸⁴ or two years in the case of Local Courts.¹⁸⁵ Suspension was not applicable to mandatory sentences until 2010.¹⁸⁶ The aim of suspended sentences is rehabilitation and deterrence. They give an offender ‘a chance to reform and become a good member of community’¹⁸⁷ but ‘with a real threat that if they commit another offence during the period, the suspended sentence will be revived’.¹⁸⁸ Suspended sentences are particularly encouraged for first offenders since they are deemed as ‘disposed to law abiding’.¹⁸⁹ This presupposes that first offenders have a higher chance of rehabilitation than repeat offenders. Section 340(1) of the CPEC requires that in cases of first offenders, imprisonment must be suspended ‘unless it appears to the court, on good grounds ... that there is no other appropriate means of dealing with him’. Further, immediate imprisonment of first

misdemeanour, acts intended to cause grievous harm or prevent arrest, preventing escape from wreck, intentionally endangering safety of persons travelling by railway, attempting to injure by explosive substance, maliciously administering poison with intent to harm, infanticide and manslaughter.

¹⁸⁴ Section 339(1) of the CPEC. Suspension may relate to the whole or part of the sentence: see section 26 of the Local Courts Act 9 of 2011. Cf *Rep v Mbene* [1973-1975] 7 ALR Mal 124 (HC); *Rep v Wasembe* [1971-1972] 6 ALR Mal 131 (HC).

¹⁸⁵ Section 26 of the Local Courts Act.

¹⁸⁶ See section 339(1) of the CPEC as amended by Act 9 of 1999; *Rep v Kambalame* Criminal case No 108 of 2002, 3. While this general restriction was removed in 2010, Parliament rejected proposals to remove this restriction with respect to community service: see *CPEC Review Report* (2003) 163; section 243(a)(ii) of the 2004 CPEC Bill. Surprisingly, similar recommendations regarding section 340 of the CPEC and other sentences and orders were adopted: see for instance section 337(1) and 338(1) of the CPEC.

¹⁸⁷ *Kalambo v Rep* Criminal Appeal No 199 of 1975.

¹⁸⁸ *Rep v Matindi* Confirmation Case No 1699 of 1976. See also *Rep v Manyamba* [1997] 2 MLR 39 (HC).

¹⁸⁹ *Rep v Namichire* Confirmation Case No 803 of 2000, 7.

offenders is subject to automatic review under section 15(1) of the CPEC. Although there is no limit on the length of a sentence which can be suspended, practice shows that only short sentences are suspended. Consequently, suspended sentences are usually ordered in minor offences committed in mitigating circumstances. However, courts have also suspended sentences for serious offences on humanitarian considerations such as the health or domestic obligations of an offender in the case of primary caregivers.¹⁹⁰

The second form of imprisonment is periodic imprisonment ('weekend or public holiday imprisonment'), a new form of imprisonment introduced in 2011. Section 28A(1) of the Penal Code provides that imprisonment may be served intermittently on weekends or public holidays, with an offender serving at least 24 hours a week. The following conditions must be met before an order is made: the period of imprisonment may not exceed three months; the accused must be in employment at the time of the offence or conviction; he would continue to be in such employment but for the conviction and sentence; and discontinuance from such employment would cause hardship to his dependants.¹⁹¹ In addition, the accused must consent to serve imprisonment intermittently and there must be 'satisfactory arrangements' in prison for the sentence to be so served.¹⁹²

Periodic imprisonment reflects a rehabilitative orientation to punishment since it minimises the disruption to an offender's life by allowing him to remain in society for the greater part. This also means that an offender is not secluded from society and

¹⁹⁰ See for instance *Rep v Moyo and 10 Others* Criminal Case No 2 of 2011 (suspending a series of 14 year sentences). *Rep v Keke* Confirmation Case No 404 of 2010 suggested that courts must seriously consider suspending sentences for offenders from 61 years.

¹⁹¹ Section 28A(2) of the Penal Code.

¹⁹² Section 28A(1)(b) of the Penal Code.

therefore his social reintegration into society is likely to be successful. It is too early to gauge the success of periodic imprisonment.¹⁹³ However, since it may only be imposed for sentences of up to three months, it is reasonable to expect that periodic imprisonment will be used for minor offences. It is unlikely to be used for serious offences where an offender is considered to pose a threat to society or where incapacitation is deemed necessary. Three months is a very low threshold which does not typically warrant immediate imprisonment. It is likely that periodic imprisonment will be imposed in cases where the offence is minor but a court considers it inappropriate to impose a non-custodial sanction or suspended sentence. It must be emphasised however, that periodic imprisonment must only be imposed if a court is satisfied that immediate imprisonment is an appropriate sentence because continuous imprisonment can be served in default.¹⁹⁴

3.3 Preventive imprisonment

As its name suggests, preventive imprisonment is aimed at preventing an offender from committing further crimes, thereby protecting the community. According to section 11 of the CPEC,¹⁹⁵ preventive imprisonment may only be imposed if: a) the offender is above 21 years old; b) is convicted by the High Court, or by a court of a resident or first grade magistrate of an offence punishable with imprisonment for a term of five years or more; c) has been convicted on at least three previous occasions, since he attained the age of eighteen years, of offences punishable with imprisonment for a term of five years or more; d) has been sentenced on at least two previous occasions to imprisonment,

¹⁹³ So far, there appears to be no case in which periodic imprisonment has been imposed.

¹⁹⁴ Section 28A(5) of the Penal Code.

¹⁹⁵ This provision has its roots in section 21 of the Prevention of Crime Act of England 1908 which provided for preventive detention.

other than a [suspended] sentence which has not taken effect; and e) the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time.

In calculating the length of imprisonment, a court must consider two elements. The first is the punitive element of the sentence which is the sentence that would have been imposed if ordinary imprisonment was applicable. This element must not exceed the maximum punishment provided for the offence. The second element is the period necessary for the protection of the public.¹⁹⁶ It is clear from section 11 that a preventive sentence must be between five and 14 years' imprisonment. Courts are encouraged to impose the deserved sentence under the relevant provision rather than invoke section 11 where a longer sentence is impossible under the former. Consequently, section 11 should not be invoked for offences attracting up to five years unless the second element demands higher than maximum.¹⁹⁷ Since the maximum sentence is 14 years, preventive imprisonment entitles a court to punish an offender three times the least maximum.

A preventive sentence must only be imposed in the public interest for community protection¹⁹⁸ in circumstances where it is the only sentence that can achieve this purpose.¹⁹⁹ This inherently assumes that an offender is likely to commit further offences

¹⁹⁶ See *Rep v Daliyani* [1966-1968] 4 ALR Mal 370 (HC).

¹⁹⁷ *Manda v Rep (1)* [1993] 16(2) MLR 579 (HC); *Mlenga v Rep* [1973-1975] 7 MLR 223 (HC). Section 11 only entitles a court to impose one sentence even where there are multiple convictions: see *Rep v Mrekebe* [1973-1975] 7 ALR Mal 397 (HC); *Unyolo v Rep* [1984-1986] 11 ALR Mal 187 (HC).

¹⁹⁸ *Guzza v R* [1961-1963] 2 ALR Mal 136 (HC); *Rep v Daliyani* [1966-1968] 4 ALR Mal 370 (HC); *Crispin v R* [1961-1963] 2 ALR Mal 340 (HC); *R v Sinya* [1961-1963] 2 ALR Mal 223 (HC); *William v R* [1961-1963] 2 ALR Mal 104 (HC).

¹⁹⁹ *Rep v Edison* Confirmation Case No 3055 of 1975.

and that his detention is necessary to incapacitate him. Even where all the conditions are met, imposition of preventive imprisonment remains within the discretion of a court.²⁰⁰

Not much has changed with regard to preventive imprisonment since 1994. The only changes are that the two-year cut line for previous imprisonment has been raised to five years; the minimum age has been raised from 16 to 18 years;²⁰¹ and inactivated suspended sentences no longer count as previous sentences. According to case law reviewed during this research, it appears that the use of preventive imprisonment has decreased significantly in the constitutional dispensation.²⁰² This could be due to negative judicial attitude to this form of imprisonment. As early as 1961, there was judicial opposition to the harshness of a preventive sentence. It was described as an ‘exceptional’²⁰³ and ‘anomalous’²⁰⁴ sentence in view of its severity. *Rep v Daliyani*²⁰⁵ noted that preventive imprisonment is a unique form of punishment in that an offender serves a sentence that exceeds what is proportional to the crime by an additional period necessary for the protection of the public. Preventive imprisonment has also been criticised as justifying the use of previous convictions as a ground for enhancing a

²⁰⁰ *Guzza v R* [1961-1963] 2 ALR Mal 136 (HC); *Rep v Sokole* [1973-1975] 7 ALR Mal 356 (HC).

²⁰¹ At the time, children below the age of 18 were not liable to conviction (see section 2 of the CYPA). However, section 2 of the CCPJA defines a child as a person below the age of 16. This means that persons between the age of 16 and 18 are treated as adults within the criminal justice system and hence liable to conviction. Nevertheless, with respect to section 11 of the CPEC, persons aged 16 to 18 years are exempted.

²⁰² The author was unable to find any case in which this sentence was imposed after 1994.

²⁰³ *Edson v Rep* [1961-1963] 2 ALR Mal 289 (HC), noting that it can result in an offence punishable with two years being punished with 14 years. At the time the case was decided, preventive imprisonment was applicable for convictions in respect of offences that attracted two years or more: see *Crispin v R* [1961-1963] 2 ALR Mal 340 (HC) 342.

²⁰⁴ *Rep v Daliyani* [1966-1968] 4 ALR Mal 370 (HC) 374.

²⁰⁵ *Rep v Daliyani* [1966-1968] 4 ALR Mal 370 (HC).

sentence. As a result, it comes dangerously close to double punishment.²⁰⁶ Indeed, Cram J warned that preventive sentences could ‘lead to institutionalisation along with the abiding sense of grievance that the punishment is for offences for which punishment has already been served’.²⁰⁷

In the pre-1994 case of *Crispin v R*,²⁰⁸ the High Court held, without much analysis, that preventive sentences were not inconsistent with the 1688 Bill of Rights which prohibited harsh and unusual punishment. In 2003, the Law Commission, also without elaboration, noted that preventive imprisonment is a justifiable limitation on right to personal liberty in accordance with section 44 of the Constitution.²⁰⁹

It can therefore be observed that despite criticism of preventive imprisonment, this form of punishment is justified for its perceived utilitarian benefits of incapacitation and community protection. As noted in chapter two, these are noble goals especially for serious offences. However, as will be shown further below,²¹⁰ preventive sentences raise a number of constitutional issues.

²⁰⁶ See *Crispin v R* [1961-1963] 2 ALR Mal 340 (HC) 342: Preventive sentences duplicate ‘punishment by imprisonment in respect of earlier punishments by imprisonment at the time regarded as adequate by the courts imposing them; *Maikolo v R* [1964–1966] 3 ALR Mal 584 (SCA) 591: ‘Scrupulous care is to be exercised before imposing this exceptional sentence which can lead to institutionalisation along with the abiding sense of grievance that the punishment is for offences for which punishment has already been served’. Noting that it is unreasonable and improper to enhance a sentence merely because of previous convictions and citing with approval Lord Caldecote CJ in *R v Betteridge*, Cram J continued: ‘[I]t is not right to hold over a man’s past offences which have been dealt with by appropriate sentences, as we must assume [that] past offences have been dealt with, and add them up and increase ... the severity of sentence for a later offence. That is dangerously like punishing a man twice for an offence’.

²⁰⁷ *Maikolo v R* [1964–1966] 3 ALR Mal 584 (SCA) 591.

²⁰⁸ *Crispin v R* [1961-1963] 2 ALR Mal 340 (HC) 342-343.

²⁰⁹ See *CPEC Review Report* (2003) 17-18.

²¹⁰ See section 5.2 below.

3.4 Life imprisonment

3.4.1 Introduction

Life imprisonment is the most severe form of imprisonment in Malawi. The aim of this section is to examine the nature of life imprisonment in Malawi, the theories of punishment that inform it and the circumstances in which it is imposed. The section will also look at the changes to life imprisonment after 1994. A major issue with life imprisonment is whether it means a whole life sentence (imprisonment for the rest of an offender's life without the possibility of parole) or imprisonment for a stipulated period after which an offender is eligible for parole. It is therefore apposite to begin with a discussion of the meaning of life imprisonment in Malawi.

3.4.2 The meaning of life imprisonment

Strictly speaking, there is no statutory definition of life imprisonment in Malawi. There are a number of meanings that may be ascribed to it. For instance, section 111 of the Prisons Act requires that every four years, a report must be prepared for prisoners serving a life sentence or a sentence beyond seven years. This may provide authority for the proposition that a life must be reviewed every four years and so carries a tariff of four years.²¹¹ This interpretation may be counter-productive. For example, it may be inconsistent with the principle of proportionality which entails that sentences imposed for more serious offences should be more severe than those imposed for lesser offences. Four years is a very low threshold for life imprisonment which is prescribed for serious offences in light of other sentences prescribed for other offences. This

²¹¹ Section 11(1) reads: 'At the end of every four years' imprisonment of each prisoner undergoing imprisonment for life, or for a period exceeding seven years, the Commissioner shall forward [to the Minister] a report upon such prisoner'.

problem is magnified by the fact that release under section 111 may be unconditional since it is subject to the prerogative of mercy.²¹² In practice, life prisoners are not considered for release every four years.

Judicial comment on the meaning of life imprisonment points to both a determinate and whole life sentence. The former is only to be found in the decisions of Mwaungulu J who has expressed the view that a life sentence is 35 years because imprisonment may only be imposed after the age of 19 and the life expectancy is (was in 2013) 55 years.²¹³ He has used this definition of life imprisonment as 35 years as an additional criterion for determining if a sentence is cruel, inhuman and degrading, which in turn feeds into the determination of whether a sentence is manifestly excessive.²¹⁴ This suggests that a sentence may be rendered unconstitutional on the sole basis of its length depending on how close it is to a 55 year sentence.

²¹² The prerogative of mercy is provided for in section 89(2) of the Constitution and may be granted with or without conditions in terms of section 326(6) of the CPEC. The prerogative of mercy is discussed in detail in chapter seven.

²¹³ See *Rep v Jeke* Confirmation Case No 178B of 2013, 4; *Rep v Yasin* Confirmation Case No 219 of 2012; *Rep v Mushali and another* Confirmation Case No 242 of 2013, 4; *Rep v Assam and another* Confirmation Case No 907 of 2008, 4; *Rep v Samson and another* Confirmation Case No 466 of 2010, 4. See also *Rep v John* Confirmation Case No 528 of 2010, 4; *Rep v Nelson and another* Confirmation Case No 1852 of 2005, 4; *Rep v Naluso* Confirmation Case No 387 of 2013, 4; *Rep v Matemba* Confirmation Case No 243 of 2012, 4; *Rep v Mapeni* Confirmation Case No 466 of 2010; *Rep v Kaufa* Confirmation Case No 314 of 2011, 3; *Rep v Naphazji* Confirmation Case No 386 of 2011, 4; *Rep v Chikwana* Confirmation Case No 131 of 2013, 4. In fact, imprisonment may only be imposed on offenders above 16 years since the CCPJA defines a child as a person below the age of 16. Therefore, in terms of Mwaungulu J's reasoning, a life sentence would be 38 years.

²¹⁴ See *Rep v Chirwa* Confirmation Case No 271 of 2013, 3; *Rep v Kanyumba and another* Confirmation Case No 904 of 2008, 4; *Rep v Mulolo and another* Confirmation Case No 362 of 2012, 4; *Rep v Kandodo and two others* Confirmation Case No 240 of 2013, 4; *Rep v Kanena* Confirmation Case No 130 of 2013; *Rep v Makoko* Confirmation Case No 469 of 2009, 4; *Rep v Headson and 4 Others* Confirmation Case No 129 of 2013, 4; *Rep v Jali* Confirmation Case No 228 of 2013, 3; *Rep v James* Confirmation Case No 244 of 2013, 3.

The predominant view is that life imprisonment means a whole life sentence. In *Rep v Cheuka and others*,²¹⁵ the accused was sentenced to an effective term of 12 years for manslaughter which carries a maximum of life imprisonment.²¹⁶ Deliberately refraining from imposing the maximum sentence, the court said that the offender's 'life imprisonment is regarded as longer than the number of years of imprisonment a court may impose'.²¹⁷ In other words, the indeterminate nature of whole life sentences renders it a disproportionate sentence since a court may never know how long an offender has to live. The understanding of life imprisonment as a whole-life sentence is also evident in cases such as *Rep v Masula and others*.²¹⁸ Chombo J held that since the accused were unlikely to be reformed, it was necessary to protect the public by locking them away for the rest of their lives.

The view that a life sentence is a whole-life sentence is perhaps most clearly seen in *Moyo v Attorney General*²¹⁹ where the High Court, sitting as a constitutional court, held that the detention of child offenders at the pleasure of the President is not the same as life imprisonment. In its unanimous judgement, the court reasoned that detention at the president's pleasure

presupposes that there will be constant reviews of the juvenile's conduct ... The aim is always that a child ... should only be recommended for release if he has shown [remorse] and if he has been adequately rehabilitated to the extent that he is no longer a danger to the society. Being so held at the pleasure of the president should not therefore be construed as life imprisonment.

²¹⁵ *Rep v Cheuka and others* Criminal Case No 73 of 2008.

²¹⁶ Section 208 of the Penal Code.

²¹⁷ *Rep v Cheuka and others* Criminal Case No 73 of 2008.

²¹⁸ *Rep v Masula and others* Criminal Case No 65 of 2008.

²¹⁹ *Moyo v Attorney General* Constitutional Case No 12 of 2007, 10-11.

This passage implies that what distinguishes detention at the President's pleasure from life imprisonment is that in the latter case an offender will spend the rest of his life in prison, regardless of whether he ceases to be a danger to society. In addition, the court excludes the need for review and the role of rehabilitation in life sentences.

The 2003 Prisons Bill proposes a new definition of life imprisonment. In terms of clause 53(1)(b) of the Bill, a life prisoner will be eligible for parole after serving 12 years. Further, clause 56 creates a possibility that life prisoners may be released both conditionally and unconditionally before the tariff period has lapsed if 'the prison system is so overcrowded that the safety, human dignity or physical care of prisoners is being affected materially'.²²⁰ In keeping with the spirit of section 111 of the Prisons Act, order 141(2) of the 2003 Draft Standing Orders provides that after a lifer has served four years of his sentence 'a copy of the record and an assessment of their characters shall be sent to the Chief Commissioner [of Prisons] who may make special recommendations'. However, it is not clear what the Commissioner's recommendations may be upon receipt of the review report under order 141(2). It is likely that these recommendations will almost always relate to the prisoner's progression during the sentence depending on his needs to ensure rehabilitation. Indeed, unlike the Prisons Act, the Prisons Bill does not hint on the possible release of prisoners serving life sentences as a result of this report.

Overall, it can be observed that there is no clarity as to the meaning of life imprisonment in Malawi. While the Prisons Act requires a report on every life sentence after four years, case law indicates that the predominant view is that life imprisonment is a whole life sentence. From a human rights perspective, the proposals in the Prisons Bill

²²⁰ These provisions are discussed in detail in section 2.3 of chapter 7.

are commendable because they give clarity on the meaning of life imprisonment and afford a possibility of release to life prisoners. However, 12 years could be seen to be on the lower side, particularly when it is recalled that the maximum fixed sentence for imprisonment under the Penal Code is 21 years.²²¹ The problems with such a low tariff are explored further in chapter seven.²²² In practice, courts are quite slow to impose life sentences; the bulk of life sentences being served today are a result of the mass commutation of death sentences to life since 1994.

3.4.3 Restrictions on life sentences

Like the death penalty, life imprisonment is subject to some restrictions. As noted in the previous chapter,²²³ section 42(2)(g)(i) of the Constitution prohibits the imposition of life imprisonment without the possibility of release on persons below the age of 18 years.²²⁴ The second restriction relates to the category of offences which are punishable with life imprisonment. Malawi has over 40 offences that attract life sentences, including genocide (where the offence consists of killing); murder; manslaughter; concealment of treason; robbery; forgery of wills, judicial records and bank notes; rioting after proclamation and related offences such as demolishing buildings; and rescuing or attempting to rescue from lawful custody a person sentenced to death or imprisonment for life or charged with an offence punishable with death or life.²²⁵ In practice, courts exude considerable restraint in imposing life sentences.

²²¹ Section 217A(2)(b) of the Penal Code.

²²² See section 3.2 of chapter 7.

²²³ See section 3.4.3 of chapter five.

²²⁴ Section 42(2)(g)(i) of the Constitution.

²²⁵ See sections 39, 78, 79, 114(1)(a), 210, 211, 217A(2)(a), 301, 357 and 358 of the Penal Code. Other offences punishable with life include promoting war; inciting to mutiny; inducing soldiers or policemen to

3.4.4 Circumstances in which life imprisonment may be imposed

Although it is prescribed for myriad offences, life imprisonment is rarely imposed in Malawi. The general principle remains that life sentences should be reserved for serious instances of the offence committed in aggravating circumstances and also where a serious offender is seen as a danger to society. It has been suggested, for example, that a life sentence would be appropriate for rape where an offender's 'behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time'.²²⁶ Further, courts have said that theft by public servant may be punished with life imprisonment where the case involving large sums of money by higher public officials

desert; aiding prisoners of war to escape; taking unlawful oaths to commit capital offences; preventing or obstructing the making of proclamation; rape; attempted rape; defilement of girls under 16 years; incest by males of a female person under the age of 16 years; manslaughter; murder; attempted murder; aiding suicide, killing unborn child, disabling or stupefying in order to commit felony or misdemeanour; causing or committing an act intended to grievous harm or prevent arrest, preventing escape from wreck; intentionally endangering safety of persons travelling by railway; kidnapping or abducting in order to murder; theft by public servant; attempted aggravated robbery; housebreaking; burglary; arson; casting away ships; destroying or damaging an inhabited house or a vessel with explosives; destroying or damaging a river bank or wall, navigation works or bridges; forgery of wills or documents of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, or promissory note; counterfeiting coin; and making preparations for coining; illegal possession of Indian hemp: see, respectively sections 40, 41, 43, 44, 54, 77, 114(1)(1), 133, 134, 138, 157, 209, 211, 223, 228, 231, 233, 235, 236, 237, 261, 283(4), 301(2), 302(2), 309(1) and (2), 337, 341, 344(2), 344(3), 372 and 373 of the Penal Code; and regulation 19(1) as read with section 4(a) of the Dangerous Drugs Act, Chapter 35:02 of the Laws of Malawi. The DFA has three offences that are punishable with life, namely, aiding the enemy; unauthorised communication with the enemy; and failure to suppress mutiny: see sections 33(1), 34(2) and 41 of the Act.

²²⁶ *Rep v Makuluni* Confirmation Case No 276 of 2001, citing with approval *R v Billam* (1986) 82 Cr App R 347. Life imprisonment has never been imposed for rape: see *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 5.

and a serious breach of trust'.²²⁷ However, it is unlikely that such offences involving no loss of life can be punished with life sentences. Indeed, courts exercise restraint even in sentencing manslaughter and murder.

In practice, life imprisonment is reserved for manslaughter and, since 2007, murder.²²⁸ Manslaughter is normally punished with fixed prison sentences²²⁹ which have ranged from to 30 years.²³⁰ This indicates that courts are reluctant to impose life sentences. Indeed, in *Rep v Eneya and others*,²³¹ the accused were sentenced to 18 years for manslaughter in circumstances described as 'most cruel and gruesome' and which came

²²⁷ *Rep v Kotamu* Confirmation Case No 180 of 2012.

²²⁸ See for instance, *Rep v Matimati* Criminal Case No 18 of 2007; *Rep v Masula and others* Criminal Case No 65 of 2008.

²²⁹ For an overview of sentencing trends in manslaughter cases, see Nyirenda (2009) 11-22.

²³⁰ See *Rep v Chimbiri* Criminal Case No 72 of 2008; *Rep v Mkandawire* Criminal Case No 11 of 2009; *Rep v Nkhokwe* Criminal Case No 50 of 2008; *Rep v Mwale* Criminal Case No 13 of 2008; *Rep v Chinguwo* Criminal Case No 53 of 2008; *State v Kaunda* Criminal Case No 6 of 2008; *Rep v Phiri* Criminal Case No 1 of 2008; *State v Phiri* Criminal Case No 2 of 2008; *State v Nyirenda* Criminal Case No 5 of 2008; *Rep v Saulos* Criminal Case No 44 of 2008; *Rep v Lingisoni and another* Criminal Case No 74 of 2009; *Rep v Jedu* Criminal Case No 4 of 2008; *Rep v Jere* Criminal Case No 49 of 2005; *Rep v Singileti* Criminal Case No 9 of 2005; *State v Phiri* Criminal Case No 11 of 2008; *Rep v Kotoma* Criminal Case No 24 of 2009; *Mapira v Rep* Criminal Case No 8 of 2008; *State v Mbale* Criminal Case No 32 of 2008; *Rep v Simbene* Criminal Case No 39 of 2009; *Phiri v Rep* Criminal Case No 11 of 2008; *Rep v Madelube* Criminal Case No 105 of 2008; *R v Tongole and another* Criminal Appeal No 12 of 2011; *Rep v Chinguwo* Criminal Case No 53 of 2008; *Rep v Kaira and 3 Others* Criminal Case No 40 of 2008; *Rep v Mathuso* Criminal Case No 27 of 2008; *Rep v Cheuka and others* Criminal Case No 73 of 2008; *Rep v Chimimba and another* Criminal Case No 11 of 2009; *Rep v Mbove* Criminal Case No 21 of 2008; *Rep v Mwale* Criminal Case No 13 of 2008; *Rep v Katimbe* Criminal Case No 29 of 2008; *Zakaliya v Rep* Criminal Case No 30 of 1997; *Rep v Eneya and others* Criminal Case No 53 of 2003; *Rep v Danger* Criminal Case No 83 of 2009; *Rep v Samaliya and 6 others* Criminal Case No 17 of 2009.

²³¹ *Rep v Eneya and others* Criminal Case No 53 of 2003.

‘as close to murder as manslaughter can get’.²³² In *Malemba v Rep*,²³³ the MSCA, noting that the accused was a first offender, doubted the propriety of the life sentence imposed on him for manslaughter.²³⁴ In sentencing for manslaughter, courts have recognised the generic sentencing factors such as lack of previous convictions,²³⁵ youth,²³⁶ plea of guilt,²³⁷ provocation,²³⁸ the brutal nature of the attack and extent of the injuries,²³⁹ the domestic environment in which the offence was committed,²⁴⁰ and whether a dangerous weapon was used.²⁴¹ In *Rep v Glasten*,²⁴² the court refrained from imposing a life sentence for manslaughter holding that the accused was not a public threat and had a prospect of rehabilitation.²⁴³ The court premised this finding on the fact that he was a first offender and had not used a dangerous weapon. Accordingly, the accused was given a lenient short sentence to afford him a chance to reform and come out of prison to be a ‘very responsible citizen’.²⁴⁴

²³² *Rep v Eneya and others* Criminal Case No 53 of 2003, 4. On appeal, the sentence was reduced to 10 years on the premise that the deceased was partly to blame for his death: see *Eneya and others v Rep* Criminal Appeal No 15 of 2006.

²³³ *Malemba v Rep* MSCA Criminal Appeal No 63 of 1995.

²³⁴ The court did not reach any finding on the appeal because the appellant had since died.

²³⁵ *Rep v Timba* Criminal Case No 88 of 2009; *Dandanla v Rep* Criminal Appeal No 11 of 2008.

²³⁶ *Rep v Chinguwo* Criminal Case No 53 of 2008; *State v Mbale* Criminal Case No 32 of 2008.

²³⁷ *Rep v Timba* Criminal Case No 88 of 2009; *Rep v Madelube* Criminal Case No 105 of 2008; *Rep v Danger* Criminal Case No 83 of 2009; *Rep v Tongole and another* Criminal Appeal No 12 of 2011; *State v Mbale* Criminal Case No 32 of 2008.

²³⁸ *Rep v Timba* Criminal Case No 88 of 2009.

²³⁹ *Rep v Madelube* Criminal Case No 105 of 2008.

²⁴⁰ *Rep v Danger* Criminal Case No 83 of 2009, holding that the circumstances of the offence constituted domestic violence which must be prevented by imposing stiffer punishment.

²⁴¹ *Rep v Glasten* Criminal Case No 104 of 2008, 6.

²⁴² *Rep v Glasten* Criminal Case No 104 of 2008.

²⁴³ *Rep v Glasten* Criminal Case No 104 of 2008, 6.

²⁴⁴ *Rep v Glasten* Criminal Case No 104 of 2008, 6.

With respect to murder, it has been said that a life sentence with possibility of release would be an appropriate sentence for the worst form of murder.²⁴⁵ It has also been suggested, more generally, that life imprisonment would be appropriate where rehabilitation of an offender is unlikely.²⁴⁶ However, the potential for rehabilitation is not easy to fathom. In *Rep v Masula and others*,²⁴⁷ the defendants were convicted on two counts of murder after they strangled two victims in order to steal their cell phones. During sentencing, Chombo J ruled out the possibility of reform:²⁴⁸

Counsel for the convicts argued that if given an opportunity the convicts would reform. *Ironically* he went on to inform the court that when the [first] convict was released on bail he committed another murder and he was re-arrested as a result of that other murder. This court therefore fails to agree with counsel's argument that there is a chance of the convicts reforming.

This is an insufficient basis for depriving an offender of liberty for the rest of his life. The court placed no significance on the fact that the offenders were young, had no criminal record, and had not displayed a high level of criminality.²⁴⁹ It also failed to individually consider the chances of reform for the other three defendants. This case shows that courts do not systematically analyse the prospect of rehabilitation in sentencing offenders.

As stated earlier, case law indicates that murder continues to be regarded as a strictly capital offence and that there are difficulties – and perhaps confusion – in recognising life imprisonment as a competent penalty for murder and other capital crimes. In 2012,

²⁴⁵ *Rep v Sukali and another* Criminal Appeal No 21 of 2011.

²⁴⁶ *Rep v Masula and others* Criminal Case No 65 of 2008.

²⁴⁷ *Rep v Masula and others* Criminal Case No 65 of 2008.

²⁴⁸ *Rep v Masula and others* Criminal Case No 65 of 2008, 3.

²⁴⁹ The court described the offenders as 'reckless people': see *Rep v Masula and others* Criminal Case No 65 of 2008, 3.

the High Court in *Mulinganiza* attempted to provide some clarification regarding the circumstances in which murder may be punished with death and life imprisonment. The facts were that the second accused, aged 31, was hired by the first accused, aged 82, to kill the first accused's husband. The second accused killed the deceased by crushing his head with a hammer in his sleep.

In passing sentence, the court was at pains to demonstrate that 'life imprisonment is the only alternative sentence in murder convictions' and that a court may, in exercise of its discretion, impose a term years if there are 'special mitigatory factors'.²⁵⁰ He held that the general principle is that courts should be more inclined to impose a life sentence than a death sentence unless the state convinces it otherwise. The court observed that an assessment of sentencing patterns following the decision in *Kafantayeni* suggests that murder has been punished with fixed sentences only in circumstances where a manslaughter conviction should have in fact been entered due to provocation or lack of mens rea or the use of non-lethal weapon.²⁵¹ Citing *Rep v Jordan*,²⁵² the court said that it was strongly persuaded

that in a murder conviction in Malawi, the lesser sentence one can impose is life imprisonment which will at least accord the court an opportunity to exercise its [discretionary] powers to determine on sentence; otherwise, imposition of a term sentence, such as 15 years imprisonment, may call for persuasive factors to reduce a murder conviction to one of manslaughter so as to justify the term sentence. May be, so as to eradicate this confusion, Malawi should positively respond to the call for the abolishment of [the] death penalty.

²⁵⁰ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 4-5.

²⁵¹ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 3: 'One is at a loss [as to] why murder convictions were maintained in the circumstances. I hope that in the near future this mist shall be clarified by the highest court of the land'.

²⁵² *Rep v Jordan* Criminal Case No 74 of 2008.

Applying this reasoning, and without much reference to the mitigating factors, the court had ‘no hesitation’ in imposing a life sentence on the second accused. In sentencing the first accused the court found that the fact that she was 82 years old and terminally ill as a result of psychosis and cervical prolapse constituted ‘special mitigatory factors’ warranting such a departure from life imprisonment that a conditional discharge in terms of section 337(1)(b) of the CPEC was justified. The court hinted that had it not been for the illness, the first accused would have also been sentenced to life imprisonment.²⁵³

This decision may be extolled for promoting restraint in the use of the death penalty. However, one should not lose sight of its major flaw in that the court proceeded from the basis that murder is a strictly capital offence, thereby considering life imprisonment not as a prescribed sentence but a lesser sentence to the death penalty. Indeed, if this case is read in light of section 210, which the court did not refer to at all, the problems with its conclusions become apparent. For example, the decision elevates life imprisonment to a mandatory sentence for murder that may only be departed from in certain circumstances; that is, unless there are ‘special mitigatory factors’, murder must be punished with life imprisonment. This places a legal burden on an offender to prove mitigating factors, a departure from the principle that the onus is on the state to prove aggravating factors. This implies that murder carries two sentences: a) a mandatory life sentence which is applicable unless an offender shows that there are ‘special’ mitigation factors justifying a lesser term; and b) a discretionary death sentence to be imposed if the state sufficiently proves aggravating factors.

²⁵³ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 5: ‘Since her illness has come to be known to me before passing sentence, I have therefore assumed jurisdiction to consider illness in passing sentence. This situation would obviously not have arisen had I passed sentence already’.

This position is legally untenable. For instance, a mandatory life sentence would be unconstitutional and liable to the general criticisms against mandatory minimum sentences.²⁵⁴ Although the court did not refer to the aims of punishment in its decision, it is apparent that priority was placed on retribution and moral blameworthiness of an offender. This is because the court dismissed the propriety of fixed prison sentences for murder by stating that murder may only be punished with such sentences when the circumstances of the case in fact only satisfied manslaughter.²⁵⁵ It is worth noting that while the rationale for this provision was to remove the mandatory death sentence for murder, the amendment was done on the general acceptance on the part of the Malawi Law Commission that mandatory sentences are inconsistent with the Constitution.²⁵⁶ In any case, a mandatory life sentence for murder is wholly inconsistent with section 210 which simply provides that murder is punishable ‘with death or imprisonment for life’.

Secondly, *Mulinganiza* is inconsistent with sections 27(1) and (2) of the Penal Code. These provisions, without casting a legal burden on an offender to justify a departure from a life sentence, endow a court to impose a shorter term or a fine.²⁵⁷ Thirdly, the court’s suggestion that murder should only be punished with fixed prison sentences if the circumstances are such as would reduce murder to manslaughter is objectionable. It

²⁵⁴ See section 2.3 above.

²⁵⁵ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 3: ‘In all these cases ... we see that term sentences were imposed due to lack of mens rea, provocation, use of a non-lethal weapon etc. All these cases could have passed for a manslaughter conviction with ease and the same term sentences meted. One is at a loss why murder convictions were maintained in the circumstances. I hope that in the near future this mist shall be clarified by the highest court of the land’.

²⁵⁶ See *Penal Code Review Report* 56: ‘The Commission resolved to maintain its approach of recommending discretionary sentences for all offences including the offence of murder’.

²⁵⁷ 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 and another* Confirmation Case No 123 of 1998 (fine rare for felony even if extenuating circumstances exist).

not only reflects that the test for what constitutes ‘special mitigatory factors’ is high but also flies in the face of the right to a fair trial. An offender cannot not be expected to show that he is not guilty of murder after conviction. It is the duty of the court to ensure that an accused is convicted of the right offence. After all, manslaughter is a competent verdict on a charge of murder.

Lastly, it should also be pointed out that the court’s assertion that murder has been punished with term sentences only where the proper charge should have been manslaughter is not entirely correct. As discussed above, courts have imposed fixed sentences for murder in light of ordinary mitigating factors that would not have justified reducing murder to manslaughter.

To conclude on life imprisonment, it can be observed that life sentences are aimed at incapacitation and community protection. Courts generally exercise considerable restraint before imposing it and do so only in serious cases of homicidal offences. In the light of this fact, it is unlikely that attempts and non-homicidal offences such as rioting, demolishing buildings and arson will be punished with life.

4 NON-CUSTODIAL SANCTIONS

4.1 Forfeiture and monetary penalties

Forfeiture involves the confiscation of property (or an equivalent sum of money) involved in the commission of a crime. The aims of forfeiture are to ensure that an offender does not reap any profit from criminal activity (such as forfeiture of smuggled goods) and to prevent further commission of crime by teaching an offender that crime does not pay but only leads to suffering through punishment. Forfeiture may also prevent crime by depriving an offender of the existing means of committing a crime.

For instance, the law allows the confiscation of the means of transportation used to smuggle goods.²⁵⁸

Monetary penalties can take the form of a fine or compensation.²⁵⁹ Fines may be imposed in substitution of or in addition to imprisonment.²⁶⁰ It is trite that except in exceptional circumstances, felonies and serious misdemeanours must be punished with immediate imprisonment and not fines.²⁶¹ Fines are aimed at retribution²⁶² and deterrence by depriving an offender of the financial benefit of the offence committed.²⁶³

²⁵⁸ See section 159(1) of the Customs and Excise Act, Chapter 42:01 of the Laws of Malawi. Other statutes that provide for forfeiture include the Penal Code (section 30), the Firearms Act (Chapter 14:08 of the Laws of Malawi), the Weights and Measures Act (Chapter 48:04 of the Laws of Malawi), the Dangerous Drugs Act (Chapter 35:02 of the Laws of Malawi), and the Explosives Act (Chapter 14:09 of the Laws of Malawi).

²⁵⁹ Compensation need not be monetary.

²⁶⁰ Section 27(3) of the Penal Code. Section 23(3) of the Local Courts Act stipulates that fines should only be ordered against accused persons who can afford to pay them.

²⁶¹ *Rep v Moffat and others* Confirmation Case No 123 of 1998 (it should be ‘unoften’ that a felony is punished with a fine). See also *Rep v Napolo and others* Confirmation Case No 932 of 1999 (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) 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 (‘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; *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 and another* Confirmation Case No 123 of 1998 (fine rare for felony even if extenuating circumstances exist).

²⁶² *Chindamba v Rep* Criminal Appeal No 16 of 2009. Cf *Namputo v Rep* Criminal Appeal No 33 of 2007; *Goode v Rep* [1971-1972] 6 ALR Mal 461 (HC).

²⁶³ *Rep v Akimu* Revision Case No 9 of 2003.

Compensation can be ordered in addition to or in substitution of the prescribed penalty for any offence and to 'any' person who has suffered personal injury or loss of property.²⁶⁴ It can also be ordered out of a fine.²⁶⁵ The aim of compensation is to minimise the loss suffered by a victim of crime and to promote reconciliation between an offender and a victim or the community. Further, compensation can also be used to achieve restorative justice in minor cases through informal reconciliation processes under section 161 of the CPEC.²⁶⁶ This means that compensation can be used as a tool to resolve criminal matters out of court in a manner that gives victims a central role in the resolution of a crime and diverts minor offenders from the criminal justice system. This can speed up cases and reduce the backlog of criminal cases.²⁶⁷ There seems to be no case in which section 161 has been invoked.

In practice, however, compensation is rarely awarded in criminal cases.²⁶⁸ This indicates that punishment is not oriented towards victim compensation and restorative justice. Courts are more inclined to order compensation in cases where the victim suffered physical injury such as in cases of assault and causing grievous bodily harm. However,

²⁶⁴ Section 32 of the Penal Code. The Malawi Judiciary *Magistrates' court sentencing guidelines* (2007) stress that compensation must be considered in passing any sentence.

²⁶⁵ However, compensation need not be monetary.

²⁶⁶ Section 161 of the CPEC provides: 'In all cases a court may, without formality, promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court and may thereupon order the proceedings to be stayed or terminated.' See also section 25 of the Local Courts Act.

²⁶⁷ *CPEC Review Report*, 85.

²⁶⁸ See Mkandawire (2001).

there is no legal basis for this limitation; the injury suffered need not be physical.²⁶⁹ The law now makes it clear that compensation can be awarded for personal injury or loss of property.²⁷⁰ Compensation may be awarded as general damages for emotional harm, and pain and suffering (such as terror, shock, distress).²⁷¹

4.2 Community penalties

Community penalties include community service,²⁷² public work,²⁷³ attendance centre orders²⁷⁴ and police supervision.²⁷⁵ Of these, only community service is regularly imposed. With the exception of police supervision, community penalties are generally imposed for minor offences committed in extenuating circumstances. The aims of community penalties include restriction of liberty, reparation and prevention of re-offending.²⁷⁶ They may also help with the reformation of an offender.

²⁶⁹ In *Chisuse v Rep* [1978-1980] 9 MLR 141 (HC), a compensation order was made against the appellant who had been convicted of theft by trick. The court ordered that his properties that were being held by the state should be sold and the proceeds shared proportionately amongst the victims.

²⁷⁰ Section 32 of the Penal Code as amended by section 23(a) of the Penal Code Amendment Act 2011. See also *CPEC Review Report* 25: “injury” includes both injury to the person and injury involving loss of property’.

²⁷¹ Malawi Judiciary *Magistrates’ court sentencing guidelines* (2007).

²⁷² Section 364(A) of the CPEC.

²⁷³ See sections 2 and 3 of the Convicted Persons (Employment on Public Work) Act, Chapter 9:03 of the Laws of Malawi. This penalty has practically fallen into disuse due to administrative problems: see Malawi Law Commission *Report of the Commission on the review of the Traditional Courts Act* (2007) 45 which also notes that community service can achieve the same purpose as public work if managed properly.

²⁷⁴ Section 25 of the Penal Code.

²⁷⁵ Section 25 of the Penal Code.

²⁷⁶ Malawi Judiciary *Magistrates’ court sentencing guidelines* (2007) 57.

The punishment of community service was introduced in 1999²⁷⁷ with a primary view to reduce prison congestion. Other aims such as reparation and rehabilitation are secondary.²⁷⁸ Community service may be imposed for any offence which carries a discretionary sentence as a condition of a suspended fine or imprisonment not exceeding 12 months. It appears that the reformation and welfare of an offender is central to community service. For instance, where practical or possible, counselling is available on request.²⁷⁹ In addition, the membership of the National Committee includes a representative from the Social Welfare Department and organisations with ‘an interest in the well-being or reformation of prisoners’.²⁸⁰ Further, District Social Welfare Officers are members of the District Committee on Community Service.²⁸¹ Moreover, the fact that community service can only be imposed on a suitable and willing offender and that a court must have regard to his attitude also shows that an offender is central to community service.²⁸² Courts have held that community service sentences are unsuitable for deterrence and thus not preferable for serious offences.²⁸³

Attendance centre orders are a new form of punishment introduced by the 2010 Penal Code Amendment Act. Although the law does not elaborate when and how this punishment should be imposed and implemented, it is reasonable to expect that the centres will offer various services and activities such as vocational training, counselling

²⁷⁷ See section 339(2) of the CPEC. For a general overview of community service in Malawi, see Malawi National Committee on Community Service (undated).

²⁷⁸ Kishindo (2012) 1, 21.

²⁷⁹ Rule 11(3) of the Community Service (General) Rules GN 34/2000.

²⁸⁰ See rule 3(2)(e) and (j)(i) of the Community Service (General) Rules GN 34/2000.

²⁸¹ Rule 10(2)(f) of the Community Service (General) Rules GN 34/2000.

²⁸² Refusal to perform community service entitles a court to ignore the option and order the offender to serve the prison sentence: see *Rep v Pitasoni* Confirmation Case No 1143 of 2001.

²⁸³ *Rep v Akimu* Revision Case No 9 of 2003.

and organised leisure activities. Therefore, such orders will have rehabilitative and incapacitative connotations.

Police supervision is quite different from other community penalties in that it is only imposed on repeat offenders as an additional penalty and comes into operation upon expiry of a prison sentence.²⁸⁴ This penalty is therefore aimed at reducing re-offending which is a means of achieving crime prevention and promoting community protection.

4.3 Orders in lieu of punishment

This section deals with the aims of orders, which are not, strictly speaking, punishment. They include reconciliation processes, binding over (or orders to find security), discharge, probation and dismissal. Reconciliation processes are provided for in section 161 of the CPEC. With regard to binding over, a court may order an offender to enter into a bond 'to keep the peace and be of good behaviour' for a specified period not exceeding one year.²⁸⁵ If the bond is broken, the bond may be forfeited in accordance with section 125 of the CPEC. The aim of binding over is to promote peace in the community and deter an offender from re-offending. Discharge, probation²⁸⁶ and dismissal may only be imposed where

the court thinks that the charge is proved but is of the opinion that, having regard to the youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, *or* to the fact that the offence has not previously committed an offence, *or* to the nature of the

²⁸⁴ Section 342(1) of the CPEC states that police supervision may only be ordered against an offender who has been convicted more than once of an offence punishable with more than three years' imprisonment.

²⁸⁵ Section 338(1) of the CPEC.

²⁸⁶ Malawi does not have a functioning probation system for adult offenders.

offence, *or* to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment ...²⁸⁷

Discharge may be absolute or on condition that an offender refrains from committing further offences during a period of up to 12 months.²⁸⁸ Probation may be imposed on various conditions in order to prevent a repetition of the same offence or the commission of other offences.²⁸⁹ Conditional discharge and probation may be considered as postponed sentences since an offender will be liable to sentence if he breaches the conditions set by a court.²⁹⁰ Section 337(5) requires that a court must warn the accused of this consequence. These orders act as deterrents because the possibility of receiving a sentence may act as an incentive for an offender to abide by the bond conditions and refrain from committing further offences. An order of dismissal of a charge is also aimed at deterrence. Since it is mandatory that a caution or admonition must be given in cases of dismissal,²⁹¹ dismissal acts as a warning to an accused, thereby creating a possibility that he will refrain from committing further crimes. Courts usually dismiss charges in dealing with minor offences committed in extenuating circumstances. Dismissal would also be appropriate for offences of vagrancy, loitering (or being an idle and disorderly person), nuisances by drunken persons and other offences which are in fact more properly seen as social problems than criminal behaviour.

It may be argued that section 337 is a reaffirmation of well-established sentencing principles in as far as aggravating and mitigating factors are concerned. However, the

²⁸⁷ Section 337(1) of the CPEC. Emphasis supplied. See also section 24 of the Local Courts Act providing for a similar provision in relation to local courts.

²⁸⁸ Section 337(1)(b) of the CPEC.

²⁸⁹ See section 4(1) of the Probation of Offenders Act, Chapter 9:01 of the Laws of Malawi.

²⁹⁰ Section 341(1) of the CPEC.

²⁹¹ *Rep v Ng'oma* Confirmation Case No 988 of 2007.

provision depicts a departure from sentencing principles in that it allows a court to consider the relevant sentencing factors in the alternative and make an order which may otherwise be seen as manifestly inadequate. This is evident from the wording of the opening paragraph of section 337(1). Ordinarily, mitigating factors cannot be considered independently of the seriousness of an offence; the significance of mitigating factors is diminished when the offence is very serious. However, section 337 makes it possible for a court to isolate mitigating factors from the seriousness of an offence. This is well demonstrated in *Mulinganiza* where an 82 year old and terminally ill murder convict was discharged.²⁹² The court, noting that imprisonment would be an inappropriate penalty in the circumstances, said that it was

concerned with the welfare of the convict and this is the time that the court should be enticed to employ humanitarian considerations as the circumstances dictate or demand. This is the whole purpose of section 337 of the [Criminal Procedure and Evidence Code] which should be considered and facts in issue examined *regardless* of the seriousness of the offence. The court cannot afford to be impersonal, for if it were so, then genuine justice would fail to be attained.²⁹³

This shows that section 337 permits a court to focus on the circumstances of an offender in deciding how to deal with him. This depicts allowance for non-retributive ways of dealing with offenders. Further, it recognises that crime may be influenced by social factors such as home surroundings.

²⁹² *Rep v Mulinganiza and another* Criminal Case No 306 of 2010.

²⁹³ *Rep v Mulinganiza and another* Criminal Case No 306 of 2010, 7. Emphasis supplied.

5 ASSESSMENT OF THE FORMS OF PUNISHMENT

5.1 The death penalty

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 from the preceding discussion 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 18. 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 Charter on the Rights and Welfare of the Child (African Children's Charter).²⁹⁴ 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. For one thing, it cannot be said that death sentences are an 'exceptional measure' because the scope of crimes in Malawian law exceeds the bounds of internationally acceptable capital crimes. Of the 12 capital crimes, only genocide and murder can be classified as serious crimes by international standards. Even then, genocide, regardless of whether killing was involved, is not a capital crime in international criminal law. This puts the imposition of the death penalty for genocide in

²⁹⁴ African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990).

Malawi at odds with the Statute of the International Criminal Court (Rome Statute)²⁹⁵ to which Malawi has been a party since 2002.²⁹⁶ 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 with death.

For another thing, the law does not clearly distinguish non-capital from capital murder. The same applies to all the offences punishable with death, except treason, since the law puts death at par with life imprisonment. The absence of any stipulation on how courts must approach offences punishable with death and life imprisonment in the alternative gives too much leeway to courts in deciding the circumstances when death is not only the appropriate sentence but also whether it is the applicable maximum sentence. Worse still, courts have not paid much attention to the availability of life imprisonment in the penal provisions of capital offences. That murder is punishable with ‘death or life imprisonment’ belies the recognition that this offence may be adequately punished with different punishment depending on the circumstances of the case.

Moreover, sentencing trends discussed above raise doubts as to whether death sentences are reserved for exceptional cases. Although death is now rarely imposed, most of the death sentences that the MSCA has upheld do not fit the category of the worst of the cases of murder. Mitigating circumstances are rarely fully addressed during sentencing and there are inconsistencies in the weight given to factors such as youth. This is notwithstanding the insistence in several cases that death, as a maximum sentence, must be imposed rarely and in the worst instance of an offence.

²⁹⁵ Rome Statute of the International Criminal Court (Rome Statute) 1998.

²⁹⁶ The Rome Statute does not have domestic force in Malawi: see Nkhata (2011) 277.

Furthermore, the alternatives for children and pregnant women found guilty of capital crimes are not immune from criticism. For children, the mandatory alternative of detention at the pleasure of the President raises a number of constitutional concerns, the full consideration of which is beyond the scope of this study. It is sufficient to point out that this penalty is inconsistent with international human rights standards on the imprisonment of children²⁹⁷ and indeed the Constitution.²⁹⁸ It is therefore regrettable that in a decision that has been criticised on a number of grounds,²⁹⁹ the constitutionality of detention at the President's pleasure was unsuccessfully challenged in *Moyo v Attorney General*.³⁰⁰

With regard to pregnant women, it is important to mention that the overall impression from section 26(4) of the Penal Code and sections 327(4)³⁰¹ and 328 of the CPEC is that life imprisonment is mandatory for pregnant women convicted of capital offences. As such, these provisions violate the right to a fair trial. The Malawi Law Commission made it clear that what is now section 327(4) would need to be amended should the recommendation on the removal of mandatory death sentences be passed.³⁰² The Commission's expectation was not just that the imposition of the life sentences would be discretionary but also that such an amendment would entail that the imposition of life imprisonment in lieu of a death sentence was not only be applicable to pregnant

²⁹⁷ See Odhiambo (2005) 387-388.

²⁹⁸ See Chirwa (2011) 224.

²⁹⁹ See Southern Africa Litigation Centre (2009).

³⁰⁰ *Moyo v Attorney General* Constitutional Case No 12 of 2007 (unreported).

³⁰¹ See section 327(4) of the CPEC which states that the Malawi Supreme Court of Appeal (MSCA) 'shall' substitute a death sentence with life imprisonment where it is found that an appellant is pregnant at the time of sentencing.

³⁰² *CPEC Review Report* 157.

women. As argued in chapter three,³⁰³ the exclusion of pregnant women from the application of the death penalty offends the right to equality.

Actually, the Law Commission was aware of the discriminatory undertones of the law in this regard. It noted that section 327(4) of the CPEC

is 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 while as the other women who may give birth before sentencing is not afforded the same treatment.³⁰⁴

Surprisingly, the Commission found solace in the fact that murder would be punishable with death or life imprisonment should the Penal Code Amendment Bill³⁰⁵ be passed because that would mean that life imprisonment is available to all women depending on the circumstances of each case.³⁰⁶ With respect, this reasoning is unconvincing. For instance, it is injudicious to refrain from amending an impugned provision in the hope that such an amendment will be made *if* another proposed amendment is adopted. It should be remembered that the mandatory death penalty for murder was still in force at the time when the *CPEC Review Report* and the 2004 CPEC Amendment Bill (CPEC Bill) were drafted since neither had the Penal Code Bill been passed nor *Kafantayeni* decided. The CPEC Bill was passed in 2010 and the Penal Code Amendment Act followed in 2011. As noted in chapter five, the Penal Code has retained the mandatory death penalty for treason. The implication is that there is no compelling reason to amend section 327(4). Possibly due to the fact that in practice only the mandatory death

³⁰³ See section 3.1.1 of the chapter three.

³⁰⁴ *CPEC Review Report* 157.

³⁰⁵ 1999 Penal Code Amendment Bill.

³⁰⁶ *CPEC Review Report* 157.

penalty for murder was used, the Commission clearly overlooked the fact that section 327 does not only apply to murder cases but to '[e]very case where a woman is convicted of an offence punishable with death'.³⁰⁷ It is important to mention that 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 application to mandatory death sentences. The same goes for section 26(3). Better to do this though unlikely than have drawn out procedure of court appeal.

The failure of the Law Commission to recommend an amendment to section 327(4) of the CPEC also means that it did not recognise the problems with prescribing a penalty of 'death or life imprisonment' without further guidance on the circumstances in which an offence should attract death or life.³⁰⁸ 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 disappear. More crucially, the Commission disregarded the core of its own argument which was 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 life imprisonment was 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.

³⁰⁷ See sections 327(1) and 328 of the CPEC; section 26(4) of the Penal Code.

³⁰⁸ See section 2.4 above.

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 appears 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 that the MSCA must set aside the death penalty if it finds that ‘the woman *is* pregnant’.³⁰⁹

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 pointed 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’.³¹⁰ After all, a child born before sentencing would also need care depending on its age. Mindful that the Affiliation Act³¹¹ 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’.³¹² The answer to this is obviously in the negative since a child is only allowed in prison until it is weaned.³¹³ 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

³⁰⁹ Emphasis supplied. It is evident that section 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 section 234(c) of the CPEC Bill.

³¹⁰ *CPEC Review Report* 157.

³¹¹ Affiliation Act, Chapter 26:02 of the Laws of Malawi, repealed by the CCPJA.

³¹² *CPEC Review Report* 157, footnote 93.

³¹³ Section 60 of the Prisons Act, Chapter 9:02 of the Laws of Malawi. 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.

mother.³¹⁴ It becomes increasingly evident then that the rationale for the proscription of imposing 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 which is ultimately discriminatory is undesirable. Accordingly, short of abolition of the death penalty, the exclusion of pregnant women only from execution as provided in articles 6(5) of the International Covenant on Civil and Political Rights (ICCPR)³¹⁵ and 4(2)(j) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa³¹⁶ is preferable.

A further shortfall from 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 murder committed before they attained the age of 18 years.³¹⁷ In addition, while mentally ill offenders are not criminally responsible for their actions and those with diminished responsibility may only be convicted 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. Further, the principle of diminished responsibility, as codified in section

³¹⁴ *Rep v Moyo and 10 Others* Criminal Case No 2 of 2011, 6-7; African Commission on Human and Peoples' Rights (2001) 36.

³¹⁵ International Covenant on Civil and Political Rights, GA Res 217A (III), UN Doc A/6316 (1966).

³¹⁶ Article 4(2)(j).

³¹⁷ Babcock and McLaughlin (2013).

214A of the Penal Code, only applies 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,³¹⁸ though it is unclear if their conditions arose before or after sentencing. With one state psychiatrist,³¹⁹ the availability of psychiatric reports on the mental state of an offender remains a big challenge in Malawi.

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 insufficiency and ineffectiveness of legal aid services³²⁰ are inconsistent with international standards on the death penalty and also section 19 of the Constitution. Legal aid is in general only available in murder trials in the court of first instance.³²¹ In addition, prison conditions are unspeakable and have been held to amount to cruel, inhuman and degrading punishment.³²² Despite a court order to improve prison conditions,³²³ they remain unacceptably poor.³²⁴ Some prisoners spend between one month and two years on death row before their sentences are commuted to life.³²⁵ Prisoners under sentence of death are kept 'literally in the shadow of the

³¹⁸ Babcock and McLaughlin (2013), noting that some death row inmates are suffering from dementia and schizophrenia and are unable to walk or feed themselves.

³¹⁹ Malawi has three qualified psychiatrists of which only one is a state psychiatrist: see Hayward *et al* (2010); Masuso (2014).

³²⁰ See Advocates for Human Rights (2014) para 18; Dudgeon and Gopalan (2010) 32-35. As of September 2014, Malawi had only 11 legal aid lawyers, the majority of whom were recent law graduates.

³²¹ Advocates for Human Rights and World Coalition against the Death Penalty (2014) para 8; Centre for International Human Rights (2010).

³²² See *Masangano v Attorney General* Constitutional Case No 15 of 2007; African Commission on Human and Peoples' Rights (2001) 6-32, 35; Nyirenda (undated) 4.

³²³ See *Masangano v Attorney General* Constitutional Case No 15 of 2007.

³²⁴ See *Rep v Moyo and 10 Others* Criminal Case No 2 of 2011, 6.

³²⁵ See Centre for Capital Punishment Studies (2003) 5.

gallows' at Zomba Central Prison.³²⁶ In line with the Prisons Act, they are segregated from other prisoners and, ordinarily, may only have access to prison officers, a visiting justice and a religious minister.³²⁷ Access to a lawyer, relatives and friends is subject to the approval of and conditions set by the Commissioner of Prisons (Commissioner).³²⁸ These restrictions reflect the law in 1968 which cannot pass constitutional muster in view of the right to dignity and a fair trial. These circumstances render the application of the death penalty arbitrary.

The arbitrary application of the death penalty may also be heightened by the changing attitudes of judicial officers towards the death penalty. As noted earlier, some judges have openly stated their opposition to the death penalty. Needless to say, judges who are not in favour of the death penalty rule it out as a competent sentence for capital crimes. Of course, as Terblanche³²⁹ tells us, the personal and philosophical differences of judicial officers are 'an inevitable yet unfortunate' factor in sentencing which 'is unfair and unjust' as it has nothing to do with the crime and infringes the right to equality.³³⁰ Few can dispute that magistrates also hold different views regarding the justifiability of the death penalty. Consequently, when faced with the capital crimes of rape, robbery, burglary or housebreaking, sentencing will differ. In addition, since magistrates cannot impose a death sentence, the referral of cases to the High Court for sentencing where death is considered to be an appropriate penalty will only be made 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

³²⁶ Babcock and McLaughlin (2013), who note that some cells have a direct view of the gallows.

³²⁷ Sections 104 and 105 of the Prisons Act.

³²⁸ Section 105 of the Prisons Act.

³²⁹ Terblanche (2007).

³³⁰ Terblanche (2007) 118-119.

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*:³³¹

[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.

In the same case, Sachs J observed:³³²

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.

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 an offender may be sentenced to death rests in the identity of the judge who tries and sentences him. It is therefore worth considering whether a

³³¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 54.

³³² *S v Makwanyane* 1995 (3) SA 391 (CC) para 351.

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.³³³ The absence of legislative or judicial guidance on this matter, coupled with the fact that courts are not diligent or aware of the problem with this dichotomy, means that an offender does not really know whether he is facing a death sentence or life imprisonment. Indeed, even after being sentenced, an offender may never really know whether the sentence was based on the maximum of death or life imprisonment.

There are also several problems with the right to seek mercy. The dictates of section 326 of the CPEC, which require 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.³³⁴ 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’.³³⁵ 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 dictating 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

³³³ See sections 2.4.2 and 3.4.4 above.

³³⁴ *CPEC Review Report* 156.

³³⁵ *CPEC Review Report* 156.

excluded from the death penalty in Malawi because of the manner in which the prerogative of mercy is exercised.³³⁶

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 only be imposed 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,³³⁷ judges are unlikely to form a different view of a case from that which is on record. Therefore, a better position would be to simply 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 a number of reasons. For example, it is inconsistent with the right to seek mercy recognised in international human rights law. It also deprives an offender of the right to appeal and therefore violates the right to appeal and access to justice. Furthermore, it unfairly discriminates between offenders sentenced under the DFA and the Penal Code. Moreover, the proviso may be regarded as an unconstitutional limitation on the pardon

³³⁶ See sections 2.1 and 3.1 of chapter seven.

³³⁷ Due to case backlogs and 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.

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.³³⁸ This raises uncertainty as to how offenders sentenced under the DFA may be considered for mercy.

While the disappearance of mandatory death sentences brings Malawi a step closer to the total abolition of death penalty, the immediate challenge is to ensure that resentencing is done timeously. The continued detention of offenders sentenced under the mandatory death penalty regime raises other constitutional violations such as unlawful detention and unreasonable delay in sentencing contrary to the right to fair trial. The Malawi Human Rights Commission has rightly observed that the continued confinement of these prisoners violates the prohibition of torture, cruel, inhuman and degrading treatment or punishment 'by subjecting the prisoners to psychological and mental torture'.³³⁹

Of further concern is that so far, the majority of the reviews of mandatory death sentences have been done through appeals in the MSCA which does not provide an opportunity to present mitigating evidence but relies on factors that existed during the trial.³⁴⁰ Technically, the cases reviewed by the MSCA can still be brought before the High Court, as the trial court, for resentencing and be taken on appeal to the MSCA.

³³⁸ 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 as it is a general provision for requesting the President to review any finding or sentence in exercise of this powers under section 113 of the DFA. Indeed, section 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 of the President.

³³⁹ Malawi Human Rights Commission (2013) 47.

³⁴⁰ See Babcock and McLaughlin (2013).

This is because in view of *Kafantayeni*, every pre-2007 death sentence is subject to resentencing. Otherwise, the review by the MSCA deprives the appellants of the benefit of *Kafantayeni* and curtails the right to appeal to a higher court. Further, in the MSCA, the state does not have to advance reasons as to why the death penalty must be upheld. As a general principle of sentencing, the onus is on the appellant to show why the court must tamper with the sentence and, as with all appeals against sentencing, there is a presumption in favour of a sentence imposed by a trial court.³⁴¹ Consequently, an offender bears the burden of showing the court why the sentence must be reduced. The MSCA has not departed from this practice in its review of mandatory death sentences. As a result, the state is largely absolved of its duty to prove beyond reasonable doubt that the death penalty is justifiable in the case at hand. This is inconsistent with the spirit of *Kafantayeni*.

Despite these problematic features of the death penalty in Malawi, it is heartening that Malawi has maintained an unbroken moratorium on executions for the past 22 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 because it goes without saying that

³⁴¹ See for instance *Kaliati v Rep* Miscellaneous Criminal Application No 236 of 2006: ‘... [T]he law presumes the sentence passed on a convict by any court of law to be right, and to remain right and deserving to be undergone until such time as a superior court has had a chance to look at it and to pronounce it otherwise.’

public opinion is not in favour of the moratorium on executions either and yet that 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.

Overall, it can be said that Malawi does satisfy most of the international law restrictions on the death penalty. It appears that it is more in the practice than the law that Malawi fails to meet international and constitutional standards.

5.2 Imprisonment

The discussion on imprisonment demonstrates that this penalty is mainly imposed for retribution, community protection (public safety) and deterrence. It is commendable that Malawian law proscribes the imprisonment of persons below the age of 18 years in any circumstances. Further, the country has taken steps to reduce institutionalised imprisonment through the recent introduction of periodic imprisonment which causes less disruption to an offender's life during the course of punishment. However, in its current form, periodic imprisonment can be criticised in that it can only benefit employed offenders. It is therefore discriminatory based on employment status. This puts unemployed offenders and those who lose their jobs upon conviction at a disadvantage. Typically, offenders convicted of offences such as theft by servant, abuse of office, corruption and other job related offences are likely to lose their jobs after conviction thus not entitled to make an application for intermittent imprisonment. Furthermore, since section 28(A) of the Penal Code is discretionary, a court may decide in favour of continuous imprisonment despite the conditions set out in section 28A being met. The use of periodic imprisonment may also be limited by the fact that it may only be imposed on application and consent by an offender. This is primarily because

most offenders in Malawi are illiterate, uneducated and generally not conversant with legal provisions. As such, very few offenders will apply for periodic imprisonment. It is, therefore, suggested that a court must have the power to invoke section 28(A) on its own motion as is the case with all penalties. Since an offender would not normally apply for periodic imprisonment if he were unwilling to serve it, the requirement for consent is apparently redundant. In any case, it is very unlikely that an offender would opt for continuous imprisonment instead of periodic imprisonment of the same length.

Regarding the use of imprisonment, it is worrisome that imprisonment is applicable to the majority of offences in the Penal Code, including those not serious enough to warrant a custodial punishment such as vagrancy³⁴² and being an idle and disorderly person.³⁴³ It is also disquieting that default imprisonment is readily imposed by courts, resulting in an increased use of imprisonment. An even more tenacious challenge to imprisonment in Malawi is the limited availability of rehabilitative programmes in prisons across the country. This may pose problems for the early release of prisoners since rehabilitation is supposedly a factor that informs pardon process.³⁴⁴

5.2.1 Preventive sentences

There are also a number of problematic issues with regard to preventive imprisonment, some of which have constitutional implications. For instance, since a preventive sentence may exceed the maximum provided for an offence, an offender may be treated more severely than an offender who has committed the offence in the worst form. There are also concerns regarding the criteria for preventive sentences which may impact the right to equality. For example, the application of preventive sentences may

³⁴² Section 184 of the Penal Code.

³⁴³ Section 180 of the Penal Code.

³⁴⁴ For a detailed discussion of the pardon process in Malawi, see sections of 2.1 and 3.1 of chapter seven.

also apply to various offenders because there are many crimes that are punishable with five years, the most common of which is simple theft.³⁴⁵ For instance, an offender with three theft convictions in respect of the theft of cell phones and who has served immediate imprisonment on two occasions for these offences faces a possible 14 year prison sentence. On the other hand, an offender who has three rape convictions and who has served 8 year sentences in each instance may be excused from the application on the ground that he was convicted by a second grade magistrate in one or both cases. It is unclear why convictions by second grade magistrates do not count towards convictions relevant to preventive sentences yet they can impose sentences of up to 10 years.³⁴⁶ The result is that an offender may be exempt from preventive sentencing simply because he was previously convicted by a court of a second grade magistrate. This may introduce arbitrariness in the application of preventive sentences because the allocation of cases in the magistrate courts does not take into account such consequences.

Preventive sentences also infringe the prohibition of cruel and inhuman punishment and the right to dignity. The public protection element in section 11 of the CPEC entails that a court must go beyond the punishment deserved for the offence committed, resulting in harsh punishment that is disproportional to the offence and inconsistent with the prohibition against cruel and inhuman punishment. Moreover, section 11 also violates the right to liberty to the extent that it allows for punishment beyond that which is proportionate to the offence committed. Liberty can only be lawfully deprived on a justifiable cause. Since an offence is the cause that makes imprisonment of an offender justifiable, only a prison term that is proportional to the offence renders imprisonment

³⁴⁵ See section 278 of the Penal Code.

³⁴⁶ See section 14(3) of the CPEC.

justifiable.³⁴⁷ The right to human dignity is also violated where preventive imprisonment exceeds the punishment that an offender deserves for the offence committed. As Ackerman J succinctly stated in *S v Dodo*:³⁴⁸

To attempt to justify any period of penal incarceration ... without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity ... Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits.

The harshness of preventive imprisonment is also aggravated by the fact that it is not subject to review; it must be served in full unless remission or pardon is granted.³⁴⁹ Therefore, it does not accommodate the objective of rehabilitation and allows the continued detention of an offender even when he is no longer a danger to community protection. As argued in chapter three,³⁵⁰ this is inconsistent with the right to liberty which requires that continued detention must be matched with continued justification for deprivation of liberty must exist throughout the period of detention. As held in *Rameka et al v New Zealand*,³⁵¹ a once-off decision is not enough; to avoid arbitrariness,

³⁴⁷ See *S v Dodo* 2001 (1) SACR 594 (CC) para 37.

³⁴⁸ *S v Dodo* 2001 (1) SACR 594 (CC) para 38.

³⁴⁹ *Maikolo v R* [1964–1966] 3 ALR Mal 584 (SCA) 592.

³⁵⁰ See section 3.2.1 of chapter three.

³⁵¹ *Rameka et al v New Zealand* Communication No 1090/2002. For a discussion of this case, see section 3.2.1 of chapter three.

there is need for regular periodic review of the sentence once the punitive element has been served.

Another problem with preventive imprisonment in Malawi is that in terms of its execution, the law does not distinguish between the punitive and preventive periods of such sentences. This means that an offender is never relieved of the conditions of a punitive sentence even during the preventive part of the sentence. As such, the observation made in *Rameka et al v New Zealand* that the distinction between the 'punitive' and 'preventive' periods of preventive sentences has no practical significance is true of the situation in Malawi. Section 11 therefore becomes problematic in two ways: it allows punishment beyond that which is proportional to the offence committed and punishes an offender for offences which it is feared might occur in the future. This infringes not only the presumption of innocence and the principle of legality but also the settled sentencing principle that an offender must only be punished for offences charged, pleaded to and proved beyond reasonable doubt in a court of law.

A further problem with preventive sentences is that they are based on the premise that an offender is likely to commit further offences and that his detention is necessary for incapacitation. The criteria for making such an assessment are so unsatisfactory as to render the detention arbitrary in respect of the period for community protection. Courts rarely, if ever, benefit from expert testimony on an offender's behavioural dispositions that may affect his criminality and propensity to commit further crime. It is unsurprising then that courts have not developed any comprehensive criteria for deciding the dangerousness of an offender. The law also omits to provide any substantive guidance on such criteria. Section 11 is therefore inconsistent with the Constitution and international standards.

5.2.2 Life imprisonment

Regarding life imprisonment, Malawian law aptly reflects the international human rights law requirement that persons below the age of 18 years should be exempted from whole life sentences. However, as is the case with the death penalty, the scope of crimes that are punishable with death is inconsistent with international standards as explained in chapter three. While some offences like murder and manslaughter are within the category of serious offences as required by international law, there are several other offences that do not fit into this category. These include forgery of wills or documents of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, or promissory note, judicial records and bank notes; rioting after proclamation and related offences such as demolishing buildings; stupefying in order to commit felony or misdemeanour; causing or committing an act intended to cause grievous harm or prevent arrest; theft by public servant; destroying or damaging a river bank or wall, navigation works or bridges; counterfeiting coins and making preparations for coining; illegal possession of Indian hemp and rescuing or attempting to rescue from lawful custody a person sentenced to death or imprisonment for life or charged with an

offence punishable with death or life.³⁵² The application of life sentences to these offences is disproportionate and amounts to cruel and inhuman punishment.³⁵³

This problem is slightly offset by the fact that in practice, life sentences are reserved for murder and that the sentencing trends as discussed above indicate that courts often refrain from imposing life sentences. However, in the cases that life sentences have been imposed, it appears that courts have focussed more on the seriousness of an offence than the circumstances of an offender. As a result, the dangerousness of an offender is not the main factor in deciding whether to impose a life sentence. An offender's capacity to reform has also not been given adequate attention. Furthermore, unlike the case with the death penalty, courts have not stressed that life imprisonment should be restricted to the worst instance of an offence. This is probably due to the fact that life imprisonment is provided as an alternative to the death penalty, a dichotomy which, as noted earlier,³⁵⁴ is yet to receive any judicial attention. Consequently, life sentences are imposed under the misapprehension that they are lenient sentences *as compared to* the death penalty. This is in contrast to the wording of section 210 of the Penal Code and fails to give life imprisonment careful attention as a severe form of punishment. As aptly

³⁵² The offences punishable with life in Malawi can be found in sections 39, 40, 41, 43, 44, 54, 77, 78, 79, 114(1)(a), 210, 211, 217A(2)(a), 301, 357, 358, , 114(1)(1), 133, 134, 138, 157, 209, 211, 223, 228, 231, 233, 235, 236, 237, 261, 283(4), 301(2), 302(2), 309(1) and (2), 337, 341, 344(2), 344(3), 372 and 373 of the Penal Code; and regulation 19(1) as read with section 4(a) of the Dangerous Drugs Act, Chapter 35:02 of the Laws of Malawi. The Defence Force Act Chapter 12:01 of the Laws of Malawi, as amended by Act No 11 of 2004 (DFA), has three offences that are punishable with life: aiding the enemy; unauthorised communication with the enemy; and failure to suppress mutiny: see sections 33(1), 34(2) and 41 of the Act.

³⁵³ See Van Zyl Smit (1995), arguing that the prohibition of cruel and inhuman punishment covers two scenarios: punishments which are barbaric in themselves and those that are disproportionate to a particular offence.

³⁵⁴ See sections 2.4.2 and 3.4.4 above.

argued by Van Zyl Smit, life imprisonment is a severe punishment ‘because of its potential to deny liberty indefinitely; this calls for vigilant consideration of the circumstances in which it is used so as to limit it to the most serious cases’.³⁵⁵

The definitional issues with life imprisonment in Malawi are also problematic. The fact that children may not be sentenced to life imprisonment without the possibility of release³⁵⁶ may insinuate that adult offenders may be sentenced to whole life sentences. However, the view that life imprisonment means that an offender will spend the rest of his life in prison regardless of whether he continues to pose a danger to society is inconsistent with rehabilitation and the regular review of long-term prisoners required in section 111 of the Prisons Act. It is also at odds with international standards. As explained in chapter three,³⁵⁷ international human rights law dictates that while life imprisonment per se is consistent with human rights, whole life sentences are inimical to the right to liberty and dignity, and the prohibition against cruel and degrading punishment. As held by the South African Supreme Court of Appeal, ‘it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment’.³⁵⁸

Regrettably, the view that life imprisonment means a whole-life sentence is borne out in practice since courts do not set a tariff period for life sentences and they are not reviewed periodically as required by the Prisons Act. While some solace can be found in

³⁵⁵ Van Zyl Smit (2006).

³⁵⁶ See section 42(2)(g) of the Constitution.

³⁵⁷ See section 3.3.2 of chapter three.

³⁵⁸ *Bull and Another v The State* 221/2000 [2001] ZASCA 105 (26 September 2001) para 23. See also *S v Tcoeb* 1996 (1) SACR 390 (NmS) 399. Cf *S v Tjjo* (unreported but quoted extensively in *S v Tcoeb* 1993 (1) SACR 275 (NmS) 275-276) where Levy J did not consider the possibility of release as mitigating the severity of life imprisonment.

the fact that life sentences are rarely imposed, it is within the understanding of life imprisonment as a whole life sentence that courts impose such lengthy sentences as 35 years. Such sentences are inconsistent with rehabilitation and the right to dignity and amount to cruel and inhuman treatment or punishment because they often exceed the life expectancy of an offender and ultimately mean that an offender will never have a chance to gain his freedom at the end of his sentence.³⁵⁹

Defining life imprisonment in terms of life expectancy may also have its own complications. For instance, with the life expectancy of 58 years for men and 60 years for women as was the case in Malawi in 2012, a life sentence for a 20 year old offender would, depending on an offender's gender, mean 38 or 40 years while for a 50 year old offender it would be eight or 10 years. The meaning of a life sentence would also vary depending on the age of an offender. This raises issues with the right to equality in that life imprisonment would mean different things depending on not only whether an offender is male or female but also the age at which an offender is sentenced.³⁶⁰ In addition, should the life expectancy drop in future, the meaning of life imprisonment would also have to change. This would mean that a drop in life expectancy may at some point imply that life imprisonment would be as low as 10 or 15 years. Likewise, an increase in the life expectancy would entail a redefinition of a life sentence. In turn,

³⁵⁹ See *Nkosi and Others v S* [2002] JOL 10209(SCA) 1, where the South African Supreme Court of Appeal set aside sentences of 120 years, 65 years and 45 years. See also *Mhlakaza and Others v S* 1997 (1) SACR 515 (SCA) where sentences of 47 years and 38 years were found to be excessive. The sentences set aside in these cases were apparently symptomatic of judicial attempts to sidestep the tariff for life imprisonment. With the death penalty no longer available in South Africa (see *S v Makwanyane* 1995 (3) SA 391 (CC)), the maximum sentence was life imprisonment which carried a 20-year tariff. To ensure that serious offenders were not released back into society through parole, courts imposed lengthy sentences as a subtle alternative to life imprisonment, courts resorted to imposing lengthy sentences as a subtle alternative to life sentences: see Mujuzi (2008) 24-25.

³⁶⁰ See Mujuzi (2009) 352.

sentences that are close to a 'life sentence' would be rendered unlawful and even unconstitutional since as maximums they must be invoked only in the worst instance of an offence. Ultimately, it would be unlawful to sentence an offender whose age is above the life expectancy to imprisonment, let alone life imprisonment, as it would amount to cruel, inhuman and degrading punishment or a manifestly excessive sentence. More importantly, the certainty of life imprisonment could be undermined if it were dependent on a variable factor like life expectancy. This outcome would be inconsistent with the principle of legality which requires that the law must clearly declare a punishment in advance. In this case, legality requires that the meaning of life imprisonment must be clearly prescribed by law and not in terms of the life expectancy.

It can therefore be concluded that but for the prohibition of whole life sentences on children, life imprisonment in Malawi largely falls short of constitutional and international standards. There are also gaps between international standards for preventive sentences and the situation in Malawi.

5.3 Non-custodial sanctions

Malawian courts have an opportunity to obviate imprisonment in punishing offenders through several non-custodial penalties such as community service and police supervision. However, in practice, the use of these measures is at a low. This is due to several factors. For instance, courts often resort to non-custodial sanctions in minor offences committed by young and first offenders.³⁶¹ Furthermore, the law and sentencing guidelines restrict the use of most non-custodial penalties to minor offences. Moreover, the law reduces some sentences such as community service to mere

³⁶¹ See section 4 above.

conditions on which a fine or imprisonment may be suspended.³⁶² This implies that imprisonment is the first port of call and that it will most likely be served in default. Furthermore, judicial perceptions of the effectiveness of community sanctions also stifles the application of these measures in practice.³⁶³

Although not often invoked, police supervision also raises a number of issues. To start with, the liberty of an offender is greatly limited by this penalty in light of the conditions applicable,³⁶⁴ more so since supervision can last for up to five years after the expiry of prison sentence.³⁶⁵ The Law Commission is of the view that this restriction of liberty is justifiable because police supervision 'seeks to assist the police in crime prevention especially in view of the fact that there are some offenders, such as sexual offenders,

³⁶² In practice, community service is imposed as an independent penalty, usually with a default sentence of imprisonment. This position is also insinuated by the Form CS/1 of the Community Service (General) Rules GN 34/2000 which states that a court 'should estimate the custody time the offender would serve if community service were not an option'. The form further states that no estimation should be made if the offence would not normally involve custody 'but rather a fine, probation, etc'. Community service is also listed as a substantive penalty in section 25(j) of the Penal Code.

³⁶³ The effectiveness of community sanctions is questionable in view of challenges in implementation: see Kishindo (2012) 40-62, who states that community service is fraught with myriad obstacles such as poor supervision and coordination due to lack of resources. This results in some offenders absconding their punishment unnoticed.

³⁶⁴ In terms of sections 343(1) and (2), a person subject to police supervision is required to personally report to the nearest police station once a month and to inform the police of his place of residence and any changes to it. The execution of and other conditions applicable to police supervision are stipulated in the Criminal Procedure (Police Supervision) Rules GN 12 of 1939. The proposals of the Malawi Law Commission to amend the rules (see the *CPEC Review Report*, 190 -193) were not adopted in the 2010 amendment of the CPEC. As such, police supervision is still governed by 1939 rules. This anomaly appears to be inadvertent as it can be traced to the omission of the proposed amendments in the CPEC Bill.

³⁶⁵ See section 342(1) of the CPEC.

with a tendency to repeat their crimes'.³⁶⁶ This rationale serves to show that in its current form, police supervision is arbitrary in that it is applicable to all offences punishable with at least three years' imprisonment. Moreover, a court is not required to assess the likelihood of re-offending when imposing the penalty. Indeed, the fact that the sentence is imposed at the same time as the original sentence precludes a court from making a meaningful assessment of the likelihood of re-offending. There will always be a chance, no matter how slim, that an offender may come out of a prison a changed man. Therefore, the restriction on the right to liberty is unjustifiable since, as argued in chapter three, it is not based on the dangerousness of an offender.

The arbitrariness of police supervision is further brought to bear in instances where an offender serves a long prison sentence or consecutive sentences resulting in a long stay in custody. In addition, a reading of the CPEC (Police Supervision) Rules shows that the measure is wholly punitive and a mimic of pre-trial bail conditions; police supervision merely subjects an offender to present himself to the police and notify the police of his residence. There is no provision that may enhance the rehabilitation or reformation of an offender. The question must also be asked whether the Malawi Police Service is the right institution to administer post-sentence supervision of an offender. The police in Malawi are understaffed and ill-equipped to contribute to the reformation of an offender. Police supervision is also unnecessary in view of the availability of probation.

To conclude, it can be observed that while the law provides for a number of community sanctions, there remain several practical challenges which undermine their use and efficacy. As a result, there is more that needs to be done to ensure that Malawi

³⁶⁶ See the *CPEC Review Report* 164 which states that the retention of section 342 was partly strengthened by the oral submission of two High Court judges and the then Chairman of the Malawi Law Society on the recidivist tendency of sexual offenders.

effectively restricts the use of imprisonment through the available non-custodial sanctions and to achieve their intended goals such as reformation of offenders.

6 CONCLUSION

This chapter has shown that in as far as the forms of punishment are concerned, the Malawian penal regime does meet some of the constitutional and international standards punishment. For instance, the law prohibits the application of the death penalty to persons below the age of 18 years and pregnant women. Further, prisoners on death row may be considered for seeking by the President. The abolition of the mandatory death penalty is also in line with the global trend towards abolition. As a result of this development, death sentences are rarely imposed in Malawi despite the existence of a number of capital crimes. However, there are some aspects of death sentences in Malawi that are troubling. For example, while it is commendable that death sentences are in practices limited to murder cases, the scope of capital offences is too wide as can be seen in the application of death sentences to robbery and burglary. Further, the right to seek pardon is not guaranteed to offenders sentenced to death under the DFA.

Similarly, the application of life imprisonment is partly consistent with international human rights law. For example, courts are prohibited from imposing whole life sentences on persons below the age of 18 years. In line with rehabilitation, the law also provides for the mandatory review of life sentences. However, the circumstances in which life imprisonment is imposed reveal that courts focus mainly on community protection and retribution; they have not paid sufficient attention to rehabilitation and the capacity of an offender to reform. Further, in the absence of a statutory definition, life imprisonment is largely understood to mean that a prisoner will spend the rest of his life in prison. In this regard, the Prisons Bill has the potential to change this perception

in view of its proposal that prisoners serving life sentences must be considered for review after 12 years. This reflects a more rehabilitation-oriented approach to life imprisonment and indeed sentencing as a whole.

CHAPTER 6

THE AIMS OF PUNISHMENT IN MALAWI

1 INTRODUCTION

So far, the study has established that while international human rights law recognises all the traditional theories of punishment, it leans more towards rehabilitation as the primary aim of punishment. It has also shown that Malawi has a range of sentencing options that represent a hybrid penal regime that reflects both retributive and utilitarian justifications for punishment. However, courts tend to place more emphasis on retribution, incapacitation and deterrence when sentencing, particularly when imposing death sentences and imprisonment. In view of this, it is important to examine how the aims of punishment are employed when courts are deciding on what goal a particular sentence must achieve.

This chapter seeks to establish how the courts have understood the Constitution and used international law to improve the penal regime; whether they have embraced rehabilitation as the predominant theory; the manner in which they understand the theories of punishment; the impact of the court's views on the aims of punishment on their sentencing decisions; and whether there has been a shift in the understanding of these aims from before to after 1994. Drawing mainly from case law, the chapter commences with an overview of the role of aims of punishment in sentencing discussion of the courts' view of the aims of punishment in sentencing. It then turns to consider the aims of punishment before and after 1994. Thereafter, the chapter provides an assessment of the aims to achieve the stated objectives of this chapter.

2 THE ROLE OF THE AIMS OF PUNISHMENT IN SENTENCING

There seems to be some inconsistency as to the proper role of the aims of punishment during the sentencing process. The *Magistrate's court sentencing guidelines*¹ state that the seriousness of the

¹ Malawi Judiciary *Magistrate's court sentencing guidelines* (2007), hereafter *Sentencing guidelines*.

offence must be assessed before a court decides the aim of punishment in a particular case. This suggests that the decision as to which aim(s) of punishment to pursue must be informed by the seriousness of an offence. Writing in 1997, Chimasula Phiri J was of the view that the aims of a sentence must be the first decision to make in sentencing.² However, in 2013 case of *Rep v Kufandiko*,³ Mwaungulu J decided that public interest considerations regarding the aims of punishment should only come into play after the right sentence has been identified. Similarly, *Rep v Keke*⁴ held that the goals of punishment ('public goals') must be the last factor to consider when sentencing.⁵

Since the factors that a court considers in sentencing and the weight attached to them is intricately linked to traditional theories of punishment, it is insignificant whether chronologically the aims of punishment are considered first or last in the sentencing process. Indeed, even where a court does not make specific reference to a particular theory of punishment, as is often the case in Malawi, the factors used in arriving at the sentence are the key to identifying the underlying rationale for the sentence imposed. Therefore, the aims of punishment are always the framework within which a sentence is imposed; the only difference is that courts will vary as to the emphasis they place on particular factors and, by implication, the theories of punishment. It is this variance in emphasis that determines the quantum of punishment in the end.

² Chimasula-Phiri (1997).

³ *Rep v Kufandiko* Confirmation Case No 126 of 2009.

⁴ *Rep v Keke* Confirmation Case No 404 of 2010, hereafter *Keke*.

⁵ *Rep v Keke* Confirmation Case No 404 of 2010, 3-4: 'Over all, in considering whether the sentence is cruel inhuman or degrading, the appellate court will investigate if the sentence fits the offence (crime), the victim, the offender, and the public interest or public goals. Courts sentencing at first instance must carefully examine these four heads of sentence and treat them in this order. In practical sentencing, the sentencer must operate in this order. This sequencing is more likely to produce uniform and fair sentences after properly considering factors exogenous to the crimes that are determinative of final disposal of the crime and the offender'.

Courts have drawn a clear distinction between the aims of punishment and sentencing principles. For instance, in *Rep v Phiri and another*,⁶ the accused, a first and young offender, was sentenced to seven years for the theft of three cows. The aim of the sentence was purportedly reformation of the offender. It was held on appeal that the sentence reflected confusion between the purpose of a sentence and sentencing. The court noted that the purpose of a sentence helps little in arriving at an appropriate sentence in a particular case. It found that the sentence was disproportionate in the circumstances and also in the light of sentences imposed in more serious cases. This judgment reveals that courts are wary of overemphasising the purposes of a sentence in the sentencing process as this might lead to a situation where the circumstances of the offender are overlooked or overemphasised. This would result in sentences that are either too lenient or too severe. *Rep v Phiri and another* also reveals the centrality of proportionality in sentencing. Indeed, the High Court has warned that regardless of its purported objective, a sentence must be imposed in the context of a just and fair punishment in relation to the crime and the offender that does not offend the prohibition of cruel, inhuman and degrading punishment.⁷

Proportionality continues to be recognised as the paramount principle in sentencing and is therefore regarded as independent of retribution itself as an aim of punishment. In *Rep v Nangwiya*,⁸ the court held that ‘the sentence passed must be just to the offender, the offence and the victim and should reflect the public interest in prevention of crime’. *Rep v Nkhoma*⁹ also held:

It is not proper that the court, to achieve any of the purposes of sentencing, retribution, deterrence, incapacitation, reformation and rehabilitation, should compromise principles of sentencing. Principles of sentencing are different from purposes of sentencing. Normally the purposes of sentencing do not assist the court in arriving at the appropriate quantum of a sentence. An appropriate sentence must achieve

⁶ *Rep v Phiri and another* [1997] 2 MLR 92 (HC).

⁷ *Rep v Keke* Confirmation Case No 404 of 2010, 8.

⁸ *Rep v Nangwiya* Confirmation Case No 608 of 1997.

⁹ *Rep v Nkhoma* Confirmation Case No 3 of 1996.

proportionality, equality and restraint. The sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance.

Courts have also linked proportionality to the prohibition of cruel, inhuman or degrading punishment or treatment. The High Court has stated that long sentences that are disproportionate to the personal circumstances of an offender violate the fundamental right not to be subjected to any cruel and unusual treatment.¹⁰ In *Rep v Pose and another*,¹¹ it held that whether a violation had occurred would depend on the circumstances of the offence and comparable sentences both for an aggravated form of the offence and more serious offences.

3 THE AIMS OF PUNISHMENT BEFORE 1994

Before 1994, the aims of punishment were largely deduced from the aims of criminal law. It was recognised that the aim of criminal law was not just retribution but ultimately crime prevention. Therefore, the courts emphasised crime prevention as the primary purpose of punishment. This required that deterrence and community protection (incapacitation) should be the priority in sentencing. In *R v Robert*,¹² Villiera J held:

The first and foremost [consideration in sentencing] is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice the punishment will be negligible. Such a sentence may also deter the particular offender from committing a crime again or induce him to turn from criminal to honest living.

Accordingly, deterrence and community protection were individually seen as major aims of punishment.¹³ Community protection was often regarded as a justification for imposing long and

¹⁰ *Rep v Pose and another* [1997] 2 MLR 95 (HC).

¹¹ *Rep v Pose and another* [1997] 2 MLR 95 (HC).

¹² *R v Robert* [1961-1963] 2 ALR Mal 291 (HC) 293, citing *R v Ball* (1951) 35 Cr App R 164, 165-166.

¹³ *Rep v Katole* [1993] 16(1) MLR 472 (HC); *Rep v Mpira and others* [1982-1984] 10 ALR Mal 67 (HC).

immediate sentences for serious offences. In *Banda and others v Rep*,¹⁴ the Malawi Supreme Court of Appeal (MSCA) held that serious offences should be severely punished with long prison sentences in order to protect the public and that the goal of public protection would in such cases justify an order that the sentences should run consecutively. Similarly, in *Rep v Phale and another*,¹⁵ the court held that community protection was a justification for imposing otherwise harsh sentences in serious cases. Apart from community protection, long and immediate sentences were also considered necessary in serious cases to mark the gravity and public disapproval of the offence, and to punish the offender.¹⁶ The pursuit of community protection and deterrence, especially where the offence was serious, would also justify a departure from sentencing principles provided this did not result in an extraordinarily excessive sentence.¹⁷

In employing deterrence, courts distinguished between specific and general deterrence. Specific deterrence provided the rationale for considering an offender's criminal record in sentencing; unlike first offenders, repeat offenders were not entitled to leniency.¹⁸ The reason for this was that a repeat offender showed that he had not learnt from or been deterred by his previous punishment. This rationale was evident, for example, in the general principle that the significance of previous convictions diminished with time.¹⁹ The justification for this principle was that a lapse of time between the previous conviction and the current one must be considered in the offender's favour as an indication that the defendant has demonstrated that he tried to lead a

¹⁴ *Banda and others v Rep* [1990] 13 MLR 56 (SCA) 59.

¹⁵ *Rep v Phale and another* [1991] 14 MLR 438 (HC)

¹⁶ *Rep v Msonoya* [1987-1989] 12 ALR Mal 394 (HC).

¹⁷ *Banda and others v Rep* [1990] 13 MLR 56 (SCA); *Kamil v Rep* [1973-1974] 7 MLR 169 (SCA); *Kumwenda v Rep* (1993) 16(1) MLR 233 (SCA).

¹⁸ *R v White* [1923-1960] 1 ALR Mal 401 (HC); *Bwanali v R* [1964-1966] 3 ALR Mal 329 (HC). Cf *Makawa v Rep* Criminal Appeal No 196 of 1975 where previous convictions were used to justify the imposition of the maximum penalty; *Maiikolo v R* [1964-1966] 3 ALR Mal 584; *Rep v Havula and another* [1991] 14 MLR 429 (HC); *Chief Public Prosecutor v Nkosi and another* [1990] 13 MLR 97 (HC) (previous convictions evidence of bad character).

¹⁹ See, for instance, *Rendall-Day v Rep* [1966-1968] 4 ALR Mal 155 (HC).

clean life.²⁰ In 1964, Cram J held that a reasonable and proper sentence is one that is appropriate to the offence and the circumstances and that is not enhanced merely because the convict has previous convictions:²¹

[I]t is not right to hold over a man's past offences which have been dealt with by appropriate sentences, as we must assume [that] past offences have been dealt with, and add them up and increase ... the severity of sentence for a later offence. That is dangerously like punishing a man twice for an offence. If a man who has been convicted shows himself unresponsive to leniency and persists in life of crime, that is a reason for giving him the proper and deserved sentence in the particular case. If, on the other hand, there are some merits, it may be that the court will treat him more leniently because he has shown himself in some way responsive to the warning which he has had.²²

General deterrence, aimed at deterring potential offenders, entailed that the prevalence of an offence was a basis for increasing a sentence.²³ This meant that, like community protection, general deterrence was often used to justify stiff sentences in the form of long and immediate imprisonment in punishing serious cases.²⁴ In addition, it justified departure from established sentencing principles.²⁵ Suspended sentences were generally seen as inadequate for general deterrence. In *Rep v Nabanda*,²⁶ for example, Unyolo J held that a serious offence like child stealing should be punished with immediate imprisonment because a suspended sentence would send a wrong signal to the offender and potential offenders.

Interestingly, courts were of the view that general deterrence was not a suitable goal of punishment for first and young offenders and therefore often refrained from imposing lengthy

²⁰); *John v Rep* Criminal appeal No 131 of 1975, where a lapse of six years prompted the court to disregard the offender's criminal record.

²¹ *Maikolo v R* [1964–1966] 3 ALR Mal 584 (SCA) 594.

²² *Maikolo v R* [1964–1966] 3 ALR Mal 584 (SCA) 594.

²³ *R v Phiri and others* [1993] 16 2 MLR 748 (HC) 751; *R v Zagna* [1923-1960] 1 ALR Mal 415 (HC).

²⁴ *Rep v Katole* [1993] 16(1) MLR 472 (HC); *Rep v Phale and another* [1991] 14 MLR 438 (HC); *Mpondammwala v Rep* [1984-1986] 11 ALR Mal 306 (HC).

²⁵ See for instance *Kamil v Rep* [1973-1974] 7 MLR 169 (SCA).

²⁶ *Rep v Nabanda* [1984-1986] 11 ALR Mal 166 (HC).

sentences on them. Relying on *Rep v Banda*,²⁷ *Rep v Domingo*²⁸ held that it is in the public interest that young offenders must not be used as ends for general deterrence. According to the court, where young offenders were concerned, general deterrence might still be achieved through short sentences.²⁹ The rationale for this was that general deterrence entailed long sentences which were unsuitable for such offenders as they would inhibit their rehabilitation. This reasoning clearly underscores the fact that general deterrence was synonymous with long sentences.

It is important to mention that courts generally viewed first offenders as more likely to respond positively to punishment or the threat of punishment. For instance, according to Jere J in *Rep v Matindi*:³⁰

The philosophy behind [suspended sentences] is that first offenders should be kept out of prison because contact with hardened criminals might have a bad influence on them, and, secondly, they should be given a chance to mend their ways but with a real threat that if they commit another offence during the period, the suspended sentence will be revived. In this way, therefore, the suspended sentence provides an incentive to first offenders to keep the law.³¹

This reasoning presupposes that first offenders have a higher chance of changing their ways than repeat offenders. Therefore, specific deterrence was likely to be achieved when dealing with first offenders.³² In fact, according to Chatsika J, '[i]t has been proved in certain cases that certain persons who are tempted to commit offences thinking that they would not be found, refrain

²⁷ *Rep v Banda* [1984-1986] 11 ALR Mal (HC) 7.

²⁸ *Rep v Domingo* Confirmation Case No 850 of 1990.

²⁹ See also *Rep v Nthara* [1984-1986] 11 ALR Mal 338 (HC) - long sentences not for first and young offender aged 20, thus sentence reduced from 42 months to 18 months for bestiality; *Maniote v Rep* [1984-1986] 11 ALR Mal 174 (HC) – first offenders must be punished with lenient sentences; *Rep v Phiri* [1984-1986] 11 ALR Mal 176 (HC).

³⁰ *Rep v Matindi* Confirmation Case No 1699 of 1976.

³¹ *Rep v Matindi* Confirmation Case No 1699 of 1976.

³² See for instance *Kalambo v Rep* Criminal Appeal No 199 of 1975 (the purpose of a suspended sentence is to give an offender 'a chance to reform and become a good member of community').

from falling into similar temptations, when they have once been found and subjected to terms of imprisonment which have been suspended'.³³

Courts also considered retribution as a major aim of sentencing. Sentences were largely determined on the basis of what an offender 'deserved' in view of the seriousness of an offence and the culpability of an offender. In *Rep v Phiri and another*,³⁴ it was held that a sentence must reflect the seriousness of the offence. The centrality of retribution in the sentencing process was also evident in how courts determined whether a first offender should be sentenced to immediate imprisonment or not. Imprisonment was deserved if the offence was serious.³⁵ The principle of proportionality, which, as discussed in chapter two, is the central tenant of retribution, was long recognised as the central principle in sentencing.³⁶ However, as noted above, courts readily endorsed otherwise disproportionate sentences for purposes of deterrence and community protection to maximise the overall aim of crime prevention.

Rehabilitation was often invoked when sentencing first and young offenders. Courts were lenient in dealing with such offenders ostensibly because they believed that such offenders had a chance of reformation. For instance, suspended sentences, which were seen as serving specific deterrence and reformation, were often used in cases involving first and young offenders.³⁷ In *John v R*,³⁸ for example, the accused, a first offender, was sentenced to three years for housebreaking. On appeal, the court held that long sentences should not be imposed on young offenders who have never been to prison. The sentence was set aside and the accused bound

³³ *Kalambo v Rep* Criminal Appeal No 199 of 1975.

³⁴ *Rep v Phiri and others* [1993] 16(2) MLR 748 (HC) 751.

³⁵ *Mwambala v Rep* [1990] 13 MLR 283 (HC) 287-288; *R v Nasoni* [1990] 13 MLR 400 (HC); *Rep v Kampango* [1991] 14 MLR 432 (HC); *Kamil v Rep* [1973-1974] 7 MLR 169 (SCA); *Rep v Atimu* Confirmation Case No 274 of 1992 (suspended sentence inappropriate for first and young offender who raped his victim twice with impunity while threatening her with a knife).

³⁶ *Rep v Shanti* [1975-1977] 8 MLR 69 (HC).

³⁷ See *Kalambo v Rep* Criminal Appeal No 199 of 1975 (suspended sentence gives an offender 'a chance to reform and become a good member of community').

³⁸ *John v R* [1923-1960] 1 ALR Mal 655 (HC).

over to give him a second chance. According to *Rep v Domingo*,³⁹ it was in the public interest that first offenders were given a chance to mend their ways through ‘shorter and proportionate confinement followed by immediate integration into the society: the better teacher and reformer’.⁴⁰ The court stressed that young offenders should not be ‘unduly thrust into the company of hardened criminals for a long period of time’, especially where there were other mitigating factors.⁴¹ However, it was held in *Thomo v Rep*⁴² that a sentence should not be reduced on the basis that a longer sentence would militate against the speedy rehabilitation of an offender. Endorsing a deterrent perspective, the High Court reasoned that the prospect of a long sentence should be foreseen by a criminal before he commits a crime.

It is clear from this that the meaning ascribed to rehabilitation was not associated with correctional interventions. Rehabilitation was perceived as an inevitable consequence of a short sentence in prison; it did not involve a positive act. It can, therefore, be said that there was a blur between rehabilitation and specific deterrence since in both instances, the understanding was that an offender would refrain from committing further crimes because of his unpleasant past experience in prison or the fear of punishment.

In summary, it can be observed that the penal philosophy before 1994 did not emphasise crime prevention as the overarching goal of punishment. This entailed that community protection (incapacitation) and deterrence were given the priority in sentencing and were used to justify long sentences. Therefore, although retribution was also recognised as an aim of punishment, the principle of proportionality was subject to the public interest in crime prevention. In other words, disproportionate sentences were justifiable if they were aimed at general deterrence and community protection. In practice, this rationale provided leeway for the imposition of long

³⁹ *Rep v Domingo* Confirmation Case No 850 of 1990.

⁴⁰ *Rep v Domingo* Confirmation Case No 850 of 1990.

⁴¹ *Rep v Domingo* Confirmation Case No 850 of 1990.

⁴² *Thomo v Rep* Criminal Appeal No 12 of 1975.

sentences in serious cases. Rehabilitation played a lesser role in punishment and was limited to non-serious offences committed by first and young offenders who, as a result, were punished with short sentences.

4 THE AIMS OF PUNISHMENT AFTER 1994

Since 1994, courts have increasingly engaged with the objectives of punishment and what they entail. Courts continue to recognise the traditional aims of punishment: deterrence, retribution, denunciation, incapacitation and rehabilitation.⁴³ In *Rep v Chikatha*,⁴⁴ it was observed that sentencing policy may have competing and conflicting purposes from which a court has to choose. It has repeatedly been held that the overarching aim of punishment is crime prevention. Courts have emphasised that the public has an interest in knowing how a sentence will help to curb criminality.⁴⁵ Echoing *R v Robert*,⁴⁶ it was held in *Rep v Pose and another*⁴⁷ that sentencers should always bear in mind that ‘criminal law is publicly enforced to prevent crime’. In *Rep v Nkbuya*,⁴⁸ the court added that the protection of society through ensuring public order is a primary goal of criminal law. The ‘public interest in preventing crime’ remains one of the four

⁴³ *Rep v Madelube* Criminal Case No 105 of 2008, 1; *Rep v London* Confirmation Case No 468 of 2002; *Rep v Kayenda* Confirmation Case No 220 of 2003; *Rep v Chavula* Criminal Appeal No 93 of 2005, 4; *Rep v Nkboma* Confirmation Case No 3 of 1996; *Rep v Nkbuya* Confirmation Case No 1002 of 2002.

⁴⁴ *Rep v Chikatha* Confirmation Case No 1602 of 1998.

⁴⁵ *Rep v Banda and others* Confirmation Case No 359 of 2012, 3.

⁴⁶ *R v Robert* [1961-1963] 2 ALR Mal 291 (HC) 293.

⁴⁷ *Rep v Pose and another* [1997] 2 MLR 95 (HC). See also *Rep v Nkboma* Confirmation Case No 3 of 1996; *Rep v Laiton* Confirmation case No 1997.

⁴⁸ *Rep v Nkbuya* Confirmation Case No 1002 of 2002. See also *Rep v Manyozo* Confirmation Case No 431 of 2002; *Rep v Chapendeka and others* Confirmation Case No 451 of 2000; *Rep v Chimaliro and others* Confirmation Case No; 461 of 2000; *Rep v Mustafa* Confirmation Case No 523 of 2001; Confirmation Case No 234 of 2001; *Rep v Chikopa* Confirmation Case No 530 of 2000; *Rep v Banda* Confirmation Case No 884 of 2002; *Rep v Joseph* Confirmation Case No 516 of 2002; *Rep v Makuluni* Confirmation Case No 276 of 2001, *Rep v Edisoni* Confirmation Case No 421 of 2001; *Rep v Kayenda* Confirmation Case No 220 of 2003; *Rep v Silaji* Confirmation Case No 452 of 2002; *Rep v Zinkambani* Confirmation Case No 481 of 2000; *Rep v Chilimba* Confirmation Case No 114 of 2011, *Rep v Khonga* Confirmation Case No. 157 of 2002.

considerations – in addition to the offence, the offender and the victim – that must be considered in sentencing.⁴⁹

It is important to mention that in the context of sentencing, ‘public interest’ refers primarily to the purposes of punishment. Courts are aware that the public generally demands heavy sentences. While courts are responsive to public outcry, it has been held that public interest requires adherence to sentencing principles. In *Rep v Steshi and another*,⁵⁰ Madise J held that it is in the public interest that the principle of proportionality must be upheld: ‘a sentence must reflect the general feeling of the public and ... should not outrage the public as too harsh or too lenient’. It has also been held that it is in the public interest that young offenders should continue their education to better their lives.⁵¹ In *Rep v Kwalala and another*,⁵² it was said that the public interest requirement will be met

if the court, having regard to the nature of the offence and the personal circumstances of the defendant and the victim, arrives at a sentence which a reasonable member of the public would say the defendant has really got what he deserves for the offence ... being that it is proportionate to the gravity of the offence, effuses equality with those similarly culpable and shows restraint.⁵³

This indicates a retributive approach to sentencing. Indeed, according to *Rep v Chikuli*,⁵⁴ victims must also derive contentment in the sentence imposed.

⁴⁹ See *Rep v Akimu* Revision Case No 9 of 2003; *Rep v Banda, and others* Confirmation Case No 633 of 1999; *Rep v Ajibu* Confirmation Case No. 1011 of 1997; *Rep v Maele* Confirmation Case No 654 of 2001; *Rep v Themule* Confirmation Case No. 228 of 2002; *Gulumba v Rep* Miscellaneous Criminal Application Case No 51 of 2003; *Rep v Phiri* Confirmation Case No 430 of 2003; *Rep v Chabwera* Confirmation Case No 728 of 2002; *Rep v Ngozo* Confirmation Case no 231 of 2003; *Rep v Samson Chilimba* Confirmation Case No 114 of 2001; *Rep v Kwalala and another* Confirmation Case No 6 of 1996.

⁵⁰ *Rep v Steshi and another* Criminal Appeal No 7 of 2001. See also *Phiri v State* Criminal Appeal No 63 of 2009.

⁵¹ *Rep v Mvalume and another* Confirmation Case No 278 of 2000; *Sipilyano v Rep* Criminal Appeal No 59 of 1998.

⁵² *Rep v Kwalala and another* Confirmation Case No 6 of 1996.

⁵³ *Rep v Kwalala and another* Confirmation Case No 6 of 1996, 2.

⁵⁴ *Rep v Chikuli* Confirmation Case No 174 of 2005.

However, it is the public interest in crime prevention which is given precedence in the principle that the overall aim of punishment is crime prevention. As was the case before 1994, this principle has entailed the prioritisation of deterrence and community protection in sentencing offenders.

4.1.1 Retribution

The central principle of retribution is that the punishment must fit the seriousness of the crime and the blameworthiness of the offender. Retribution is widely employed as a justification for punishment in Malawi. While reference to the word ‘retribution’ itself is rare, sentencing courts have referred to notions of retributive justice in their sentencing judgments. For instance, they often make subtle reference to the notion of just deserts by stating that an offender ‘deserves’ a particular punishment. Retribution is also evident in that young offenders are generally treated with mitigation.⁵⁵ This is because they are regarded as being less blameworthy, committing crimes due to peer pressure, impetuosity, immaturity, youth or adventure.⁵⁶

The seriousness of the offence is the most determinative factor in sentencing and indeed the decision to imprison. As noted earlier, courts have prescribed that serious offences must be

⁵⁵ *Mzungu v Rep* Criminal Appeal Case No 21 of 2007; *Rep v Banda and others* Confirmation Case No 359 of 2012; *Rep v Yasin* Confirmation Case No 219 of 2012; *Asekwe and another v Rep* Criminal Appeal No 59 of 2000 (offenders aged 27 and 28 years); *Matevere v Rep* Criminal Appeal No 63 of 2005 (23 year old offender); *Rep v Phiri* Confirmation Case No 430 of 2003; *Patel v Rep* (23 year old offender); *Rep v Kachule* Confirmation Case No 234 of 2001; *Nzabwa v Rep* Criminal Appeal 6 of 2007 (21 year old offender); *Phiri v Rep* Criminal Appeal No 111 of 2006 (21 year old offender); *Rep v Magombo and others* Confirmation Case No 264 of 2011 (23 years young); *Rep v Chatepa and another* Confirmation Case No 822 of 2004. In some cases, older offenders aged between 30 and 40 years have also been regarded as young offenders: see for instance *Sipiliyano v Rep* Criminal Appeal No 59 of 1998 (34 years); *Rep v Mtendere* Confirmation Case No 310 of 210 (34 years); *Chanza v Rep* Criminal Appeal No 170 of 2005 (36 years ‘very young’); *State v Mbale* Criminal Case Number 32 of 2008 (32 year old ‘fairly young’).

⁵⁶ *Rep v Keke* Confirmation Case No 404 of 2010; *Rep v Chavula* Confirmation Case No 93 of 2005, 5; *Patel v State* Criminal Appeal No 81 of 2007. Research indicates that peer pressure is a common factor that influences older offenders to commit crime: see Burton *et al* (2005) 27.

punished with long and immediate imprisonment in order to send a right message to society.⁵⁷ It was stated in *Rep v Masula and others*⁵⁸ that the consideration in sentencing should always be the seriousness of the offence. The seriousness of an offence can be garnered from the nature of the offence (the actions and mental component comprising the crime),⁵⁹ the circumstances in which it was committed⁶⁰ and the maximum sentence (which, theoretically, reflects the public's view of the offence and is an indicator of the public interest in a crime because it is set by parliament as the representative of the public),⁶¹ the effect of the crime on society,⁶² the motive;⁶³ and the *modus operandi*.⁶⁴

⁵⁷ *Chitsonga v Rep* [1995] 1 MLR 86 (HC) 88.

⁵⁸ *Rep v Masula and others* Criminal Case No 65 of 2008.

⁵⁹ *Rep v Edisoni* Confirmation Case No 421 of 2001. Strict liability is mitigating factor: see *Mangani v Rep* Criminal Appeal No 3 of 2007.

⁶⁰ *Rep v Maele* Confirmation Case No 654 of 2001; *Rep v Themule* Confirmation Case No. 228 of 2002.

⁶¹ *Rep v Iddi* Confirmation Case No 48 of 1998; *Rep v Timba* Criminal Case No 88 of 2009; *Rep v Misomali* Confirmation Case No 738 of 2000; *Rep v Chenka and others* Criminal Case No 73 of 2008. Offences that are serious by nature include murder, manslaughter, robbery, housebreaking (see *William Hassan v Rep* Criminal Appeal No 102 of 2005) and theft by public servant (see *Rep v Koloko* [1995] 2 MLR 723 (HC)).

⁶² *Rep v Kambalame* Criminal Case No of 108 of 2002 (effect of corruption on economy considered).

⁶³ *Rep v Mbeve* [1973-1975] 7 ALR Mal 124 (HC) where the defilement of a 13 year old girl in the presence of another person was found not to have been committed out of lust but aimed at degrading and humiliating victim; *Nyamatcherenga v Rep* Criminal Appeal No 56 of 2000.

⁶⁴ See for instance *Rep v Tito* [1995] 2 MLR 638 (HC); *Rep v Chikazingwa* [1984-1986] 11 ALR Mal 160 (HC); *Chimanya v Rep* MSCA Criminal Appeal No 8 of 2006 (SCA) 5. The offence will be aggravated where the manner in which an offence was committed reveals elements that show a disposition beyond the ordinary elements or requirements of the offence portraying a dangerous criminal: see *Harry v Rep* Criminal Appeal No 5 of 2005); *Asekwe and another v Rep* Criminal Appeal No 59 of 2000 ('peculiar determination and criminal ingenuity', a 'real criminal mind at work'); *Rep v Banda and others* Confirmation Case No 633 of 1999 (violent and evil person with a high level of criminality evidenced by the fact that the victims were terrorised and manhandled); *Idi v Rep* [1994] MLR 99 (HC) 102 (19 year old first offender described as 'a determined and dangerous criminal' after raping his victim while brandishing a knife). Aggravation of the offence may also be enhanced by the way the victims were treated by an offender: such as brutality (*Chinkango v Rep* MSCA Criminal Appeal No 7 of 2009 (SCA) (victim was brutally stabbed to death); victim held captive (*Rep v Alick* [1997] 2 MLR 73 (HC); *Mwale v Rep* Criminal Appeal Case No 5 of 1994); victim threatened, humiliated or injured (*Rep v Mandavala* Confirmation Case No 930 of 2003 (victim threatened); *Rep v Layelo* Confirmation Case No 577 of 2000; *Rep v Manjeza and another* [1995] 2 MLR 571 (HC) – complainant was tied up naked and his wife raped 'in a very disgraceful and revolting manner' in the presence of her husband and

Courts have also emphasised retribution by taking account of public sentiments in sentencing. It was held in *Rep v Chikuli*⁶⁵ that a victim must ‘derive contentment in the sentence imposed’. In some cases, courts have hinted at retribution in a manner that borders on revenge. A case in point is *Khoviva v Rep*⁶⁶ where the accused was convicted of murder and the Malawi Supreme Court of Appeal (MSCA) held that the accused deserved the death penalty because he did not give the deceased a chance to live.

Courts have also been encouraged to pass meaningful sentences that will reduce resort to mob justice on the part of society.⁶⁷ *Banda and another v Rep*⁶⁸ held that a sentence must reflect the general feeling of the public so that it does not outrage the public as too harsh or too lenient.⁶⁹ Punishment is also aimed at denunciation of certain conduct. For instance, the court in *Rep v Kaira*⁷⁰ held that a sentence of three and a half years for defilement was not enough to reflect public revulsion of the offence and its seriousness. It noted that courts must be alive to public sentiments regarding offences and show public disapproval through the sentences they impose. The High Court has in fact reasoned that a combined consideration of all the aims of

children; *Rep v Malola Idi* Confirmation Case No 658 of 2000) repeated assaults (*Rep v Mawaya and others* Confirmation Case No 794 of 2000; *Rep v Makuluni* Confirmation Case No 276 of 2001; *Manuel Peter v Rep* Criminal Appeal No 65 of 2008; *Nwangwu v Rep* Criminal Appeal No 11 of 2008 (SCA); dangerous weapon was carried or actually used (*Rep v Iddi* Confirmation Case No 48 of 1998; *Rep v Mkoma* [1995] 2 MLR 598 (HC); *Rep v Chikakuda and others* [1997] 2 MLR 288 (HC) 294; *Rep v Masula and others* Criminal Case No 65 of 2008; *Naison and another v Rep* Criminal Appeal No 42 of 1996; *Kachimanga v Rep* Criminal Appeal 180 of 2005; *Kbonje v Rep* Miscellaneous Criminal Case No 41 of 2009; *Moses v Rep* Criminal Appeal No 106 of 2006; *Uladi v Rep* MSCA Criminal Appeal No 5 of 2008 (SCA), 20 years for murder where bare hands used to fight victim; *Kwalala v Rep* MSCA Criminal Appeal No 3 of 2008 (SCA); *Rep v Banda and others* Confirmation Case No 633 of 1999; *Rep v Chalunda and others* Miscellaneous Criminal Case No 3 of 2008); victim tricked into the crime (*Wesle v Rep* [1995] 1 MLR 367 (HC); *Rep v Kammendo*; *Rep v Chida* [1995] 2 MLR 644 (HC); *Phiri v Rep* Criminal Appeal Case No 54 of 2007).

⁶⁵ *Rep v Chikuli* Confirmation Case No 174 of 2005.

⁶⁶ *Khoviva v Rep* MSCA Criminal Appeal No 6 of 2007.

⁶⁷ *Mulewa v Rep* [1997] 2 MLR 60 (HC) 66.

⁶⁸ *Banda and another v Rep* Criminal Appeal No 7 of 2011. See also *Rep v Stesbi and another* Criminal Appeal No 7 of 2001; *Phiri v S* Criminal Appeal No 63 of 2009.

⁶⁹ See also *Rep v Stesbi and another* Criminal Appeal No 7 of 2001; *Phiri v S* Criminal Appeal No 63 of 2009.

⁷⁰ *Rep v Kaira* Confirmation Case No 689 of 2003.

punishment (retribution, denunciation and deterrence) simply means ‘that courts must ‘pass meaningful sentences which will not generate contempt in the eyes of the public. Courts must pass sentences that will fit the crime, the defendant and also satisfy the legitimate expectations of the public.’⁷¹

The High Court in *Rep v Masula and others*,⁷² stated that a sentence should be of sufficient severity such that ‘right-thinking members of the public with full knowledge of the relevant facts and circumstances learning of [the] sentence’ should ‘not question the court’s sanity’ or wonder if ‘something had gone wrong with the administration of justice’. Courts are also wary of public responses to the sentences imposed on offenders. For example, courts have by and large responded by imposing harsher sentences to avoid mob justice. In *Mulewa v Rep*⁷³ the High Court remarked:

Apart from other things, there is a perception that the increase in the number of [burglary] offences could only have come about because of the sentences that courts impose. Whether this perception is right or not, the public has resorted to mob justice, burning to death, not bringing to the courts, those that offend. It is a reaction, uncivil though it is, which can only be matched by an adjustment in our sentencing policy. This court has, therefore, for these reasons and many others approved of longer and immediate imprisonment.

4.1.2 Deterrence

In *Rep v Alick*,⁷⁴ deterrence was described as ‘the primary purpose of punishment and the criminal process’. Similarly, *Rep v Kufandiko*⁷⁵ held that the first and foremost issues among public interest considerations during sentencing are deterrence and antecedents. It is generally believed that

⁷¹ *Rep v Chavula* Criminal Appeal No 93 of 2005, 4.

⁷² *Rep v Masula and others* Criminal Case No 65 of 2008, 2, citing *R v Fawcett* (1983) 5 Cr App R 158.

⁷³ *Mulewa v Rep* [1997] 2 MLR 60 (HC) 66. See also *Rep v Nkehoma* Confirmation Case No 3 of 1996 where the High Court agreed with the trial court’s observation linking mob justice attacks where suspected thieves have been burnt to death to lenient sentences.

⁷⁴ *Rep v Alick* Confirmation Case No 725 of 2000.

⁷⁵ *Rep v Kufandiko* Confirmation Case No 126 of 2009.

deterrence calls for stiffer sentences.⁷⁶ However, unlike before 1994, it is readily accepted that this does not mean that sentences aimed at general deterrence are justified even when they are disproportionate to the offence and the offender.⁷⁷ The reason for this is that sentencing goals should not be confused with sentencing principles.⁷⁸

Deterrence is usually employed for prevalent, serious and violent offences such as robbery,⁷⁹ burglary,⁸⁰ housebreaking,⁸¹ rape and theft by servant.⁸² General deterrence is also invoked in punishing offences involving the obstruction of public duty and administration of justice such as resisting lawful arrest⁸³ and escape from lawful custody.⁸⁴ In such cases, immediate imprisonment is likely to be imposed in order to send out a warning to potential offenders. Further, in order to maximise the deterrent effect, it has been held that sentences for serious offences should run consecutively to a sentence that is being served.⁸⁵ Courts have stressed that as a general principle serious and prevalent offences must be punished with long and immediate imprisonment.⁸⁶ This is departed from only in 'extremely rare' or exceptional circumstances when the mitigating

⁷⁶ See for instance *Rep v Madelube* Criminal Case No 105 of 2008, 4.

⁷⁷ *Rep v Kayenda* Confirmation Case No 220 of 2003.

⁷⁸ *Rep v Kayenda* Confirmation Case No 220 of 2003.

⁷⁹ For instance it was held in *Rep v Chitembeya and others* that robbery with violence is a serious offence and offenders deserve severe sentences to deter them from further committing crimes and to protect society by keeping them away.

⁸⁰ *Rep v Misomali* Confirmation Case No 527 of 1996.

⁸¹ *Rep v Tomasi* [1997] 2 MLR 70 (HC); *Rep v Chizumila and others* [1994] MLR 288 (HC); *Rep v Tembo* Confirmation Case No 726 of 2000 (irrespective of the mitigating factors, a simple burglary should be punished with no less than three years).

⁸² *Rep v Madando* [1995] 2 MLR 733 (HC); *Banda v Rep* Criminal Appeal No 221 of 2009.

⁸³ *Rep v Harry* (1997) 1 MLR 119 (HC); *Rep v Matiki* [1997] 1 MLR 159 (HC).

⁸⁴ *Rep v Lampu* Confirmation Case No 89 of 1996; *Rep v Gwaŕa* [1995] 2 MLR 752 (HC) 754: 'The news of escape from prison may spread to inmates like bushfire and they may attempt to try their luck too'.⁸⁴

⁸⁵ *Rep v Gwaŕa* [1995] 2 MLR 752 (HC) 754. See also *Rep v Matiki* [1997] 1 MLR 159 (HC) 162, holding that a sentence for resisting lawful arrest must run consecutively to a sentence for the substantive offence.

⁸⁶ *Mtetera v Rep* Criminal Appeal No 88 of 2005; *Rep v Chavula* Criminal Appeal No 93 of 2005, 5; *Rep v Austin* Confirmation Case No 1222 of 2003; *Rep v Nkehoma* Confirmation Case No 554 of 1996; *Rep v Mzuzi* Confirmation Case No 1607 of 1998.

factors outweigh the aggravating factors ‘considerably’, such that a court may opt to suspend the sentence or impose a non-custodial one.⁸⁷

However, the fact that an offence is serious does not imply that imprisonment must be imposed automatically. The *Sentencing guidelines* state that reasons must be given as to why an offence is so serious as to justify imprisonment.⁸⁸ In practice however, serious offences are still likely to attract long and immediate imprisonment even in the presence of strong mitigating factors.⁸⁹

[S]ome crimes are so heinous that a plea of youth, a plea that the crime was a first offence or that the offender has never been in prison before is irrelevant. Those who participate in such crimes should know that they will be subjected to long and immediate imprisonment, though they are young, even if they pleaded guilty, even if they had no previous convictions, even if the victims were neither young nor infirm. Courts will not readily accede to pleas of guilty or the age of the defendant where offences are very serious and committed in the most austere of circumstances.⁹⁰

Courts have gone even further to prescribe starting points for various offences and flagged them for long and immediate imprisonment. These include rape (six years),⁹¹ robbery, (three⁹² or four⁹³ years), burglary and housebreaking (six years)⁹⁴ arson⁹⁵ and theft of cattle.⁹⁶ Shorter sentences are considered more appropriate for less serious offences such as breaking into a building, minor

⁸⁷ *Rep v Tomasi* [1997] 2 MLR 70 (HC) 72; *Rep v Kufandiko* Confirmation Case No 126 of 2009.

⁸⁸ *Sentencing guidelines* 55.

⁸⁹ *Mussa v Rep* Criminal Appeal No 44 of 1995.

⁹⁰ See also *Rep v Mkomu* [1995] 2 MLR 598 (HC) 601; *Rep v Mtaya* Confirmation Case No 98 of 1995; *Phiri and others v Rep* Criminal Appeal No 6 of 1996; *Mbekeani v Rep* Criminal Appeal No 48 of 2006, 20; *Lusale v Rep* Criminal Case No 141 of 2005; *Lobo v Rep* Criminal Appeal No 110 of 2008; *Rep v Chavula* Confirmation Case No 93 of 2005, 6.

⁹¹ *Rep v Ndamera* Confirmation Case No 314 of 2001. Cf *Rep v Msowoya* [1987-1989] 12 ALR Mal (HC) 394 recommending three years as the starting point for rape if the aggravating factors equal the mitigating factors.

⁹² *Rep v Harry* [1997] 2 MLR 74 (HC).

⁹³ *Rep v Napulula* Confirmation Case No 665 of 2003.

⁹⁴ *Rep v Chizumila and others* [1994] MLR 288 (HC); *Chitsonga v Rep* [1995] 1 MLR 86 (HC); *Rep v Iddi* Confirmation Case No 48 of 1998.

⁹⁵ *Rep v Kathumba* [1997] 1 MLR 390 (HC) 392; *Rep v Chitseko* Confirmation Case No 78 of 1997

⁹⁶ *Rep v Phiri and another* [1997] 2 MLR 92 (HC) 94.

cases of sexual indecency, petty frauds, assaults and other instances of violence causing minor injuries.⁹⁷

The general principle that serious offences must be punished with immediate imprisonment is also underscored by considerations of community protection which may require that an offender should be removed from society. However, the principle is also accentuated by the perception that non-custodial sentences and short prison terms are insufficient for deterrence.⁹⁸

Deterrence is also reflected in the emphasis placed on a number of sentencing factors which largely remain the same as before 1994. It is worth mentioning that while courts continue to consider previous convictions in sentencing,⁹⁹ a number of cases have criticised this practice. *Rep v Sozinyo and another*¹⁰⁰ held that, except where statute provides for an enhanced sentence for a second offence,¹⁰¹ enhancing a sentence on the basis of previous convictions is ‘tantamount to

⁹⁷ *Rep v Iddi* Confirmation Case No 48 of 1998.

⁹⁸ *Rep v Tomasi* [1997] 2 MLR 70 (HC). See also *Rep v Akimu* Revision Case No 9 of 2003. In *Rep v Josephy* Confirmation Case No 261 of 2013, a short immediate sentence of six months’ was justified in that it was imposed for deterrent purposes and that community service is not generally seen as fit for this purpose.

⁹⁹ See, for instance, *Rep v Phiri and another* [1996] MLR 365 (HC); *Rep v Manyozo* Confirmation Case No 431 of 2002, *Rep v Kamuna* Confirmation Case No 669 of 2002; *Rep v Zwangeti* Confirmation Case No 179 of 2002; *Moses and 3 others v Rep* Confirmation Case No 140 of 2011; *Rep v Ngalu* Confirmation Case No 196 of 1999; *Rep v Kafwambira* Confirmation Case No 37 of 2008; *Rep v Yohane* Confirmation Case No 1851 of 2005; *Nyirenda v S* Criminal Appeal Case No 6 of 2011; *Bonomali v Rep* Criminal Appeal No 7 of 2010; *Rep v Gondwe* Confirmation Case No 27 of 2006; *Mangani v Rep* Criminal Appeal No 3 of 2007; *Nkhome v Rep* Criminal Appeal No 12 of 2010; *Rep v Jumbe* Criminal Appeal No 565 of 2008; *Dandaula v Rep* Criminal Appeal No 11 of 2008; *Rep v Amosi* Criminal Appeal No 569 of 2008. The failure to respond to past sentences may affect the seriousness of an offence: see Malawi Judiciary (2007) 53.

¹⁰⁰ *Rep v Sozinyo and another* [1997] 2 MLR 16 (HC).

¹⁰¹ Malawian statutory law is awash with provisions that prescribe higher sentences for a second offence: see, for instance, sections 88(3) (official corruption), 169(4) (offences relating to gaming houses), 180 (idle and disorderly persons), 184 (rogues and vagabonds) and 183(1) (nuisances by drunken persons) and 290 (theft) of the Penal Code. See also section 29 of the Road Traffic Act, Chapter 69:01 of the Laws of Malawi, providing for a general penalty clause and sections 90(11), 126(4)(c), 128(9)(b), 141(3), 152(4)(b), 153(2)(b) of the Road Traffic Act, Chapter 69:01 of the Laws of Malawi.

punishing an offender twice over for offences for which he has already been punished'.¹⁰² It can be argued that if enhancing a sentence based on previous convictions breaches the principle of double jeopardy and therefore the right to a fair trial, it is fictitious to regard legislation-sanctioned enhancements any differently.

The treatment of pleas of family hardship or obligations also highlights the significance of deterrence in punishment.¹⁰³ These pleas usually arise in connection with immediate imprisonment as it involves the removal of an offender from his family and exposes him to the risk of losing a job. The general rule is that domestic obligations are not relevant to sentencing, let alone the decision to imprison.¹⁰⁴ Departure from this general rule will only be justified if imprisonment will cause 'unusual or exceptional hardship' to the offender's family or the domestic obligations are 'exceptional or unusual': unless there are unusual and exceptional circumstances.¹⁰⁵ Courts have often said that the possibility of imprisonment and resulting family

¹⁰² *Rep v Sozinyo and another* [1997] 2 MLR 16 (HC) 18. See also *Rep v Chizenga* Confirmation Case No 297 of 2008; *Rep v Ngomwa* Confirmation Case No 1021 of 2003, 2 (previous offences 'must be deemed to have been paid for by the penalties that attached to them and so they do not attract extra punishment, so to speak'); *Rep v Kapitawo* Confirmation Case No 303 of 2005 (it is wrong to base sentence on the fact that the accused is not a first offender).

¹⁰³ The rejection of family obligations as a mitigating factor is also partly based on retribution and community protection. For instance, courts have emphasised that the consideration of family obligations may detract a court from imposing the right sentence by making it focus on the hardship a sentence may inflict on an offender's family: see *Rep v Eneya and others* Criminal Case No 53 of 2003; *Chitsonga v Rep* [1995] 1 MLR 86 (HC) 88 (family hardship as a result of imprisonment is part of the price to pay when committing a crime); *Rep v Asidi and another* Confirmation Case No 955 of 1999.

¹⁰⁴ *Kanyinji v Rep* Criminal Appeal No 116 of 2008; *Rep v Mutawo* Confirmation Case No 237 of 1999 (the obvious reason for rejecting domestic matters in sentencing is that offenders know that 'they are likely to be sent to prison and that this will affect their children. Sound sentencing policy should be such that it conveys to those who commit [crimes] that the court is going to look at the crime rather than their domestic matters'); *Millo v Rep* Criminal Appeal No 30 of 2000 (the public interest in criminal justice cannot be 'easily dispelled by domestic considerations. The public interest in the criminal process would be precariously compromised if courts unduly consider such matters'); *Rep v Jasi* Confirmation Case No 1026 of 1994; *Rep v Chimbelenga* (1996) MLR 342 (HC) 354 (offender's family responsibilities not considered in sentencing him to 30 years imprisonment for stealing over K1 million from the government).

¹⁰⁵ See *Rep v Mafaiti* Confirmation Case No 660 of 1990; *Rep v Mutawo* Confirmation Case No 237 of 1999. *Chitsonga v Rep* [1995] 1 MLR 86 (HC). See also *Rep v Asidi and another* Confirmation Case No 955 of 1999; *Rep v Chilenje* [1996]

hardship should have acted as a deterrent to committing crime in the first place. According to Chipeta J,¹⁰⁶

[a] man who opts for and goes ahead to commit a crime should factor in the possibility that if the long arm of the law catches up with him and accords him a custodial penalty, his family will suffer and that the courts are not encouraged to be moved by such pleas.¹⁰⁷

Similarly, *Millo v Rep*¹⁰⁸ held that ‘offenders should put domestic matters in the equation when embarking in conduct society disapproves and enforces with criminal sanctions’. The underlying assumption here is that offenders weigh their options carefully before committing an offence.

Courts continue to distinguish between specific and general deterrence.¹⁰⁹ In *Rep v Wilson; Rep v Khapuleni and others*,¹¹⁰ Banda CJ was of the view that a first custodial sentence should be aimed at specific and not general deterrence. It was held in *White and another v Rep*¹¹¹ that a sentence should not be suspended if the aim is to achieve general deterrence such as where the offence is serious

MLR 361 (HC) – the test for exceptional circumstances is satisfied where the effect of imprisonment is to deprive young children of parental care or where a close family member is terminally ill. In other cases, courts have readily regarded ordinary family responsibilities as mitigating without applying the exceptional hardship test or having regard to the seriousness of the offence: see for instance *Makanjira v Rep* Criminal Appeal No 67 of 2007 (offender responsible for grandparents and orphans); *Daukire and another v Rep* Criminal Appeal No 148 of 2004; *Rep v Kachimanga* Confirmation Case No 1746 of 2007 (caring for old grandmother accepted as mitigating factor); *Rep v Chinthiti and others (2)* [1997] 1 MLR 70 (HC).

¹⁰⁶ *Rep v Eneya and others* Criminal Case No 53 of 2003.

¹⁰⁷ *Rep v Eneya and others* Criminal Case No 53 of 2003, 3. See also *Kapolo v Rep* Criminal Appeal No 82 of 2007; *Kwilasya v Rep* Criminal Appeal No 62 of 1975; *Thomo v Rep* Criminal Appeal No 12 of 1975; *Rep v Saidi* Criminal Case No 4 of 1975; *Rep v Chimbelenga* [1996] MLR 342 (HC) 354.

¹⁰⁸ *Millo v Rep* Criminal Appeal No 30 of 2000

¹⁰⁹ *Rep v Nkhoma* Confirmation Case No 3 of 1996 (special deterrence is directed at preventing an offender from committing further crime); *Rep v Kufandiko* Confirmation Case No 126 of 2009 (a general deterrent sentence is an exemplary sentence imposed to prevent others from committing crimes).

¹¹⁰ *Rep v Wilson; Rep v Khapuleni and others* [1995] 2 MLR 567 (HC) 569, citing *R v Curran* 57 Cr App R 945.

¹¹¹ *White and another v Rep* Criminal Appeal No 19 of 2007.

and public safety has been compromised such that meaningful and punitive sentences are deserved.¹¹²

According to *Rep v Nkhoma*,¹¹³ general deterrence should attract lengthier sentences with an added ‘premium’ of imprisonment for deterrent purposes.¹¹⁴ This literally means that sentences imposed for general deterrence are in effect disproportionate sentences. In fact, *Rep v Chikwana*¹¹⁵ unequivocally states that general deterrence entails ‘passing a sentence that is beyond one the offender deserves based on the crime committed’.¹¹⁶ Chikopa J observed in *Rep v Nkhata*¹¹⁷ that punishment should not be used as a warning to the general public because this is punishing an offender for wrongs he has not committed.¹¹⁸ It was said in *Rep v Sakhwinya*¹¹⁹ that general deterrence ‘is immoral because it leaves the feeling that human beings can be used as a means to an end and ... it may be a cruel and degrading punishment under section 19(3) of the Constitution.’¹²⁰ Similarly, it was observed in *Rep v Jeke*¹²¹ that a sentence based on general deterrence ‘is wrong in principle because it is tantamount to using (or is it abusing) humans as means to an end. Such sentences would be degrading cruel and inhuman(e) punishment or treatment’.¹²² These sentiments have been reiterated in several High Court judgments such as *Rep*

¹¹² Cf *Rep v Nkhoma* Confirmation Case No 3 of 1996: ‘The question of suspension of a sentence, a principle of sentencing, should be treated distinctively from the question of deterrence ... The question of suspension arises after, not before, an appropriate prison sentence has been arrived’.

¹¹³ *Rep v Nkhoma* Confirmation Case No 3 of 1996.

¹¹⁴ *Rep v Nkhoma* Confirmation Case No 3 of 1996; *Rep v Adam* Confirmation Case No 500 of 1995.

¹¹⁵ *Rep v Chikwana* Confirmation Case No 131 of 2013. See also *Rep v Nkhoma* Confirmation Case No 3 of 1996.

¹¹⁶ *Rep v Chikwana* Confirmation Case No 131 of 2013, 4.

¹¹⁷ *Rep v Nkhata* Confirmation Case No 534 of 2003.

¹¹⁸ *Rep v Nkhata* Confirmation Case No 534 of 2003.

¹¹⁹ *Rep v Sakhwinya* Confirmation Case No 359 of 2013.

¹²⁰ *Rep v Sakhwinya* Confirmation Case No 359 of 2013. See also *Rep v Nelson and another* Confirmation Case No 1852 of 2005, 4; *Rep v Naluso* Confirmation Case No 387 of 2013, 4; *Rep v Matemba* Confirmation Case No 243 of 2012, 4.

¹²¹ *Rep v Jeke* Confirmation Case No 178B of 2013.

¹²² *Rep v Jeke* Confirmation Case No 178B of 2013, 4-5. See also *Rep v Keke* Confirmation Case No 404 of 2010, 3-4; *Rep v Mushali and another* Confirmation Case No 242 of 2013, 4; *Rep v Assam and another* Confirmation Case No 907 of 2008, 4.

v Kanena,¹²³ *Rep v Naphazji*,¹²⁴ and *Rep v Kanyumba and another*¹²⁵ to mention a few. However, except for the views expressed in *Rep v Nkhata*,¹²⁶ all these sentiments have been expressed only to show that general deterrence is an inappropriate goal for the punishment of first offenders. In other words, the criticisms are justification for not imposing general deterrent sentences on first and young offenders, except where the offence is very serious. The general view is that sentences imposed on first offenders ‘can only be as [to] fit the offence and only for the purpose of reforming or preventing the offender from committing offences in the future’.¹²⁷

For first and young offenders, general deterrence is readily accepted by the courts as a consequence of punishment. For instance, entrenching the position before 1994, it is often stated that punishment imposed on first and young offenders should only aim at specific

¹²³ *Rep v Kanena* Confirmation Case No 130 of 2013

¹²⁴ *Rep v Naphazji* Confirmation Case No 386 of 2011, 4.

¹²⁵ *Rep v Kanyumba and another* Confirmation Case No 904 of 2008, 4. See also *Rep v Kufandiko* Confirmation Case No 126 of 2009, 6; *Rep v Foster* Confirmation Case No 1690 of 2005, 9; *Rep v Tembo* Confirmation Case No 187 of 2013; *Rep v Yasin* Confirmation Case No 219 of 2012; *Rep v Samson and another* Confirmation Case No 466 of 2010, 4; *Rep v Mulolo and another* Confirmation Case No 362 of 2012, 4; *Rep v Kanena* Confirmation Case No 130 of 2013; *Rep v Makoko* Confirmation Case No 469 of 2009, 4; *Rep v Jali* Confirmation Case No 228 of 2013, 3; *Rep v James* Confirmation Case No 244 of 2013, 3; *Rep v John* Confirmation Case No 528 of 2010, 4; *Rep v Mapeni* Confirmation Case No 466 of 2010; *Rep v Kaufa* Confirmation Case No 314 of 2011, 3.

¹²⁶ *Rep v Nkhata* Confirmation Case No 534 of 2003, holding that punishment should not be used as a warning to the general public because this is punishing an offender for wrongs he has not committed.

¹²⁷ *Rep v Jali* Confirmation Case No 228 of 2013, 3, citing *Rep v Sakhwinya* Confirmation Case No 359 of 2013. See also *Rep v Alick* Confirmation Case No 725 of 2000 (the preference for specific deterrence in cases of young and first offenders means that sentences in such cases ‘should fit the crime, the offender the victim and the public interest in preventing crime’); *Rep v Akishoni* Confirmation Case No 196 of 1997(‘it should be really seldom that first offenders should receive sentences whose purpose is to prevent others from crime. Consequently, a first offender should only receive [a punishment that prevents] him from further mischief. This will be achieved if the sentence fits the crime, the offender, the plight of the victim and the public interest in preventing crime’.

See also *Rep v Headson and 4 Others* Confirmation Case No 129 of 2013, 4; *Rep v Chirwa* Confirmation Case No 271 of 2013, 3.

deterrence and that general deterrence may still be achieved as ‘a matter of course’.¹²⁸ It has been held that first and young offenders should not be used as ‘means to the end of’,¹²⁹ ‘as guinea pigs’¹³⁰ or ‘scapegoats’¹³¹ for general deterrence and that ‘[s]uch sentences would be degrading cruel and [inhuman] punishment or treatment’.¹³² It has been held that such offenders may be reformed or deterred from future crime by the likelihood or certainty of punishment rather than its severity.¹³³ Therefore, ‘a short, sharp and quick sentence may just be as effective as a longer one’.¹³⁴ On the other hand, *Rep v Kufandiko*¹³⁵ held that for repeat offenders, the use of sentences aimed at general deterrence is justified because society should be protected from repeat criminal conduct.¹³⁶ In other words, longer sentences are more appropriate for repeat offenders as they have not been deterred by previous punishment and are unlikely to be deterred by the likelihood of punishment.

It has been held that whether a sentence in fact achieves deterrence should be the concern of penologists and not courts, and that where certain levels of sentences are incapable of affecting crime, it is in the public interest that courts should shift their sentencing policy so that it reflects the public interest in curbing crime.¹³⁷ According to *Rep v Adam*,¹³⁸

[w]hen that point is reached, individual personal circumstances have to be weighed against public interest.

¹²⁸ See for instance *Rep v Banda and others* Confirmation Case No 633 of 1999; *Mtanga and another v Rep* Criminal Appeal No 15 of 1998; *Rep v Bayani* Confirmation Case No 11 of 2000; *Rep v Alick* Confirmation Case No 725 of 2000; *Rep v Akishoni* Confirmation Case No 196 of 1997.

¹²⁹ *Rep v Alick* Confirmation Case No 725 of 2000. See also *Rep v Mwakikunga* Confirmation Case No 326 of 1998

¹³⁰ *Rep v Nkhoma* Confirmation Case No 3 of 1996.

¹³¹ *Rep v Akishoni* Confirmation Case No 196 of 1997. See also *Mwachilira v Rep* Criminal Appeal Case No 86 of 2006 (there is something ‘unwholesome’ about using first offenders as a means to an end).

¹³² *Rep v Samson and another* (2013) Confirmation Case No 169 of 2013, 4-5

¹³³ *Rep v Sakhwinya* Confirmation Case No 359 of 2013.

¹³⁴ *Rep v Sakhwinya* Confirmation Case No 359 of 2013.

¹³⁵ *Rep v Kufandiko* Confirmation Case No 126 of 2009, 6.

¹³⁶ See also *Rep v Sakhwinya* Confirmation Case No 359 of 2013.

¹³⁷ *Rep v Adam* Confirmation Case No 500 of 1995.

¹³⁸ *Rep v Adam* Confirmation Case No 500 of 1995.

The way forward, a way justified by public policy, is to attach a premium on conventional sentences to reflect the need to deter crime by enhancing sentences’.

Consequently, deterrence has been used as a justification for increasing the levels of sentencing where past sentences are perceived to have been unsuccessful in reducing crime. For example, *Rep v Bayani*¹³⁹ held that prevalence of an offence means that the prevailing sentencing policy has failed to dissuade potential or repeat offenders either because of inadequate punishment as provided by statute or as passed by courts. In the latter scenario, the solution is for courts to generally increase the sentences imposed.¹⁴⁰ Similarly, *Rep v Nyungwe*,¹⁴¹ held that the ‘phenomenal upsurge’ in burglary cases at the time was partly as a result of ‘the sentencing policy of our courts’ which passed ‘medium sentences’ on offenders.

It was this perception that lengthier sentences could curb crime that prompted the issuance of the sentencing guideline two decades ago in *Rep v Chizumila*,¹⁴² one of the earliest reported cases after 1994 that has had a great impact on sentencing trends for burglary and housebreaking.¹⁴³ According to *Chizumila*, short sentences are responsible for the increase in burglary cases and mob justice is a result of public dissatisfaction with lenient sentences.¹⁴⁴ The court therefore suggested a departure from lenient sentences in cases of burglary and housebreaking. It recommended that the starting point for burglary should be six years, which at the time was about six times and twice the average sentence previously imposed on first and repeat offenders

¹³⁹ *Rep v Bayani* Confirmation Case No 11 of 2000.

¹⁴⁰ *Rep v Bayani* Confirmation Case No 11 of 2000. See also *Rep v Chizumila and others* [1994] MLR 288 (HC) reasoning that short sentences are responsible for the increase in burglary cases and suggesting a starting point of six years of imprisonment.

¹⁴¹ *Rep v Nyungwe* [1997] 2 MLR 127 (HC) 130.

¹⁴² *Rep v Chizumila* [1994] MLR 288 (HC), hereafter *Chizumila*

¹⁴³ The guideline in *Chizumila* has been adopted in several cases: see for instance *Chitsonga v Rep* [1995] 1 MLR 86 (HC) 88; *Rep v Ndamera* Confirmation Case No 314 of 2001.

¹⁴⁴ *Rep v Chizumila* [1994] MLR 288 (HC) 306

respectively.¹⁴⁵ Similar reasoning is evident in *Mulewa v Rep*¹⁴⁶ where the court, despite noting that long sentences have not necessarily led to a decrease in crime and uncertainty as to whether the length of sentences was responsible for the increase in crime, imposed a higher sentence to curb crime and the incidence of mob justice on the part of society. This tendency has been justified on the basis that courts should be responsive to public outcry.¹⁴⁷ In other words, the lengthier sentences are meant to satisfy public sentiment.

It is noteworthy that some cases have not approved of the general principle that serious offences should be punished with long and immediate imprisonment. For example, it was said in *Rep v Limbani and others*¹⁴⁸ that in view of prison conditions, courts should follow ‘a deliberate policy of decongesting prisons’ by imposing short sentences even for serious offences such as such as manslaughter, robbery, rape, defilement, burglary, housebreaking, theft of bicycle, theft of livestock ‘and many more to be in the category of serious offences’.¹⁴⁹ The High Court has pointed out that guidelines that emphasise long imprisonment for serious offences are skewed because they ignore the importance of reformation of the offender as they only focus on retributive justice and deterrence without any consideration of the negative consequences of long sentences both on an offender and others.¹⁵⁰ Contending that short sentences can be as effective as long sentences and that the public is more deterred by getting of caught and punished, Ndovi J observed in *Rep v Kholoviko*:¹⁵¹

¹⁴⁵ See *Rep v Chizumila* [1994] MLR 288 (HC) 306: ‘Up to about three months ago [September 1994] sentences passed by the courts have generally been short term sentences ranging between 9-30 months for burglary. Longer sentences of up to 36 months have been reserved for repeat offenders’.

¹⁴⁶ *Mulewa v Rep* [1997] 2 MLR 60 (HC).

¹⁴⁷ *Rep v Makata and another* Confirmation Case 968 of 1996.

¹⁴⁸ *Rep v Limbani and others* Confirmation Case No 839 of 2005.

¹⁴⁹ *Rep v Limbani and others* Confirmation Case No 839 of 2005, 2.

¹⁵⁰ *Rep v Kholoviko* [1996] MLR 355 (HC).

¹⁵¹ *Rep v Kholoviko* [1996] MLR 355 (HC) 359-360, adding that effectiveness in law enforcement as seen for instance through arrests, convictions and recovery of stolen property may deter a person from embarking on a criminal career by creating ‘a lingering possibility of being caught and deprived of the fruits of his or her nefarious activity’.

The courts must also consider how such long sentences that are advocated can deter other accused persons, present as well as future ones. There is no evidence that these offences have reduced by reason of long sentences. In fact they are on the increase. For first time offenders, not only common sense but the law as well, require[s] that they should not be sent to prison willy-nilly. They should only be sent to prison if there are real and compelling reasons for doing so. This court does not believe, nor is it convinced, that mere trend or level or even conventional sentences alone have any impact on the accused himself. It may have merit on generating confidence in the courts and promoting the concept of predictability of the sentences that the courts will impose generally, but there is no real impact on deterrence and reformation.

These views have not found much common ground. In fact, post-1994 sentencing practices indicate a gradual increase in the severity of sentences. For instance, in some cases, the recommended starting points for serious offences have tripled.¹⁵² Furthermore, although the justification for leniency in dealing with first and young offenders has largely remained the same after 1994, the duration of sentences imposed on them have increased. Courts have advocated for stiffer sentences in light of public opinion and prevalence of serious offences.¹⁵³ The *Sentencing guidelines* now provide for starting points that are much higher than sentences imposed before 1994. For instance, sentences for burglary used to range from 9-30 months for first offenders and three years for repeat offenders. The starting point for a threshold case of burglary is now six years. These developments are mainly premised on the pursuit of deterrence because it is believed that stiffer sentences have a greater deterrent value. This understanding is also

See also *Rep v Mwakikunga* Confirmation Case No 326 of 1998 (public deterred by a ‘real possibility that a first offence could land you in jail’); *Rep v Thomas Magombo and others* Confirmation Case No 264 of 2011 (the likelihood and possibility of prison sentence may be more effective than actual imprisonment).

¹⁵² For instance, the 1987 case of *Rep v Msonoyya* [1987-1989] 12 ALR Mal (HC) 394 recommended that a sentence for rape should start at three years, while the 2007 *Sentencing guidelines* recommend a starting point of 10 years: see *Sentencing guidelines* (2007) 5. However, in 2011 the High Court in *Nani v Rep* Criminal Appeal No 1 of 2011 recommended a starting point of six years.

¹⁵³ See for instance *Rep v Chizumila* [1994] MLR 288 (HC) 306; *Rep v Wilson*; *Rep v Khapuleni and others* [1995] 2 MLR 567 (HC) 571, where, in light of the prevalence of the offence of unlawful possession of dangerous drugs and the large quantities of Indian hemp being found in unlawful possession of persons, Chief Justice called for an increase in the maximum sentence for possession of Indian hemp contrary to section 19 of the Dangerous Drugs Act, Chapter 35:02 of the Laws of Malawi. The maximum was raised to life imprisonment.

responsible for the recent enhancement of maximum sentences in the Penal Code. In the long run, these enhancements will lead to lengthier sentences since the maximum sentence is an indicator of the seriousness of an offence which is the most determinative factor on the quantum of punishment.¹⁵⁴

It is important to note some recent developments regarding the role of deterrence in sentencing. In 2013, the High Court¹⁵⁵ issued a string of judgments advocating for a shift in sentencing policy regarding the punishment of serious offences. It has urged courts to move beyond deterrence as the goal of punishment and consider rehabilitation as a legitimate purpose of punishment. For instance, in *Rep v Keke*,¹⁵⁶ it was held that public interest goes beyond deterrence and extends to the reformation of an offender so that the punishment process results in making him a better person in the community.¹⁵⁷ Further, in a clear departure from the principles advanced in earlier cases like *Rep v Chizumila*,¹⁵⁸ the High Court has held that immediate imprisonment should not be seen as an automatic disposal of serious offences such as burglary and housebreaking; such offences may be punished with suspended sentences or indeed a non-

¹⁵⁴ See *Patel v S* Criminal Appeal No 81 of 2007 (an increase in the maximum sentence reflects that the offence concerned is regarded as more serious and thus courts must respond accordingly); *Namate v Rep* [1975-1977] 8 MLR 132 (SCA); *Rep v Iddi* Confirmation Case No 48 of 1998 (the higher the maximum of the offence, the stiffer the punishment to be imposed).

¹⁵⁵ All the judgments were authored by Mwaungulu J.

¹⁵⁶ *Rep v Keke* Confirmation Case No 404 of 2010.

¹⁵⁷ *Rep v Keke* Confirmation Case No 404 of 2010, 8.

¹⁵⁸ See for instance *Rep v Mushali and another* Confirmation Case No 242 of 2013, 3; *Rep v Assam and another* Confirmation Case No 907 of 2008, 3; *Rep v Chirwa* Confirmation Case No 271 of 2013, 3; *Rep v Kanyumba and another* Confirmation Case No 904 of 2008, 3; *Rep v Mulolo and another* Confirmation Case No 362 of 2012, 3; *Rep v Kandodo and two others* Confirmation Case No 240 of 2013, 3; *Rep v Kanena* Confirmation Case No 130 of 2013, 3; *Rep v Headson and 4 Others* Confirmation Case No 129 of 2013, 3; *Rep v Jali* Confirmation Case No 228 of 2013, 3; *Rep v James* Confirmation Case No 244 of 2013, 3; *Rep v John* Confirmation Case No 528 of 2010, 4; *Rep v Mapeni* Confirmation Case No 466 of 2010, 3; *Rep v Kaufa* Confirmation Case No 314 of 2011, 3; *Rep v Naphazi* Confirmation Case No 386 of 2011, 3.

custodial sentence altogether.¹⁵⁹ The court has also encouraged the use of non-custodial sentences for simple theft.¹⁶⁰

In summary, it can be observed that deterrence retains a significant role in sentencing and is often cited to justify stiff sentences for serious and prevalent offences. While courts recognise that deterrence carries the risk of the instrumentalisation of offenders, this is deemed problematic only when dealing with first offenders. The application of sentencing principles emanating from community protection paint a similar picture as deterrence.

4.1.3 Community protection

In several cases, courts have stated that community protection is a major aim of sentencing and a primary goal of criminal law.¹⁶¹ For example, in *Rep v Chavula*,¹⁶² it was held that community protection requires that serious and prevalent offences should be punished severely despite mitigating factors. According to Katsala J, community protection will be a paramount consideration in punishing an offender if the offence is rampant and the security of the public is compromised; in such cases stiff sentences are required.¹⁶³ Incapacitation and public protection have also been endorsed as appropriate goals for serious offences like robbery,¹⁶⁴ burglary,

¹⁵⁹ *Rep v Yasin* Confirmation Case No 219 of 2012; *Khonje v Rep* Miscellaneous Criminal Case No 41 of 2009.

¹⁶⁰ See for instance *Rep v Kotamu* Confirmation Case No 180 of 2012, 6; *Rep v Kachaso and another* Confirmation Case No 26 of 2012, 6; *Rep v Mumamba* Confirmation Case No 247 of 2012, 2; *Rep v Foster* Confirmation Case No 1690 of 2005. See also *Rep v Tembo* Confirmation Case No 187 of 2013.

¹⁶¹ *Rep v Nkhuya* Confirmation Case No 1002 of 2002. See also *Rep v Manyozo* Confirmation Case No 431 of 2002; *Rep v Chapendeka and others* Confirmation Case No 451 of 2000; *Rep v Chimaliro and others* Confirmation Case No; 461 of 2000; *Rep v Mustafa* Confirmation Case No 523 of 2001; *Rep v Kachule* Confirmation Case No 234 of 2001; *Rep v Chikopa* Confirmation Case No 530 of 2000; *Rep v Banda* Confirmation Case No 884 of 2002; *Rep v Joseph* Confirmation Case No 516 of 2002; *Rep v Makuluni* Confirmation Case No 276 of 2001, *Rep v Edisoni* Confirmation Case No 421 of 2001; *Rep v Kayenda* Confirmation Case No 220 of 2003; *Rep v Silaji* Confirmation Case No 452 of 2002; *Rep v Zinkambani* Confirmation Case No 481 of 2000; *Rep v Chilimba* Confirmation Case No 114 of 2011, *Rep v Khonga* Confirmation Case No. 157 of 2002.

¹⁶² *Rep v Chavula* Criminal Appeal No 93 of 2005, 4.

¹⁶³ *Rep v Chavula* Criminal Appeal No 93 of 2005, 4.

¹⁶⁴ *Rep v John* Confirmation Case No 122 of 2013; *Rep v Chikakuda and another* Confirmation Case No 536 of 1996.

housebreaking,¹⁶⁵ and rape.¹⁶⁶ The potential risks of drug offences such as possession and cultivation of Indian hemp have also been used to justify incapacitation of an offender through imprisonment.¹⁶⁷ Case law indicates that the certainty of incapacitation during the period of imprisonment provides a compelling justification for imprisonment such that an offender may be imprisoned for incapacitation even if the sentence cannot achieve deterrence.¹⁶⁸

Unlike deterrence and community protection, rehabilitation does not take pre-eminence in sentencing.

4.1.4 Rehabilitation

In 1997, Chimasula Phiri J observed that arguments that rehabilitation should be the main aim of punishment were not well received by judges.¹⁶⁹ He indicated that rehabilitation should be employed ‘in so far as it is applicable’¹⁷⁰ because ‘[t]he function of the criminal law is deterrence, not reform. As law, it [is] not concerned with the reform of the criminal’.¹⁷¹ It appears that courts are now more desirous to give rehabilitation a greater role in sentencing. Manda J held in *Rep v Mussa*¹⁷² that every sentence should aim at the reformation of the offender.¹⁷³ And in *Rep v Eneya and others*,¹⁷⁴ Chipeta J observed, obiter, that prisons are places of not only punishment but also rehabilitation and reflection, and that imprisonment is imposed with the hope that an offender ‘will eventually come out with a mended life and return to society as a useful citizen’.¹⁷⁵ In *Rep v*

¹⁶⁵ *Rep v Mwanyengamapazi* Confirmation Case No 742 of 1997.

¹⁶⁶ *Rep v Cidreck* [1995] 1 MLR 215 (HC).

¹⁶⁷ *Patel v S* Criminal Appeal No 81 of 2007.

¹⁶⁸ *Mwale v Rep* Criminal Appeal Case No 5 of 1994; *Rep v Brown and others* [1995] 1 MLR 212 (HC).

¹⁶⁹ Chimasula-Phiri (1997).

¹⁷⁰ Chimasula-Phiri (1997) 10.

¹⁷¹ Chimasula-Phiri (1997).

¹⁷² *Rep v Mussa* Confirmation Case No 686 of 2010.

¹⁷³ *Rep v Mussa* Confirmation Case No 686 of 2010.

¹⁷⁴ *Rep v Eneya* Criminal Case No 53 of 2003.

¹⁷⁵ *Rep v Eneya* Criminal Case No 53 of 2003, 3.

Keke,¹⁷⁶ the court held that sentences must cohere with reformation, restoration and rehabilitation. It stressed that an offender remains part of the public whose interest a sentence must serve. In an apparent reference to the belief that long sentences may contribute to recidivism fuelled by a desire to vengeance on the part of offenders, the court warned that an overemphasis on deterrence may be counterproductive:¹⁷⁷

Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have [the] opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society's continuum.¹⁷⁸

The court further observed that the doctrine of spent convictions may foster rehabilitation, adding that based on section 80(9)(c) of the Constitution, 'courts should completely disregard convictions over seven years old as a matter of principle'.¹⁷⁹

It is generally accepted that short sentences are appropriate for the rehabilitation of first and young offenders since they are enough to teach them a lesson where a less serious offence is involved.¹⁸⁰ Courts often associate rehabilitation with suspended or short sentences which are

¹⁷⁶ *Rep v Keke* Confirmation Case No 404 of 2010, 8.

¹⁷⁷ *Rep v Keke* Confirmation Case No 404 of 2010, 8.

¹⁷⁸ See also *Rep v Chikatha* Confirmation Case No 1602 of 1998: 'Heavy handedness ... may increase and complicate rather than reduce crime. Offenders who know that death or disproportionately long sentences ... are likely punishment for rape will choose to eliminate the victims and witnesses to avoid detection'.

¹⁷⁹ *Rep v Keke* Confirmation Case No 404 of 2010, 7. Section 80(9)(c) of the Constitution requires a lapse of seven years after conviction of an offence involving moral turpitude or dishonesty or electoral fraud before a person can be elected as president. Similar provisions apply for persons who may be appointed as government ministers or hold a parliamentary seat: see sections 51(2) and 94(3) of the Constitution. For the definition of dishonesty and moral turpitude, see *Tembo and others v Attorney General* Civil Cause No 50 of 2003. Malawi does not have a legal framework for spent convictions: see Nyirongo (2005).

¹⁸⁰ See for instance *Nkhambule v Rep* Criminal Appeal No 27 of 2006. *Sipiliyano v Rep* Criminal Appeal No 59 of 1998, 2 (three-year sentence replaced with 18 months. a young convict 'should be spared the agony of a long prison life'). Cf *S v Chirambo* (manslaughter convict with prior record where he had served 3 years at Mpemba Approved School (a reformatory school) placed on probation for 3 years).

recommended for young¹⁸¹ or first offenders.¹⁸² First offenders are regarded as ‘disposed to law abiding’.¹⁸³ Courts have held that suspended sentences are inappropriate for serious offences and general deterrence.¹⁸⁴

The perceived link between suspended sentences and rehabilitation on the one hand, and suspended sentences and first and young offenders on the other, has translated into a situation where rehabilitation is considered an appropriate goal when sentencing first and young offenders. However, when coupled with the undesirability of suspending sentences for serious offences, the propriety of rehabilitation in sentencing is relegated to cases where the offence is not serious. Nevertheless, the association of rehabilitation with first and young offenders is

¹⁸¹ The definition of a ‘young’ offender is fluid because it is not fixed to a specific age: see *Rep v Magombo and others* Confirmation Case No 264 of 2011 (offender 35 years); *Rep v Mtendere* Confirmation Case No 310 of 210 (offender 34 years); *Rep v Malizami* Criminal Case No 219 of 2010, 5 (35 years not youthful age but may be taken beneficial to first offender as he has lived long without legal blemish); *Rep v Masamba* Confirmation Case No 411 of 2013 (28 year old offender). In *Rep v Keke* Confirmation Case No 404 of 2010, the court attempted to expound some general principles to govern the treatment of age in sentencing which can be summarised as follows: Offenders below the age of 25 years should be punished with short and quick sentences because at this age involvement in crime may be due to ‘impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending’. However, offenders above 25 years are considered to be mature enough to refrain from criminal behaviour based on a proper understanding of the consequences of crime. This means that on the one hand, such offenders deserve ‘a full rigour of the sentence that fits the crime’. On the other hand, a court may be lenient in such cases because an offender has lived long without committing crime and therefore less likely to reoffend. Consequently offenders aged above 25 may also be punished with ‘short and quick sentences’. Here again the reason is that elderly offenders are less likely to reoffend. Sentencers must seriously consider suspending sentences for offenders aged 61 years and above. However, it appears that a court will not exercise leniency unless the offender is very elderly: see for instance *Rep v Mulinganiza and another* Criminal Case No 306 of 2010 – 82 year old offender; *Rep v Ng’ambi* [1971-1972] 6 ALR Mal 457 (HC) – 80 year old offender. Cf *Rep v Misomali* confirmation Case No 527 of 1996, where a 55 year old offender considered to be ‘a responsible adult’ deserving of no mercy despite the fact that he was a first offender and had pleaded guilty.

¹⁸² See, for instance, *Rep v Manyamba* [1997] 2 MLR 39 (HC).

¹⁸³ *Rep v Namichire* Confirmation Case No 803 of 2000, 7.

¹⁸⁴ *Rep v Banda* Confirmation Case No 266 of 1997, adopting the position in *Rep v Mkenate* [1973-1975] 7 ALR Mal 407 (HC).

preserved in the principle that immediate imprisonment imposed of first or young offenders must be ‘short and quick’ because in such cases short sentences can be just as effective as long ones.¹⁸⁵ Indeed, it has been held that there is a ‘public interest in affording young [first] offenders an opportunity to reform’.¹⁸⁶

There is also authority for the proposition that short sentences foster rehabilitation by avoiding the negative effects of long imprisonment. It has been held that young offenders should not be ‘unduly thrust into the company of hardened criminals for a long period of time’, especially where there are other mitigating factors.¹⁸⁷ According to *Rep v Kabichi*,¹⁸⁸ long sentences may backfire by breeding resentment and resignation resulting in a life of recidivism, a situation which would neither achieve deterrence nor serve public interest.¹⁸⁹ Courts have also found short sentences appealing because they do not endanger social reintegration. In *Rep v Masamba*,¹⁹⁰ it was held that long prison sentences may actually delay social integration to enable a young life to start a new life and lead a meaningful life. In order to achieve the ends of justice and deter future offending, the court held, young offenders should be punished with ‘short, quick and sharp’ sentences’.¹⁹¹ *Rep v Mvalume and another*¹⁹² held that due to their age, young offenders ‘have a bigger future’ and ‘should be given a chance unless they have really squandered it’. In *Rep v*

¹⁸⁵ *Rep v Kathumba* [1997] 1 MLR 390 (HC) 39; *Sipiliyano v Rep* Criminal Appeal No 59 of 1998 (first offenders must be ‘spared the agony of a long prison life if possible’); *Rep v Brighton and another* Confirmation Case No 653 of 1997. *Rep v Ngalu* Confirmation Case No 196 of 1999; *Rep v Banda* Confirmation Case No 266 of 1997; *Rep v Banda* Confirmation Case No 266 of 1997.

¹⁸⁶ *Rep v Mofolo* Confirmation Case No 651 of 1999, 3.

¹⁸⁷ *Rep v Kholoviko* [1996] MLR 355 (HC); *Rep v Sambani* [1994] MLR 311 (HC).

¹⁸⁸ *Rep v Kabichi* Confirmation Case No 294 of 1997.

¹⁸⁹ *Rep v Kabichi* Confirmation Case No 294 of 1997. See also *Mzembe and others v Rep* Criminal Appeal No 42 of 2006, holding that long sentences imposed on young offenders may be counterproductive as they may be perceived by a young offender as reflecting a harsh society on which to avenge, breeding resentment and resulting in recidivism.

¹⁹⁰ *Rep v Masamba* Confirmation Case No 411 of 2013. See also *Rep v Magombo and others* Confirmation Case No 264 of 2011; *Rep v Mbichama* Confirmation Case No 147 of 2013.

¹⁹¹ *Rep v Masamba* Confirmation Case No 411 of 2013. See also *Rep v Magombo and others* Confirmation Case No 264 of 2011; *Rep v Mbichama* Confirmation Case No 147 of 2013.

¹⁹² *Rep v Mvalume and another* Confirmation Case No 278 of 2000.

Chirwa,¹⁹³ the High Court said that first offenders should get shorter and quicker sentences because:

Generally, for first offenders, it is the likelihood that the sentence will be passed rather than the length of the sentence that may reform or dissuade or persuade the offender from future crime. In those circumstances, opting for a longer sentence as against a shorter, quicker and sharper sentence might be in principle a wrong exercise of the discretion.¹⁹⁴

Courts have at times justified the imposition of long sentences by ruling out the possibility of rehabilitation.¹⁹⁵ *Rep v Chikatha*¹⁹⁶ recognises that a failure to prioritise rehabilitation where an offender has the capacity to reform may violate the prohibition of cruel and inhuman treatment. Acknowledging that a court has discretion to choose amongst competing and conflicting purposes and goals of punishment, Mwaungulu J held:

A deterrent purpose may have to give way to a more corrective and rehabilitative purpose. If there is a chance [that an offender may be reformed by] a shorter sentence, a longer sentence may be regarded as a degrading and cruel treatment under the [C]onstitution.¹⁹⁷

The reasoning here is that that a longer sentence would be unnecessary to the extent that it ignores the importance of reformation. This gives primacy to rehabilitation over deterrence and

¹⁹³ *Rep v Chirwa* Confirmation Case No 271 of 2013, 4.

¹⁹⁴ *Rep v Chirwa* Confirmation Case No 271 of 2013, 4, citing *Rep v Sakhwinya* Confirmation Case No 359 of 2013. Cf *Rep v Chavula* Confirmation Case No 93 of 2005, 6, where Katsala J held that faced with the aftermath of violent crimes like armed robbery, '[i]t would ... be irresponsible and insensitive if the courts were to mete out lenient sentences to these offenders on the ground that they are first offenders, and/or that they have pleaded guilty, and/or that they are young or old and/or that they ought to be given a second chance in life (*as if that chance will not be available after serving a long sentence*)'. Emphasis added. In casu, the court upheld a 12 year sentence imposed on a 19 year old young and first offender convicted on his own plea of guilty of armed robbery.

¹⁹⁵ See, for instance, *Rep v Masula and others* Criminal Case No 65 of 2008, where a life sentence was partly justified by the court's finding that the accused was not a suitable candidate for reformation. For a discussion of this case, see section 2.4 of chapter five. As noted in that chapter, the criteria for determining whether an offender has the capacity to reform are unsatisfactory.

¹⁹⁶ *Rep v Chikatha* Confirmation Case No 1602 of 1998.

¹⁹⁷ *Rep v Chikatha* Confirmation Case No 1602 of 1998, 3. Senior prison officials hold the view that rehabilitation cannot be achieved during a sentence of less than two years: see Kishindo (2012) 31.

community protection because the court unequivocally holds that despite other competing aims of punishment, a sentence longer than that required for the reformation of an offender would fall short of the prohibition of the cruel and degrading punishment.

Lastly, the principle of ‘short and quick’ sentences for first offenders appears to be judicial rhetoric. Indeed, in practice, the actual sentences imposed on first and young offenders can hardly be described as ‘short and quick’. For instance, in robbery cases, these offenders have been sentenced to 7 years,¹⁹⁸ 8 years,¹⁹⁹ 10 years²⁰⁰ and 12 years.²⁰¹ In *Rep v Chimbelenga*,²⁰² a first offender was sentenced to 30 years theft of over K1 000 000 from the government. In fact, in murder and manslaughter cases, the ‘short and quick’ sentences argument is abandoned altogether, although age and criminal record may be considered mitigating. In *Rep v Banda and others*,²⁰³ for instance, a first offender was sentenced to 35 years for murder.²⁰⁴ Little can be made of an argument that such sentences are conducive to rehabilitation, let alone social reintegration.

¹⁹⁸ *Rep v Masamba* Confirmation Case No 411 of 2013 (sentenced reduced from 10 years); *Rep v Banda and others* Confirmation Case No 359 of 2012.

¹⁹⁹ *Rep v Mtendere* Confirmation Case No 310 of 2010. *Rep v Mbichama* Confirmation Case No 147 of 2013; *Phiri v Rep* Criminal Appeal No 22 of 2007. *Rep v Zaola* Confirmation Case No 276 of 1995.

²⁰⁰ *Rep v Thamando and others* Confirmation Case No 59 of 1995. *Rep v Wjyson* Criminal Appeal No 38 of 2004. See also *Rep v Magombo and others* Confirmation Case No 264 of 2011 (9 years).

²⁰¹ *Harry v Rep* Criminal Appeal No 5 of 2005.

²⁰² *Rep v Chimbelenga* (1996) MLR 342 (HC) 354.

²⁰³ *Rep v Banda and others* Criminal Case 25 of 2011.

²⁰⁴ See also *Namizjnga another v Rep* Criminal Appeal No 18 of 2007 (SCA) 3 (25 year murder sentence for 22 year old first offender); *Rep v Chenka and others* Criminal Case No 73 of 2008 (12 years for manslaughter); *Rep v Mulinganiza and another* Criminal Case No 306 of 2010 (31 year old offender sentenced to life imprisonment for murder); *Namboya v R* MSCA Criminal Appeal No 14 of 2005 (SCA) (28 year old first offender sentenced to 15 years for murdering her son due to oppression from her ex-husband); *Rep v Tongole and another* Criminal Appeal No 12 of 2011 (eight years for manslaughter); *Rep v Malizani* Criminal Case No 219 of 2010 (35 year old first offender sentenced to 27 years for murder); *Rep v Ganizani and another* Criminal Appeal 261 of 2010 (17 years for murder by first offender); *Rep v Sukali and another* Criminal Appeal No 21 of 2011 (7 years for murder committed by a child offender); *Rep v Katimbe* Criminal Case No 29 of 2008 (14 years for manslaughter); *Zakaliya v Rep* Criminal Case No 30 of 1997 (15 years for manslaughter); *Rep v Chimimba and another* Criminal Case No 11 of 2009 (12 years for manslaughter); *Rep v Danger* Criminal Case No 83 of 2009 (20 years for manslaughter); *Rep v Mwale* Criminal Case No 13 of 2008 (2 years

In light of the above, it can be said that post-1994, sentencing decisions speak more to the importance of rehabilitation and how it can be achieved than was previously the case. It has also been recognised that rehabilitation is embodied in the prohibition of cruel and inhuman treatment. However, as was the case before 1994, rehabilitation and social reintegration are generally regarded as suitable aims in punishing young and first offenders convicted of minor crimes. This shows that courts have not embraced rehabilitation as the main aim of punishment. Rather, punishment is, to a large extent, used as a means to achieve crime prevention through community protection and deterrence of offenders.

5 ASSESSMENT OF THE AIMS OF PUNISHMENT

Malawi has a hybrid penal system that recognises all the traditional aims of punishment. Imprisonment remains largely used for community protection and deterrence while rehabilitation is deemed suitable for first and young offenders. The reluctance of courts to employ general deterrence as a justification for punishment of first and young offenders reflects the criticism advanced in chapter three against deterrence and utilitarianism in general, namely, the instrumentalisation of an offender. What is unique with the sentencing jurisprudence in Malawi is that courts regard general deterrence as an unsuitable goal for the punishment of first and young offenders. This qualified criticism of general deterrence raises a number of questions in light of the Bill of Rights. For instance, is it acceptable for a second custodial sentence to be disproportionate? Secondly, how justifiable is general deterrence for offenders other than first and young offenders?

for manslaughter); *Phiri v Rep* Criminal Case No 11 of 2008 (8 years for manslaughter); *Rep v Kaira and 3 Others* Criminal Case No 40 of 2008 (10 years for manslaughter); *Rep v Mbove* Criminal Case No 21 of 2008 (12 years for manslaughter); *Rep v Eneya* Criminal Case No 53 of 2003 (18 years for manslaughter, later reduced to 10 years on appeal on the premise that the deceased was partly to blame for his death: see *Eneya and others v Rep* MSCA Criminal Appeal No 15 of 2001).

It can be argued that courts are overly speculative when it comes to justifying leniency in sentencing first and young offenders. With respect, there seems to be no demonstrable basis for claims such as that lengthy sentences ‘backfire’ by breeding vengeance which may promote recidivism. In any event, there is no reason why the claim, if true, should not hold true for other offenders as well, unless, of course, they are locked away for such a long time that by the time they are released they are too old to commit certain crimes.

The qualified use of general deterrence is clearly rooted in the conceptualisation of general deterrence as synonymous with disproportionately lengthy sentences. Restricting general deterrence to repeat offenders is essentially endorsing that they may be punished with disproportional sentences. This downplays the instrumentalisation of repeat offenders. The selective application of general deterrence is partly justified on community protection. However, the need to protect society does not arise from the fact that the offender is not a first offender but rather on the extent to which the offence compromises public safety. Surely, a first-time murderer compromises public safety more than a repeat petty offender? An argument can be made that the way in which general deterrence is applied in Malawi indefensible in light of the right to human dignity and equality. If general deterrence reduces an offender to a ‘guinea pig’ then it should be a wholly objectionable goal of punishment regardless of the status of an offender. As held in *S v Makwanyane*, the instrumentalisation of an offender violates the right to human dignity.²⁰⁵ The age or criminal record of an offender is of no consequence. Otherwise, compliance with the non-discrimination injunction in section 20 of the Constitution may be called into question.

The discussion on deterrence reveals that the manner in which general deterrence is applied in Malawi results in sentences that are inconsistent with the principle of proportionality and therefore violates the right to human dignity and the prohibition of cruel, inhuman and

²⁰⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 313 and 316.

degrading punishment. Once the element of disproportionality in general deterrent sentences is removed, the justification for not imposing general deterrent sentences on first and young offenders becomes vague. The concern will then be whether the sentence is proportional to the offence and the offender. If, as has been suggested in various sentencing judgments, general deterrence can be achieved as ‘a matter of course’, then there is no reason to actively pursue it by increasing sentences.

In view of the foregoing, there is no proper justification for not applying the same objections against general deterrence to repeat offenders. General deterrence should be an objectionable goal of punishment if it results in sentences that are cruel, inhuman or degrading by reducing an offender to a ‘guinea pig’ or ‘a means to an end’. It should not make any difference whether or not an offender is a first or repeat offender, young or old. The reason for this is that the right to human dignity is violated if offenders are reduced to a means to an end. Criticism from some judges that general deterrence is generally an inappropriate aim of punishment lends credence to the argument that the manner in which general deterrence is understood and applied in Malawi results in sentences that are disproportionate and inconsistent with the right to human dignity and the prohibition of cruel, inhuman and degrading punishment.

The selective application of general deterrence also defies the deterrent effect of the certainty of punishment. As noted in chapter two, certainty of punishment is a key concept of deterrence theory in general and if there is no likelihood of actually being caught, prosecuted and punished, a person is likely to commit a crime.²⁰⁶ There is no compelling reason for only applying the certainty principle to young offenders.

²⁰⁶ See section 3.3.1 of chapter two. See also *S v Makwanyane* 1995 (3) SA 391 (CC) para 122: ‘The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness’; Sangmin (2007) 57 (‘what brings down the level of crime is the knowledge, on the part of criminals, that if I commit an offence, I will end up in jail’); Walker (1991) 17; Bagaric (2010) 147-148; Canadian Sentencing Commission (1987) 136-137; Wilson (1994) 174.

On a somewhat different note, the continued justification of long sentences on the basis of general deterrence is particularly perturbing in the light of seemingly judicial indifference to whether or not longer sentences in fact have a greater deterrent value than shorter sentences. Case law does not indicate why lengthier sentences are considered to have a greater deterrent effect. Courts readily assume that punishment has a deterrent effect and that heavier sentences have a greater deterrent value than lighter sentences. This is not necessarily the case and is symptomatic of the pitfalls of deterrence as explained in chapter two.²⁰⁷

Therefore the case of *Chizumila*, discussed earlier,²⁰⁸ can be criticised for concluding, without much proof, that short sentences were the reason for the increase in burglary cases at the time. Mob justice cannot be blamed on sentencing alone and it is not entirely correct to claim that mob justice is an indicator of society's views as to the appropriate punishment. In the face of high crime rates, mob justice in Malawi is most probably fuelled by a general dissatisfaction with the criminal justice system including the failure of police to apprehend suspects and the release of suspects on bail. This dissatisfaction is in fact antagonistic with the presumption of innocence, especially where an offender was *flagrante delicto*. It is ironic that while courts are unsure as to the underlying reasons for an upsurge in mob justice incidents, they have by and large responded by imposing harsher sentences. Courts cannot endorse such societal views which at best are uninformed of the sentencing process and the circumstances that inform it. Indeed, the question of whether sentences imposed on offenders are adequate cannot be determined through the lenses of perpetrators of mob justice. The majority of such people cannot be within the remit of – to use the words of Chombo J in *Rep v Masula and others*²⁰⁹ – ‘right-thinking members of the public with full knowledge of the relevant facts and circumstances’ of the case and who upon learning of the sentence can ‘question the court’s sanity’ or wonder if ‘something had gone

²⁰⁷ See section 3.3.2 of chapter two.

²⁰⁸ See section 4.1.2 above.

²⁰⁹ *Rep v Masula and others* Criminal Case No 65 of 2008.

wrong with the administration of justice'.²¹⁰ After all, it is questionable that judicial officers in fact know the views of society.²¹¹

A crucial question that *Chizumila* raises is how a court can, on the one hand, be ostensibly unconcerned about whether imprisonment succeeds in deterring offenders and, on the other, justify increasing the level of sentences on the basis that lower sentences are incapable of reducing crime. The latter reasoning can only be true if the deterrent effect of imprisonment is certain and that longer sentences have a greater deterrent effect. Therefore, if the court is not interested in knowing whether deterrence is at all achieved by imprisonment then it has no basis for adopting a sentencing policy that imposes longer sentences in a bid to attain deterrence. Such sentences would be contrary to the right to liberty in that the deprivation of liberty is not rationally connected to its stated aim. It is paradoxical that a court, as the authority responsible for depriving the offender's liberty, has no interest in knowing if the stated aim can be achieved but rather proceeds on an assumption that deprivation of liberty for a longer time will achieve the desired goal. As explained in chapter four,²¹² a limitation of a right is justifiable in terms of section 44 of the Constitution if, among other things, it is reasonable in that the aim it seeks to achieve is actually achieved. In the context of imprisonment, the deprivation of liberty cannot pass constitutional scrutiny where the authority restricting the right is indifferent as to whether such deprivation will in fact achieve the stated objective.

Furthermore, the tendency of enhancing sentences with little concern as to whether the purpose for the enhancement will be achieved violates the right to human dignity because it reduces an offender to a means to an end. In this case, an offender is used to purely satisfy public sentiment without any regard as to whether the restriction of his rights will achieve the legitimate goal of reducing crime. Sentencing cannot be led by public sentiment alone; if anything, courts must lead

²¹⁰ *Rep v Masula and others* Criminal Case No 65 of 2008, 4.

²¹¹ Terblanche (2009) 166.

²¹² See section 4.2 of chapter four.

public opinion by upholding the constitutional rights of offenders. In addition, it is not proper for a court to be indifferent as to whether or not an enhanced sentence has a greater deterrent value than a lesser sentence since a limitation must constitute the least restrictive means to achieve the objective. Needless to say, public sentiment is not a lawful basis on which the right to liberty may be limited. In the case of imprisonment, a court cannot justifiably impose a longer sentence in the absence of proof that a shorter sentence (a less restrictive means) cannot achieve the same objective. This is supported by *Rep v Kapitawo*²¹³ where Chikopa J held that a court must not only state its basis for claiming that an offence is prevalent but also why the offence is on the increase and how or why a stiffer sentence would reverse the situation. Such statements, the judge continued, are matters of fact, the truth of which must be carefully established beyond reasonable doubt.²¹⁴ Therefore, indifference to the realisation of the aims of punishment is indefensible and duplicitous.

On a positive note, the emerging jurisprudence that places more emphasis on rehabilitation and cautions against an overly retributive or deterrent approach to sentencing may have a significant and positive impact on the use of imprisonment in Malawi. However, if courts continue to follow public opinion and respond to increasing incidence of mob justice with stiffer sentences, then it is very likely that there will be no meaningful change in sentencing practices in Malawi towards rehabilitation.

In the pursuit of rehabilitation, courts should be wary of placing too much faith in the prison system and what it can do for an offender. For instance in *Semba v Rep*,²¹⁵ the court opted not to suspend a sentence because the offender was an 'ill-tempered man' who 'could learn to control his temper' during his time in prison. Surely, assuming that this is a justifiable ground for imprisonment, such a sentence would be meaningless and arbitrary if there are no measures in

²¹³ *Rep v Kapitawo* Confirmation Case No 303 of 2005. See also *Rep v Gondwe* Confirmation Case No 28 of 2006.

²¹⁴ *Rep v Kapitawo* Confirmation Case No 303 of 2005, 3.

²¹⁵ *Semba v Rep* [1997] 1 MLR 388 (HC).

prison that can teach an offender better anger management? This makes it difficult to reconcile the goal of rehabilitation with the reality in Malawian prisons where there are few opportunities for prisoners to acquire skills through suitable rehabilitative programmes. In practice, priority for participation in such programmes is given for short term prisoners.²¹⁶ As noted in chapter two, the success of rehabilitative programmes also depends on the availability of resources for implementation which makes rehabilitation a challenging objective for penal systems in developing countries like Malawi. Rehabilitation programmes are poorly funded and at times only a certain category of privileged offenders have access. In fact, a 2005 study found that offenders serving life sentences or long prison terms are generally not allowed access to the limited rehabilitation programmes which are often reserved for short term prisoners convicted of minor offences.²¹⁷ Furthermore, it found that the nature of rehabilitative programmes was driven by the need to generate income for the prison and occupy prisoners' time rather than equip them for re-integration into the community.²¹⁸ For long-term prisoners, the success of social reintegration after release is lessened even further by the fact that they may have virtually nothing to return to in society.²¹⁹ This presents difficulties when it comes to the pardon process since the rehabilitation plans of an offender are taken into account. If practice shows that rehabilitation is an aim that is unlikely to be achieved through imprisonment, then it would be pointless for a court to impose a sentence that flies in the face of such a reality. Courts should also not turn a blind eye to reality.²²⁰ As stated in *Rep v Nasoni*,²²¹ a court achieves nothing by imposing a

²¹⁶ Burton *et al* (2005).

²¹⁷ Burton *et al* (2005) 68.

²¹⁸ Burton *et al* (2005) 68-80.

²¹⁹ For example, a prisoner who had spent 40 years in prison found that his house was non-existent: see Chiyembekeza (2001).

²²⁰ Cf Mujuzi (2008), arguing that courts should be wary of doubting the ability of prison authorities to rehabilitate an offender.

²²¹ *Rep v Nasoni* [1990] 13 MLR 400 (HC).

sentence which cannot be carried out in practice. Similarly, a court should not impose a sentence which cannot achieve the aim its stated or obvious aim; such a sentence would be arbitrary.

Questions should also be raised as to how courts assess the prospect of reform in Malawi. In particular, the conclusion reached in *Rep v Masula*,²²² that the fact that an offender committed an offence while on bail rules out the possibility of reform, is quite unconvincing. As observed in *Rameka et al v New Zealand*,²²³ every person has the potential to change and improve and therefore less dangerous over time. The suggestion, implicit in cases such as *Rep v Chavula*,²²⁴ that lengthy sentences are justifiable because an offender will still have a chance at rehabilitation after release from prison ignores the fact that prisons must work towards the rehabilitation and social reintegration of an offender. It also reflects an overemphasis on retribution, deterrence and community protection with total disregard for the offender.

Lastly, it can be deduced from the sentencing decisions analysed in this chapter that the conceptualisation of rehabilitation in Malawi remains detached from a positive act on the part of the prison authorities and an offender through the provision and participation in rehabilitative programmes during the course of imprisonment. Rather, rehabilitation is considered as an outcome of inward reflection as a result of painful experiences such as imprisonment or the fear of punishment. Understood this way, rehabilitation is often confused with deterrence. For instance, it is generally accepted that short sentences are appropriate for the rehabilitation of first and young offenders since they are enough ‘to teach them a lesson’. As a result of the overlap between rehabilitation and deterrence, little attention has been given to the question of whether prisons provide a conducive environment for the rehabilitation of offenders. Rehabilitation in prison is only possible if the prison environment is conducive to reform. On the other hand, it

²²² *Rep v Masula and others* Criminal Case No 65 of 2008, where a life sentence was partly justified by the court’s finding that the accused was not a suitable candidate for reformation.

²²³ See the Individual Opinion of Committee Member Mr Walter Kälin *Rameka et al v New Zealand* Communication No 1090/2002.

²²⁴ *Rep v Chavula* Criminal Appeal No 93 of 2005.

has also been recognised that imprisonment has the undesirable outcome of producing hardened criminals.²²⁵ While this shows a lack of faith in the rehabilitative effect of imprisonment, it does not, in practice, preclude a court from imposing imprisonment. Often, courts address such concerns by imposing short sentences.²²⁶

Overall, it can be concluded from the foregoing analysis that there has been no significant shift in the understanding of the aims of punishment post 1994.

6 CONCLUSION

Sentencing jurisprudence shows that courts have understood that the Constitution has significance in punishment. For example, courts have linked the principle of proportionality to the right to human dignity and the prohibition of cruel and inhuman treatment. However, the courts' understanding of the aims of punishment and how they should influence sentencing decisions has not changed significantly since 1994. In general, courts have not recognised rehabilitation as the essential aim of punishment. Reminiscent of the position before 1994, they generally stress retribution, deterrence and incapacitation as the main justifications for punishment. Therefore, the aims of punishment have not been infused with constitutional and international standards. Although some cases have invoked the right to human dignity and the prohibition of cruel and inhuman treatment to discredit general deterrence, courts have found justification for overlooking this when sentencing serious and repeat offenders. As a result, there is an emphasis on retribution, incapacitation and deterrence, resulting in the imposition of stiff sentences.

On a positive note, there is emerging jurisprudence that draws links between rehabilitation and the right to human dignity and the prohibition of cruel and inhuman treatment. It remains to be

²²⁵ See for instance *Rep v Sambani* [1994] MLR 311 (HC).

²²⁶ *Rep v Kadwala* Confirmation Case No 725 of 2005. See also *Rep v Kholoviko* [1996] MLR 355 (HC); *Rep v Sambani* [1994] MLR 311 (HC).

seen whether this jurisprudence will bring about a significant shift in the courts' understanding of the aims of punishment.

CHAPTER 7

EARLY RELEASE MECHANISMS IN MALAWI

1 INTRODUCTION

The last two chapters have established that the aims and forms of punishment in Malawi do not wholly conform to international standards and the ideal of rehabilitation. They found that the forms of punishment in Malawi reflect both retributive and utilitarian justifications for punishment and that for the large part, courts attach little significance to rehabilitation in sentencing. Further, courts have not infused the sentencing process with constitutional and international standards values which promote rehabilitation as the essential goal of punishment. The task of this chapter is to consider whether the early release system in Malawi is consistent with constitutional and international standards. It will be recalled that chapter three demonstrated that the pursuit of rehabilitation as the essential aim of punishment requires that a penal regime must have an effective mechanism for release. This mechanism must provide a reasonable possibility of release for prisoners and must fulfil certain standards such as that it must be administered by an independent body with the power to release an offender and that offenders must have a right to be heard during the process. This chapter will therefore answer three key questions: what early release mechanisms are available in Malawi? Are they conducive to the promotion of rehabilitation as the essential aim of imprisonment? To what extent do they reflect constitutional and international standards? The first part of this chapter will answer the first question by describing the forms of early release system in Malawi while the other two questions will be dealt with in the second part.

2 FORMS OF EARLY RELEASE¹

2.1 The prerogative of mercy

Like its predecessor, the 1994 Constitution allows the President to ‘pardon convicted offenders, grant stays of execution of sentence, reduce sentences, or remit sentences’² in consultation with the Advisory Committee on the Granting of Pardon (Pardon Committee or Committee).³ This Committee is comprised of the President as chairperson, the Attorney General and such number of cabinet ministers as determined by the President.⁴ It determines its own procedure while the President, as chairperson, presides over the meetings and determines when the committee is to meet.⁵

The Prisons Act⁶ sets out a number of ways in which a case can be considered for mercy. Section 108 of the Act provides for special remission by the President. It states that all prisoners including those serving less than one month⁷ and life sentences may be recommended for remission by the President on grounds of ‘meritorious conduct or mental or physical condition

¹ The failure to timeously confirm sentences subject to automatic review triggers a fascinating early release mechanism under section 15(3) of the CPEC which prohibits the continued imprisonment of an offender beyond the terms stipulated in section 15(1)(b) unless they are confirmed on appeal or review. However, this provision is not discussed in this study because it is not connected to any aims of punishment. In *Rep v Isaaki* Confirmation Case No 410 of 2005, 2, NyaKaunda Kamanga J observed that section 15(3) ensures that there is no prolonged confinement of prisoners in the face of the risk of an unfair trial arising from a disproportionate sentence.

² Section 89(2). This power is not limited to ‘prisoners’ but extends to all offenders and may be exercised before a sentence is imposed. Cf section 1.1 of the 2005 Amended Guidelines for the Exercise of Prerogative of Mercy Adopted by the Advisory Committee on the Granting of Pardon (Pardon Committee Guidelines) which refers to convicted ‘prisoners’. The title of these guidelines (‘Amended Guidelines for the Pardon Committee Guidelines’) suggests that there is/are earlier version/s. However, the author was unable to get a copy of any earlier versions. It is also difficult to determine if the guidelines are still in force or have been amended since 2005.

³ Section 89(2)(a).

⁴ Section 3 of the Advisory Committee on the Granting of Pardon Act, Chapter 9:05 of the Laws of Malawi (Pardon Committee Act).

⁵ Section 4 of the Pardon Committee Act.

⁶Chapter 9:02 of the Laws of Malawi.

⁷ In practice, immediate imprisonment of less than one month is rare.

of such prisoner'. Special remission must first be recommended by the Commissioner of Prisons to the Minister of Home Affairs and Internal Security,⁸ 'who if he thinks fit', may make a recommendation to the President.⁹ According to *Chibana v State and another*,¹⁰ the practice is that prisoners who have 'demonstrated good conduct in the course of serving at least half of their prison sentences on offences classified as minor' are 'carefully selected by a Committee of Senior Prison Officers'.¹¹ Thereafter, the recommendations are considered by the Pardon Committee before the Minister seeks the approval of the President to release the prisoners recommended for mercy.¹²

The second method for bringing a case to the President's attention relates to the review of sentences imposed on 'long-term prisoners'. A long-term prisoner is 'any prisoner serving a total sentence of imprisonment of seven years or more'.¹³ Section 111(1) of the Prisons Act requires that every four years, the Commissioner 'must' send a report to the Minister regarding every prisoner serving a life sentence or imprisonment of more seven years. The Minister may also request for such reports at any time.¹⁴ Section 111(3) of the Prisons Act suggests that the power to release long-term prisoners can only be exercised by the President. This is because section 111(3) states that where the Minister requests a report to be supplied at any time or at intervals more frequent than stipulated in section 111(1) of the Act (that is, an interval of less than four years), 'the Commissioner shall arrange for compliance with any instructions as to pardon, respite, reprieve, commutation or remission of the sentence by the President'. It is reasonable to conclude then that reports received under section 111(1) must be sent to the President in order that a prisoner may be considered for mercy. On the other hand, this argument is ostensibly

⁸ The Malawi Prison Service falls under the Ministry of Home Affairs and Internal Security.

⁹ Section 108 of the Prisons Act.

¹⁰ *Chibana v State and another* Miscellaneous Civil Cause No 41 of 2009.

¹¹ *Chibana v State and another* Miscellaneous Civil Cause No 41 of 2009, 16.

¹² *Chibana v State and another* Miscellaneous Civil Cause No 41 of 2009, 14-16.

¹³ Regulation 2 of the Prison Regulations.

¹⁴ Section 111(3).

defeated by the wording of section 111(3) which, it may be argued, is only applicable in cases where the Minister requests a report and not where the report is submitted to him in observance of the statutory duty in section 111(1).

However, the latter interpretation is unduly restrictive, especially in view of the fact that the law is silent as to what action the Minister must take after receiving reports under section 111(1). It is not in accordance with the principle that penal provisions must be construed generously to the benefit of an offender, which is the corollary of the principle that penal provisions must be construed restrictively in the benefit of an offender. In other words, a court must be wary to interpret a penal provision in a restrictive manner which limits the rights of an offender when a more generous interpretation encompassing such rights is possible. Therefore, section 111(1) should be read in the context of section 111(3), with the result that reports received under the former must be forwarded to the President. It can, therefore, be said that sentences imposed on long-term prisoners must be reviewed every four years. This conclusion also finds strength in the mandatory nature of section 111(1): a report *must* be sent to the Minister every four years.

The third route to consideration for mercy is regulation 35 of the Prison Regulations which states that a medical officer must submit a report to the officer in charge where he is of the view that:

- a. the life of a prisoner is likely to be endangered by his further confinement in prison; or
- b. a sick prisoner is unlikely to survive his sentence; or
- c. a prisoner is totally and permanently unfit to undergo prison discipline; or
- d. the mental health of a prisoner appears likely to become impaired by his further confinement in prison.

The regulation further requires that the officer in charge must ‘immediately’ forward the report to the Commissioner for transmission to the Minister.¹⁵ It is quite clear from the circumstances listed in regulation 35 that the appropriate remedy in each case would be the release of the offender concerned. Indeed, the continued confinement of such prisoners would amount to

¹⁵ Regulation 35.

cruel, inhuman and degrading punishment. Since the Minister is not empowered to release a prisoner except on licence,¹⁶ he must arrange for such cases to be considered for mercy.

A case may also be brought to the President's attention through section 72(2) of the Prisons Act which provides:

If any prisoner ... was sentenced to death before being adjudged to be a mentally disordered or defective person and such sentence has not, at the time he is certified to be of sound mind, been commuted to a term of imprisonment, the Minister shall report the matter to the President.

This indicates that the President need only be notified after the prisoner concerned has been declared to be of sound mind. There is therefore no general duty on the Minister to report any instances of mental illness of prisoners under sentence of death. However, the duty exists if the death sentence has not been commuted to imprisonment, regardless of whether the prisoner was already considered for mercy in the past.¹⁷

The fifth mode of bringing a case for mercy can be found in regulation 23 of the Prison Regulations. This provision allows a prisoner to petition the Minister 'with respect to any matter relating to his imprisonment or in mitigation of sentence'. The Minister may 'if he thinks fit' forward the petition to the President 'if the circumstances so require'.¹⁸ This is a more general provision which applies to all sentenced prisoners since there are no special qualifications. Therefore, any prisoner, including those serving life sentences and those on death row can apply for mercy through regulation 23. With regard to how this provision relates to other specific provisions which require prisoners to 'qualify' for mercy, it can be said that a prisoner would not be barred from invoking regulation 23 on the basis that he does not 'qualify' for mercy under another provision of the Prisons Act. For instance, a life prisoner would not be barred from

¹⁶ Section 110 of the Prisons Act, discussed in section 2.2 below.

¹⁷ There is no legal reason for restricting the prerogative of mercy to a once-off event regarding an offender. As such the President may consider mercy multiple times for the same offender and even reconsider his past decisions by exercising even more lenience. An objection might only be raised where an unconditional

¹⁸ Regulation 23(2).

petitioning the Minister under this regulation simply because he has not served four years as required by section 111(1) of the Act. Indeed, holding otherwise would cause injustice, since one of the purported utilities of the prerogative of mercy is to correct miscarriage of justice and, in Malawi, pardon is principally reserved for this purpose.¹⁹ Consequently, phrase ‘if circumstances so require’ in regulation 23 should be interpreted generously to cover cases where an applicant cogently pleads innocence. The Minister will also have to apply his mind to the Pardon Committee Guidelines in determining whether the matter should be sent to the President.

The sixth mode of bringing cases for mercy is court-driven. Section 326(1) of the CPEC requires automatic referral to the President of all cases where a death sentence has been passed. The duty is on the court to send all such cases together with the recommendations of the presiding judge to the President.²⁰

Victims of crime may also petition the President for mercy on behalf of an offender ‘for the sake of promoting peace, tolerance and harmony in society’.²¹ Such a petition may be entertained regardless of the seriousness of the offence concerned.²² Lastly, practice indicates that the media also provides a channel to prompt the President to exercise the prerogative for mercy.²³

¹⁹ See clause 2 of the 2005 Amended Guidelines for the Exercise of Prerogative of Mercy Adopted by the Advisory Committee on the Granting of Pardon (Pardon Committee Guidelines). Actually, as a general rule, pardon should ‘generally be reserved for cases of miscarriage of justice after the matter has been thoroughly exhausted through the judicial system’

²⁰ For further discussion of this provision, see section 2.2 of chapter five.

²¹ Clause 6 of the Pardon Committee Guidelines.

²² Clause 6 of the Pardon Committee Guidelines.

²³ For instance, in 2002, following media reports, President Muluzi pardoned a woman who had given birth in prison: see US Department of State (2014).

2.1.1 Eligibility criteria and relevant factors for consideration for mercy

The Pardon Committee Guidelines²⁴ prescribe the overarching principles, eligibility criteria and factors that the Pardon Committee should consider in the exercise of its functions. The guidelines state that the public protection is the paramount consideration in the exercise of mercy.²⁵ Other considerations include whether ‘the prisoner’s release will cause no undue risk that he will reoffend before his sentence expires’²⁶ and whether his release ‘will contribute to the welfare and protection of the community by helping or furthering his reintegration into the community as a law-abiding person’.²⁷

The Guidelines set down three general rules for eligibility. First, pardon ‘shall generally be reserved for cases of miscarriage of justice after the matter has been thoroughly exhausted through the judicial system’.²⁸ Second, prisoners must have served at least half of their sentences to be eligible for presidential remission or reduction of sentence.²⁹ Third, serious 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 the prerogative of mercy.³⁰ While the guidelines do not state the circumstances in which the first and second rule may be departed from, it makes it clear that departure from the third rule is permissible if the prisoner is terminally ill³¹ or if ‘for the sake of promoting peace, tolerance and harmony in society’, a victim or his close relative petitions the President for mercy.³²

²⁴ The title of these guidelines (‘Amended Guidelines for the Pardon Committee Guidelines’) suggests that there is/are earlier version/s. However, the author was unable to get a copy of any earlier versions.

²⁵ Clause 1.1.

²⁶ Clause 1.2.

²⁷ Clause 1.3.

²⁸ Clause 2.

²⁹ Clause 5.

³⁰ Clause 3.

³¹ Clause 4.

³² Clause 6.

The Pardon Committee must consider the eligibility criteria in conjunction with the following information on the prisoner as provided by the Commissioner of Prisons:³³

- 8.1 an assessment of his character and history
- 8.2 previous convictions (if any);
- 8.3 an assessment of his attitude to the offence;
- 8.4 any matters of custom relevant to the offence committed;³⁴
- 8.5 particulars of any disputes within the community which have arisen as a result of the commission of the offence or which may be likely to arise if he is released;
- 8.6 the amount and nature of any compensation paid in relation to the offence;
- 8.7 the likelihood of his re-offending if he is released;
- 8.8 an assessment of the probability of his successful reintegration into the community if released;
- 8.9 an assessment of his rehabilitation plans, particularly in respect of education and training, employment, proposed housing, community and church/religious involvement, and the likelihood of future employment and education;
- 8.10 an assessment of his financial situation, assets and property, family circumstances and marital status;
- 8.11 any other particulars which the Commissioner of Prisoners thinks relevant in assisting the Committee to decide whether to reduce or remit his sentence.

Clause 7 of the Pardon Committee Guidelines states that where the offender is ‘terminally ill *and* the Commissioner of Prisons ... is *desirous* of recommending their names’ to the Pardon Committee, the Commissioner’s report must contain the information on an assessment of character and history during imprisonment, medical and psychiatric reports, and a report of a chaplain where appropriate.

In view of the Constitution, there are other factors that should inform the pardon process such as the rights to human dignity and liberty and the prohibition of cruel and inhuman treatment.

³³Clause 8.

³⁴ It is unclear what is meant by ‘matters of custom’ and how they are relevant to a decision on whether an offender should benefit from early release.

2.2 Remission and release on licence

There are two forms of release under the Prisons Act: remission and release on licence. Section 107(1) of the Act stipulates that a prisoner ‘may earn by satisfactory industry and good conduct a remission of one third of his sentence’, provided that the remaining sentence is not less than one month.³⁵ Remission is only applicable to offenders serving fixed sentences of more than one month.³⁶ As noted earlier,³⁷ prisoners serving life sentences or imprisonment for less than a month may be recommended for remission by the President in terms of section 108 of the Prisons Act. Apart from the difference in the category of offenders and the grantor, the other difference between remission under sections 107 (general remission) and 108 (special remission) is that the latter may be granted on account of mental or physical health. In addition, unlike general remission, special remission is not limited to one third of the sentence and cannot be lost through punishment under section 110(1) of the Prisons Act.

Release on licence is only applicable to prisoners serving life imprisonment.³⁸ The Minister may grant a licence ‘at any time he thinks fit’ and ‘subject to such conditions as may be specified in the licence’ and which ‘the Minister may at any time vary, modify or cancel’.³⁹ He may also recall the prisoner ‘at any time’ ‘but without prejudice to the power of the Minister to release him on licence again’.⁴⁰

³⁵ The Commissioner of Prisons must calculate the release dates by drawing up a Remission Table: see regulation 132 of the Prison Regulations. Where the release date falls on a Sunday, the prisoner must be released on ‘the next preceding day not being a Sunday or public holiday’: see section 113 of the Prisons Act; *Chibana v Attorney General* [1993] 16(2) MLR 483 (HC).

³⁶ Section 107(1) of the Prisons Act.

³⁷ See section 2.1 above.

³⁸ Section 110(1) of the Prisons Act.

³⁹ Section 110(1) of the Prisons Act. Regulation 134 of the Prison Regulations requires that a prisoner must, as a condition of the licence, report to a designated police station.

⁴⁰ Section 110(2) of the Prisons Act.

2.3 Release under the Prisons Bill

2.3.1 The aim and administration of early release

The aim of conditional release under the Bill is ‘to contribute to the rehabilitation and reintegration of prisoners into the community as law abiding citizens’.⁴¹ To facilitate this aim, prisoners must be placed in pre-release programmes⁴² and may be granted temporary absence of up to 12 hours in preparation for release or ‘any other reason related to the successful reintegration of the prisoner into the community’.⁴³ Conditional release shall be cancelled if a parolee is convicted of an offence and sentenced to imprisonment without the option of a fine as prescribed.⁴⁴

The Bill entrusts the general administration of early release in the Inspectorate of Prisons, a constitutional body charged with the inspection of prisons.⁴⁵ The Inspectorate may only release prisoners conditionally; it has no powers to grant unconditional release. It is composed of a justice of appeal or judge of the High Court nominated by the Judicial Service Commission, as chairperson; the Chief Commissioner of Prisons or his nominee who must be a senior member of the prison service; a member of the Prison Service Commission nominated by the commission; a magistrate nominated by the Judicial Service Commission and the Ombudsman.⁴⁶ In addition, the Inspectorate may co-opt persons to represent local or international organisations having an office in Malawi involved in the monitoring of human rights or more generally concerned with the welfare of offenders as may be approved of by the membership of the

⁴¹ Section 53(1) of the Prisons Bill.

⁴² Section 46(1) of the Bill.

⁴³ See sections 45(1)(c) and (d) of the Bill.

⁴⁴ Section 53(4) of the Bill. Time spent on parole is considered as part of the sentence: see section 55(1)(b) of the Bill.

⁴⁵ See sections 169 and 170 of the Constitution.

⁴⁶ Section 170(1) of the Constitution.

Inspectorate of Prisons.⁴⁷ 'The Inspectorate must be independent of any interference from any person or authority in the exercise of its functions and duties.'⁴⁸ In addition to any powers granted by statute, the Inspectorate is charged with, among others things, the monitoring of prison conditions, administration and general functioning of penal institutions taking due account of applicable international standards'.⁴⁹

2.3.2 Eligibility for early release

The Bill proposes that all prisoners must automatically be granted remission of one third of the sentence upon admission.⁵⁰ Such remission is mandatory and may only be reduced by up to 90 days as punishment for a disciplinary infringement.⁵¹

The Bill provides for six instances in which early release may be granted. The first category of offenders eligible for parole is that of prisoners who have served at least one third or 12 years of a determinate sentence in accordance with section 53(1)(a) of the Bill.⁵² This means that the 12-year tariff will apply where a sentence exceeds 36 years; that is where one third of the sentence is more than 12 years. Long-term prisoners whose release may be triggered upon expiry of 12 years may also be considered for release much earlier in their sentences. This is because order 142(1) of the 2004 Draft Standing Orders, in keeping with the spirit of section 111 of the Prisons Act, proposes that sentences over seven years must be reviewed every four years 'or when otherwise directed'. The relevant review documents must be carefully scrutinised by the officer in charge of a prison and submitted to the Commissioner of Prisons at least seven days before the due date.⁵³ Although not stipulated in the Draft Standing Orders or the Bill, it is judicious to conclude that

⁴⁷ Section 170(2) of the Constitution.

⁴⁸ Section 169(2) of the Constitution.

⁴⁹ See sections 169(1), (3)(a) and (3)(d) of the Constitution

⁵⁰ Section 52 of the Bill.

⁵¹ See sections 35(2)(e) of the Bill.

⁵² Section 53(1)(a).

⁵³ Order 142(2).

for offenders sentenced to 12 years or less, review documents referred to in order 142(2) must be forwarded to the Inspectorate of Prisons or the President so that the prisoners concerned may be considered for conditional release or mercy respectively. Indeed, for a seven year sentence, four years is way beyond the one third-tariff required which must be served before parole may be considered under section 53(1)(a) of the Bill. Four years would also satisfy the tariff for a sentence of 12 years under the same provision. In so as far as order 142 may trigger early release, it would apply to sentences beyond 12 years only once the required tariff has been served.

The second category of prisoners eligible for conditional release is that of prisoners sentenced to one year or less without the need to consider individual cases, provided they have served one third of their sentences.⁵⁴ Section 53(5)(a) states that the Inspectorate may make general rules to govern such release.⁵⁵ In addition, the Inspectorate may, ‘in exceptional circumstances’ release short-term prisoners who do not qualify for release in terms of its rules, provided they have served at least one third of their sentences.⁵⁶

The fourth group of prisoners who qualify for conditional release is terminally ill prisoners. Such prisoners may be released on the basis of the medical report certifying that they are terminally ill.⁵⁷ Such release is not subject to the conditions in section 53(1). Therefore, terminally ill prisoners may be released at a very early stage in their sentences. However, the Inspectorate must have due regard to the factors listed in section 43(1)(c)⁵⁸.

The fifth class of prisoners eligible for parole is those serving life sentences. Section 53(1)(b) of the Bill provides that a lifer must be considered for release after serving at least 12 years. When it

⁵⁴ Section 53(5)(a).

⁵⁵ See section 53(5)(a).

⁵⁶ Section 53(5)(b) of the Bill.

⁵⁷ Section 54. The medical officer will be appointed by the Prisons Service Commission: see section 68 of the Bill.

⁵⁸ See section 3.3.3 below. The medical report must be sent to the Inspectorate ‘immediately’: see regulation 34(3) of the 2003 Draft Prison Regulations.

is recalled that the highest tariff for a determinate sentence is 12 years,⁵⁹ the ramification of this provision is that a life sentence would be equated to sentence of 36 years. Consequently, sentencing an offender beyond 36 years or to life imprisonment would make no difference in as far as eligibility for early release is concerned.

Order 141(2) further provides that after a lifer has served four years ‘a copy of the record and an assessment of their characters shall be sent to the Chief Commissioner [of Prisons] who may make special recommendations’.⁶⁰ However, it is not stated what the Commissioner’s recommendations may be. Unlike section 111(1) of the Prisons Act, except where an offender is eligible under a different provision of the Bill, the Commissioner cannot recommend that the prisoner should be released because this would contradict section 53(1)(b) of the Bill. The recommendations may likely relate to how the sentence should be served going forward to maximise the rehabilitation and potential for social reintegration of the offender concerned. Thus, order 141(2) may facilitate the development of suitable programmes for prisoners taking into account their needs ‘regarding reintegration into the community’ in terms of sections 40(1)(d) and (e) of the Bill.

Order 141(1) of the Draft Standing Orders state:⁶¹

Officers should explain to prisoners concerned [prisoners serving life sentences] that although a sentence of imprisonment for life may be substituted in commutation of a capital sentence it is not the practice to keep offenders in prison interminably, and that in order that proper consideration may be given to each such sentence, the law requires a case of every life sentence prisoner to be submitted for review periodically.

The import of the explicit mention of life sentences commuted from death in order 141(1) cannot be gainsaid. It underlines the fact that such sentences are in essence not different from

⁵⁹ See section 53(1)(a) of the Bill.

⁶⁰ Order 141(2).

⁶¹ Order 141(1) of the 2004 Draft Standing Orders.

other life sentences. An interesting question in this regard and indeed more generally in the context of life imprisonment is: from which date should the tariff be calculated? Should it run from the date of commutation, the date on which the death sentence was imposed or the date of arrest? These are important questions because death sentences are not commuted to life sentences immediately. This is partly due to the fact that section 326(1) of the CPEC, which requires that every sentence of death must be brought to the attention of the President, does not stipulate time frames within which the administrative aspects of the process must be done.⁶²

Further, since the innate nature of a life sentence precludes consideration of the time spent in pre-trial custody, life prisoners are in general invariably disadvantaged. This disadvantage is compounded by the fact that with life imprisonment is often imposed in serious cases such as murder, the length of pre-trial custody is usually lengthy. These issues raise legitimate concerns as to how the 12-year tariff would be calculated. It should also be borne in mind that as a general rule, determinate sentences run from the date of arrest.⁶³ It would defeat the whole purpose of parole under the Bill if a life sentence is to be calculated from the date of its imposition or commutation since this would exclude the lengthy period of time spent in custody and may result in the tariff expiring after a prisoner has practically been in prison for a long period of time.⁶⁴ Therefore, the default position must be that the 12-year tariff must run from the date of arrest.

⁶² Section 326(1) simply requires that the record must be sent to the President ‘as soon as conveniently may be after the sentence of death has been pronounced’. If an offender appeals the sentence, the delay is further prolonged if the death penalty is upheld.

⁶³ See for instance *Rep v Banda and others* Criminal Case 25 of 2011; *Rep v Malizani* Criminal Case No 219 of 2010. Cf *Kapolo v Rep* Criminal Appeal No 82 of 2007, holding that pre-trial custody may be ignored provided the resulting sentence is proportional. See also section 15 of the Supreme Court of Appeal Act, Chapter 3:01 of the Laws of Malawi, which creates a presumption against the consideration of time spent in custody during sentencing.

⁶⁴ In 2010, the CPEC introduced pre-trial custody limits as follows: 30 days for offences triable by a subordinate court (section 161D); 30 days pending committal to the High Court (section 161E); 60 days pending trial by the High court after committal (section 161F); and 90 days pending trial for serious offences; namely treason, genocide, murder, rape, defilement and robbery (section 161G). However, these periods cannot be observed in practice due to

Lastly, release of prisoners under the Bill may also be triggered by prison overcrowding. Section 56 reads:

1. If the Inspectorate is of the opinion that the prison system is so overcrowded that the safety, human dignity or physical care of prisoners is being affected materially, it may recommend to the Minister that one or more of the following steps be taken:
 - a. sentenced prisoners who would not otherwise qualify are released conditionally; or
 - b. the conditional release dates of any group of sentenced prisoners are advanced.⁶⁵
2. If the Minister accepts the recommendations of the Inspectorate, he may order the release of prisoners or groups of prisoners either unconditionally or on such conditions as he may set in consultation with the Inspectorate.

This provision expands the categories of persons eligible for parole. It also creates the possibility that prisoners may serve much shorter terms than those prescribed in section 53(1); that is, prisoners may be released before they serve one third or 12 years of a determinate sentence or 12 years of a life sentence. Section 56(3) states that the powers of the Inspectorate in section 56(1) may also be exercised at the instance of the Chief Commissioner.

It should be mentioned that in terms of section 7(2)(c)(i) of the Bill, the Chief Commissioner of Prisons may transfer prisoners from an overcrowded prison to another prison where adequate space is available. However, this power is expressly subject to clause 44(1) which requires that in order to promote close family and community contacts, offenders ‘shall be housed closest to the place where he is to live after release’. While this may greatly limit the application of section 7(2)(c)(i), it is interesting to note that section 44(1) itself is subject to accommodation.⁶⁶

Nevertheless, in practice, the possibility of adequate space in another prison is unlikely because

several factors including lack of funding for capital trials, shortage of legal aid lawyers and, more recently, court strikes.

⁶⁵ Concern over prison overcrowding is also evident in section 57 of the Bill which places an obligation on the officer in charge of a prison to approach and request the Chief Resident Magistrate or the High Court to consider granting bail to unsentenced prisoners where overcrowding materially affects the dignity, safety and physical care of prisoners.

⁶⁶ See clause 44(2).

the prison system as a whole is ever overcrowded. In addition, there are only two maximum security prisons in Malawi which, in terms of order 116(1)(a) of the 2003 Draft Standing Orders, will be reserved for serious offenders including those sentenced to life imprisonment; this will limit the transfer of such prisoners. The only viable option then will be to consider special release under section 56 of the Bill.

2.3.3 Factors to consider in granting parole

The Bill establishes a Classification and Security Assessment Committee (CSAC) whose duties include preparing reports for prisoners to be considered for conditional release.⁶⁷ This report must be made available to the prisoner who has the right to make and submit written representations when being considered for release.⁶⁸ In terms of section 43(1)(c) of the Bill, the report should include the following information regarding the prisoner:⁶⁹

- a. the offence and the court's remarks regarding sentencing;
- b. previous criminal record;
- c. conduct, disciplinary record, adaptation, training, aptitude, physical and mental state;
- d. the likelihood of relapse into crime, the risk posed to the community and the manner in which such risk can be reduced;
- e. a recommendation on the possible conditional release of the prisoner;
- f. such other information as the Inspectorate may request.

⁶⁷ See sections 39 and 43(1)(c). See also order 117(2) of the 2004 Draft Standing Orders which requires the CSAC to provide monthly reviews of each prisoner and to make them available to the Inspectorate of Prisons and the prisoner concerned. The CSAC will be comprised of the Prison Welfare Officer, the Discipline Officer, the Block Officer and the Independent Prison Visitor. It may also take counsel from the prison medical officer on matters concerning the health of an offender: see sections 39(1) and (2) of the Bill.

⁶⁸ Section 43(2) of the Prisons Bill.

⁶⁹ Section 43(1)(c) of the Bill.

Order 143(2) of the 2004 Draft Standing Orders sets out additional information that must be provided in respect of a life prisoner:⁷⁰

- a. employment whilst in prison;
- b. the trade he shall follow when released;
- c. whether or not he shall be able to earn his living or some other trade when released;
- d. names and addresses of his relatives with whom he shall stay;
- e. whether or not his relatives have visited and corresponded with him; and
- f. a report by the District Commissioner showing the [attitude] of the local authority to the suggestion that the prisoner might be released from prison.⁷¹

It is clear from the above that the CSAC will play a crucial role in the parole process, especially since it must make a recommendation on the suitability of a prisoner for early release.⁷² In cases involving life prisoners, a recommendation that a prisoner is unsuitable for release must be accompanied by sufficient reasons which should also be made available to the prisoner.⁷³

Like the factors that inform the granting of mercy under Pardon Committee Guidelines, the factors that will inform the parole decision reflect a blend of the traditional theories of punishment. For example, the likelihood of relapse into crime and the risk posed to the community reflect the need for community protection while consideration of the adaptation, training and skills of an offender speak more to rehabilitation and may be indicative of the potential for social reintegration and recidivism. An assessment of risk and likelihood of relapse into crime is likely to involve consideration of family ties and the prospects of employment. The remarks of the sentencing court may prove valuable since the reasons must, ideally, encapsulate the court's view of culpability and level of criminality of an offender as evidenced from factors

⁷⁰ See order 143(1) of the 2004 Draft Standing Orders.

⁷¹ Order 143(3) states that: 'When writing to the District Commissioner officers shall not convey the idea that the prisoner shall be released early, but shall draft the letter as though it were a routine enquiry'.

⁷² Section 43(1)(c)(v) of the Bill.

⁷³ Order 143(2) of the 2004 Draft Standing Orders.

such as how well the crime was planned and his participation in the crime. The emphasis on community protection in the parole process is also evident in section 53(4) which states that conditional release shall be cancelled if a parolee is convicted of an offence and sentenced to imprisonment without the option of a fine as prescribed. However, rehabilitation considerations also come into play in that a recalled prisoner may be considered for release within two years of his recall.⁷⁴

The rationale for the additional factors required in cases of prisoners sentenced to life is that such offenders would have committed serious offences. The emphasis here is rehabilitation and the potential for social reintegration. Indeed, all the factors listed in order 143(2) speak to these two objectives. Theoretically, offenders who are employed or otherwise able to earn a living and have steady family support are more unlikely to relapse into crime than those who do not. The degree to which an offender has maintained contact with his relations and the reaction of the community to his release are a measure of how an offender will be received into society and his chances of a successfully reintegrating into it.

3 ASSESSMENT OF THE EARLY RELEASE SYSTEM

3.1 The prerogative of mercy

Estimably, the eligibility criteria for pardon are broad enough to cover all prisoners including serious offenders. This gives room for the possibility of release in cases where an offender has been reformed or ceases to be a danger to society. The character, history and antecedents of an offender may inform the likelihood of re-offending and danger posed by an offender. An offender's attitude to the offence may indicate remorse, which is usually taken as a pointer to the

⁷⁴ Clause 55(5). The duty is on the officer in charge to inform the Inspectorate that such time is about to lapse and that the prisoner has served the stipulated period qualifying him or her for conditional release: see order 34(4) of the 2004 Draft Prison Standing Orders. The decision to recall a prisoner is made by magistrate and can only be made if there is a 'material' breach of the conditions: see clause 55(3).

possibility that an offender will not re-offend. Some factors may make it more likely that an offender will lead a responsible life as they increase the prospect of rehabilitation. These include the prospect of rehabilitation or reintegration into society as deduced from factors such as the offender's rehabilitation plans in respect of prospects for employment, education, community involvement and others listed in clause 8.9 of the Pardon Committee Guidelines. Additionally, factors such as an offender's financial status, assets, family circumstances and marital status may also have an impact on the successful reintegration of an offender upon release. An offender who has no financially stable or family support may find it difficult to resist temptations to slip back into a life crime. Consideration of compensation speaks more to the restorative ends of punishment.

The Pardon Committee Guidelines also reveal concern for the welfare of an offender even where the offence is serious by providing for terminally ill prisoners regardless of the offence. This is consistent with the right to dignity and the prohibition of cruel and inhuman treatment. The Guidelines also reflect a restorative justice approach to punishment, which is rarely pursued in the Malawian criminal justice system, in the victim petition process.

With respect to the factors that inform the pardon process, factors such as the assets, family circumstances, and financial and marital status of an offender, should be treated with circumspection because of the non-discrimination provision in section 20 of the Constitution. Therefore, they should count in favour of and not against an offender.⁷⁵ An offender's attitude to the offence may indicate whether he is remorseful; remorse is usually taken as a pointer to the possibility that an offender will not re-offend. This factor may, however, may pose difficulties since a prisoner who continues to claim his innocence is likely to be jeopardized by his claim.

⁷⁵ See *Léger v France* 11 April 2006 (Application No 19324/02) Dissenting Opinion of Judge Fura-Sandström. See also Recommendation Rec (2003)22 of the Committee of Ministers to Member States on Conditional Release (Parole) (adopted on 24 September 2003).

This is demonstrated by *Leger v France*,⁷⁶ where, among other things, the applicant's claim of innocence throughout his incarceration following a conviction of murder was seen as evidence of a lack of 'serious effort to readjust to society'.⁷⁷ A lack of remorse for the offence committed should therefore not be a major consideration.⁷⁸ In addition, the likelihood of re-offending should be carefully assessed to avoid arbitrary detention.⁷⁹ More importantly, the test should not be 'zero risk' of offending.⁸⁰ Other factors pose challenging questions. For instance, it is not easy to decipher what is meant by 'matters of custom' and how they are relevant to a decision on whether an offender should benefit from early release. It is also unclear how proof of subsequent disputes in the community is assessed and why such a factor, which is beyond an offender's control, should be relevant to an early release decision. The lack of clarity on these factors may render the pardon process arbitrary.

Interestingly, it appears that there is little consideration given to most of the factors in the Pardon Committee Guidelines in practice. Actually, the generic official justification for the exercise of mercy is invariably that an offender has been of good behaviour, has served more than half his sentence and was not convicted of serious crimes. This indicates that retribution, rehabilitation (as gauged from good behaviour) and community protection (as seen from the seriousness of the offence) all play a role in deciding whether to grant pardon.

There are several problems with the pardon process. The first relates to how matters are brought to the President's attention. The Minister, for instance, has wide discretion in forwarding regulation 23 petitions under the Prisons Regulations and in recommending prisoners under clause 7 of the Guidelines. Similarly, the Pardon Committee Guidelines also give the Commissioner wide discretion. Further, under section 108 of the Prisons Act, special remission

⁷⁶ *Leger v France* 11 April 2006 (Application No 19324/02).

⁷⁷ *Leger v France*, Judgment, 11 April 2006.

⁷⁸ *Leger v France* 11 April 2006 (Application No 19324/02) Dissenting Opinion of Judge Fura-Sandström.

⁷⁹ Stokes (2008) 293.

⁸⁰ See Partly Dissenting Opinion of Judge Costa in *Leger v France* 11 April 2006 (Application No 19324/02) para 13.

by the President is contingent on ‘meritorious conduct’ on the part of the prisoner and a recommendation of the Commissioner to the Minister. The meaning of what constitutes meritorious conduct for this purpose remains elusive. Moreover, the Minister has discretion to forward the recommendation to the President. Thus, in order to be considered for mercy, a prisoner must overcome two hurdles: recommendation by the Commissioner and the Minister. A prisoner has no role to play in this process. As such, there is no certainty as to whether a prisoner will in fact be recommended and considered for remission, let alone when this will be done. Such certainty is crucial since long term prisoners may not be considered for remission for lengthy periods. This also has negative implications for life prisoners who are already excluded from general remission under section 107(1) of the Prisons Act. The uncertainty in remission procedures for long term prisoners infringes the principle of legality and therefore the right to a fair trial. As held in *Kafkaris v Cyprus*,⁸¹ discussed in chapter three, release procedures must be clear and should be communicated to a prisoner so that he is aware of what should be done in order to be considered for release.⁸²

A further problem with the pardon process is that the law does not cast a duty on the Commissioner or the Minister to inform a prisoner of his recommendation. Therefore, a prisoner may never actually know if he has been recommended or if not, why he has not been recommended. It is only in relation to prisoners on death row who have been certified to be of sound mind that referral of a case to the President is mandatory. Moreover, it is important that *all* terminally ill prisoners are considered for release since, as noted in chapter three, their continued detention may amount to cruel, inhumane and degrading punishment.

The Pardon Committee Guidelines also raise other issues. For example, while it is clear from the Guidelines that exceptional circumstances may justify a departure from the prescribed criteria,

⁸¹ *Kafkaris v Cyprus* [2008] ECHR 21906/04.

⁸² The European Commission also reached a similar finding in *Hogben v United Kingdom* 3 March 1986 (11653/85) (EComHR) 231.

there is no indication of what these circumstances are or may be. They do not specifically cover life imprisonment and death sentences. Further, there is no specific provision for the elderly. Additionally, the Guidelines do not adequately provide for the consideration of long-term prisoners every four years as required by section 111 of the Prisons Act. They also fail to guarantee procedural safeguards in the pardon process. For example, an offender has no right to be heard before the Committee either orally or through written submissions. It is not surprising then that the Committee is under no obligation to inform a prisoner of the outcome of the proceedings or reasons for withholding mercy. In practice, individual and formal notification of mercy is not given to a prisoner, leading in some cases to humiliating legal battles where apparent beneficiaries of mercy are unable to satisfy a court as to the basis for their early release and its implications for the enjoyment of their rights.⁸³ It is only in respect of regulation 23 petitions under the Prisons Regulations that the law requires an offender to be informed of the outcome. This jeopardises the possibility of a court challenge in case of an adverse decision.

In addition, the failure to hear an offender in the process of determining whether he is suitable for early release makes a mockery of the factors that the Pardon Committee must consider and denies the offender a chance to rebut any adverse contents of the report of the Commissioner to the Committee. For instance, it is important to hear an offender for the Committee to make an informed decision regarding his attitude to the offence; his rehabilitation plans; the likelihood of his re-offending; his family circumstances; and whether he is likely to compromise public protection, to mention a few. Decisions on these chapters will invariably be arbitrary if an offender is not given a chance to demonstrate to the Committee how he satisfies these criteria.

⁸³ See *Ngwali v Judicial Service Commission and another* Civil Cause No 487 of 2012 where the applicant failed to prove that his early release was based on a pardon which obliterated his guilt and therefore entitled him to reinstatement as a judicial officer. See also *Chibana v State and another* Miscellaneous Civil Cause No 41 of 2009 where the applicant had no proper documentary proof that he had been pardoned let alone lawfully released from prison.

It is noteworthy that during the review of the CPEC in 2003, the Malawi Law Commission debated the propriety of stipulating procedures for the pardon process. It concluded that such stipulation might 'disadvantage the majority of Malawians who are illiterate' and that section 326 of the CPEC deals with 'policy issues which may not be properly prescribed' under the CPEC. These conclusions are quite unconvincing. Section 326 falls under Part XII of the CPEC which deals with 'sentences and their execution'; issues connected to pardon can conveniently be included in this Part as they relate to the execution of sentences. In any event, section 326 itself outlines the pardon procedure for death row inmates. The absence of substantive offender-driven pardons leaves the fate of prisoners in the hands of the executive alone. A simple and well-defined procedure would ensure that prisoners are aware of their rights in the mercy process. At present, not even the procedure for victim petitions under clause 6 of the Guidelines is provided for. It should also be recalled, that the routes to consideration for mercy are spread out in various sections of the Prisons Act and that with the exception of regulation 23, offenders cannot initiate the pardon process. It is also important to state that the 'Committee of Senior Prison Officers' which is said to be responsible for recommending prisoners for mercy is not regulated by any law. As such, there is no telling as to the appointing authority, the actual composition of this ad hoc committee, the factors and documentation that it actually relies on, its meeting schedules and what rights offenders have with respect to the committee's proceedings. This is a regrettable situation, considering the fact this committee constitutes the first and probably most important step in the mercy process.

With regard to serious offenders, it is worrisome that the opportunity for their release is very narrow. Indeed, only offenders convicted of relatively minor offences benefit from mercy; it is only in rare cases that serious offenders are pardoned, often amidst controversy.⁸⁴ The exclusion

⁸⁴ Such as the pardoning of Edward Hayles, a British national, barely 18 months into his 12-year sentence for the sexual abuse of three street children: see *Hayles v Rep* MSCA Criminal Appeal No 8 of 2000. Two offenders convicted of rape and murder were also released in 2012 amidst allegations that the pardons were based on the fact

of serious offenders from the general scheme of the prerogative of mercy means that they will not be eligible for early release unless they are terminally ill or if a victim petitions the President for mercy. These are very restrictive conditions that indicate an overly retributive approach in the pardon process. Despite provision for terminally ill serious offenders in clause 7 of the Pardon Committee Guidelines, very few terminally ill serious offenders are pardoned in practice.⁸⁵ Recent media reports tell that pardon is often denied to serious offenders convicted of offences such as rape, defilement, armed robbery and murder. The then President Joyce Banda reportedly said in relation to an offender convicted of defilement and denied pardon: 'One of them has [a] serious liver problem but we will bury him if need be because he knowingly doomed the future of a young girl whom he raped repeatedly'.⁸⁶ Ironically, and without explanation, two serious offenders, convicted of rape and murder, were also pardoned on the same occasion.. As explained in section 2.2 above, terminally ill prisoners are likely to have been brought to the President's attention through regulation 35 of the Prisons Regulations. As such, they are prisoners who are unlikely to survive the full duration of the sentence or totally unfit to undergo it. The continued detention of such prisoners is unlawful if the offender no longer poses a dangerous threat to society. As noted in chapter three, it is based solely on retribution and constitutes a violation of the right to human dignity and the prohibition of cruel and inhuman punishment.

It must be recalled that the release of prisoners on grounds of terminal illness does not amount to a tangible prospect of release. To borrow the words of the European Court of Human Rights

that one was related to the President and the other to a senior chief. Other serious offenders have been pardoned on the basis that they suffered a miscarriage of justice: see Nation Online (2012).

⁸⁵ During Malawi's 39th independence celebrations, for instance, President Muluzi released 592 prisoners convicted of minor offences and out of which only 26 were released due to poor health or because they were female prisoners breastfeeding infants: see Presse (2003).

⁸⁶ See Muheya (2012).

(ECtHR) in *Vinter and Others v The United Kingdom*,⁸⁷ discussed in chapter three, such release ‘cannot really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather [than] behind prison walls. Indeed ... compassionate release of this kind was not what was meant by a “prospect of release” in *Kafkaris [v Cyprus]*’.⁸⁸ In practice, even the little window of hope made available through the release of terminally ill prisoners is awash with irregularities and political interference. For example, Jolofani and DeGabriele⁸⁹ narrate a 1997 incident where a recommendation for the release of 240 terminally ill prisoners was debated in Parliament. Worse still, there was an inordinate delay of almost a year in the pardon process such that by the time a final decision was taken to release only 21 prisoners, 14 of them had already finished their sentences while two had died.⁹⁰

Furthermore, the possibility of release or mercy initiated by victim petitions cannot apply to ‘victimless offences’ such as corruption. It is not proper that the release of an offender should solely rest on the victim, more so in a country like Malawi where it is highly doubtful that victims are aware of such procedures, let alone the Pardon Committee Guidelines. Further, this position may bolster retributive instincts. In addition, it may threaten the right to equality in that serious offenders will not have an equal opportunity to be considered for release.

Another problematic aspect of the release of serious offenders is that clause 3 of the Pardon Committee Guidelines is not sufficiently clear. For instance, while the ‘classes of offences’ is ostensibly exhaustive, the scope of the offences included in each class is unclear. For instance, burglary is not necessarily a violent offence. The meaning of ‘grand corruption’ is not clear while it is puzzling that murder is cited as a class of offences. The criterion used to determine the classes of offences to include in clause 3 is also unclear and borders on arbitrariness. One may

⁸⁷ *Vinter and Others v The United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013.

⁸⁸ *Vinter and Others v The United Kingdom* Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013, para 127

⁸⁹ Jolofani and DeGabriele (1999).

⁹⁰ Jolofani and DeGabriele (1999) 23.

have reasonably expected the inclusion of offences such as treason, manslaughter and even theft by public servant which in some cases may be as, if not more, serious than corruption.

A final observation regarding the Pardon Committee Guidelines is that they are not fully aligned with the Prisons Act. For example, they do not highlight how a matter that is brought to the Pardon Committee in terms of section 72(2) of the Prisons Act is handled. Second, the consideration of special remission for lifers pursuant to section 108 of the Prisons Act is not catered for in the Guidelines. For obvious reasons, the remission of life sentences cannot be based on an offender serving half of his sentence as required by clause 5 of the Guidelines. For a lifer, the real question should be how many years must be served before he can be considered for mercy.

The absence of stipulation as to when the general rule that an offender must have served at least half of his sentence before he can be considered for mercy may be departed from makes it difficult to tell with certainty the circumstances in which life sentence prisoners may be considered for mercy. This in turn raises questions as to how life sentences are handled in practice. Similarly, the practice of commuting death sentences cannot be traced to any provision of the Pardon Committee Guidelines. This is alarming in view of the frequent mass commutation of death sentences to life imprisonment since 1994. It is also unclear how matters pursuant to section 326 of the CPEC are handled. These omissions flout the principle of legality which requires that the procedures for early release must be sufficiently clear.

The last issue concerning pardons in Malawi is that the independence of the Pardon Committee is undermined by the fact that all its members are political appointees of the President⁹¹ who also determines the number of ministers to form part of the Committee. Having the President as chairperson brings the Committee strictly within the control of the President and politically biased. This is contrary to section 89(2)(a) of the Constitution which envisions a two-stage

⁹¹ See sections 94 and 98(3) of the Constitution.

process: consideration for mercy by the Pardon Committee and then by the President. This can only be achieved if the Committee is self-standing and independent; of the President. Indeed, it is difficult to see how the ‘consultation’ required by section 89(2) can be realised when the President is the chairperson of the very committee upon whose recommendation he is required to act. The absurdity of this arrangement is manifested where, as is professedly the practice, the Minister of Home Affairs and Internal Security writes a memorandum to the President supposedly seeking his approval of the early release of prisoners following recommendation by the Committee which was in fact chaired by the President himself.⁹² The constitutionality of the Pardon Committee Act is also brought into question on the basis that Parliament has effectively delegated its powers under section 89(2)(a) to the President. The Constitution requires that Parliament determines the ‘composition and formation’ of the Committee. However, the Act apparently delegates this duty to the President. This leaves the whole process under the President’s control and effectively brings the current set up at par with that under the 1966 Constitution.

In view of the foregoing analysis, it can be concluded that although the pardon process has potential to be an effective mechanism for release, it does not fully reflect international and constitutional standards. While it accommodates the goal of rehabilitation in line with international human rights law, the pardon process is compromised by inadequate procedural safeguards such as the right to be heard and the independence of the Pardon Committee.

3.2 The Prisons Act and Prisons Bill

Remission under section 108 of the Prisons Act remains the most transparent and consistent avenue for early release which benefits the majority of prisoners in Malawi.⁹³ In practice, the

⁹² See *Chibana v State and another* Miscellaneous Civil Cause No 41 of 2009, 14-15.

⁹³ African Commission on Human and Peoples’ Rights (2001) 34. A remission table is drawn up to calculate the release date for each prisoner in accordance with regulation 132 of the Prison Regulations: see *Chibana v Attorney General* [1993] 16(2) MLR 483 (HC).

requirement of 'satisfactory industry' is not enforced as offenders are automatically granted remission. In any case, this standard is antiquated considering that prisoners are not subjected to significant prison labour as was the case previously. The availability of release on licence of lifers is commendable. However, a glaring problem is that it is too deferential to the Minister in that it gives him unbridled discretion as to the circumstances in which licences may be granted or revoked. Indeed, the Prisons Act does not enumerate the circumstances in which an offender may be released on licence, recalled or allowed to be released again. It is even more unfortunate that licence procedure has fallen into disuse.

The mandatory review of long-term prisoners and lifers as provided under section 111 of the Prisons Act is desirable in the light of the principle of restraint in the use of imprisonment, the right to dignity and liberty, and the prohibition of cruel, inhuman and degrading punishment. It is also consistent with the goal of rehabilitation and recognises that the continued detention of a long-term prisoner would be unjustifiable if he is no longer a danger to society although his sentence has not expired. The fact that section 111 does not require a prisoner to be terminally ill or advanced in age buttresses this line of thought. However, the tariff of four years appears to be on the lower side and may, as a result, be counterproductive. For instance, the release of long-term prisoners, especially those serving life imprisonment, may be indiscriminately postponed to avoid their release only four years into their sentences. In practice, prison authorities do not report on long-term prisoners as required by section 111. This is a deplorable situation which undermines the rule of law.⁹⁴

Therefore, the proposals in the Prisons Bill are laudable, if only to complement the poor early release mechanism in place at the moment. The release mechanism in the Bill is not only centred on rehabilitation but also proposes the placement of offenders on pre-release programmes to facilitate their release. Unlike the Prisons Act, the Bill provides for remission of automatic

⁹⁴ A 1999 study found that there was a general perception amongst prison staff that the Prisons Act has been suspended: see Jolofani and DeGabriele (1999) 30.

remission. It is noteworthy that the Bill sets a lower tariff (a third of the sentence) for fixed sentences than the Pardon Committee Guidelines (half of the sentence) and therefore indicates a lesser emphasis on retribution. The 12-year tariff for fixed sentences is significant in that it equates a sentence beyond 36 years to a life sentence. Sentencing patterns predict that the 12 year tariff for fixed sentence will rarely be invoked in practice because very few sentences are as long as 36 years.⁹⁵ The absence of a tariff for terminally ill prisoners illustrates that the Bill evinces that retribution is not the dominant premise for their punishment.

The Bill also generously caters for short-term prisoners who may be released subject to the Inspectorate's guidelines or 'exceptional circumstances'. Although the Bill does not clarify what would amount to 'exceptional circumstances', the paramount consideration will remain the rehabilitation and reintegration of an offender into society, since this is the primary aim of early release according to section 53(1).⁹⁶ It can also be expected that exceptional circumstances would include situations where further detention would be inconsistent with the right to human dignity such as where a prisoner is elderly or terminally ill. This is more so because the Bill is premised on the right to human dignity and detention in the humane conditions as stated in the preamble and clause 4. In practice, very few prisoners other than those serving default sentences will benefit from this provision since courts are encouraged to suspend sentences of up to one year⁹⁷ and, in any case, terminally ill prisoners are not readily sent to prison for short sentences.

'Release as a special measure' marks a further departure from wholly retributive or utilitarian justifications for imprisonment by focussing on the rights and welfare of an offender. The Inspectorate will have to consider international standards in assessing the extent to which

⁹⁵ The highest fixed sentences found during the course of research for this study are the 35 years imposed for murder in *Rep v Banda and others* Criminal Case No 25 of 2011 and the 30 years imposed for theft in *Rep v Chimbelenga* [1996] MLR 342 (HC) 354.

⁹⁶ Section 45(1)(d) of the Bill which cites preparation for release cannot provide any guidance in this regard since early release is not certain until granted by the Inspectorate.

⁹⁷ See *Rep v Josephy* Confirmation Case No 261 of 2013.

overcrowding is affecting the dignity of prisoners.⁹⁸ Should this be done, release as a special measure has the potential to be a very powerful mechanism of early release for a majority of prisoners in view of perpetually poor prison conditions in Malawi. In the end, it will be the factors that must be considered in granting parole that would curtail the application of this measure. Considering that this form of release may be unconditional, it is plausible to predict that serious offenders would not be the primary beneficiaries unless they have almost served the tariffs set out in section 53(1). Of further significance is the fact that while the Minister can release a prisoner on parole, he can also release prisoners unconditionally under section 56(2), a power not given to the Inspectorate of Prisons. Such release will culminate in the expiry of a sentence.

The factors that will inform parole decisions serve as indicators of the likelihood of reoffending. Employment and strong family ties, for example, foster the rehabilitation and social reintegration of an offender. However, although these factors may reflect on how well an offender may reintegrate into society, they should not count against an offender. It is desirable that factors beyond the control of an offender should not be given undue weight since some factors such as visits by and correspondence with family during imprisonment may be hampered by the stigma, location of the prison⁹⁹ and other factors beyond an offender's control. Since life imprisonment is likely to be imposed in serious cases like murder, family members may shun away from an offender, especially where the victim was another family member. Stigmatisation from the community and the limited availability of employers willing to employ such serious offenders

⁹⁸ Section 169(3) of the Constitution states that the Inspectorate of Prisons shall take 'due account of applicable international standards' in monitoring the conditions, administration and general functioning of penal institutions.

⁹⁹ For instance, Burton *et al* (2005) 40-41, report that for most prisoners, visits from family and friends are few and far between because of distance while other prisoners have completely lost touch with their families.

also pose insurmountable difficulties for social reintegration, worsened by the absence of social workers and psychologists who can offer after-care for offenders.¹⁰⁰

It is significant that while the Bill requires an assessment of the risk that an offender may pose to society, it also demands that due attention must be given to how the risk, if any, can be minimised. Inevitably, a risk assessment would involve prediction of future dangerousness or criminality, an exercise which is inherently problematic and borders on arbitrariness in the absence of sound criteria.¹⁰¹ Moreover, the CSAC has no experts who can make such a prediction.¹⁰² The danger of arbitrariness is slightly attenuated by the fact that order 117(4)(e) of the 2003 Draft Standing Orders allows the CSAC to seek assistance from an expert in assessing, among other things, the performance, attitude and behaviour of a prisoner. However, this is not mandatory. It is commendable that the CSAC's report must include an assessment of how the risk posed by an offender can be reduced; this means that a prisoner may still be released if the Inspectorate thinks that the risk can be managed. This is in line with the principle of proportionality which entails that the continued detention of an offender must be necessary in that 'the acknowledged risk posed by the offender cannot satisfactorily be managed in the community'.¹⁰³

Admirably, unlike the Pardon Committee Guidelines, the Bill affords offenders the right to be heard during the parole process. However, there is no appellate process in the proposed parole mechanism. This means that offenders will have to approach the courts to challenge any parole decisions.

¹⁰⁰ See Burton *et al* (2005) 79.

¹⁰¹ See the Individual Opinion of Committee Members Mr Prafullachandra Natwarlal Bhagwati, Ms Christine Chanet, Mr Glèlè Ahanhanzo and Mr Hipólito Solari Yrigoyen in *Rameka et al v New Zealand* Communication No 1090/2002.

¹⁰² The CSAC will be composed of the Prison Welfare Officer, the Discipline Officer, the Block Officer and the Independent Prison Visitor (if one has been appointed for the prison by the Inspectorate of Prisons under section 96(f)). None of these persons can be said to have the necessary skill to make predictions of future criminality.

¹⁰³ See Elliot (2007) 43.

A few other concerns may be raised regarding the early release proposals in the Bill. For instance, it does not expressly provide for the conditional release of elderly prisoners. While it may be argued that advanced age may constitute an exceptional circumstance under section 53(5)(b), this provision is only applicable to prisoners serving one year or less and who have served at least one third of their sentences. As such, elderly prisoners serving longer sentences cannot be considered under this provision. Further, special release under section 56 is limited since it may only be triggered by acute overcrowding and there are no guidelines as to how prisoners will be selected for release. Some solace can be found in the fact that courts are unlikely to imprison very elderly prisoners especially for short terms.

Another concern relates to the reliance on the nature of the sentence as the basis for recalling a parole. It appears from section 53(4) of the Bill that it is not the nature or gravity of the offence itself or its penalty but rather the actual sentence imposed by a court that will revoke parole; that is, only offences that are punishable with imprisonment and in fact punished with imprisonment without the option of a fine may be considered. To some extent, the actual sentence plays a crucial role in that an offence which only attracts a fine can never form the basis of a revocation of parole. This is probably based on the assumption that imprisonment is only prescribed and imposed for serious offences. While this is the international standard, it does not fully reflect the situation in Malawi. The problem is that the offences which may fit this description coupled with sentencing discretion in imposing imprisonment instead of a fine will render the threshold for revocation of parole too low. A good example is that a conviction on vagrancy charges would be sufficient ground for revocation of parole since vagrancy is punishable with imprisonment.¹⁰⁴ Revocation would also be justified where a court imposes imprisonment for an offence which may be punished with a fine. As explained in chapter five,¹⁰⁵ although a fine is generally a

¹⁰⁴ See section 184 of the Penal Code.

¹⁰⁵ See section 2.4.2
of chapter five.

competent substitute for imprisonment, courts do not usually consider the propriety of a fine unless it is specifically mentioned in the penal provision for an offence. Creating an hierarchy of offences based on their penalties may also lead to absurdities in some cases. For instance, the possession of Indian hemp is punishable with a fine while vagrancy attracts imprisonment. Further problems with section 53(4) of the Bill lie in the fact that in practice the imposition of imprisonment without the option of a fine may be based on several grounds such as the fact that an offender has no means to pay a fine. Therefore, a better option could be to base revocation on the length of a prison sentence or amount of a fine to be revised from time to time.

With respect to the factors that will inform early release decision, a contentious factor is the report of the District Commissioner (DC) concerning the attitude of the community to an offender's release. Since the fact that parole is being considered would not be disclosed,¹⁰⁶ a DC, labouring under the false impression that the report is part of a 'routine enquiry' and is of no real consequence, might not give the matter the attention it deserves as a factor that may affect the liberty of an offender. Moreover, it is doubtful that the DC, even if he were told of the reason for the enquiry, could devote much time and resources into finding out the views of community members regarding an offender. It is also doubtful whether a DC is best placed to assess the public attitude to the early release of an offender.

More importantly, consideration of public attitude towards an offender is in and of itself questionable because, if the incidence of mob justice in Malawi is anything to go by, public attitude is generally hostile towards offenders. It would be unjust and arbitrary to solely premise continued detention on the basis of the public reaction to the early release. At the end of the day, the real question turns on the extent to which an offender's liberty should be curtailed by the possibility of negative ramifications on society. Little weight if any should be given to this factor.

¹⁰⁶ Order 143(3) of the 2004 Draft Standing Orders reads: 'When writing to the District Commissioner, officers shall not convey the idea that the prisoner shall be released early, but shall draft the letter as though it were a routine enquiry'.

As Stokes reminds us, early release must ultimately be based on whether the continued detention of an offender is justifiable.¹⁰⁷

The proposal that the Inspectorate should be responsible for the granting of parole is also cause for concern. This is because the composition of the Inspectorate is not representative of the wider interests of society; the co-option of an additional member pursuant to section 170(2) of the Constitution is discretionary. Second, the inclusion of judicial officers may also compromise the independence of its parole decisions due to conflict of interest. It is not far-fetched to conceive of a case where an offender appears before the same judicial officer who sentenced him. Another challenge is that the Inspectorate has been handicapped in its functions since its inception due to financial constraints. This is largely attributable to the fact that it lacks financial independence. It lacks financial independence as its funding is controlled by the Ministry of Finance and, in practice, has not been provided with adequate and timely funding. Additional functions for the Inspectorate may stretch its funding even more. Section 100(3) of the Bill proposes that the Ministry of Home Affairs and Internal Security must be responsible for all expenses of the Inspectorate. However, this shift in the financial structure is not sufficient to ensure financial independence of the Inspectorate. What is required is a direct allocation of funds to the Inspectorate by Parliament. The powers of the Inspectorate will be greatly undermined if its independence both in terms of finances and operations is not achieved.¹⁰⁸ This will have significant repercussions on the parole system which would primarily depend on the proper functioning of the Inspectorate. Indeed, there should be little optimism that the parole functions of the Inspectorate will be funded very well in view of the fact that the government does not seem to place any priority on the functions of the Malawi Prisons Service.¹⁰⁹ On a different note, the effectiveness of the Inspectorate as a parole board may also be undermined by the fact that it

¹⁰⁷ Stokes (2008) 293.

¹⁰⁸ See Harding (2007) 548-549.

¹⁰⁹ The Malawi Prisons Service is routinely provided with inadequate funding.

will have to practically move across the 23 prisons in the country to conduct parole hearings, which is too burdensome and time consuming for its members who have full-time jobs.

Overall, the proposed parole system is underscored by retributive and utilitarian theories of punishment. However, the main aim is to facilitate the rehabilitation and reintegration of offenders into society. Further, the Bill places emphasis on the right to dignity through provision of special release based on poor prison conditions likely to apply to minor offences. In addition, administrative challenges such as inadequate staff and monitoring may undermine the efficacy of a parole system in Malawi. Without effective monitoring, and adequate human and financial resources, the system is likely to be ineffectual.

In view of the foregoing analysis, it can be said that notwithstanding its shortcomings, the Prisons Bill remains a significant attempt to give meaning to the Bill of Rights in the early release system. It proposes a release mechanism which reflects international and constitutional standards. The Bill embraces rehabilitation as a bedrock of release decisions while carefully balancing this with community protection.

3.3 Implications for life and long-term imprisonment

The above analysis of early release mechanisms in Malawi does not bode well with prisoners serving long-term and life sentences. Since prisoners serving life sentences do not benefit from remission under the Prisons Act, their only hope of release lies in the prerogative of mercy. However, life prisoners are not specifically provided for in the Pardon Committee Guidelines since, for obvious reasons, they are excluded from the general principle that prisoners must have served at least half of their sentence to be eligible for mercy. This situation is inconsistent with regulation 35 of the Prison Regulations and sections 108 and 111 of the Prisons Act. It is worth noting that regulation 35, which provides for unfit and terminally ill prisoners, is couched in general terms and is not contingent on the severity of the sentence or the seriousness of the offence. Therefore, the law clearly envisages the pardoning or early release of a prisoner where

his health has deteriorated regardless of the sentence he is serving. This indicates that the law is not wholly retributive or utilitarian but allows for the consideration of the welfare of an offender and recognises that further detention may not be acceptable in certain cases. This is also supported by the fact that under the Prisons Regulations, every prisoner sentenced to more than seven years is classified as a ‘long-term prisoner’ and therefore entitled to a review of his sentence every four years.¹¹⁰

Further, the exclusion of serious offenders from the general consideration for release also has an adverse effect on prisoners serving long-term and life sentences as they are likely to have been convicted for serious offences. The problems cited above regarding the release of serious offenders, coupled with the inherent failure of the Pardon Committee to be independent, underscore the argument, made in chapter three, that the prerogative of mercy does not constitute an effective form of early release. In any case, an advisory panel is not enough because it concentrates power in the President alone. As held by the minority in *Kafkaris v Cyprus*,¹¹¹ noted in chapter three, the absence of clear procedural rules for release mitigates any certainty as to whether lifers will be considered for release and the prisoner’s legitimate expectation that his possible release will be considered once the tariff has been served.¹¹²

Another negative implication arising from the nature of the early release system in Malawi is that there is no opportunity for lifers to present their submissions to the Pardon Committee and no obligation on both the Pardon Committee or the President to inform the prisoners concerned of the reasons why they have not been recommended or granted release. As explained in chapter three,¹¹³ the right to human dignity and rehabilitation requires that the law should provide for a ‘real and tangible prospect of release’ for life and long term prisoners. This entails among other

¹¹⁰ See regulation 2 of the Prison Regulations.

¹¹¹ *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008)

¹¹² *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008) para 6 of the Joint Dissenting Judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

¹¹³ See section of 3.2.2 of chapter three.

things that the early release system must respect the right to be heard and other principles of natural justice.

Furthermore, as explained in chapter three, the justification for detention must exist throughout the entire period of detention.¹¹⁴ In this regard, long-term and life prisoners cannot be justifiably detained if they no longer pose a danger to society. The right to challenge the lawfulness of detention under section 42(1)(f) of the Constitution can therefore be interpreted to require that prisoners should be given an opportunity to challenge their continued detention before an independent court and to be released if their detention is unlawful. The absence of an effective review mechanism for long-term and life sentences by an independent body breaches the right to liberty.

Ultimately, the early release system in Malawi is an insufficient form of release in view of international standards which require that the law must provide for a real prospect of release for prisoners serving life sentences. The pardon process fails to offer a real prospect of release to lifers. The secrecy surrounding the pardon process and the flagrant disregard of the Pardon Committee in the process renders the prerogative of mercy an inadequate mechanism for the release for prisoners serving life imprisonment.¹¹⁵ The composition of the Pardon Committee only worsens matters because it is politically biased as all its members are from the executive. Moreover, no provision is made for life imprisonment in the Pardon Committee Guidelines. As serious offenders, most lifers may only benefit if they become terminally ill or through victim petitions. The result is that life imprisonment in Malawi amounts to a violation of the right to life and dignity, and the prohibition of cruel and inhuman punishment. Indeed, it is parole that saves

¹¹⁴ See section 4 of chapter three.

¹¹⁵ See Van Zyl Smit (2001) 302.

indeterminate or life sentences from the prohibition of cruel, inhuman and degrading treatment or punishment.¹¹⁶

It is therefore admirable that the Prisons Bill makes a deliberate move away from whole life sentences by prescribing a 12-year tariff for life imprisonment. This will have significant consequences for the nature of life imprisonment in Malawi. The possibility of release for prisoners serving life sentences indicates a less retributive approach to punishment and is consistent with international standards for prisoners serving lengthy sentences. However, a potential problem with the Bill may spring from the fact that life prisoners may end up serving relatively short terms. This is because the 12-year tariff, though higher than the four-year tariff in section 111 of the Prisons Act, is quite low and there is a possibility that prisoners sentenced to life imprisonment may be released earlier under section 56 of the Bill. For one thing, the maximum fixed sentence under the Penal Code is 21 years.¹¹⁷ For another, the maximum tariff for fixed sentences under section 53(1)(a) of the Bill is also 12 years. Although this effectively equates life imprisonment to 36 years which is a lengthy sentence, it can be said that the proposed tariff for life imprisonment upsets the penal scheme in Malawi. The only way around the tariff would be the imposition of consecutive sentences. It is trite, however, that a court must not take into account the possibility of release in sentencing an offender.¹¹⁸

It can be concluded that as far as life and long-term imprisonment is concerned, the Malawi penal system is merely retributory and therefore inconsistent with international standards. Once again, the failure largely stems from practice and not the law in that the few restrictions provided by the law and are not implemented in practice. As such, the proposals in the Prisons Bill are

¹¹⁶ *S v Bull and another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) para 23; *S v Tcoeb* 1996 (1) SACR 390 (NmS) 399-340; *S v Siluale and another* 1999 (2) SACR 102 (SCA) 106-107; *S v Mahlakaza and another* 1997 (1) SACR 515 (SCA) 521-523; Van Zyl Smit and Snacken (2009) 8.

¹¹⁷ This is the penalty for genocide: see section 217A(2)(b) of the Penal Code.

¹¹⁸ *Manyela v Rep* 4 ALR Mal 279 (HC); Terblanche (2007).

desirable because they give clarity on the meaning of life imprisonment and afford a tangible possibility of release for lifers and other long-term prisoners.

4 CONCLUSION

The early release system in Malawi is largely inconsistent with international and constitutional standards. The law and practice do not promote rehabilitation as the major aim of punishment. As a result, the release system remains overly retributive and fails to provide an effective release mechanism that complies with international human rights law. In some cases, the shortcomings stem from practice and not the law. For instance, while the law provides for the review of lengthy sentences including life sentences, this is not done in practice. The result is that lifers and long-term prisoners do not have a tangible prospect of release; this violates the prohibition of cruel and inhuman treatment and the right to dignity and liberty.

The Prisons Bill has the potential to improve the early release system and bring it more in line with international and constitutional standards. It proposes a mechanism that is centred on rehabilitation and ways in which this goal can be achieved. For instance, the Bill proposes the development of suitable programmes for prisoners that take into account their needs regarding social reintegration upon release and requires the placement of offenders on pre-release programmes. The mechanism proposed in the Bill also embodies the procedural safeguards such as the right to be heard dictated by international human rights law. It is therefore cause for concern that the Bill is no closer to enactment than it was over a decade ago when it was drafted.

CHAPTER 8

CONCLUSION

1 INTRODUCTION

This study set out to examine the status of punishment in Malawi and the extent to which it conforms to international and constitutional standards for punishment. Chapter one identified three main aspects of punishment for this analysis: the aims of punishment, the forms of punishment, and the early release system. The conceptual framework for the study was laid out in chapters two and three which looked at theories of punishment and international standards for punishment in respect of the three aspects identified in chapter one. Chapter four gave a brief background to punishment in Malawi and described the relevant provisions of the Bill of Rights pertinent to punishment. Chapters five, six and seven of the thesis discussed the forms and aims of punishment and early release mechanisms respectively in relation to the position in Malawi. These chapters also explored whether the situation in Malawi regarding these aspects of punishment is consistent with the constitutional and international standards for punishment. In this concluding chapter, the study highlights the main findings of the thesis through a detailed summary of the previous chapters. It then makes some recommendations on how punishment in Malawi may be improved in line with the international and constitutional framework for punishment.

2 FINDINGS

2.1 The aims of punishment

Both the retributive and utilitarian theories of punishment have strengths and weaknesses. Retribution is hailed for recognising that wilful wrongdoing is the catalyst

for punishment and for its emphasis on the principle of proportionality which requires that punishment must be commensurate with the seriousness of an offence. However, retribution is problematic in that it fails to give concrete meaning to what the principle of proportionality actually entails. It also does not take into account the fact that social factors influence criminal behaviour and cannot effectively deal with crime because it largely rejects the fact that punishment may be imposed to achieve certain goals in the interest of the public. Despite these weaknesses, retribution remains a relevant theory because, among other things, it embodies an important distributive principle of punishment which should guide the imposition of punishment, namely that punishment must reflect the gravity of the offence and the circumstances of an offender.

Utilitarianism justifies punishment by focussing on its consequences and holds that punishment must seek to protect the community. However, it runs the risk of justifying disproportionate punishment and instrumentalising an offender. This is because it overemphasises the benefits of punishment to society of punishment and regards the welfare of an individual as subservient to that of society. As a result, utilitarianism fails to sufficiently consider the circumstances of an offence and an offender. This encourages the use of harsh punishments and does not seek to redress the underlying causes of punishment. These observations extend to deterrence and incapacitation. For instance, while both theories are desirable for serious offences that undermine public safety, they are often used to justify increasingly stiffer sentences in the face of prevalent offences and trivialises the circumstances of an offence and an offender. Incapacitation also becomes problematic when it involves the prediction of future criminality to punish an offender and indeterminate sentencing.

Rehabilitation is a more suitable goal for punishment because it is concerned with the welfare of an offender and attempts to avert him from a life of crime by dealing with the underlying causes of crime. In this way, it serves community protection by preventing future criminality through reforming offenders into law abiding citizens. Rehabilitation is also attractive because it focuses on the eventual re-integration of an offender into society; this underscores the idea that an offender remains a part of society throughout his punishment. By requiring that offenders must have access to rehabilitative programmes, rehabilitation entrenches the right to dignity by promoting the need for humane conditions of detention. However, the problem with this theory is that it is dependent on the ability of an offender to reform and may therefore result in lengthy or indeterminate sentences to ensure that an offender is reformed. This calls for a vigilant approach which ensures that there is proportionality between punishment and the offence. In spite of this, rehabilitation remains an attractive theory of punishment which must have a bigger role in punishment. This conclusion is also supported by international law.

2.2 International standards for punishment

The emphasis that international law places on rehabilitation is seen in the recommendations and principles it provides with respect to the forms of punishment that may be imposed. For example, it has been shown that despite the fact that the death penalty has not yet been outlawed, international law recommends its abolition. Furthermore, both the death penalty and life imprisonment may only be applicable to serious offences committed by persons above the age of 18 years. For those above 18 who are sentenced to death, international law gives them the right to seek pardon while those sentenced to life imprisonment are entitled to a reasonable prospect of release.

Additionally, the early release mechanism must adhere to certain standards. For example, there must be an independent body with the power to release an offender and offenders must have a right to be heard during the process. These principles are meant to give credit to the prisoner that shows remorse and has been reformed.

2.3 The situation in Malawi

2.3.1 The Constitution and punishment

Malawi's penal regime has a long history of retributive and deterrent punishment and unfair trials. In the absence of a constitutional set up that recognised human rights, punishment during the colonial period was largely premised on retribution and deterrence, driven by the need to maintain colonial authority. Offenders were subjected to corporal punishment and the mandatory death penalty. Rehabilitative measures were mostly restricted to young offenders. During the latter years of colonial rule, there were a number of reforms that took place with a view to create a more rehabilitation-oriented system of punishment. This saw the introduction of rehabilitative programmes in prisons and the enactment of several statutes pertinent to criminal justice in general and punishment in particular. The one-party regime was characterised by gross violation of human rights. It maintained corporal punishment and the mandatory death penalty for murder and treason. Political opponents were often tried in traditional courts where they were denied basic procedural rights such as legal representation.

The adoption of the new Constitution in 1994 was supposed to usher in a new penal regime in which rehabilitation would play a major role compared to retribution and deterrence. The new Constitution introduced a Bill of Rights that guaranteed many rights including the right to a fair trial, the right to liberty and security of person, the right to human dignity, and freedom from torture, inhuman and degrading treatment.

The Constitution also introduced restrictions on certain forms of punishment and prohibited others. For example, corporal punishment is expressly prohibited, the death penalty cannot be imposed unless it follows a conviction of an offence under Malawian law by a competent court. The courts have interpreted the rights to dignity and a fair trial, and the prohibition of cruel and inhumane treatment to mean that the death penalty cannot be imposed as a mandatory sentence.

Many other provisions of the Constitution point towards an intention to create a penal system that is just and fair, informed by human rights and in which rehabilitation plays an important part. For example, the Constitution requires the courts to have regard to international law when interpreting its provisions. It also has domesticated several key international treaties which are key to punishment. For example, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights have domestic force in Malawi. The Constitution specifically requires the state to adopt policies and legislation that promote the humane application and enforcement of laws and policing standards.

The Constitution has triggered significant law reform to achieve a more human rights based criminal justice system. These reforms largely signal a shift towards a more humane penal regime that promotes rehabilitation. This can be seen, for example, in the prohibition of the imprisonment of children for any offence, and the introduction of more non-custodial punishments such as community service, periodic imprisonment and attendance centre orders. Reforms to prison law also point to a more humane approach to the treatment of offenders that embraces several rights such as dignity, liberty and the prohibition of cruel and inhuman treatment. The ideals of the Constitution for punishment have also been enforced through litigation. Indeed, poor

prison conditions and the mandatory death penalty have been held to be at odds with the Constitution.

2.3.2 Assessment of the aims and forms of punishment

The forms of punishment in Malawi partly reflect international and constitutional standards. The death penalty is restricted to persons above the age of 18 years and those sentenced to death have a right to seek pardon. Courts have stressed that death sentences must be reserved for worst instances of murder. Life imprisonment is generally accepted to mean a whole-life sentence and is mainly imposed for community protection. The law provides for a number of restrictions on the application of death and life sentences. For example, life imprisonment without the possibility of release cannot be imposed on persons below the age of 18 years. In practice, courts do not focus on an offender's capacity for reform when imposing death or life sentences. Furthermore, death and life imprisonment in Malawi do not meet some of the international requirements. These punishments are not restricted to the most serious crimes. In addition, offenders on death row are detained in despicable prison conditions and do not have an effective right to seek pardon. Active members of the Defence Force may be denied the right to seek mercy altogether in the interests of discipline and securing the safety of the Defence Force. Release procedures for prisoners serving life and long-term sentences also fail to provide a reasonable prospect of release, with their hope lying only in the pardon process.

Sentencing jurisprudence indicates that courts have generally not understood how the Constitution and international law can be used to improve the penal regime. Indeed, there is little reference to the Bill of Rights in the determination of sentences. Apart from the absence of the mandatory death penalty, sentencing practices have not

changed from before 1994 to after 1994. Courts have not embraced rehabilitation as the major aim of punishment. Courts continue to limit the consideration of rehabilitation to the punishment of first and young offenders in cases that involve minor offences. In practice, this manifested in the imposition of short sentences with the hope that an offender will come out of a prison as a reformed person. While a few cases have recognised that rehabilitation is consistent with the right to dignity and the prohibition of cruel and inhuman treatment, and even argued that rehabilitation must be given primacy, the predominant theories of punishment remain retribution, deterrence and community protection. This has resulted in the imposition of lengthy sentences, especially where general deterrence and community protection are invoked.

2.3.3 Assessment of the early release mechanisms

The early release system in Malawi largely fails to comply with international standards. It does not adequately promote the ideal of rehabilitation. The pardon process, for example, is overly retributive in that offenders convicted of serious offences are not given an equal opportunity to be considered for mercy. In practice, only offenders convicted of minor crimes are pardoned, with a few exceptions where serious offenders have been pardoned. The effectiveness of the pardon process is also undermined by the lack of clarity in procedure and the independence of the committee responsible for making recommendations to the President. Remission and release on licence are also problematic in that they are based on the rehabilitation efforts of offenders. In any case, licences are not granted in practice.

The proposals in the 2003 Prisons Bill reflect more compliance with the Constitution and international standards in as far as the early release procedures are concerned. Modelled on the importance of public protection, rehabilitation and social reintegration

of offenders, the Bill provides a real prospect of release for offenders serving both fixed and life sentences. It proposes the establishment of a parole system that adheres to the international standards such as the existence of procedural safeguards. However, the 12-year tariff proposed for life sentences is too low as compared to the punishments in the Penal Code.¹

3 RECOMMENDATIONS

The forms of punishment in Malawi do not wholly comply with constitutional and international standards. In particular, the law does not accommodate all the restrictions on the imposition of death and life sentences. Furthermore, sentencing decisions on the death penalty and life imprisonment show that the capacity to reform is not given careful consideration by the courts. Moreover, the wording of penal provisions for capital crimes does not provide sufficient guidance on when the death penalty or life imprisonment should be imposed because these punishments are provided for in the alternative without qualification.

In view of this, it is recommended that the Penal Code should be amended to restrict the death and life sentences to the most serious crimes such as aggravated forms of murder and genocide with killing. The circumstances in which offences that attract death should be regarded as non-capital crimes must be set out in the law. This will ensure that courts reserve the death penalty for the worst instances of a capital crime and promote consistency in sentencing since the law would stipulate the broad circumstances that should escalate an offence to a capital crime. Furthermore, to ensure that the capacity to reform is properly considered in sentencing, the Judiciary should

¹ Penal Code, Chapter 7:01 of the Laws of Malawi.

develop sentencing guidelines on the imposition of death and life sentences.² 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 Defence Force Act³ which curtails this right with respect to active members of the Defence Force.

With respect to life imprisonment, it is recommended that it should be limited to the most serious crimes such as genocide, murder, manslaughter and rape. The law should also clearly stipulate the circumstances in which these offences would attract life and those in which they would be punishable with fixed sentences. The law should also stipulate a tariff for life sentences. This would provide the much needed clarity on life imprisonment in Malawi. Moreover, the Judiciary should develop sentencing guidelines regarding the circumstances in which life imprisonment may be imposed. These guidelines should give concrete guidance on matters such as the treatment of particular factors, the threshold for a 'dangerous' offender, and the role of rehabilitation in the determination of whether a life sentence should be imposed.

The study has shown that courts have not embraced rehabilitation as the predominant aim of punishment and have generally limited it to first and young offenders convicted of minor offences. The Constitution and international law are not often used when sentencing. Sentencing decisions reveal courts emphasise retribution, public protection and deterrence when imposing punishment. Further, general deterrence is understood to require punishment that exceeds what is proportional to the offence. It is therefore

² Judicial officers have apparently undergone training sessions on capital sentencing and have been provided with copies of capital sentencing guidelines by Fitzgerald and Starmer (2007). However, it appears that these guidelines are not utilised.

³ Defence Force Act, Chapter 12:01 of the Laws of Malawi, as amended by Act No 11 of 2004 (DFA).

recommended that courts should give rehabilitation a greater role in sentencing and infuse sentencing decisions with the constitutional and international standards. Courts should also reconsider the conceptualisation of general deterrence. Indeed, once it is accepted, as Malawian courts have done, that general deterrence may lead to disproportionate sentences, and that this would infringe the right to human dignity and the prohibition of cruel and degrading treatment, it is futile to assert that repeat offenders may be subjected to general deterrent sentences. It must be recalled that the right to human dignity will be violated where the length of sentence is not commensurate with the gravity of an offence, regardless of whether or not the sentence has been overtaken by penal objectives such as deterrence and rehabilitation. In this regard, it is recommended that courts must adopt a stricter interpretation of proportionality which does not allow for punishment that exceeds the bounds commensurate with the offence.

The early release system in Malawi is also in need of reform. Presently, it fails to provide a reasonable possibility of release and is overly retributive. It is also ineffective and does not have adequate procedural safeguards. In view of this, it is recommended that the Prisons Bill should be passed as soon as possible to ensure that prisoners have a real prospect of release that promotes rehabilitation and social integration. However, it is recommended that the proposed tariff for life sentences must be increased and that a lower tariff should be introduced for elderly offenders. In addition, the Pardon Committee Act should be amended to include provisions that guarantee adequate procedural safeguards for offenders such as the right to be heard, the right to be provided with all relevant documents concerning their petitions, the right to be informed of the recommendation made to the President, and the reasons for such a

recommendation and to respond to it. Further, the composition of the Pardon Committee should be amended by removing the President and adding more members who represent the wider interests of society. This will ensure that the Committee is independent. It is further recommended that the Pardon Committee Guidelines should be amended by removing the restrictions on serious offenders and including provisions on the pardoning of prisoners serving life sentences. These amendments will provide a more reasonable opportunity for offenders.

4 CONCLUSION

The Constitution was meant to be a turning point for the treatment of offenders, more so with the importance it places on international law. While significant law reform has taken place in the criminal justice system, the punishment of adult offenders remains. Indeed, the punishment of adult offenders is not fully in conformity with international and constitutional standards. Restrictions on death sentences and life imprisonment are wanting, and the early release system leaves much to be desired. Nevertheless, it is encouraging, that Malawi has made some strides towards improving the penal scheme for punishment after 1994. However, there is a lot that needs to be done to fully realise the promise of the Constitution for punishment.

It is hoped that the recommendations made in this chapter will bring punishment in Malawi more in line with international and constitutional standards, it must not be forgotten that ultimately, regardless of extensive law reform, real change can only be achieved if there is compliance with the law. In fact, if the law presently in force were to be followed to the letter, Malawi would fare much better in terms of compliance with international and constitutional standards for punishment.

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