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RECENT DEVELOPMENTS

Toward a Global Consensus on Life Imprisonment Without Parole: Transnational Legal Advocates and the Zimbabwe Constitutional Court's Decision in *Makoni v Commissioner of Prisons*

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Abstract

In June 2016, the Zimbabwe Constitutional Court held that life imprisonment without the possibility of parole is unconstitutional, finding that it constituted cruel and degrading punishment and a violation of the right to equal protection under the country's new constitution. The court widely cited international and foreign law to assess global trends on life imprisonment, especially the jurisprudence of the European Court of Human Rights. The decision illustrates the benefits for human rights advocates of citing international and foreign law in their pleadings, and is an example of "sharing" constitutional jurisprudence across borders and the diffusion of constitutional norms.

Keywords
Human rights litigation, international law, life imprisonment, pardon, parole, Zimbabwe

BACKGROUND TO *MAKONI*

On 13 July 2016, the Constitutional Court of Zimbabwe (the Court) held that life imprisonment without the possibility of parole is unconstitutional.[1] According to the Court, in a decision written by Justice Bharat Patel, such sentences violate rights under the Zimbabwe Constitution to equal protection and human dignity, as well as the prohibition against cruel and degrading punishment.[2] When life sentences were discretionary, Zimbabwe made no distinction between life-term prisoners eligible for parole and those ineligible

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1 *Makoni v Commissioner of Prisons* constitutional appeal no CCZ 48/15, judgment no CCZ 8/16 (13 July 2016) (Zimbabwe Constitutional Court) (*Makoni*).

2 Zimbabwe Constitution, arts 51, 53 and 56(1).

for parole; all life-term prisoners were ineligible for parole for the rest of their lives.[3] In *Makoni v Commissioner of Prisons* (*Makoni*), the Court struck down the provision of the Prisons Act that excluded all life-term prisoners from the formal process of consideration by the Parole Board. As a consequence, life-term prisoners are now eligible to seek parole.[4]

The decision in *Makoni* was remarkable for the Court's reliance on foreign and international legal authorities to discern an emerging global consensus that life imprisonment without the possibility of parole constitutes cruel and degrading punishment. Of particular relevance were decisions of the European Court of Human Rights (ECtHR) addressing irreducible life imprisonment.[5] The decision in *Makoni* may be indicative of an emerging global "common law" on life without parole, similar to the body of transnational jurisprudence that developed on the application of the death penalty.[6] Just as human rights advocates used international and comparative jurisprudence to encourage the abolition of capital punishment in domestic constitutional challenges, advocates concerned about the human rights implications of life without parole are using a similar strategy to encourage more rehabilitative sentencing.

Makoni is one of a series of progressive human rights judgments from the Court since it was created by Zimbabwe's new Constitution, overwhelmingly approved by voters in March 2013.[7] On 20 January 2016, the Court declared child marriage unconstitutional, citing international treaties to which Zimbabwe was a party, including the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.[8] On 24 February 2016, the Court confirmed that criminal defamation laws were unconstitutional under the new constitution; the laws had previously been found to violate the old constitution.[9] However, in a

3 Prisons Act, sec 115.

4 *Makoni*, above at note 1 at 18 and 21–22.

5 *Kafkaris v Cyprus* (2009) 49 EHRR 35; *Vinter v United Kingdom* judgment of 9 July 2013, appeal nos 66069/09, 130/10 and 3896/10.

6 P Carozza "'My friend is a stranger': The death penalty and the global *ius commune* of human rights" (2003) 81 *Texas Law Review* 1031; MA Burnham "The death penalty in east Africa: Law and transnational advocacy" in M Mutua (ed) *Human Rights NGOs in East Africa: Political and Normative Tensions* (2009, University of Pennsylvania Press) 268 at 274.

7 "Zimbabwe approves new constitution" (19 March 2013) *BBC News*, available at: <http://www.bbc.com/news/world-africa-21845444> (last accessed 19 February 2018); S Mhofu "Zimbabwe's Constitutional Court outlaws child marriages" (20 January 2016) *VOA News*, available at: <http://www.voanews.com/content/zimbabwe-constitutional-court-oulaws-child-marriages/3154549.html> (last accessed 19 February 2018).

8 *Mudzuru v Minister of Justice* constitutional appeal no 79/14, judgment no CCZ 12/2015 (20 January 2016).

9 *Media Institute of Southern Africa v Minister of Justice* constitutional appeal no 7/15 (3 February 2016). See also *Madanhire v Attorney General* constitutional appeal no 78/12, judgment no CCZ 2/14 (12 June 2014).

subsequent decision in March 2017, the Court missed an opportunity to commute death sentences as a result of undue delay and the conditions on death row.[10] The Court failed to reach the merits of the case and did not cite international or foreign law, notwithstanding a substantial body of global jurisprudence on the so-called death row "phenomenon." Whether the decision in *Makoni* is indicative of a longer-term jurisprudential trend at the Court remains to be seen.

THE ROLE OF TRANSNATIONAL LEGAL ADVOCATES IN CHALLENGES TO LIFE WITHOUT PAROLE

Judges across legal systems frequently refer to the constitutional jurisprudence of other nations in resolving domestic constitutional questions.[11] Slaughter writes that the "dialogue" or "conversation" among judiciaries is a "diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law".[12] One of the most prominent actors in this judicial sharing process is the ECtHR, which has become "a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority", including in jurisdictions far beyond Europe.[13] The ECtHR, however, is only one actor in a complex, web-like and fragmented process that encompasses domestic courts, regional tribunals and international treaty bodies.[14] The process is not top-down: domestic courts also make an active contribution to solidifying and expanding international legal norms. As Waters writes, domestic courts are not "passive conduits through which fixed and immutable international norms become part of domestic law", but rather "mediators between international and domestic legal norms" that can create, enforce and shape the international norms themselves.[15]

The process becomes self-reinforcing: "[c]omparative law dialogue among domestic courts helps to harmonize state practices and to encourage courts to declare the emergence of a new international norm on a given issue. The emerging norm in turn informs and shapes ongoing judicial dialogue, further reinforcing and entrenching the norm in domestic and international legal

10 *Chawira v Minister of Justice* constitutional appeal no 47/15, judgment no CCZ 3/2017 (20 March 2017).

11 V Jackson "Constitutional dialogue and human dignity: States and transnational constitutional discourse" (2004) 65 *Montana Law Review* 15.

12 AM Slaughter "Judicial globalization" 40 *Virginia Journal of International Law* (2000) 1103 at 1104.

13 Id at 1109–10.

14 AM Slaughter "A typology of transjudicial communication" (1994) 29 *University of Richmond Law Review* 99 at 99–100.

15 M Waters "Mediating norms and identity: The role of transnational judicial dialogue in creating and enforcing international law" (2005) 93 *Georgetown Law Journal* 487 at 490.

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systems".[16] Constitutional jurisprudence on the criminalization of same-sex sexual relations is one example of an issue on which judges have long shared human rights jurisprudence across borders, citing, following and distinguishing each other's decisions in developing a new international norm.[17] To point to another example, the abolition of the death penalty "provide[s] an especially strong example of the growing globalization of human rights norms".[18] Carozza uses the metaphor *ius commune* [the medieval body of legal principles to which judges looked before the rise of modern national systems] to describe an emerging body of global death penalty jurisprudence, comprising decisions of domestic courts and international tribunals that have pronounced on the legal parameters of capital punishment.[19] The international norm that abolitionist states cannot extradite death-eligible prisoners to states that retain the death penalty crystallized after decisions of the ECtHR, Supreme Court of Canada, Constitutional Court of South Africa and the United Nations Human Rights Committee, among others.[20] The norm pertaining to the "death row phenomenon", that delay in executing a death sentence can render an otherwise constitutional sentence cruel and degrading, was developed by the Supreme Court of India and the ECtHR, and was later adopted in Canada, Jamaica, Zimbabwe, Uganda and even by two dissenting US Supreme Court justices.[21] In each of these examples, transnational human rights advocates brought constitutional challenges in domestic courts and used them to reinforce an emerging international human rights norm.

That judges "share" jurisprudence across borders is not a novel observation. What is underappreciated, however, is the role that human rights advocates play in selecting, citing and reinforcing specific cases in their pleadings. In this respect, the instrumental force of the transnational judicial dialogue is not judges, but legal advocates themselves, as several scholars have recognized.[22] Jackson has suggested that the selective use of foreign and

16 Id at 527.

17 LR Helfer and AM Miller "Sexual orientation and human rights: Toward a United States and transnational jurisprudence" (1996) 9 *Harvard Human Rights Journal* 61 at 91–92 and 100–01.

18 Carozza "'My friend is a stranger'", above at note 6 at 1034.

19 Id at 1036–43.

20 B Malkani "The obligation to refrain from assisting the use of the death penalty" (2013) 62/3 *International and Comparative Law Quarterly* 523 at 532–35.

21 *Soering v United Kingdom* (1989) EHRR 439; *Catholic Commission for Justice and Peace v Attorney General* (1993) LRC 277 (Zimbabwe Supreme Court) (*Catholic Commission*); *Triveniben v State of Gujarat* (1989) 1 SCJ 383 (India); *United States v Burns* [2001] 1 SCR 283 (Canada); *Pratt and Morgan v Attorney General* (1993) UKPC 1 (appeal taken from Jamaica); *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda Supreme Court) (*Kigula*); *Lackey v Texas* 514 US 1045 (1995), Stevens J dissenting to the denial of the certificate; *Knight v Florida* 528 US 990 at 993 (1999) (*Knight*), Breyer J dissenting to the denial of the certificate.

22 For the contrary argument, see C McCrudden "A common law of human rights? Transnational judicial conversations on constitutional rights" (2000) 20/4 *Oxford*

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international sources may impact the willingness of a court to adopt global norms, as it was "unlikely" that a court "will identify persuasive (but not binding) foreign and international sources when neither the parties nor the amici bring them to the Court's attention".[23] She describes the part that lawyers themselves play in "alert[ing] domestic judges to the possible utility or applicability of foreign or international legal sources".[24] Roberts adds that the process by which domestic courts engage with international and foreign law, even when attempting to discern or apply an objective rule, "gives great discretion to those engaged in comparative analysis to upgrade foreign decisions that they like … and downgrade ones they dislike".[25] The *ius commune* of human rights is not strictly an organic process; it is cultivated.

The transnational human rights advocates engaged in constitutional litigation across borders have a very specific goal in mind when they cite foreign courts and supranational tribunals: the restriction and eventual abolition of the death penalty and life sentences without parole. In *Makoni*, the applicant was represented by former Member of Parliament and Finance Minister Tendai Biti, who opened a law practice in Harare after his departure from the legislature. Veritas Zimbabwe, a non-governmental organization specializing in law reform, made the court filings and other documentation available. London-based Death Penalty Project, which specializes in international death penalty litigation, provided additional support. Death Penalty Project's solicitors and the barristers at Doughty Street Chambers have sponsored or advised on constitutional litigation in the Commonwealth Caribbean, sub-Saharan Africa, and southern and south-eastern Asia. Among the cases in which Death Penalty Project has assisted is *Boucherville v Mauritius*, discussed below,[26] in which the Judicial Committee of the Privy Council in London found that life imprisonment without the possibility of parole was unconstitutional in Mauritius. To this end, the applicant's legal team was able to access a transnational network of human rights lawyers engaged in death penalty litigation across borders, lawyers who themselves were instrumental in building a global body of cruel and degrading punishment jurisprudence.

This transnational litigation is only the most recent manifestation of a prolific history of human rights litigation in Zimbabwe. Once the transitional

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contd
Journal of Legal Studies 499 at 527. McCrudden argues that citation of foreign and international legal authorities is not simply results-driven, in favour of a rights-expanding agenda; rather, judges have a variety of motivations for citing this jurisprudence. Nonetheless, decisions favouring the emerging international norm have a much longer shelf-life and broader global reach than those that do not.

23 V Jackson "Transnational discourse, relational authority, and the US court: Gender equality" (2003) 37 *Loyola Los Angeles Law Review* 271 at 324.

24 Id at 343.

25 A Roberts "Comparative international law? The role of national courts in creating and enforcing international law" (2011) 60 *International and Comparative Law Quarterly* 57 at 61.

26 See below at note 37.

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provisions of the country's 1980 independence constitution expired in 1987, local advocates brought many fundamental rights challenges to the Supreme Court.[27] Although not all these precedents survived in Zimbabwean law, they had far-reaching impact elsewhere. For instance, the Supreme Court's decision in *Catholic Commission for Justice and Peace v Attorney General*,[28] which found the delay and conditions of death row to be unconstitutional, has been favourably cited around the world, even as the Zimbabwean Parliament amended the constitution to reverse the decision in 1993.[29] Newer constitutions in countries such as Kenya, Namibia and South Africa have also spurred significant human rights litigation based on expansive fundamental rights protections, direct application of international law and increasingly assertive judiciaries.[30]

THE COURT'S USE OF FOREIGN AND INTERNATIONAL LAW

In *Makoni*, the Court widely cited international and foreign case law on life sentences without parole, accepting the existence of, and further reinforcing, an emerging global consensus that irreducible life sentences are cruel and degrading. Given the relatively undeveloped nature of international law concerning life without parole compared to that regarding the death penalty, the Court's decision will probably be significant at the international level. Van Zyl Smit has described how the US Supreme Court has looked to the "climate of international opinion", including ECtHR jurisprudence, in finding mandatory juvenile life sentences without parole unconstitutional.[31] Bernaz adds that, unlike the death penalty, which has a "developed body of law" at the international level, life sentences without parole have been the subject of comparatively few legal challenges, primarily in the USA and the Council of Europe.[32] She continues that, except for the Convention on the Rights of

27 See Zimbabwe Constitution (1980), art 26. In 1987, a full bench of the Supreme Court held that whipping adults constituted cruel and degrading punishment, although this challenge was later reversed by constitutional amendment. Challenges also succeeded against solitary confinement, reduced diet, retroactive punishments and punishments based on mute confessions. A de Bourbon "Human rights litigation in Zimbabwe: Past present and future" (2003) 3/2 *African Human Rights Law Journal* 195 at 209–10; J Hatchard "The fall and rise of the cane in Zimbabwe" (1991) 35 *Journal of African Law* 198 at 198–200 and 202.

28 Above at note 21.

29 For example, *Catholic Commission* is mentioned in: *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1 (PC); *Kigula*, above at note 21; and *Knight*, above at note 21.

30 M Killander and H Adjolohoun "International law and domestic human rights litigation in Africa: An introduction" in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010, Pretoria University Law Press) 3 at 12–16.

31 D van Zyl Smit "Outlawing irreducible life sentences: Europe on the brink?" (2010) 23/1 *Federal Sentencing Reporter* 39; *Graham v Florida* 560 US 48 (2010).

32 N Bernaz "Life imprisonment and the prohibition of inhuman punishments in international human rights law: Moving the agenda forward" 35 (2013) *Human Rights Quarterly* 470.

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the Child, few treaty sources directly relate to life sentences without parole, and life imprisonment is generally validated as an alternative to capital punishment in the statutes of international criminal tribunals.[33]

Among the cases cited by the Court was *State v Tcoeib* (*Tcoeib*),[34] a decision of the Supreme Court of Namibia upholding the constitutionality of a life sentence where the prisoner was ineligible to seek parole for 18 years. In this case, the Namibian court suggested that a life without parole sentence would have been unconstitutional under the Namibian Constitution, but an institutional committee had the opportunity to evaluate the petitioner's situation and make a recommendation for probation or early release. The court in *Tcoeib* looked to case law from around the world in its decision, especially the 1977 decision of the German Federal Constitutional Court finding a life sentence without parole unconstitutional.[35] Similarly, the Zimbabwe Court cited a South African decision holding that the possibility of parole saved a whole life sentence from being cruel, inhuman and degrading.[36] The Court also referenced *Boucherville v Mauritius* (*Boucherville*),[37] in which the Judicial Committee of the Privy Council in London found unconstitutional a mandatory sentence of life imprisonment without parole in a case arising from Mauritius. *Boucherville* was a challenge to the mandatory nature of a life without parole sentence rather than simply to parole ineligibility, but the decision was notable for its application of mandatory death penalty jurisprudence in the life imprisonment context.[38]

After surveying decisions in neighbouring jurisdictions, the Court turned to ECtHR jurisprudence, particularly the most recent case *Vinter v United Kingdom* (*Vinter*).[39] In *Vinter*, the Grand Chamber ruled that life-term prisoners must have a meaningful prospect of release and possibility of review, and must be aware at the beginning of their sentence of the circumstances under which they may be considered for release. *Vinter* is among the most recent in a series of cases that have come before the ECtHR on life imprisonment over the last decade. In 2006, the ECtHR upheld life imprisonment as a lawful sentence in *Léger v France*, but noted that denying a prisoner hope of meaningful release such as through a parole mechanism could raise an issue under article 3 of the European Convention on Human Rights.[40] In 2008, the ECtHR ruled in *Kafkaris v Cyprus*[41] that a life-term prisoner must have a meaningful prospect for release besides simply the theoretical right to seek clemency.

33 Id at 482–83; Convention on the Rights of the Child, art 37.
34 1996 (1) SACR 390 (NmS).
35 *Life Imprisonment Case* (1977) 45 BVerfGE 187.
36 *State v Bull* 2002 (1) SA 535 (SCA).
37 [2008] UKPC 37 (9 July 2008).
38 Id, paras 17–19.
39 Above at note 5.
40 *Léger v France* ECtHR judgment of 4 November 2006, appeal no 19324/02.
41 Above at note 5.

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Although the appellant's brief cited the ECtHR chamber judgment in *Hutchinson v United Kingdom* (*Hutchinson*),[42] the Court did not have the benefit of the subsequent Grand Chamber judgment of 17 January 2017. The essential issue in *Hutchinson* was whether having only a theoretical prospect of release and possibility of review was enough to satisfy the *Vinter* holding that a whole life sentence must be reducible in law and in practice. Unexpectedly, the Grand Chamber upheld the life sentence at issue, even though parole rested solely on the discretion of the executive and no instances of parole appeared to have been granted in similar circumstances.[43] *Hutchinson* had the consequence of limiting *Vinter*. Although the Zimbabwe Court cited *Vinter* extensively in its decision, it is unlikely that the Court would have come to a different conclusion if *Hutchinson* had been decided before *Makoni*. The United Kingdom reserved such sentences for a relatively small number of exceptional cases.[44] By contrast, in Zimbabwe, all lifers and only lifers were ineligible for parole, which greatly broadened the scope of parole ineligibility and added an arbitrary distinction that the United Kingdom's law did not have.

After discerning a global trend away from irreducible life imprisonment, the Court decision by Judge Patel found that a "comparative survey of international law further fortifies" the position that rehabilitation of prisoners is preferred over retribution, citing article 10 of the International Covenant on Civil and Political Rights and the 1957 United Nations Standard Minimum Rules for the Treatment of Prisoners.[45] The Court continued that the rules were revised in 2015 to "reflect recent advances in correctional science and best practices" and explained that, while the rules were non-binding, the "general consensus amongst States" was that they were "highly persuasive" in influencing prisoner treatment.[46] According to article 46(1) of Zimbabwe's 2013 Constitution, courts "must take into account international law and all treaties and conventions to which Zimbabwe is a party" and, where appropriate, "may consider relevant foreign law".[47] The new constitution also requires, "[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law" and, in an identical provision, "with any international convention, treaty or agreement which is binding on Zimbabwe".[48]

Judge Patel used the international survey of life sentences without parole to conclude that irreducible life imprisonment without any provision for release

42 Applicant's heads of argument at 33; *Hutchinson v United Kingdom* ECtHR chamber judgment 3 February 2015, appeal no 57592/08.
43 *Hutchinson v United Kingdom* ECtHR Grand Chamber judgment of 17 January 2017, appeal no 57592/08.
44 Id at 13–14.
45 *Makoni*, above at note 1 at 9–10.
46 Id at 11–12.
47 Zimbabwe Constitution, art 46(1)(c)–(d).
48 Id, arts 326(2) and 327(6).

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was unconstitutional: "[t]he regional and European case authorities that I have cited earlier all point to the conclusion that whole life imprisonment, without rehabilitative treatment coupled with the possibility of release, is tantamount to inhuman and degrading treatment in contravention of the relevant constitutional and conventional rights".[49]

Considering the relevant constitutional provisions, Justice Patel saw "no reason to depart from the foreign and international jurisprudence that has developed on the subject over the past sixty years" and determined that a life sentence without parole constituted a violation of human dignity and amounted to cruel and degrading treatment or punishment in violation of articles 51 and 53 of the constitution.[50]

One of the more striking aspects of the Court's decision is how closely it cited some of the international and foreign authorities in the applicant's brief. For instance, the Court cited and even adopted a block quote from a Canadian Supreme Court decision that was quoted in the applicant's brief.[51] The Court's block quote from *Vinter* also mirrored the quote that the applicant used.[52] These examples support the inference that citations to international and foreign law in advocates' briefs are especially important drivers of the judicial dialogue or conversation that is helping to instil important international human rights norms in domestic constitutional jurisprudence. By contrast, the respondent's brief cited only domestic precedent, underscoring the lopsided and even unidirectional nature of the transnational judicial dialogue as expansive of human rights protection.[53]

DEPRIVING ALL LIFE-TERM PRISONERS OF PAROLE VIOLATES RIGHT TO EQUAL PROTECTION

The Court did not simply reference and adopt international and foreign jurisprudence uncritically. Rather, it made its own contribution to the corpus of life imprisonment jurisprudence through holding that a life sentence without parole violates the right to equal protection. The Zimbabwe Prisons Act contains a unique peculiarity: although life imprisonment is a discretionary sentence, all life-term prisoners are deprived of the opportunity to seek parole.[54] This created a unique opportunity for a challenge regarding equal protection on the basis that the Prisons Act did not distinguish between life-term prisoners eligible for parole and those ineligible for parole. Rather, it arbitrarily treated all prisoners as ineligible for parole without regard for their underlying crimes. The Court did not accept the applicant's argument that Zimbabwe's

49 *Makoni*, above at note 1 at 13.
50 Id at 14.
51 Applicant's heads of argument at 12.
52 Id at 32.
53 Respondents' heads of argument.
54 *Makoni*, above at note 1 at 21–22; Prisons Act, sec 115.

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life without parole scheme was constructively mandatory, as in *Boucherville*, since a sentence of life imprisonment was discretionary and based on an analysis weighing mitigating and aggravating factors, including in murder cases.[55] However, the Court did accept that depriving all life-term prisoners of the opportunity to seek parole without regard for the circumstances of the crime was over-inclusive. According to the Court:

> "By excluding life prisoners from the statutory process of possible release on parole availed to other prisoners, [the provisions of the Prisons Act] operate to deny them the constitutional guarantee of the right to equal protection and benefit of the law. Apart from the argument that persons sentenced to life imprisonment would have been so sentenced for having committed some heinous or atrocious crime, the respondents have proffered no reasonable or justifiable basis for the limitation of their rights…".[56]

The Court's ruling here is that treating *all* life-term prisoners differently from all other prisoners did not serve a "legitimate public interest", as at least some life-term prisoners still had potential for reformative and rehabilitative incarceration. The Court's holding on equal protection leaves open the possibility that a life-without-parole sentencing scheme could be constitutional if it separated life-term prisoners eligible for parole from the comparatively few "worst of the worst" who would be ineligible for parole. Even if the legislature implemented such a scheme, however, the Court's alternative holding on cruel and degrading punishment would still appear to apply even to the small subset of "worst of the worst" life-without-parole prisoners.

THE "SHEER HOPELESSNESS" OF INDETERMINATE IMPRISONMENT

One of the most remarkable aspects of the global body of emerging jurisprudence on life without parole is the degree to which it is influenced by "death row phenomenon" jurisprudence, relating to the theory that long delays and detention conditions could render an otherwise constitutional sentence cruel and degrading by working mental torture on a prisoner.[57] Human rights advocates involved in death penalty litigation are increasingly successful in making a similar argument on behalf of prisoners serving irreducible life sentences. Judge Patel's decision used imagery familiar to death penalty abolitionists in describing the mental consequences of indeterminate sentences on a life-term prisoner. As Judge Patel noted, the critical feature as to the constitutionality of a life sentence without parole was not the physical fact of imprisonment itself, a fact common to every prisoner, but rather the mental consequences of

55 Applicant's supplementary heads of argument at 12–17.
56 *Makoni*, above at note 1 at 21–22.
57 WA Schabas *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (1996, Northeastern University Press) 127.

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irreducible incarceration. The court referenced the "sheer hopelessness" of indeterminate imprisonment on emotional and psychological well-being. Further incarceration of the applicant without consideration for parole and the possibility of release breached his rights to human dignity and protection against inhuman or degrading treatment.[58] Prolonged deprivation of liberty can lead to increased social isolation, desocialization, anxiety, suicide and dependence, which can hamper efforts at rehabilitation and reintegration into society. Indeterminate-length sentences, in which the prisoner does not know the date of release, can exacerbate these stressors.[59]

Notably, the Court rejected the respondent's argument that a life-term prisoner's situation was not completely hopeless because of the existence of a mechanism for executive clemency, similar to previous holdings by the ECtHR and other domestic courts. The respondent argued that the hope of release was inherent in a life sentence because the president can exercise the prerogative of mercy at any time, even without an application by a prisoner. Simply because the president had not granted mercy did not imply that the applicant would never be pardoned. The state also referenced the mandatory report that the commissioner of prisons makes to the president on behalf of every life-term prisoner every five years after the first ten years of imprisonment.[60] Judge Patel explained that the existence of a clemency or pardon mechanism was constitutionally insufficient to provide a life-term prisoner with a prospect of release. In *Makoni*, the respondent was unable to identify any life-term prisoner who received clemency.[61] According to the Court, the presidential clemency power derived from the common law royal prerogative of mercy and therefore was "not ordinarily justiciable".[62] By contrast, decisions of the Advisory Board, Parole Board, commissioner of prisons and minister of justice were "ordinarily reviewable on the established grounds of irrationality, illegality or procedural irregularity", either under English common law principles or Zimbabwe's Administrative Justice Act.[63]

This holding accords with both previous Zimbabwean constitutional jurisprudence and international trends. In *Nkomo v Attorney General*,[64] the Zimbabwe Supreme Court ruled that a pending clemency petition did not oust the court's jurisdiction to hear challenges to a death sentence on the basis that it was cruel and degrading punishment. Distinguishing clemency review from appellate review, the then Chief Justice Anthony Gubbay wrote, "there is no right in the condemned prisoner to insist on a hearing before

58 *Makoni*, above at note 1 at 25–26.
59 R Stokes "A fate worse than death? The problems with life imprisonment as an alternative to the death penalty" in J Yorke (ed) *Against the Death Penalty: International Initiatives and Implications* (2008, Ashgate) 281 at 289.
60 Respondents' heads of argument at 7.
61 *Makoni*, above at note 1 at 16.
62 Id at 20.
63 Id at 27.
64 1993 (2) ZLR 422.

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the Cabinet in order to deliver an oral argument, or to be present at its deliberations".[65] Subsequently, in *Woods v Commissioner of Prisons* (*Woods*),[66] the Supreme Court found that the president's denial of clemency to a prisoner so that he could receive medical treatment in South Africa was not cruel and degrading treatment. Relying on decisions of the Judicial Committee of the Privy Council in *de Freitas v Benny* (*de Freitas*)[67] and *Reckley v Minister of Public Safety and Immigration* (*Reckley*)[68] (arising from Trinidad and Tobago and the Bahamas, respectively), the Zimbabwean Supreme Court agreed that the prerogative of mercy was not subject to judicial review and was, in essence, an act of grace from the president. The Supreme Court explained:

> "By its very nature the President's prerogative of mercy can still be exercised in favour of Woods at any time in future. It cannot be said that he has been effectively abandoned in prison as a thing without any residual dignity and without any hope of restitution of freedom in his lifetime. The contention advanced on the sentence of imprisonment for life having become an inhuman and degrading punishment because the President's prerogative of mercy has not been exercised must fail."[69]

Certainly, such a holding conflicts with the Court's holding in *Makoni* that the existence of a clemency mechanism did not render constitutional an otherwise unlawful sentence to life without parole. However, it is submitted that *Woods* is not controlling for two reasons. First, by the time *Woods* was decided, the Privy Council had reversed both *de Freitas* and *Reckley* in *Lewis v Attorney General of Jamaica* (*Lewis*).[70] The applicant pointed this out in his supplementary heads of argument.[71] In *Lewis*, the Privy Council ruled that, although the final clemency decision was not reviewable in court, a court could inquire, for example, into whether the clemency authority properly followed its own procedure and carried out the required constitutional process. *Lewis* triggered a trend throughout the English-speaking world towards judicial reviewability of clemency decisions.[72] Secondly, even though *Woods* and *Makoni* both involved life-term prisoners denied the prospect of release, *Woods* may be distinguishable because it was a challenge to the president's denial of clemency, not a challenge to the lack of a parole mechanism. In *Makoni*, the applicant did not challenge the denial of clemency itself; rather, clemency was raised by the state as a defence to the applicant's challenge to lack of parole. As a result, only

65 Id at 427.
66 2003 (2) ZLR 421 (S).
67 [1976] AC 234 (PC).
68 [1996] 1 AC 527 (PC).
69 *Woods*, above at note 66 at 435.
70 [2000] UKPC 35 at 47.
71 Applicant's supplementary heads of argument at 7–8.
72 A Novak *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (2015, Routledge) at 176–81.

in *Woods* was the non-justiciability of clemency petitions central to the outcome of the case. The applicant in *Makoni* also argued that, insofar as *Woods* stood for the proposition that the availability of executive clemency saved the constitutionality of a life sentence without parole, it was wrongly decided.[73] *Makoni* is the better-reasoned decision and will no doubt be far more influential beyond Zimbabwe's borders.

CONCLUSION

The decision of the Zimbabwe Constitutional Court reinforces a global trend toward more rehabilitative sentencing and away from irreducible life sentences. On behalf of the applicant, transnational legal advocates brought a range of foreign and international sources to the Court's attention, purporting to show an emerging consensus that a life sentence without parole constitutes cruel and degrading punishment. By accepting the applicant's argument, the Court reinforced that emerging consensus. The strategy worked in the death penalty context, and constitutional challenges to life imprisonment without the possibility of parole benefit from the same transnational "sharing" process that has succeeded in restricting the scope of capital punishment. However, the Court was not simply a passive recipient of jurisprudence from the global north, and European institutions in particular, but rather made its own contribution to the global body of life imprisonment jurisprudence through its rather novel holding that a life sentence without parole could violate the right to equal protection. The *Makoni* decision will probably be cited by foreign courts and thereby become part of the human rights *ius commune*.

73 Applicant's supplementary heads of argument at 8.

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