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A Critical Analysis of Life Imprisonment in Malawi

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Abstract

The abolition of the mandatory death penalty for murder in Malawi has attracted attention to life imprisonment as a possible punishment for capital crimes. This article considers the human rights challenges that life imprisonment in Malawi raises in view of the Bill of Rights and Malawi's international obligations under the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and other international and regional human rights instruments that prescribe various standards for punishment. The article argues that, in the absence of a clear statutory definition of life imprisonment and an inadequate release system, the application of life imprisonment in Malawi is inconsistent with the Bill of Rights and international standards on punishment.

Keywords

Malawi, life imprisonment, punishment, human rights, death penalty

INTRODUCTION

The striking down of the mandatory death penalty for murder in 2007[1] has significant consequences for sentencing in capital cases in Malawi. Apart from the fact that courts now have discretion in sentencing for murder, the decision leaves life imprisonment as a likely alternative in punishing murder. While the 1994 Malawian Constitution (the Constitution) specifically prohibits the imposition of whole life sentences on children, it does not expressly prescribe any limitations on life imprisonment for adult offenders. This article considers the nature of life imprisonment in Malawi in view of constitutional and international standards. First it considers the international human rights aspects of life imprisonment. It then examines whether the situation in Malawi complies with these standards, by focussing on the meaning of life imprisonment and the possibility of release for offenders sentenced to life.

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1 *Kafantayeni v Attorney General* constitutional case no 25 of 2005.

CONSTITUTIONAL STANDARDS ON PUNISHMENT

The Constitution elaborates a number of fundamental principles that underpin its framework and serve as a guide to state action. The entrenchment of the supremacy of the Constitution is probably the most noteworthy. 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.[2] In vesting legislative powers in Parliament,[3] the power to initiate and implement policies and laws in the executive,[4] and the enforcement and interpretation of laws in the judiciary,[5] the Constitution seeks to create a division of powers in the area of punishment as a means of curbing abuse of the 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".[6]

The Constitution envisages significant changes to punishment and lays the foundations for a penal system that is premised on human rights. The Bill of Rights contained in chapter IV of the Constitution guarantees several rights that underpin fundamental changes to the penal regime and indeed the criminal justice system as a whole. For instance, it provides for the right to dignity,[7] and outlaws corporal punishment,[8] torture[9] and cruel, inhuman or degrading punishment or treatment.[10] 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 without the possibility of parole on persons below the age of 18 years.[11] Imprisonment of children may only be used as a last resort and for the

2 Constitution, secs 7, 8 and 9 provide separate duties and functions for the executive, legislature and judiciary respectively.
3 Id, sec 8.
4 Id, sec 7.
5 Id, sec 9.
6 Id, sec 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 at 34–35 and 44–45.
7 Constitution, sec 19.
8 Id, sec 19(4).
9 Id, sec 19(3).
10 Ibid.
11 Id, sec 42(2)(g)(i).

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shortest time consistent with justice and public protection.[12] The Constitution also provides for the right to liberty and a wide range of rights for arrested, detained and sentenced persons.[13] For instance, it protects the right to be detained in humane conditions,[14] to challenge the lawfulness of one's detention[15] and to be released from unlawful detention.[16] These provisions indicate that the Constitution envisages significant changes to punishment in Malawi.

The Constitution protects the right to equal and effective protection under the law[17] 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".[18] The right to equality entails that all persons, including offenders, should be treated equally. In *Masangano v Attorney General and Others* (*Masangano*), the High Court said that despite the fact that prisoners are lawfully deprived of their liberty through imprisonment, they remain just as entitled to human rights.[19] Therefore, prisoners are entitled to all rights guaranteed to "every person", subject to necessary limitations on account of their imprisonment. The Constitution also enshrines the right to human dignity in section 19. Specifically, it requires that human dignity be respected in all judicial proceedings or any proceedings before any organ of state and during the enforcement of a penalty; furthermore it prohibits corporal punishment, torture, and cruel, inhuman and degrading treatment or punishment. These provisions have significant implications for the aims and severity of criminal punishment and the manner in which it is enforced.

The Constitution also recognizes 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* it was stated that liberty must be given due respect and should not be interfered with unduly.[20] In buttressing the protection of liberty, the Constitution also protects several other specific rights. These include the right to be promptly informed of the reason for one's detention,[21] the right to be brought before a court of law within 48 hours[22] and the right to be released from detention with or without bail.[23] The Constitution also guarantees the right to challenge the lawfulness of one's detention and to be released immediately if such detention is

12 Id, sec 42(2)(g)(ii).
13 Id, sec 42.
14 Id, sec 42(1)(b).
15 Id, sec 42(1)(e).
16 Id, sec 42(1)(f).
17 Id, sec 20(1).
18 Ibid.
19 *Masangano*, above at note 6 at 37.
20 *In re Chizombwe* [1991] 14 MLR 482 (HC) 486.
21 Constitution, sec 42(2)(a).
22 Id, sec 42(2)(b).
23 Id, sec 42(2)(e).

unlawful.[24] 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. 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 contains additional provisions regarding children, who are defined as persons under the age of 18 years.[25] For instance, it requires that they must be treated in a manner that promotes their "reintegration into society to assume a constructive role".[26] Further, children may only be imprisoned as "a last resort and for the shortest period of time consistent with justice and public protection".[27] The imposition on children of life imprisonment without the possibility of release is specifically prohibited by section 42(2)(g)(i).

The Constitution also embraces international law. 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 they are "applicable" in interpreting the Constitution. Customary international law is automatically binding on Malawi and its application is subject to the Constitution and acts of Parliament.[28] Further, section 44(2) of the Constitution provides that permissible limitations to rights must be "recognised by international human rights standards". International law can be used as a source of law in domestic courts.[29] This means that various standards for punishment contained in major international and regional human rights instruments are binding on Malawi and must be reflected in its penal regime.

INTERNATIONAL STANDARDS FOR LIFE IMPRISONMENT

International standards for life sentences reveal four key restrictions. First, life imprisonment without the possibility of release should not be imposed for offences committed by persons below the age of 18 years.[30] Regional human rights bodies have affirmed this position in their jurisprudence.[31]

24 Id, sec 42(1)(e) and (f).
25 Id, sec 42(2)(g).
26 Id, sec 42(2)(g)(v).
27 Id, sec 42(2)(g)(ii).
28 Id, sec 211(3).
29 Id, sec 211(1).
30 Convention on the Rights of the Child, art 37a; rule 2 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules) [1985] UNGA 30; A/RES/40/33 (29 November 1985).
31 See, for instance, decisions by the European Court of Human Rights (ECtHR) in *Weeks v United Kingdom* (1988) 10 EHRR 293; *Hussain v United Kingdom* 22 EHRR 1; and *V and T v United Kingdom* 30 EHRR 121.

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, inhuman and degrading punishment. 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 to protect the community.

Article 77(1)(b) of the International Criminal Court 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 imprisonment[32] 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 and convincing evidence" and only for "intentional crimes, with lethal or extremely grave consequences".[33]

Thirdly, there must be a realistic prospect of release for offenders sentenced to life imprisonment. Although an explicit prohibition of life imprisonment without parole is only recognized at treaty level in the Convention on the Rights of the Child (CRC) with respect to children, there is clear support in international law for the proposition that all prisoners must be offered the possibility of rehabilitation and the prospect of release. Indeed, article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) requires that the prison system must have as its essential aim the reintegration and social rehabilitation of an offender. This intimates that prisoners cannot be kept in prison indefinitely. This is in line with article 10(1) of the ICCPR that 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.[34]

While article 37 of the CRC prohibits life imprisonment for children without the possibility of release, neither the Universal Declaration of Human Rights nor the ICCPR makes specific reference to the prospect of release for prisoners in general. Similarly, the American Convention on Human Rights,

32 UN Crime Prevention and Criminal Justice Branch "Life imprisonment", para 14.

33 "Safeguards guaranteeing protection of the rights of those facing the death penalty" ECOSOC res E/RES/1984/50 (1984).

34 D van Zyl Smit and S Snacken *Principles of European Prison Law and Policy: Penology and Human Rights* (2009, Oxford University Press) at 8 and 329–30, citing the decision of the German Federal Constitutional Court in BVerfG-1 BvR 14/76, 21 June 1977 (BVerfGE 45 at 187 and 238).

the African Charter on Human and Peoples' Rights and the European Convention on Human Rights (ECHR) do not have specific provisions for early release. However, the need for the possibility of release is echoed by various UN and regional instruments, as well as the jurisprudence of international human rights bodies. 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 emphasize 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 prisoners[35] encourages states to ensure that all prisoners are considered for release, stressing that "considerations of general prevention alone should not justify refusal of conditional release".[36] It adds that life sentences should be reviewed after between eight and 14 years of detention and at regular intervals thereafter.[37] Further, the 2003 recommendation on conditional release (parole) requires the introduction of early release legislation applicable to all prisoners including lifers.[38] It is worth noting that, with the exception of the International Criminal Tribunal for Rwanda, the maximum sentence available to UN tribunals is 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 eliminate the possibility of release.

The African Commission on Human and Peoples' Rights has recommended the use of conditional or early release, parole and remission of sentences to improve the rehabilitation of offenders.[39] The European Committee for the Prevention of Torture has condemned irreducible life sentences and held

35 Council of Europe Committee of Ministers res (76) 2 on the treatment of long-term prisoners (1976), para 10 (now covered by rec (2003) 23 on the management of life-sentence and other long-term prisoners).

36 Ibid.

37 Id, para 11.

38 See Council of Europe Committee of Ministers rec (2003) 22 to member states on conditional release (parole), para 4a. See also European Committee for the Prevention of Torture "11th general report" CPT/Inf (2001) at 16, para 33; European Committee for the Prevention of Torture "Hungary visit" CPT/Inf (2007) at 24, para 33.

39 See African Commission on Human and Peoples' Rights "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.

that "it is inhuman to imprison a person for life without any realistic hope of release".[40] 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, the 2003 recommendation on the management by prison administrations of life sentence and other long-term prisoners contains recommendations on how, among other things, to "increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law abiding life following their release".[41] The 2003 recommendation on conditional release (parole) states that the law should provide for conditional release for all prisoners, including those serving life sentences.[42] Similarly, the 2006 European Prison Rules (European Rules) emphasize that the regime for all sentenced prisoners should be "designed to enable them to lead a responsible and crime-free life".[43] Rule 103.2 of the European Rules further requires that mechanisms be put in place to prepare prisoners for release. This position is also found in the 1999 recommendation concerning prison overcrowding[44] and the 2003 recommendation on conditional release.[45]

The European Court of Human Rights (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.[46]

In *Vinter and Others v United Kingdom* (*Vinter*),[47] the court held that, if it is to comply with the prohibition of cruel and inhuman punishment, life imprisonment must be accompanied by a possibility for release and regular reviews. The court gave three reasons for finding whole life sentences inconsistent with the ECHR. The first reason was that, since detention can only be justifiable if it is based on a penological ground (retribution, deterrence, rehabilitation or 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.[48] The second reason was

40 European Committee for the Prevention of Torture "Report on the visit to Bulgaria from 4 to 10 May 2012" CPT/Inf (2012) 4 December 2012, para 32; European Committee for the Prevention of Torture "Report on the visit to Switzerland from 10 to 20 October 2011" CPT/Inf (2012) at 26.

41 Rec (2003) 23 on the management of life-sentence, above at note 35, para 2.

42 Rec (2003) 22 on conditional release, above at note 38, para 4a. See also res (76) 2 on the treatment of long-term prisoners, above at note 35.

43 European Rules, rule 102.1.

44 Rec (99) 22 concerning prison overcrowding and prison population inflation (1999).

45 Above at note 38.

46 *Kafkaris v Cyprus* [2008] ECtHR 21906/04 (12 February 2008), para 6 of the joint dissenting judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

47 *Vinter and Others v United Kingdom* appln nos 66069/09, 3896/10 and 130/10, merits 9 July 2013.

48 Id, para 111.

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that a whole life sentence means that a prisoner will never atone for his offence: "whatever 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".[49]

The last reason given by the court in *Vinter* for rejecting irreducible life sentences was that it would be inconsistent with the right to human dignity to deny an offender a chance of release. 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 [is] constitutionally required in any community that establishe[s] human dignity as its centrepiece".[50] The court emphasized that these principles "appl[y] to all life prisoners, whatever the nature of their crimes".[51] It also held that compassionate release only for those who are terminally ill or close to death is not a sufficient prospect of release. This is because 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".[52] The court stressed that a life sentence must be reducible at the time of its imposition so that a prisoner is able to "work towards his rehabilitation":

> "[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

49 Id, para 112.
50 Id, para 113.
51 Ibid.
52 Id, para 129. This conclusion reflects the position of the 16 January 2010 decision of the German Federal Constitutional Court (cited in D van Zyl Smit "Outlawing irreducible life sentences: Europe on the brink?" (2010) 23 *Federal Sentencing Reporter* 29 at 54–55), where the court found that the right to human dignity would be infringed where "only severe infirmity or life threatening illness of a prisoner could lead to a life sentence not being carried out further". It thus held that the constitutional power of the Turkish president to release offenders "on grounds of chronic illness, disability, or old age" did "not open even a vague prospect … of a life in freedom that makes the implementation of the life sentence bearable in terms of the dignity of the person in any way that would satisfy the German constitutional order: At best, it lets the offender hope to die in freedom."

> 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."[53]

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.[54] The emphasis on rehabilitation entails that prisoners must, as of right, be offered rehabilitative programmes while in prison to prepare them for reintegration into society. In *Kafkaris v Cyprus* (*Kafkaris*),[55] 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.[56] 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 jeopardizes that aim is not in itself capable of constituting inhuman and degrading treatment".[57]

The fourth restriction regarding life imprisonment in international law is that 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. The imposition of life imprisonment is usually based on the dangerousness of an offender. Dangerousness is susceptible to change[58] and it can hardly be argued that all lifers will always be a danger to society.[59] Since the length of imprisonment can itself amount to inhuman and degrading treatment,[60] even in countries where there is no distinction between "penal" (non-parole

53 *Vinter*, para 122. Before the *Vinter* judgment, the ECtHR had previously hinted that an irreducible life sentence might be incompatible with art 3. See *Einhorn v France*, para 27: "the Court does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under article 3 of the Convention"; *Kafkaris*, para 98: "It is enough for the purposes of article 3 that a life sentence is de jure or de facto reducible".

54 D van Zyl Smit, P Weatherby and S Creighton "Whole life sentences and the tide of European human rights jurisprudence: What is to be done?" (2014) 14 *Human Rights Law Review* 59 at 65–71.

55 Above at note 46.

56 Joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström and Spielmann in id, para 5.

57 Id, para 98.

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

59 Explanatory memorandum to rec (2003) 22 on conditional release, above at note 38, para 4.

60 See para 4 of the dissenting opinion of Judge Fura-Sandström in *Leger v France* 11 April 2006 (appln no 19324/02).

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period) and "risk" (parole period) elements of a life sentence, there is a 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."[61]

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.[62] Once the tariff of a life sentence is served, the punishment aspect of the sentence is satisfied and the only justification for continued detention becomes the offender's dangerousness.[63] Continued detention must therefore be judicially reviewed at regular intervals to assess whether the prisoner still poses a danger to society.[64] Although there is no fixed period for the 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.[65]

International jurisprudence is to the effect that, once the punitive element of a sentence has been served, continued detention remains lawful only as long as the rationale for its initial imposition exists.[66] Prolonged detention will become arbitrary if the offender no longer poses a dangerous risk to society.[67] If dangerousness is the basis for continued detention, it is paramount that the criteria used to determine whether the offender is still dangerous are sound. Ideally, professionals should carry out the review. 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".[68] A change in circumstances, such as advancement in age or sickness,

61 *Kafkaris*, concurring opinion of Judge Bratza. Cypriot law did not distinguish between "penal" and "risk" elements of a life sentence.

62 D van Zyl Smit "Life imprisonment as the ultimate penalty in international law: A human rights perspective" (1999) 9 *Criminal Law Forum* 5 at 34.

63 *Stafford v United Kingdom* (2002) 35 EHRR 32, paras 80 and 81.

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

65 *Oldham v United Kingdom* no 36273/97 (2001), ECHR 2000-X, paras 28–37.

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

67 *Kafkaris*, concurring opinion of Judge Bratza.

68 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 293.

that reduce the dangerousness of an offender, can therefore be grounds for early release.[69] Continued imprisonment of such individuals is based solely on retribution and therefore violates human dignity.[70]

With regard to the body responsible for considering release, the Human Rights Committee held in *Rameka et al v New Zealand* that the possibility of release must be considered by an independent judicial body.[71] Similarly, in *Stafford v United Kingdom*, the ECtHR stated that, since an offender who has served the tariff period has satisfied the punishment element of his sentence, his continued detention requires a determination that there is a new lawful basis for his further detention. The court held that such an inquiry must comply with the requirements of article 5(4) of the ECHR.[72] A judicial body (an independent body with the independent character of a court), which is impartial and meets standards of due process, must therefore consider the prisoner for release.[73] In other words, release procedures must not be at the mercy of the executive alone and must be procedurally fair.[74] Further, the body must actually have the power to order the release of the offender concerned and comply with procedural safeguards for the applicant;[75] an advisory panel will not suffice.[76] In *Kafkaris*, the dissenting judgment found that, on the

69 *Leger v France* 11 April 2006 (appln no 19324/02) dissenting opinion of Judge Fura-Sandström, para 15. A detailed consideration of how dangerousness should be assessed is beyond the scope of this article. It is sufficient to note that most scholars are agreed that dangerousness is very difficult to assess. See, for instance D van Zyl Smit *Taking Life Imprisonment Seriously in National and International Law* (2002, Kluwer Law International) at 194; M Levi "Violent crime" in M Maguire, R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* (1997, Oxford University Press) 841; M Brown "Calculations of risk in contemporary penal practice" in M Brown and J Pratt (eds) *Dangerous Offenders: Punishment and Social Order* (2000, Routledge) 91; S Shute "Parole and risk assessment" in N Padfield (ed) *Who to Release? Parole, Fairness and Criminal Justice* (2007, Willan Publishing) 21 at 27; A von Hirsch "The problem of false positives" in A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (1998, Hart Publishing) 98 at 100.

70 G De Beco "Life imprisonment and human dignity" (2005) 9/3 *International Journal of Human Rights* 411 at 417.

71 *Rameka et al v New Zealand* comm no 1090/2002.

72 ECHR, art 5(4) reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." *Stafford v United Kingdom* (2002) 35 EHRR 32.

73 van Zyl Smit and Snacken *Principles of European Prison Law*, above at note 34 at 334; *Waite v United Kingdom* 53236/99 (10 December 2002).

74 *Wynne v United Kingdom* (1995) 19 EHRR 333; *Hussain v United Kingdom* 22 EHRR 1; *R v Secretary of State for the Home Department, ex parte Doodly, Pegg, Pierson and Smart* [1994] 1 AC 531.

75 *X v United Kingdom* appln no 7215/75 (1981), para 61; *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, paras 49–56; *Weeks*, above at note 31, paras 58–68; *Thynne, Wilson and Gunnel*, above at note 58, paras 79–80.

76 *Weeks*, id, paras 64–69; *Curley v United Kingdom* no 32340/96 (28 March 2000), paras 32–34.

facts of the case, the possibility of pardon did not offer "a real and tangible prospect" of release.[77] This was because:

> "[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."[78]

This passage accurately reflects the pardon process in most countries. Due to the secrecy surrounding the granting of pardons that results in most prisoners not knowing on which factors pardons are based, the possibility of pardon is not a sufficient guarantee of release.[79]

In summary, international law recognizes that life imprisonment is a heavy penalty that 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 of release and that the law must provide a review mechanism that 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 a 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 examines the nature of life imprisonment in Malawi with respect to these restrictions. A major issue with life imprisonment in general 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.

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77 *Kafkaris*, para 6 of the joint dissenting judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

78 Ibid.

79 D van Zyl Smit "Abolishing life imprisonment?" (2001) 3 *Punishment and Society* 299 at 302.

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THE NATURE OF LIFE IMPRISONMENT IN MALAWI

The meaning of life imprisonment

Strictly speaking, there is no statutory definition of life imprisonment in Malawi. However, 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 exceeding seven years. This may provide authority for the proposition that a life sentence must be reviewed every four years and so carries a tariff of four years.[80] However, 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 prescribed for serious offences, in light of other sentences prescribed for other offences. This problem is magnified by the fact that release under section 111 may be unconditional since it is subject to the prerogative of mercy.[81] 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.[82] He arrives at this conclusion by explaining that "since legally imprisonment is generally permissible after the age of 19[83] and life expectancy is 55 years, a life sentence is 35 years", being the difference between life expectancy (as it then was) and the age for eligibility for imprisonment.[84]

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80 Sec 111(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."

81 The prerogative of mercy is provided for in sec 89(2) of the Constitution and may be granted with or without conditions under sec 326(6) of the Criminal Procedure and Evidence Code, chap 8:01 of the Laws of Malawi.

82 See *Rep v Jeke* confirmation case no 178B of 2013 at 4.

83 See Child Care, Protection and Justice Act, 2010, sec 140. In fact, at the time of writing the judgment, imprisonment could only be imposed on offenders over 16 years old, since sec 2 of the same act defined a child as a person below the age of 16. Therefore, according to Mwaungulu J's reasoning, a life sentence would have been 38 years. However, the High Court has since ruled that this definition of a child is unconstitutional in view of sec 42 (2)(g) and has thus raised the age of a child to 18; see *S and Others ex parte Kashuga* miscellaneous appln no 129 of 2012 at 15–16.

84 See *Rep v Jeke*, above at note 82 at 4; *Rep v Yasin* confirmation case no 219 of 2012; *Rep v Mushali and Another* confirmation case no 242 of 2013 at 4; *Rep v Assam and Another* confirmation case no 907 of 2008 at 4; *Rep v Samson and Another* confirmation case no 466 of 2010 at 4. See also *Rep v John* confirmation case no 528 of 2010 at 4; *Rep v Nelson and Another* confirmation case no 1852 of 2005 at 4; *Rep v Naluso* confirmation case no 387 of 2013 at 4; *Rep v Matemba* confirmation case no 243 of 2012 at 4; *Rep v Mapeni* confirmation case no 466 of 2010; *Rep v Kaufa* confirmation case no 314 of 2011 at 3; *Rep v Naphazi* confirmation case no 386 of 2011 at 4; *Rep v Chikwana* confirmation case no 131 of 2013 at 4.

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Mwaungulu J 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.[85] This suggests that a sentence may be rendered unconstitutional on the sole basis of its length depending on how close it is to a 35 year sentence.

Defining life imprisonment in terms of life expectancy may also have its own complications. For instance, with life expectancy in Malawi in 2015 of 57 years for men and 60 years for women,[86] a life sentence for a 20 year old male offender would mean 37 years; while for a 50 year old offender it would be seven years, or slightly longer for female offenders. The meaning of a life sentence would therefore vary depending on the age and gender of an offender. This raises issues regarding the right to equality, in that life imprisonment would mean different things depending on not only the age at which an offender is sentenced, but also whether an offender is male or female.[87] In addition, should life expectancy decrease in future, the meaning of life imprisonment would also have to change. This would mean that a decrease in life expectancy may at some point imply that life imprisonment could be as low as 10 or 15 years. Likewise, an increase in life expectancy would entail a redefinition of a life sentence. Furthermore, sentences that are close to a "life sentence" would be rendered unlawful and even unconstitutional since, as maxima, they must be invoked only in the worst instance of an offence. Ultimately, it would be unlawful to sentence an offender who has exceeded life expectancy to imprisonment, let alone life imprisonment, as it would amount to cruel, inhuman and degrading punishment or a manifestly excessive sentence. This outcome would be inconsistent with the principle of legality that requires that the law must clearly declare a punishment in advance.[88] This means that the meaning of life imprisonment must be prescribed by law and not in terms of life expectancy. The certainty of life

85 See *Rep v Chirwa* confirmation case no 271 of 2013 at 3; *Rep v Kanyumba and Another* confirmation case no 904 of 2008 at 4; *Rep v Mulolo and Another* confirmation case no 362 of 2012 at 4; *Rep v Kandodo and Two Others* confirmation case no 240 of 2013 at 4; *Rep v Kanena* confirmation case no 130 of 2013; *Rep v Makoko* confirmation case no 469 of 2009 at 4; *Rep v Headson and Four Others* confirmation case no 129 of 2013 at 4; *Rep v Jali* confirmation case no 228 of 2013 at 3; *Rep v James* confirmation case no 244 of 2013 at 3.

86 Statistics according to the World Health Organization, available at: <http://www.who.int/countries/mwi/en/> (last accessed 18 August 2017).

87 See JD Mujuzi "High crime rate forces Liberia to reintroduce the death penalty and put international treaty obligations aside: What the critics missed?" (2009) 17/2 *African Journal of International and Comparative Law* 342 at 352.

88 Compare with *S v Prinns* 2012 (2) SACR 183, holding that the principle of legality does not require that the precise extent of a punishment must be identifiable in advance, so long as some punishment is affixed by legislation or common law. The distinction with the argument in this article is that there is no certainty as to what the punishment of life imprisonment itself entails. So, while there is a penalty attached to the crimes punishable with life, there is no clarity on what such a sentence is in practice.

imprisonment could be undermined if it were dependent on a variable factor like life expectancy. Ultimately, the definition provided by Mwangulu J is inherently problematic as it presupposes that an offender will be imprisoned until he dies, as it is based on life expectancy. In other words, it is a whole life sentence.

Case law indicates that the predominant view in Malawi is that life imprisonment means a whole life sentence. In *R v Cheuka and Others*,[89] the accused was sentenced to an effective term of 12 years for manslaughter, which carries a maximum sentence of life imprisonment.[90] 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".[91] In other words, the indeterminate nature of a whole life sentence 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 *R v Masula and Others*.[92] In that case, 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*[93] 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 judgment, 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."[94]

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. Under 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

89 *Rep v Cheuka and Others* criminal case no 73 of 2008.
90 Penal Code, sec 208.
91 *Cheuka*, above at note 89 at 60.
92 *Rep v Masula and Others* criminal case no 65 of 2008.
93 *Moyo v Attorney General* constitutional case no 12 of 2007.
94 Id at 10–11.

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or physical care of prisoners is being affected materially". 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 or her 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 progress during the sentence depending on his needs to ensure rehabilitation. Indeed, unlike the Prisons Act, the Prisons Bill does not hint at the possible release of prisoners serving life sentences as a result of this report.

It is admirable that the Prisons Bill makes a deliberate departure 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 it may lead to life prisoners 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 relatively low and there is a possibility that prisoners sentenced to life imprisonment may be released earlier under clause 56 of the bill. For one thing, the maximum fixed sentence under the Penal Code is 21 years.[95] For another, the maximum tariff for fixed sentences under clause 53(1)(a) of the bill is one third or 12 years of a determinate sentence in accordance with section 53(1)(a) of the bill. 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. Read in conjunction with the 12 year tariff for life sentences, the bill effectively equates life imprisonment to 36 years. Although 36 years is a lengthy sentence and that, given the sentencing practices prevailing at the moment it is unlikely to be imposed, 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, in sentencing an offender, a court must not take into account the possibility of release.[96]

Restrictions on life sentences

Malawian law places a number of restrictions on life imprisonment. First, section 42(2)(g)(i) of the Constitution prohibits the imposition on children of life imprisonment without the possibility of release.[97] The fact that the law expressly states that children may not be sentenced to life imprisonment

95 This is the penalty for genocide; see Penal Code, sec 217A(2)(b).
96 *Manyela v Rep* [1966–1968] 4 ALR Mal 279 (HC).
97 Constitution, sec 42(2)(g)(i).

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without the possibility of release 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 the regular review of long-term prisoners required under section 111 of the Prisons Act. It is also at odds with the right to dignity, the prohibition of cruel and inhuman punishment and international standards. 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.

The second restriction on life imprisonment relates to the category of offences which are punishable with life imprisonment. Malawi has over 40 offences that attract life imprisonment. The list includes: 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.[98] While some of these offences, like murder and manslaughter, fall within the category of serious offences as required by international law, many of them do not fit into this category. These include forgery of wills or documents of title to land, judicial records, powers of attorney, bank notes, currency notes, bills of exchange or promissory notes; rioting after proclamation and related offences; stupefying in order to commit a felony or misdemeanour; causing or committing an act intended to cause grievous harm or prevent arrest; theft by a public servant; destroying or damaging a river bank or wall, navigation works or bridge; 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. The application of life sentences to these offences is disproportionate and amounts to cruel and inhuman punishment.[99] In practice, courts exercise considerable restraint in imposing life sentences, limiting their imposition to manslaughter and, since 2007, murder cases.[100] The majority of life sentences

98 See Penal Code, secs 39, 78, 79, 114(1)(a), 210, 211, 217A(2)(a), 301, 357 and 358 respectively.

99 See D van Zyl Smit "Constitutional jurisprudence and proportionality in sentencing" (1995) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 369, arguing that the prohibition of cruel and inhuman punishment covers two scenarios: punishments that are barbaric in themselves and those that are disproportionate to a particular offence.

100 See for instance, *Rep v Matimati* criminal case no 18 of 2007; *Rep v Masula*, above at note 92. For an overview of sentencing trends in manslaughter cases, see TC Nyirenda "Sentencing trends in homicide cases: Are homicide convicts given their just deserts?" (paper presented to the Working Group on Homicide for Judges of the High Court

being served today result from the automatic mass commutation of death sentences to life since 1994.[101]

With respect to early release, offenders serving life sentences in Malawi may be released either by the minister responsible for prisons or by the president.[102] The minister may release a lifer on 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".[103] He may recall the prisoner "at any time" "but without prejudice to the power of the Minister to release him on licence again".[104] A glaring problem with release on licence 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 the licence procedure has fallen into disuse. Therefore the only hope of release for lifers lies with the president.

The president may decide to exercise the prerogative of mercy in favour of an offender sentenced to life imprisonment under section 89(2) of the Constitution. The Prisons Act provides three instances in which a lifer may be released by the president. First, section 108 of the act provides that the commissioner of prisons "may recommend to the President that remission should be granted to a prisoner by reason of the meritorious conduct or mental or physical condition of such prisoner".

Secondly, lifers may also benefit from the prerogative of mercy under 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.[105] It is quite clear from the circumstances listed in regulation

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and Supreme Court of Appeal, Ku Chawe Inn, Zomba, Malawi, 19 December 2009) at 11–22.

101 Chirwa argues that the automatic commutation of death sentences to life imprisonment is unconstitutional because the president does not have the power to substitute one form of punishment with another and that it amounts to a mandatory imposition of life sentences, since there is apparently no individual consideration of the circumstances of the offenders concerned during the commutation process. See DM Chirwa *Human Rights under the Malawian Constitution* (2011, Juta) at 134.

102 Prisons Act, sec 110.

103 Id, sec 110(1). Reg 134 of the Prison Regulations requires that a prisoner must, as a condition of their licence, report to a designated police station.

104 Id, sec 110(2).

105 Prison Regulations, reg 35.

35(a) to (d) that the appropriate remedy in each case would be the release of the offender concerned. The continued confinement of such prisoners would amount to cruel, inhuman and degrading punishment. Since the minister is not empowered to release a prisoner except on licence,[106] he must arrange for such cases to be considered for mercy.

The third way 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".[107] 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 such reports at any time.[108] However, the law does not state the minister's powers once reports are received. 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, therefore, reasonable to conclude that reports received under section 111(1) must be sent to the president so that a prisoner may be considered for mercy. 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 accordingly. It can, therefore, be said that sentences imposed on long-term prisoners must be reviewed every four years. This conclusion is also supported by the mandatory nature of section 111(1): a report *must* be sent to the minister every four years.

It is important to mention that the Prisons Act does not restrict the powers of the president under section 89(2) of the Constitution. As such, he may decide to exercise mercy on lifers in situations other than those prescribed in the act. The Constitution only requires that the prerogative of mercy must be exercised in consultation with the Advisory Committee on the Granting of Pardon (Pardon Committee),[109] which comprises the president as chairperson, the attorney general and such number of cabinet ministers as the president determines.[110] The Pardon Committee determines its own procedures, while the president, as chairperson, presides over the meetings and determines when the committee is to meet.[111]

106 Prisons Act, sec 110.
107 Prison Regulations, reg 2.
108 Prisons Act, sec 111(3).
109 Constitution, sec 89(2)(a).
110 Advisory Committee on the Granting of Pardon Act, chap 9:05 of the Laws of Malawi (Pardon Committee Act), sec 3.
111 Id, sec 4.

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The 2005 Amended Guidelines for the Pardon Committee (Pardon Committee Guidelines) set down three general rules for eligibility. First, a pardon "shall generally be reserved for cases of miscarriage of justice after the matter has been thoroughly exhausted through the judicial system".[112] Secondly, prisoners must have served at least half of their sentence to be eligible for presidential remission or a sentence reduction.[113] Thirdly, 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.[114] While the guidelines do not state the circumstances in which the first and second rules may be disregarded, they state that the third rule may be disregarded if the prisoner is terminally ill[115] or if "for the sake of promoting peace, tolerance and harmony in society", a victim or his close relative petitions the president for mercy.[116]

It is clear from the eligibility criteria that the Pardon Committee Guidelines do not specifically cover life imprisonment since, for obvious reasons, lifers 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 Prisons 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 or her health has deteriorated, regardless of the sentence he is serving.

It is also worrisome that the opportunity for serious offenders to be released 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 amid controversy.[117] The exclusion of serious offenders from general consideration for release also has an adverse effect on prisoners serving life sentences, as they are likely to have been convicted for serious offences. The exclusion 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 a victim petitions the president for mercy. These are very restrictive conditions that indicate an overly retributive approach in the

112 Pardon Committee Guidelines, clause 2.
113 Id, clause 5.
114 Id, clause 3.
115 Id, clause 4.
116 Id, clause 6.
117 One example is 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 amid allegations that the pardons were based on the fact that one was related to the president and the other to a senior chief. Other serious offenders have reportedly been pardoned on the basis that they suffered a miscarriage of justice.

pardon process. In any case, as noted above, the release of terminally ill prisoners is not an adequate form of release for lifers.[118] Moreover, an advisory panel is not enough, because it concentrates power in the president alone. To make matters worse, despite provision for terminally ill serious offenders in clause 7 of the Pardon Committee Guidelines, very few terminally ill offenders are pardoned in practice.[119] As explained above, terminally ill prisoners are likely to have been brought to the president's attention through regulation 35 of the Prison Regulations. As such, they are prisoners who are unlikely to survive the full duration of their sentence or are totally unfit to undergo it. The continued detention of such prisoners when they no longer pose a dangerous threat to society is based solely on retribution and constitutes a violation of the right to human dignity and the prohibition of cruel and inhuman punishment.

A further shortfall in the pardon process is that the Pardon Committee Guidelines do not set out any procedural requirements for the pardon process. They therefore fail to provide 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 therefore unsurprising that the Pardon Committee is under no obligation to inform a prisoner of the outcome of the proceedings or reasons for withholding mercy. Further, there is no opportunity for lifers to present their submissions to the committee and there is no obligation on the committee or indeed the president to inform the prisoners concerned of the reasons why they have not been recommended for or granted release. As held by the minority in *Kafkaris*, the absence of clear procedural rules mitigates any certainty as to whether a lifer will be considered for release and the prisoner's legitimate expectation that his possible release will be considered once the tariff has been served.[120]

Another problem with the pardon process is that the independence of the Pardon Committee is undermined by the fact that all its members are political appointees of the president[121] who also determines the number of ministers to join the committee. Having the president as chairperson brings the committee under his or her control and makes it politically biased. This is contrary to section 89(2)(a) of the Constitution which envisions a two stage process: consideration for mercy first by the Pardon Committee and then by the president. This can only be achieved if the Committee stands alone and is independent of the president. Indeed, it is difficult to see how the "consultation" required by section 89(2) can be realized when the president is the chairperson of the very

118 *Vinter*, para 113.

119 During Malawi's 39th independence celebrations, for instance, President Muluzi released 592 prisoners convicted of minor offences, of whom only 26 were released due to poor health or because they were female prisoners breastfeeding infants.

120 *Kafkaris*, para 6 of the joint dissenting judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

121 See Constitution, secs 94 and 98(3).

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committee upon whose recommendation he is subsequently required to act. The absurdity of this arrangement is manifested where, as is professedly the practice, the minister writes a memorandum to the president supposedly seeking his approval of the early release of prisoners following recommendation by the committee that was in fact chaired by the president himself.[122] 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.

In view of this analysis, it can be concluded that, although the pardon process has the potential to be an effective mechanism for release, it does not fully reflect international and constitutional standards. It does not provide a real and tangible prospect of release. The inadequate release mechanism also greatly undermines the constitutional injunction in section 42(2)(g), which prohibits the sentencing of children to whole life sentences. Thankfully, the 2010 Child Care, Protection and Justice Act (CCPJA)[123] now prohibits the imprisonment of a person below the age of 18 years for any offence.[124]

Ultimately, the early release system in Malawi is an insufficient form of release in view of international standards that 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. 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 of the prohibition of cruel and inhuman punishment. Indeed, it is parole that saves prisoners under indeterminate or life sentences from cruel, inhuman and degrading treatment or punishment.[125] The justification for the detention of a prisoner

122 See *Chihana v State and Another* miscellaneous civil cause no 41 of 2009 at 14–15.

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

124 See id, sec 140. The only penalty applicable to child offenders that involves detention is a reformatory order under the CCPJA, sec 146(1)(h). Detention at a reformatory centre is an attempt to modify the penalty of detention at the president's pleasure provided in sec 26 (2) of the Penal Code. See Malawi Law Commission *Report on the Review of the Children and Young Persons Act* (2005, Government Printer) at 54. Under sec 141(1) of the CCPJA, courts are now empowered to determine the period that a child must be detained; however, there is no maximum period for that detention. These orders are reserved for serious crimes as stipulated in sched six of the CCPJA. Sec 140, and indeed the whole scheme of the CCPJA, portrays a clear shift from a punitive to a more rehabilitative and restorative approach in the punishment of children. For instance, diversion of child offenders is now legally recognized in sec 146(1)(i) of the act.

125 *S v Bull and Another*; *S v Chavulla and Others* 2002 (1) SA 535 (SCA), para 23; *S v Tcoeib* 1996 (1) SACR 390 (NmS) at 399–440; *S v Siluale and Another* 1999 (2) SACR 102 (SCA) at 106–07; *S v Mahlakza and Another* 1997 (1) SACR 515 (SCA) at 521–23; van Zyl Smit and Snacken *Principles of European Prison Law*, above at note 34 at 8.

must exist throughout the entire period of detention. In this regard, 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 mechanism for an independent body to review life sentences breaches the right to liberty. It might be argued that the continued detention of offenders would be an acceptable limitation under section 44 of the Constitution. It must be recalled, however, that, in the absence of a legal framework that provides for an assessment as to dangerousness, it would be impossible to inquire into the justifiability of the limitation on the rights of an offender. After all, it is the existence of such a mechanism that matters. The justification for continued detention would therefore lie in the fact that, after assessment, an offender is deemed dangerous and therefore should remain imprisoned. Without a clear definition of life imprisonment, a legal framework for the applicable procedure and stipulation as to the regularity of the reviews, the point at which such an assessment must be made remains unclear. A one off decision at the time of sentencing is insufficient; there is need to assess periodically whether continued detention is "necessary for community protection".

CONCLUSION

Life imprisonment in Malawi largely falls short of constitutional and international standards. While there are some instances in which it reflects international norms, such as the prohibition of whole life sentences on children, there are gaps between international standards and the situation in Malawi. The scope of crimes punishable with life is too wide to be consistent with international standards. The release system is inadequate and fails to provide a realistic possibility of release for offenders serving life sentences. This renders life imprisonment in Malawi a cruel, inhuman and degrading punishment. The passing of the Prisons Bill may mitigate the harshness of life imprisonment in Malawi. One can only hope that the bill, which was rejected by Parliament and is now back at the Malawi Law Commission, will soon become law.

Valid questions may be asked about whether or not parole is the answer to the challenges posed by life imprisonment. While whole life sentences mean that a prisoner is never "post-tariff",[126] such that there is no purpose in reviewing his dangerousness, life imprisonment with the possibility of parole simply asks for a real chance for reconsideration, although the possibility remains that the sentence will effectively last the whole of an offender's life.

126 van Zyl Smit, Weatherby and Creighton "Whole life sentences", above at note 54 at 64.

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Accordingly, as Levy J remarked in *S v Tjijo*, "parole is no answer" to the problem of life imprisonment:

> "The concept of life imprisonment destroys human dignity, reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free. The fact that he may be released on parole is no answer. In the first place for a judicial officer to impose any sentence with parole in mind, is an abdication by such officer of his function and duty and to transfer his duty to some administrator probably not as well equipped as he may be to make judicial decisions. It also puts into the hands of the executive where the sentence is life imprisonment, the power to detain a person for the remainder of his life irrespective of the fact that the person may well be reformed and fit to take his place in society. Furthermore, even though he or she may be out of gaol on parole such person is conscious of his life sentence and conscious of the fact that his or her debt to society can never be paid. Life imprisonment makes a mockery of the reformative end of punishment."[127]

127 *S v Tjijo* (decided 4 September 1991), cited in *S v Tcoeib* 1993 (1) SACR 274 (NM) at 275–76.

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