ANNEXURES TO THE REPORT OF THE TASK FORCE ON REVIEW OF THE MANDATORY DEATH SENTENCE UNDER SECTION 204 OF THE PENAL CODE

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3. EXPERT REPORTS

3.1 DEATH PENALTY PROJECT EXPERT REPORT

REPORT TO THE TASK FORCE ON REVIEW OF THE MANDATORY DEATH SENTENCE UNDER SECTION 204 OF THE PENAL CODE

With a copy to:
KENYA LAW REFORM COMMISSION

Prepared by:
The Death Penalty Project (UK)
1. **Introduction**

1.1. The Death Penalty Project is providing this report at the invitation of the Task Force (the ‘Task Force on Review of Mandatory Death Sentence under Section 204 of the Penal Code Act’, hereinafter the ‘Task Force’), with a view to supporting the fulfilment of its Terms of Reference. In particular, we hope that our observations may help the Task Force to develop a legal framework to ensure all prisoners affected by the ruling of the Supreme Court in *Muruatetu*¹ are judicially resentenced.²

1.2. The Death Penalty Project (the ‘DPP’) is a legal action charity based in London. DPP was privileged to be permitted by the Supreme Court of Kenya to intervene as amicus curiae in the *Muruatetu* case challenging the imposition of the mandatory death penalty, as international experts on the death penalty. We have been working in Kenya on death penalty-related issues for many years. We worked directly with Kenyan counsel on the challenge to the mandatory death penalty in *Mutiso v Republic*³ and we were directly involved in similar challenges in Uganda,⁴ Malawi⁵ and Ghana.⁶ We have worked with judges, prosecutors, defence lawyers and other participants in the criminal justice system in many other countries in Africa and in the common law jurisdictions in Asia and the Caribbean on human rights issues related to the death penalty and related to the implementation of sentences of life imprisonment.

1.3. On 14 December 2017 the Supreme Court of Kenya issued a landmark ruling finding that the mandatory death penalty contained in section 204 of the Penal Code was unconstitutional: *Francis Karioko Muruatetu & Anr v Republic Of Kenya*.⁷ The Court held further that a life sentence should not necessarily mean natural life, but rather it could also mean a certain judicially set minimum or maximum term.

1.4. In its remedial order, the Court tasked the Honourable Attorney General of Kenya, the Director of Public Prosecutions and other relevant agencies to prepare a professional review setting up a framework to deal with sentence re-hearings of those persons subject to the mandatory death penalty. The Court also ordered the

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¹ [2017] eKLR, Petition No. 15 of 2015 (as consolidated with Petition No 16 of 2015) [*Muruatetu*]
² Terms of Reference for the Task Force are set out in Gazette Notice No. 2610 (23 March 2018) and include a directive for the Task Force to “Prepare a detailed professional review with regard to the death penalty in the context of the Judgment and the Order made in the Petition with a view to – i. Set up a legal framework to deal with sentence re-hearing cases similar to that of the Petitioners; ii. Review the legislative framework on death penalty in Kenya; iii. Recommend a guide to death sentencing; iv. Formulate parameters of what ought to constitute life imprisonment; v. Formulate amendments and enact a law to give effect to the judgment; vi. Prepare and forward a progress report to the Supreme Court within twelve (12) months from the date of the Judgment; vii. Create awareness and sensitize stakeholders and the public on the Judgment and its implications and take into account their views on the same”.
³ [2011] EALR 242
⁴ *Kigula & Ors v Attorney General* [2005] UGCC 8 (Constitutional Court of Uganda); *Attorney General v Kigula & Ors* [2009] UGSC 6 (Supreme Court of Uganda)
⁵ *Kafantayeni & Ors v Attorney General* [2007] MWHC 1
⁶ *Johnson v Republic* [2011] 2 SCGLR 601
⁷ *Muruatetu*, supra note 1.
Speakers of the National Assembly and the Senate, the Attorney-General and the Kenya Law Reform Commission to consider legislative reform necessary to give effect to the Court’s judgment on the parameters of what ought to constitute life imprisonment.8

1.5. On 15 March 2018 the Attorney General constituted a Task Force whose Terms of Reference include preparing the aforementioned professional review to, inter alia, formulate the legal frameworks to deal with the sentence re-hearing cases and the parameters of what ought to constitute life imprisonment.9

1.6. Section 2(b) of the Mode of Operation of the Task Force provides that the Task Force shall “co-opt any resources persons as and when necessary, on a short term basis, to assist in the achievement of the Terms of Reference”.10 DPP has been invited to share with the Task Force the benefit of its experience in other jurisdictions that have undertaken similar resentencing projects in recent years and any lessons learnt.

1.7. This report has been prepared by the DPP with the assistance of Joe Middleton of Doughty Street Chambers. The Death Penalty Project is pleased to be able to offer whatever engagement or support it can for the enormously important work being done by the Task Force.

2. Summary of the report and our key proposals

2.1. The Task Force faces a formidable challenge in proposing a principled and practically achievable strategy for implementing the Supreme Court’s ruling in Muruatetu that the imposition of a mandatory death penalty is unconstitutional. Informed by our experience, our suggestions as to how this might be achieved, and how the legality of replacement sentences for the mandatory death penalty might be ensured, have been divided into three parts:-

- Part A of our report addresses the way in which other common law jurisdictions have addressed the practical and procedural challenges of resentencing, following the abolition of the mandatory death penalty. This comparative overview includes

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8 Ibid. at paragraph 112

9 Terms of Reference for the Task Force are set out in Gazette Notice No. 2610 (23 March 2018) and include a directive for the Task Force to “Prepare a detailed professional review with regard to the death penalty in the context of the Judgment and the Order made in the Petition with a view to – i. Set up a legal framework to deal with sentence re-hearing cases similar to that of the Petitioners; ii. Review the legislative framework on death penalty in Kenya; iii. Recommend a guide to death sentencing; iv. Formulate parameters of what ought to constitute life imprisonment; v. Formulate amendments and enact a law to give effect to the judgment; vi. Prepare and forward a progress report to the Supreme Court within twelve (12) months from the date of the Judgment; vii. Create awareness and sensitize stakeholders and the public on the Judgment and its implications and take into account their views on the same”.

10 The Death Penalty Project was also asked by the Task Force to address the issue of deterrence. To best address this issue, The Death Penalty Project requested the expert technical assistance of Professor Jeffrey Fagan, Isidor and Seville Sulzbacher Professor of Law at Columbia Law School (USA), who produced a report for the Task Force titled “Deterrence and the Death Penalty Internationally and in Kenya”, included at Annex 1.
developments in Africa, Asia and the Caribbean. There is a particular emphasis on the resentencing processes in Malawi and Uganda, in which DPP was directly involved.

One of the key features to emerge from these resentencing exercises, particularly in Malawi and Uganda, is the enormity of the practical challenges posed by resentencing and the potential drain on judicial and other resources. The lessons learned from these experiences in other jurisdictions inform our observations in Part B on potential resentencing solutions for Kenya.

- **Part B** sets out some concrete suggestions as to how resentencing might be approached in Kenya. Our primary suggestions seek to balance the need for principled solutions and the reality that any strategy needs to be practically achievable, bearing in mind the very large cohort of prisoners who will fall to be re-sentenced in the light of Muruatetu. We also offer some suggestions in response to the Task Force’s “Summary of Recommendations of the Task Force on the Review of the Mandatory Death Penalty”, dated 3 October 2018.

- **In Part C**, we have set out some brief observations on the current definition of murder and the proposal for life without parole to form part of a potential sentencing regime. We recommend amending the definition of murder to reflect the proposed sentences and we remind the Task Force of the recent decision of the Constitutional Court of Zimbabwe in the Makoni case, in which the Court held that life imprisonment without the prospect of qualifying for parole was incompatible with fundamental constitutional rights.

2.2. **Our key proposals are as follows:**

i. We invite the Task Force to consider a resentencing process using ‘camp courts’. These would dispense streamlined justice in situ at prisons, applying discretionary sentences for robbery with violence and murder, while according so far as possible with the ordinary principles of justice and criminal procedure. This suggestion is inspired in part by the successfully streamlined processes that were instituted in Malawi (see pages 15-21 below).

ii. Recognising that the Task Force may ultimately not opt for a resentencing scheme that provides streamlining for all or the majority of prisoners, we suggest at least streamlining the sentencing process for a portion of the Muruatetu cohort for whom a sentencing hearing will not make any practical difference. We note that there will be prisoners who have already served the maximum sentence that can be imposed under the new legislative proposals for that offence, or who will have served any minimum period of life imprisonment that will become applicable for that offence. In such circumstances a full sentencing hearing may

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be otiose where the inevitable outcome is immediate release or immediate consideration for release by the Parole Board.

iii. We would encourage the Task Force to consider applying the approach now adopted in Zimbabwe, where life imprisonment without the prospect of parole has been acknowledged to be incompatible with fundamental constitutional rights.

iv. We also seek to discourage the Task Force from proposing lengthy mandatory minimum sentences or mandatory minimum periods of detention before eligibility for parole. This is because of the inherent risk that such sentences would violate fundamental human rights. We suggest that a judicial discretion to depart from minimum terms of imprisonment or minimum periods of detention, at least in exceptional cases, be included and clearly stated in the amending legislation.

3. **Part A. Substituting a lawful sentence in place of a mandatory death sentence, when criminal proceedings have concluded: approaches from various jurisdictions**

3.1. This Part considers the approaches adopted in other jurisdictions where there has been a change in the law or a change in the understanding of the law, which has meant that the mandatory death sentences imposed on this category of prisoners can no longer be carried out. These changes have followed the abolition of the mandatory death penalty or, in the case of South Africa, the abolition of the death penalty itself.

3.2. The following brief survey focuses on the procedural aspects of the resentencing exercises conducted in these jurisdictions. For a detailed overview of the rich body of jurisprudence that has emerged out of these historical examples and a comprehensive discussion of the legal principles that apply in the capital resentencing context (including considerations that arise when offenders need to be re-sentenced under a newly discretionary capital regime and courts’ treatment of those considerations), see Joe Middleton and Amanda Clift-Matthews with Edward Fitzgerald QC, *Sentencing in Capital Cases* (The Death Penalty Project: 2018). This report draws heavily from that text.

**AFRICA**

**South Africa**

3.3. In 1995, the Constitutional Court of South Africa ruled in *S v Makwanyane* that the death penalty was unconstitutional in that it violated fundamental rights under South Africa’s 1993 Constitution. Consequently, the Court ordered the following (at [149] and [150]),

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12 See Annex 2.
13 [1995] ZACC 3
“This, and other capital cases which have been postponed by the Appellate Division pending the decision of this Court on the constitutionality of the death sentence, can now be dealt with in accordance with the order made in this case...

The following order is made:

In terms of section 98(5) of the Constitution [the court’s power to make a declaration of unconstitutionality], and with effect from the date of this order, the provisions of paragraphs (a), (c), (d), (e) and (f) of section 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of section 229, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

In terms of section 98(7) [the court’s power to order the State to refrain from unconstitutional action] of the Constitution, and with effect from the date of this order:

a. the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and

b. all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.” [Emphasis added]

3.4. At that time there were between 300 and 400 prisoners under sentence of death. All prisoners under sentence of death who had cases pending on appeal were re-sentenced by the appellate courts. But that still left a large number of prisoners under sentence of death for whom criminal proceedings had already concluded. Legislation was enacted to provide a means by which their sentences could be substituted. That took the form of the Criminal Law Amendment Act No. 105 of 1997:-

“(1) The Minister of Justice shall, as soon as practicable after the commencement of this Act, refer the case of every person who has been sentenced to death and has in respect of that sentence exhausted all the recognised legal procedures pertaining appeal or review, or no longer has such procedures at his or her disposal, to the court in which the sentence of death was imposed.

(2) The court shall consist of the judge who imposed the sentence in question or, if it cannot be so constituted, the Judge President of the court in question shall designate any other judge of that court to deal with the matter in terms of subsection (3).

(3) (a) The court shall be furnished with written argument on behalf of the person sentenced to death and the prosecuting authority.

(b) The court—
(i) shall consider the written arguments and the evidence led at the trial; and

(ii) may, if necessary, hear oral argument on such written arguments, and shall advise the President, with full reasons therefor, on the appropriate sentence to be substituted in the place of the sentence of death and, if applicable, on the date to which the sentence shall be antedated.

(4) The President shall set aside the sentence of death and substitute for the sentence of death the punishment advised by the court.

(5) No appeal shall lie in respect of any aspect of the proceedings, finding or advice of the court in terms of subsection (3)."

3.5. In other words, prisoners with no criminal proceedings outstanding were to have their sentences substituted under a statutorily prescribed scheme. That scheme compelled the Minister of Justice to ensure all prisoners affected had their cases referred back to the courts. It permitted the substituted sentence to be determined by a judge and for the prisoner to first make written representations. But it was streamlined to the extent that there was no right to an oral hearing, no right to call evidence in support and no right of appeal. The eventual commutation of sentence was effected by the exercise of clemency, although the President was obliged to substitute the judge’s recommendation as to the appropriate sentence.

3.6. This process was challenged in the case of Sibiya14 because the resentencing procedure lacked full fair trial guarantees. However, the Court of Appeal found the process to be constitutionally compatible. It said:

“The death penalty was not declared invalid with retrospective effect. The order of this Court was to have prospective effect only. It follows that all death sentences imposed before 6 June 1995 remained valid sentences.” ([10])

3.7. It further found:

“The applicants and all other people in their position therefore had their death sentences imposed upon them, in terms of the law as it stood at the time. They had been tried, convicted and sentenced to death by a high court at a time when the Bill of Rights was not in force.” ([30])

3.8. The Court of Appeal also took into account that the provisions were enacted to deal with an “extraordinary situation” and that it was necessary that the “substitution of sentence occur quickly and efficiently.” ([33])

14 Case CCT 45/04, 25 May 2005
3.9. It is questionable whether the Constitutional Court in *Makwanyane* was correct to make its order prospective from the date of judgment only, or whether its ruling should have had retrospective effect from the date of the coming into force of the 1993 Constitution, that is, the date when the rights that were violated by the death penalty also came into force. Applying the law retrospectively in this way is an accepted principle of constitutional interpretation. It would have meant that prisoners sentenced to death after the introduction of the new Constitution would have been entitled to a resentencing hearing, even if their criminal proceedings had concluded.

3.10. However, the Court’s ruling that the decision in *Makwanyane* had no application to the imposition of the sentences which were imposed and confirmed on appeal prior to the introduction of the 1993 Constitution is unassailable. *Makwanyane* applied only to their execution in that, while the penalty had been lawfully imposed at the time, to carry it out would have been to deprive that person of their right to life in circumstances now considered to be cruel and inhuman.

**Delays in resentencing**

3.11. It took nine years for the resentencing process under the Act to be completed and 11 years from the decision in *Makwanyane*. It was not until 26 July 2006 that the final remaining person sentenced to death in South Africa (out of 300 to 400) received a substitute sentence.

3.12. Concerned about the very lengthy delays, in May 2005 the Court of Appeal began what it termed a ‘supervisory’ function to ensure speedy progress of the resentencing exercise for the remaining prisoners (around 40) that still by that date had not yet had lawful sentences substituted for their death sentences. The Court ordered the State to report on the progress of the resentencing programme at monthly to three monthly intervals. It concluded its supervisory role in November 1996.\(^{15}\)

**Lessons from South Africa**

3.13. The South African experience illustrates how not all prisoners sentenced to death before a judicial declaration of that sentence’s incompatibility with the Constitution are necessarily entitled to a resentencing hearing (although of course they are entitled not to be executed under that penalty). Instead, South Africa provides an example of a quasi-judicial mechanism that can be introduced by legislation to provide for a fair resentencing programme.

3.14. But, even resentencing hearings that do not have full fair trial safeguards can be time-consuming. Regular reporting to the courts by the State on the progress of the resentencing programme may assist with momentum and compliance.

**Uganda**

\(^{15}\) *Sibiya v DPP* Case CCT 45/04 30, 30 November 1996
3.15. On 10 June 2005 in *Kigula & Ors v Attorney General*, in response to a petition filed on behalf of all 417 prisoners on death row, the Constitutional Court of Uganda held that the mandatory death penalty in all contexts was inconsistent with constitutionally guaranteed rights to life, protection from inhuman treatment, fair hearing and equality. The Court also held that inordinate delay in carrying out a death sentence is inconsistent with the right to a fair hearing.

3.16. On 21 January 2009 the Supreme Court upheld the Constitutional Court’s judgment, adding that the mandatory death penalty also violated constitutional separation of powers between the legislature and the judiciary. The Supreme Court ordered as remedy that all sentences already confirmed by the Supreme Court would be considered under the Executive’s mercy power within three years. In those cases where after three years no determination had been made, sentences would be deemed to be commuted to life imprisonment without remission. For those individuals whose sentences were still pending appeal, the Supreme Court ordered their sentences remitted to the High Court to be reheard on mitigation of sentence only and reconsidered. By February 2009, the number of prisoners on death row was roughly 700 individuals. Approximately 530 of these individuals were eligible for resentencing.

**Resentencing hearings: first phase (2009-2011) and second phase (2012-present)**

3.17. The resentencing exercise in Uganda occurred in two waves. The first took place between the Supreme Court’s 2009 *Kigula* ruling and 2011. Approximately 60 sentences were re-heard during this period. The second wave began in 2012, following the creation of a governmental Task Force to address the post-*Kigula* resentencing process. These efforts continue to the present.

3.18. Having assisted the legal team in Uganda in drafting submissions on behalf of the petitioners in *Kigula*, The Death Penalty Project also assisted in the provision of legal representation for those subsequently entitled to sentence re-hearings. Together with the Ugandan NGO Foundation for Human Rights Initiative, a local project office was established and a law firm was sub-contracted to assist. Case preparation for the sentence re-hearings was carried out primarily between 2007 and mid-2009 and involved: establishment and continuous updating of the schedule of death row prisoners; obtaining trial transcripts and relevant court documents; conducting prisoner interviews and preparing case summaries; obtaining psychiatric reports (a team of psychiatrists were instructed and mental assessments were carried out on 548 prisoners on death row); and collecting witness statements (a total of 25 witnesses were located and statements obtained).

3.19. Approximately 60 individuals went back to court to be re-sentenced between 2009 and 2011.

3.20. Case law from this resentencing period indicates the following matters emerged as relevant to determining the appropriate substitute sentence: age; mental health of the prisoner,

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16 Constitutional Court Petition No. 6 of 2003, pp. 62, 137
18 Constitutional Appeal No. 3 of 2006, 21 January 2009, p. 45
19 *Attorney General v Kigula & Ors* [2009] UGSC 6, pp. 63-64
including any addictions;\textsuperscript{21} physical health of the prisoner, such as any terminal or incurable illnesses;\textsuperscript{22} capacity for reform; continuing dangerousness; length of time already detained;\textsuperscript{23} remorse; character of the prisoner including education, family connections and religious links; attempts to reconcile with the victim and/or their family;\textsuperscript{24} and views of the victim’s family.\textsuperscript{25}

3.21. Progress on the sentence re-hearings stalled in 2011. In 2012, the government formed the Kigula Task Force to establish a more systematic and uniform resentencing process. An initial session was planned for 2013 covering 136 cases remitted to the High Court. Preparation for these sessions included the development of a scheme of Pre-sentence and Social Inquiry Reports and mental health assessments for every inmate appearing for resentencing.\textsuperscript{26} The development of the Pre-sentence Reports included interviews with the prisoner on his or her background, progress in prison and reasons for his or her offending behaviour, as well as consultation of official documents such as medical and prison reports. Social workers also conducted independent assessments of the prisoner’s capacity to reform and developed Social Inquiry Reports from information garnered through inquiries in the offenders’ home communities regarding background and ability for reintegration. Mental health reports were also produced, in part via assessments carried out by a consultant psychiatrist.\textsuperscript{27}

3.22. Ten judges, ten defence advocates and ten prosecutors were assigned for the special session covering 136 sentence redetermination.\textsuperscript{28} Advocates report that as a result of the session, out of the 136 re-sentenced, 85 were given fixed terms of imprisonment, 22 were given life sentences, 15 individuals were released, nine given death sentences (which were subsequently appealed), four referred to a psychiatric facility and one was given a Minister’s Order due to minority status.\textsuperscript{29} Ultimately 127 individuals left the condemned section of the prison as a result of the session.

3.23. The Chief Justice simultaneously issued discretionary sentencing guidelines in 2013.\textsuperscript{30} The guidelines provide a starting point and sentencing ranges for capital offenses, affirm the principle of the ‘rarest of the rare’ and the relevance of both aggravating and mitigating

\textsuperscript{21} Uganda v Bwenge Patrick, HCT-03-CR-SC-190/1996, 11 November 2009
\textsuperscript{22} Musiitwa Lubega v Uganda, Criminal Appeal No. 73/2003, 23 March 2009
\textsuperscript{23} Bagatugira Mujuni v Uganda Session Case No. HCT-05-SC-0137 of 2000, 1 December 2009
\textsuperscript{24} Losike Apanapira Peter v Uganda, Criminal Appeal No. 22 of 2005, 12 February 2010
\textsuperscript{25} Ibid.
\textsuperscript{26} Blog post by Tanya Murshed, “Uganda Conducts Resentencing Hearings in the Wake of the Kigula Decision”, 14 July 2014, available at http://blog.deathpenaltyworldwide.org/2014/07/uganda-conducts-resentencing-hearings-in-the-wake-of-the-kigula-decision.html. Ms Murshed was the Uganda Project Director for the Centre for Capital Punishment Studies (CCPS), a UK-based NGO founded in 1992 by Peter Hodgkinson OBE. CCPS reports having been identified as a key stakeholder by the Kigula Task Force.
\textsuperscript{27} Ibid. For more information about the need for a social inquiry report and psychiatric and/or psychological evidence in every capital case, please see, Sentencing in Capital Cases, Annex 2 at pp. 78-82.
\textsuperscript{28} See Murshed, supra note 26.
\textsuperscript{29} Ibid.
\textsuperscript{30} The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, available on the website of the Justice Law and Order Sector (www.jlos.go.ug). We understand that work has been undertaken in the last year to redraft the Guidelines as they apply to capital cases, but any amendments to the 2013 version do not yet appear to have been approved.
circumstances (detailing specific circumstances relevant to capital offenses) and recognize
the importance of proffer of relevant materials from both sides on these matters.\textsuperscript{31}

3.24. The overall procedural characteristics of the hearings were as follows.\textsuperscript{32} Those \textit{Kigula}
beneficiaries who were able to go back to the High Court for resentencing were
automatically granted hearings and no affirmative applications had to be made. Names to
appear would be put on the Court’s notice board. The sentence re-hearings took place in
open court, before the original sentencing judge where possible and with the offender always
physically present. Depending on the number of sentence re-hearings a judge had to
conduct, the hearings were integrated into a judge’s normal case schedule, but sometimes
special sessions were organized in the trial courts, as described above. There was no
expedited process for any cases, though batch sentence re-hearings were sometimes
conducted.

3.25. Resentencings were based only on mitigation, and written submissions were made (with no
set timeline) in cases where prisoners had representation. While the length of each hearing
depended on the availability of the judge and the parties, hearings would not extend over a
week. Some sentences were determined on the same day of the hearing. New sentences
could be appealed the Court of the Appeal, and subsequently to the Supreme Court.

\textit{Challenges – inconsistency and delay}

3.26. A 2012 report by Penal Reform International (PRI) discussing the post-\textit{Kigula} sentence re-
hearings during the 2009-2011 period identified a number of challenges created in the
immediate wake of the judgment.\textsuperscript{33} As many \textit{Kigula} beneficiaries had been on death row for
extended periods of time, availability of the initial sentencing judges became an issue.
Insufficient availability of lawyers with relevant mitigation experience and a lack of
authoritative jurisprudence on assessing mitigation also hindered the process. PRI also noted
a lack of awareness among prisoners regarding the benefit of the hearings and the
submission of mitigating evidence and argument, which, combined with inexperience in
investigating and presenting mitigation evidence amongst lawyers, weakened the
effectiveness of the hearings. Finally, there was no process to fast-track these hearings, in
part leading to the halt of progress seen in 2011.

3.27. Challenges continued into the second phase of the resentencing process hearings beginning
in 2013. Advocates reported that despite the issuance of the sentencing guidelines and the
duty they imposed on both sides to provide information on the offender, detailed information
was still often not being presented to the court. Advocates also reported judges applying an
inconsistent approach to sentencing, including with regard to consideration of post-

\textsuperscript{31} \textit{Ibid.} at paragraphs 20-21, 55 and 60. Aggravating circumstances include degree of harm and whether the victim
was particularly vulnerable and whether there was gratuitous degradation of the victim, and mitigating
circumstances include guilty plea, mental disorder linked to the commission of the offence, an element of self-
defence (not rising to a defence), previous good character and remorse.
\textsuperscript{32} We are grateful to Susan Kigula, prisoners’ rights advocate and named plaintiff in the \textit{Kigula} case, for providing
information for this summary.
\textsuperscript{33} See Penal Reform International, \textit{The abolition of the death penalty and its alternative sanction in East Africa:
research-report-on-death-penalty-and-life-imprisonment.pdf
conviction mitigation, application of the ‘rarest of the rare’ standard and relevance of pre-sentence reports (with some judges disregarding the reports altogether). \[^{34}\]

3.28. Delay has also clearly featured in the post-*Kigula* resentencing process. Difficulties in locating files led to many sentence re-hearings being delayed well into 2016 and 2017; for example, in 2016, 26 men and 3 women, beneficiaries of the *Kigula* judgment but whose sentence re-hearings had been delayed as a result of missing case files, finally came before a High Court judge for resentencing. \[^{35}\] (Following the hearing, 12 were released and the remaining 17 had their sentences reduced to terms of imprisonment ranging from between 3 and 18 years). Moreover, one advocate has reported that several cases were listed only for the Court to be informed on the morning of the hearing that the prisoner had died while awaiting resentencing. \[^{36}\] As of the time of writing, there are reportedly *Kigula* beneficiaries still waiting to be re-sentenced.

**Lessons from Uganda**

3.29. The most obvious lesson from the on-going post-*Kigula* resentencing exercise is the time- and resource-intensive nature of providing individualized sentence re-hearings for all those eligible for resentencing following the invalidation of the mandatory death penalty, and the attendant risks of delay. The Ugandan experience also shows the risk of inconsistencies in resentencing judgments rendered following the invalidation of the mandatory death penalty, even after the promulgation of sentencing guidelines; these are challenges unsurprising in the context of a newly discretionary regime, where the court and advocates alike may be unfamiliar with evaluating and presenting evidence as to sentence, including mitigation evidence, in capital cases. Relatedly, the Ugandan experience also shows that awareness and buy-in among prisoners with regard to the sentence re-hearing process may not necessarily be uniform, which is particularly problematic in a system of individualized sentence re-hearings that require prisoners to permit and assist their lawyers in gathering and presenting mitigating evidence.

3.30. The Ugandan experience also indicates that government ownership of the resentencing process, including establishment of an oversight body to guide the resentencing process, can be important to make sure the process remains on track.

\[^{34}\] See e.g. Murshed, *supra* note 26


Malawi

3.31. On 27 April 2007 the High Court of Malawi ruled in Kafantayeni & Ors v Attorney General that the mandatory imposition of death for the offence of murder amounted to inhuman and degrading treatment or punishment, in violation of section 19(3) of the Constitution, and, by denying judicial discretion on sentencing, violated the right to a fair trial guaranteed under section 42(2)(f). Accordingly, the Court set aside the death sentences of the plaintiffs and ordered (111) each of the plaintiffs to be brought once more before the High Court for a judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the judge in regard to the individual offender and the circumstances of the offence.

3.32. The Supreme Court of Appeal affirmed Kafantayeni in Twoboy Jacob v Republic three months later. Three years later, in Yasini v Republic, the Supreme Court ruled further that all murder convicts who had been sentenced to the mandatory death penalty were entitled to resentencing (even if their death sentences had subsequently been commuted to life imprisonment) and that it was the duty of the Director of Public Prosecutions to bring all such prisoners before the High Court for sentencing re-hearings. The Penal Code was amended in 2011 to come into compliance with these decisions, introducing a statutory discretionary death penalty for murder. Resentencing hearings Guidelines

3.33. In 2013, a Special Committee was appointed by the Chief Justice to oversee the implementation the Kafantayeni and Yasini judgments. The Committee set out the following procedural guidelines to govern the sentence re-hearings:

1. The Registrar should conduct an audit of category (a) cases in all Registries.
2. Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms or lawyers that represented the convicts.
3. Cases be set down for sentence re-hearing before the trial judge unless he or she is not available.
4. When the case is called the state should address the court first. The re-hearing process should follow the normal adversarial process. The state may call witness

37 Constitutional Case No. 12 of 2005 [2007] MWHC
38 Ibid. at p. 11
39 MSCA Criminal Appeal No. 18 of 2006
40 MSCA Criminal Appeal No. 29 of 2005
41 In the 2016 judgment in Republic v Maiche (9 of 2016) [2015] MWHC 559, the High Court affirmed that individuals whose mandatory death sentences had been confirmed by the Supreme Court of Appeal after Kafantayeni was decided were also entitled to resentencing under Kafantayeni.
42 Malawi Penal Code, secs. 38, 210, Act 22 of 1929, Laws of Malawi Ch. 7:01, as amended through to 2012. (“Any person convicted of murder shall be liable to be punished with death or with imprisonment for life.”) This amendment does not apply however to re-sentence hearings, in which the prosecution and defence may pursue other sentences and where in many cases determinate sentences of imprisonment have been passed.
or submit relevant reports in terms of Section 260(2) of the Criminal Procedure and Evidence Code.

5. The defence will be called upon to give its version and, likewise, call witnesses or submit reports in terms of section 260(2) of the Criminal Procedure and Evidence code.

6. The state has right to reply.

7. The Judge will after hearing both sides pass sentence. The burden and standard of proof remain the same.

Facts and figures

3.34. At the time of the Kafantayeni judgment in 2007 the number of prisoners who stood to be re-sentenced numbered approximately 190: 23 individuals on death row and approximately 164 individuals (among them four women) who had had their death sentences commuted to life imprisonment by the Executive. However, sentence re-hearings did not begin in earnest until 2015 (continuing through 2017), following the initiation of a resentencing project by the Malawi Human Rights Commission in partnership with a coalition of stakeholders, including the judiciary, the Director of Public Prosecutions, the Legal Aid Department and members of the Bar (many of whom provided pro bono representation). Over a roughly two-year period, 156 hearings were set and 154 sentences ultimately handed down (one individual died pending hearing and another pending judgment).

3.35. The 155 completed resentencing hearings were held on 77 hearing dates over 2 years and three months, involving a total of 14 judges, 29 defence attorneys and 14 attorneys from the DPP. Time taken for decisions to be rendered post hearing ranged from same day to one year, with the median being 16 days.

i. Hearing dates. The 155 resentencing hearings were held over 77 dates, from 11 February 2015 to 31 May 2017.

ii. Average decision times. The median decision time was 16 days. Of the 154 sentencing hearings, a third were decided on the same day. Nearly half were decided within two weeks. Roughly 15 percent took longer than two months. Only one decision took over a year.

iii. Judicial caseload. 155 resentencing hearings were heard by a total of 14 judges. Each judge heard between two and 37 matters each, with the average and median number of matters heard for each judge at 11 and eight, respectively. Judges who handled the highest number of resentencing hearings did so on multiple hearing dates held over several months. For example, the judge who heard 37 matters – i.e. the judge who heard the most cases – heard these matters over approximately 20 dates spanning from February 2015 to May 2017 (hearing between one and four

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45 Sandra Babcock, Faculty Director at the Center on the Death Penalty Worldwide, Cornell Law School, provided the data on which this summary is based.
matters per date). This judge took an average of approximately 1.5 months to render his sentencing decisions, with about half of these decisions rendered within a month of the hearing. The second highest volume judge, who heard 25 matters, did so on 15 hearing dates over a two-year period. Over two-thirds of these matters were decided within three weeks (where half of these – i.e. one-third of the total – were decided the same day as the hearing). The remaining third were decided within seven to 14 weeks of the hearing.

iv. Counsel. 29 defence attorneys represented the 156 prisoners with caseloads ranging between one and 20 clients each. The median number of clients per attorney was four; five attorneys represented 10 or more individuals. 14 attorneys from the DPP, sometimes working in teams of two, covered the 155 hearings.

**Resentencing principles**

3.36. Over the course of this resentencing process, the High Courts issued written judgments refining considerations of aggravating and mitigating factors, and dealing with other issues related to redetermination of sentence including, for example, burden of proof, missing files, the impact of prior violations of constitutional rights (e.g. denial of the right to appeal) and the relevance of post-conviction conduct. These judgments fill the gap left by the absence of comprehensive guidance from the Supreme Court of Appeal on the issue of discretionary capital sentencing. For example, while the ‘rarest of the rare’ approach was not expressly articulated in either *Kafantayeni* or *Twoboy Jacob*, the approach was explicitly adopted in subsequent cases.

3.37. A particularly influential judgment on the development of sentencing principles is the case of *R v Makolija*. Outlined in the judgment’s dicta, these principles were relied upon in many of the subsequent sentence re-hearings held between 2015 and 2017 and included: the idea that the death penalty should be reserved for the ‘worst of the worst’; the recognition that considerations such as age, lack of prior offending and other personal circumstances of the offender should be taken into account, as well as the manner in which the offence was committed; the mitigating power of duress, provocation and lesser participation; and the significance of other factors including remorse and good conduct in prison.

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46 See e.g. *Republic v John & Thobowa*, Sentence Rehearing Cause No. 13 of 2015, p.8 (addressing the cumulative weight of a previously unlawful sentence and breach of other rights and stating “the pronouncement of the unconstitutional death sentence then and the resultant long confinement under death row detention after declaring the death penalty unconstitutional, militate against the imposition at this stage of death or life imprisonment” and resentencing petitioners to determinate periods of 24 and 20 years, including time already served). See also *Republic v Miamo* (Malawi), Sentence Rehearing Case No. 2 of 2015.

47 For a comprehensive study of discretionary capital sentencing both in Malawi and in several other jurisdictions around the world, including in the context of sentence rehearings following the abolition of the mandatory death penalty, see *Sentencing in Capital Cases*, Annex 2.

48 See for example *Republic v White*, Criminal Case No. 74 of 2008; *State v Charles Fred & Anr*, Criminal Case No. 163 of 2012; *Republic v Makolija*, Sentence Rehearing Cause No. 12 of 2015

49 *Sentence Rehearing Cause No. 12 of 2015*

50 *Republic v Makolija*, Sentence Rehearing Cause No. 12 of 2015. See also, *Sentencing in Capital Cases*, Annex 2 at p. 54. While a minority of cases held that resentencing courts should not take post-conviction conduct into account, see for example *State v Njoloma* Sentence Rehearing Cause No. 22 of 2015, p.4, the majority recognized the obligation, explicitly acknowledged in *Republic v Payenda*, Sentence Rehearing Cause No. 18 of 2015,
**Resentencing outcomes (new sentences)**

3.38. The 154 new sentences handed down during this period resulted in a range of outcomes, from immediate release (indeed this was the case for the majority) to the imposition of a sentence of life imprisonment (in just one case). New sentences resulted in immediate release in 112 cases. This was either because the court gave an order for immediate release, or it imposed a determinate sentence that, allowing for time served since the date of arrest, resulted in immediate release. Determinate sentences requiring further time in prison were imposed in 41 cases. At the time of writing, approximately half of that cohort had completed their sentences and been released. Where periods of determinate imprisonment were imposed, including those resulting in the prisoner’s immediate release, most of the sentences were in the region of 20 years, with the most serious cases attracting sentences in the region of 30 years. The shortest sentences were suspended sentences of three years’ imprisonment and the longest individual sentence was 42 years’ imprisonment with hard labour. In just one case the prisoner was re-sentenced to life imprisonment.

**Defence representation and difficulties bringing cases before court**

3.39. Missing and lost case files featured in many of the cases dealt with in the post-Kafantayeni resentencing process. Judges in Malawi adopted a consistent and principled approach to the issue, acknowledging as a general principle that cases cannot be left in abeyance (judicial redress must be afforded even if there is no case file), that loss of a case file does not mean decisions must take place in a vacuum as basic information may be obtainable from other sources, and that loss of a case file militates against re-imposition of death sentence, in part because it renders impossible a sound finding that an offence fell within the ‘rarest of the rare’ category. It also means the benefit of any vacuum in the facts must be given the prisoner.

3.40. As reported by the Malawi Human Rights Commission (who in coalition with various NGOs and academic institutions initiated a project in 2013 to provide defence representation to those entitled to resentencing), defence representation included: prison interviews; mental and physical health evaluations; mitigating investigations; preparation paragraph 62, to consider the personal circumstances of the offender, including their capacity for rehabilitation, at the time of the offense and at the time of sentencing. For further information and a compendium of selected jurisprudence from the resentencing hearing, see Cornell University Law School and Malawi Human Rights Centre, *Malawi Capital Resentencing Project: Selected Jurisprudence* (2017).

51 The three-year suspended sentences were imposed in a case where the prosecution acknowledged that the prisoners (both minors at the time of the offence and who had suffered a catalogue of constitutional violations) should never have been convicted, but the Court’s hands were tied because it was only dealing with sentence. See *R v James & Ors*, Sentence Rehearing Cause No. 69 of 2015, paras 18-28.

52 *R v Maonga*, Sentence Rehearing Cause No. 29 of 2015. The longest composite sentence comprised consecutive sentences of 23 and 25 years, but even in that case time already served plus the prospect of remission meant that the offender would be eligible for release in 2024. See *Khwalala v Republic*, Sentence Rehearing Cause No. 70 of 2015.

53 *Miumbo & Ors v Republic*, MSCA Criminal Appeal No. 1 of 2012, p.6

54 See for example *Republic v James & Ors* Sentence Rehearing Cause No. 69 of 2015, paragraph 2

of court briefs and submissions; and finally advocacy before the resentencing court during the sentence rehearing.56

**Lessons from Malawi**

3.41. As with other jurisdictions including Uganda, the resentencing hearing process in Malawi also shows how time- and resource-intensive it can be to prove individualized resentencing hearings for a cohort of individuals whose unlawful mandatory death sentences must be replaced with new sentences. As discussed in greater detail above, processing the 156 individuals required the participation of 14 judges and 29 members of the defence bar and 13 attorneys from the DPP (not to mention the assistance provided by local and international academic institutions and civil society organisations), and, of course, time: 77 hearing dates and over two years, to complete the hearings alone, not to mention the substantial case preparation and file search time preceding the start of the hearings.

3.42. The Malawi experience also shows the importance of government oversight and accountability for the process and the impact of missing and lost case files.

**Zimbabwe**

3.43. Following the introduction of Zimbabwe’s new Constitution in 2013 and the Criminal Procedure in Amendment Act 2016, which provides for a new, more restrictive application of the death penalty, five prisoners who had been sentenced to death under the old regime brought a claim before the Constitutional Court of Zimbabwe seeking commutation of their death sentences. That matter, *Nyathi v Minister of Justice*57, was heard in July 2017 and judgment is pending.

**CARIBBEAN**

3.44. In the Caribbean region, it is usually up to the individual prisoner to assert his or her rights and file a constitutional motion to enable a judge to quash an unlawful mandatory death sentence and impose a substitute sentence. This, however, can leave prisoners under sentence of death for inordinately long periods of time, even when it is accepted by all parties that the death sentence is unlawful.

3.45. Once a constitutional motion is filed, the Court is not bound by the lawful penalties under criminal law in force at the time of the resentencing, but may give a reduced penalty from


57 CCZ No.14 of 2017
the one that would otherwise have been deserved in recognition of the breaches of the prisoner’s constitutional rights e.g. Harris v Attorney General of Belize.\textsuperscript{58}

**Antigua**

3.46. The mandatory death penalty was held to be unconstitutional in the Eastern Caribbean region in the judgment of *Spence and Hughes v The Queen*\textsuperscript{59} in April 2001. Thirteen years later, in June 2014, seven individuals remained under sentence of death in Antigua, having been sentenced to death mandatorily before the cases of *Spence* and *Hughes* were decided. The Attorney-General brought a constitutional motion as the claimant, with all the prisoners who had been sentenced to a mandatory death sentence as defendants. The Attorney General sought a declaration that their sentences were unlawful and an order that the prisoners be resentedenced by the High Court. On 4 June 2015, the declaration and order was granted. These cases were referred to the Criminal Division of the High Court and were first listed for hearings in September 2016. There were adjournments for reports to be prepared and for the parties to make submissions on the appropriate substituted sentences, with the prisoners finally being re-sentenced in November 2016. Some of those prisoners were immediately released, for example the defendant in *R v Lorriston Cornwall*.

3.47. The approach in Antigua shows that one way of ensuring all prisoners are re-sentenced is for the Attorney General to bring a civil action to quash the sentences on account of their unconstitutionality and to invite the Court to re-sentence all prisoners concerned, or refer them to the appropriate judge.

**Jamaica**

3.48. In the case of *R v Watson* [2005] 1 AC 172, the Privy Council declared the mandatory death penalty in Jamaica to be unconstitutional. After *Watson*, there were 38 individuals unlawfully under sentence of death who were not in the appellate process. In March 2005 Parliament amended the Offences Against the Person Act to substitute a discretionary sentence of death for the former mandatory one. That Act also dealt with these individuals:

“8(1) … the provisions of the principal Act as amended by this Act shall have effect in relation to persons who were sentenced to death on or after the 14th October, 1992, but before the date of commencement of the Offences Against the Person (Amendment) Act 2005 … as if the amending Act were in force at the time of the …

(2) For the purpose of subsection (1), in relation to the case of every person referred to in that subsection, a Judge of the Supreme Court shall-
(a) quash any sentence passed before the date of the commencement of the amending Act; and

\textsuperscript{58} Claim No. 339 of 2006, 11 December 2006
\textsuperscript{59} *Spence v The Queen* (Court of Appeal, Criminal Appeal No. 20 of 1998) from St Vincent and the Grenadines; and *Hughes v The Queen* (Court of Appeal, Criminal Appeal No.14 of 1997) from St Lucia (2 April 2001). The decision was upheld by the Privy Council in *R v Hughes* [2002] 2 AC 259.
\textsuperscript{60} Case No. 50 of 1995, 22 November 2016
(b) determine the appropriate sentence having regard to the date of conviction and the provisions of the principal Act as amended by the Amending Act.”

3.49. In effect, those individuals were to be brought back before the courts for a full resentencing hearing. The law also provided that in cases where a death sentence was selected by the judge as the appropriate punishment, there was a right of appeal (8(4)).

ASIA

Singapore

3.50. Parliament reformed the mandatory death penalty for murder in Singapore in 2013 to restrict a mandatory death sentence to only certain categories of murder. At the same time, it enacted transitional provisions to allow for the resentencing of individuals then on death row who had been sentenced under the former regime, including for those for whom criminal proceedings had been concluded. The following measures were introduced to enable the category of the prisoner’s murder to be determined and, if a mandatory death sentence was no longer applicable, a re-sentence in accordance with the new law:

“(5) Where on the appointed day, the Court of Appeal has dismissed an appeal brought by a person for an offence of murder under section 302 of the Penal Code, the following provisions shall apply:
(a) either the Public Prosecutor or the person may file a motion for resentencing with the Court of Appeal;
(b) when a motion for resentencing has been filed, the person or the Public Prosecutor may also apply to the Court of Appeal to hear further arguments or admit further evidence for the purpose only of determining the meaning of murder that the person is guilty of;

…

(d) if no application is made under paragraph (b), the Court of Appeal shall clarify the meaning of murder that the person is guilty of;
(e) if the Court of Appeal clarifies … that the person is guilty of murder within the meaning of section 300(a) of the Penal Code, it shall affirm the sentence of death imposed on the person;
(f) if the Court of Appeal clarifies under paragraph (c)(ii) or (d) that the person is guilty of murder within the meaning of section 300(b), (c) or (d) of the Penal Code, it shall remit the case back to the High Court for the person to be re-sentenced;
(g) when the case is remitted back to the High Court under paragraph (f), the High Court shall re-sentence the person to death or imprisonment for life and the person shall, if he is not re-sentenced to death, also be liable to be re-sentenced to caning;
(h) the provisions of Division 1 of Part XX of the Criminal Procedure Code relating to appeals shall apply to any appeal against the decision of the High Court under paragraph (g) …;

61 Act to Amend the Offences Against the Person Act, No. 1 of 2005
(6) If —

(a) any Judge of the High Court, having heard the trial relating to an offence of murder, is unable for any reason to sentence, affirm the sentence or re-sentence a person under this section;

... any other Judge of the High Court or any other Judge of Appeal, respectively, may do so.”

3.51. It can be seen from the above that either the prisoner or the prosecution could bring an application to the Court of Appeal to determine the category of murder committed by the prisoner. In addition, the Court of Appeal could list the matter of its own motion. The legislation permitted both parties to call evidence on the issue of the category of murder into which the offence fell under the new legislation and to make oral submissions. But since the Court of Appeal is the highest court in Singapore, there could be no appeal against the finding as to which category of murder the prisoner stood convicted. For the categories of murder for which a death sentence was no longer mandatory, the legislation provided for a full resentencing hearing in which the judge had the same powers as he or she would have had in a case of an offence committed after the introduction of the amending Act. The prisoner had the same rights as newly convicted offenders to appeal that sentence.

3.52. In October 2017, Amnesty International reported that it could confirm that at least 11 out of 34 prisoners upon whom a mandatory death sentence had been imposed prior to the amendment legislation (either for the offence of murder and for drug trafficking offences for which the mandatory death penalty was also restricted in 2012) had been re-sentenced. However, since statistics are not publically available, it was unable to ascertain the precise number.

Hong Kong

3.53. Hong Kong abolished the death penalty in 1993 by legislation. Following abolition, all prisoners then under sentence of death but for whom criminal proceedings had been concluded had their sentences commuted by the Governor-General to terms of imprisonment.

62 “Cooperate or Die: Singapore’s Flawed Reforms to the Mandatory Death Penalty”, 11 October 2017, ACT 50/7158/2017 p.20 fn. 64
4. **Part B. Recommendations on resentencing**

4.1. This Part provides our recommendations to the Task Force with regard to conducting resentencing hearings in accordance with the *Mruuatetu* judgment. We also use this opportunity to comment upon some aspects of the legislative proposals and urge the Task Force to reconsider recommending legislative amendments that include provisions allowing the imposition of sentences of life without the eligibility of parole and to clarify the retention of juridical discretion even where mandatory minimum sentences or mandatory minimum periods of detention have been recommended.

**RECOMMENDATIONS ON RESENTENCING PROCEDURE**

4.2. Responsive to the requests of the Task Force, these recommendations deal with the procedural aspects of the post- *Mruuatetu* resentencing process. For a detailed overview of the legal principles that apply in the capital resentencing context (including considerations that arise when offenders need to be re-sentenced under a newly discretionary capital regime and courts’ treatment of these considerations), we suggest *Sentencing in Capital Cases*, referred to earlier and at Annex 2.

4.3. Broadly, we recommend that the Task Force consider not providing individual sentence re-hearings for all individuals eligible for resentencing, but instead implement a more streamlined resentencing procedure that is detailed below.

*Profile of those eligible for resentencing*

4.4. The Task Force has determined that those who are eligible for resentencing include all offenders without pending appeals who have been subject to the mandatory death penalty (the majority having been convicted of armed robbery or murder), including those who have had their sentences commuted to life imprisonment (several thousand prisoners had their death sentences commuted to life in the mass commutations of 2009 and 2016), and any offenders sentenced after the decision in *Mruuatetu* but without compliance with the judgment who have exhausted all appeal mechanisms. The individuals that make up these groups have been estimated to total between seven and eight thousand individuals.

4.5. **Murder.** Of those individuals who have been subjected to unlawful mandatory death sentences, including both those who are currently on death row and who have had their sentences commuted to life, available data indicates that under one-fifth, if not less, have been convicted murder.

4.6. **Robbery with violence.** Of those individuals who have been subjected to unlawful mandatory death sentences, including both those who are currently on death row and who have had their sentences commuted to life, available data indicates that upwards of 80 percent have been convicted of robbery with violence or attempted robbery with violence.

63 Capital offenders with pending appeals can have their sentences dealt with through the already activated appellate process.
4.7. Underpinning values: scalability and effectiveness of remedy

In all instances where lawful sentences must be put in place as substitution for a mandatory death sentence, there exists the overarching need to ensure the new sentence affords a remedy for previous breaches of fundamental rights. This requires that the resentencing procedure – and thus the realisation of the remedy – is practically accessible and expeditious. These recommendations are in part based on realistic consideration of how all those individuals who are entitled to redetermination of sentence – a group numbering as many as 8,000 individuals – can be processed while maintaining access to justice and fairness. The number of individuals eligible to be re-sentenced under Muruutetuto dwarfs the cohorts of those affected by the analogous judgments discussed in Part A. The most comparable examples were those resentencing processes in Malawi and Uganda, and still those cohorts were a fraction of the individuals who must be resentenced in the instant case (representing only approximately 2 and 7 percent, respectively, of the anticipated Kenyan cohort).

4.8. To put it in context, should the resentencing hearings in Kenya be conducted at the same rate as in Malawi (roughly adjusting for their differences in population), it would take nearly half a century to complete the hearings for all these prisoners. That this would render justice elusive is particularly clear given that convictions reach back at least well into the 1990s and that hundreds of the prisoners are already in their 50s and older. Providing the 156 clients in Malawi sentence re-hearings required the participation of 43 defence and prosecution attorneys; with the same case load this would require well over two-thousand attorneys in Kenya. There may also be other potential causes of delay, such as where the case files are missing or lost.64

4.9. Justice requires that substitute sentences should provide a remedy for the fact that the offender has been given an unlawful and unconstitutional sentence. (And moreover, some of these individuals may have also suffered protracted detention on death row under these unlawfully imposed sentences).65 Put simply, prisoners should receive a discount in their sentence to reflect the breaches of their rights. Fairness requires that these factors are weighed into the determination of a new sentence, militating in favour of sentencing at the lower end of the scale (and also arguably precluding the re-imposition of the death penalty altogether).66

4.10. It is with these goals in mind – scalability and effectiveness of remedy – that we make our recommendations on how to best address the sentence re-hearings.

64 It must be emphasised that missing case files does not mean that a resentencing judge must operate in a vacuum, as information on the offender can be obtained from different sources; additionally, the loss of a case file means that the benefit of any doubt on the facts or issues in the case must go to the prisoner, as was illustrated by the sentence re-hearing courts of Malawi, discussed infra on page 20.

65 The data available to DPP indicates that the majority of commuted prisoners likely served protracted terms under sentence of death (i.e. more than 3 years) prior to having their sentences commuted to life imprisonment, with some individuals serving 10 years or more on death row prior to commutation.

66 For more information on resentencing to provide a remedy for previous imposition of an unlawful sentence, and/or for breaches of fundamental rights, see Sentencing in Capital Cases, Annex 2 at paragraphs 6.1-6.9.
A POTENTIAL PRINCIPLED AND PRACTICAL SOLUTION: USE OF CAMP COURTS APPLYING DEFAULT SENTENCES FOR RESENTENCING

4.11. In outline, our primary recommendations invite the Task Force to consider a resentencing process using ‘camp courts’. These would dispense streamlined justice in situ at prisons, applying discretionary default sentences for robbery with violence and murder, while according so far as possible with the ordinary principles of justice and criminal procedure. This suggestion is inspired in part by the successfully streamlined processes that were instituted with considerable success (after an initial delay) in Malawi.

4.12. The following observations outline three elements to the camp court proposal: the procedure, the sentencing parameters, and the regulatory framework.

Procedure for camp courts

4.13. In terms of procedure, we would envisage three stages to the camp court process: audit; camp court hearing; appeal. The third stage is unlikely to arise in practice.

Stage 1: audit

4.14. The first stage would involve a small team of lawyers or other authorised individuals visiting each prison to conduct a resentencing audit. This process would involve the following tasks.

4.15. Firstly, the audit team would identify all prisoners eligible for resentencing in that prison.

4.16. Second, the team would prepare a short resentencing summary for each prisoner. The summary would be based on the prison file and a short interview with each prisoner. It would set out basic details on the prisoner, the offence, and any specific aggravating or mitigating features. This might include a short section for the prison authorities to comment on the extent to which the prisoner has shown signs of remorse or rehabilitation.

4.17. The persons performing these functions would require some training, but not much. The key point is that by keeping this process streamlined, the auditors would be able to process a significant number of prisoners in a relatively short time.

Stage 2: camp court hearings

4.18. Once the audit has been completed, each prison would be visited by a team comprising a judge, prosecutor and defence lawyer. Prisoners would be entitled to appoint their own defence lawyer if they wished, or to represent themselves, but the majority would no doubt opt to be represented by the appointed camp court defence lawyer.

4.19. The judge would then process the resentencing hearings at prison, in the presence of the prisoner, prosecutor and defence lawyer. Using the short summaries prepared by the audit team and applying the suggested default sentences outlined below, the camp court hearings might process dozens of sentence rehearings in a single working day. Clearing the resentencing caseload would be manageable and would not consume vast State resources.

Stage 3: option to appeal
4.20. We suggest that prisoners in camp court hearings should not be deprived of their right of appeal. But for reasons explored below, it is very unlikely that prisoners would exercise that right, because they would rarely have any incentive to appeal. Many would become eligible for immediate release or for parole. This stage of the process, although available in principle, should therefore rarely arise in practice, and so would not impose any significant burdens on the criminal justice system. (By way of comparison, there have been few, if any appeals in the Malawi resentencing process.)

**Sentencing parameters for camp courts**

4.21. In Malawi there were sentencing guidelines for the post-Kafantayeni sentence rehearings, but the sentencing parameters were not otherwise formally prescribed. In particular, there were no explicit minimum sentences for that resentencing process. But as our survey in Part A reveals, most of the replacement sentences were determinate sentences in the region of 20 years (see pages 19-20 above), with many such sentences resulting in the immediate release of prisoners who had already served long sentences. These were all replacement sentences for murder, the offence for which the affected prisoners had been originally sentenced to death (whether subsequently commuted to life imprisonment or not).

4.22. If more formal parameters are preferred in Kenya, our suggestion is that the camp courts would sentence on the basis of discretionary default sentences for murder, robbery with violence and attempted robbery with violence. We would suggest that the default sentence for each should be the minimum sentence for the corresponding offence under the Penal Code as amended in line with the Task Force’s recommendations. For prisoners who were convicted of robbery with violence, this would be a 14-year determinate sentence, being the proposed minimum for the new offence of aggravated robbery. A default sentence would also be prescribed for attempted robbery with violence, reflecting the corresponding minimum sentence under the amended Penal Code. The proposed sentence for the least serious kinds of murder would also be the default sentence for murder in the camp courts, whether that be a determinate sentence or life without eligibility for parole for a specified period of years.

4.23. The default sentences would likely be imposed in the vast majority of resentencing hearing, but in exceptional cases the judge would have a discretion to depart from the default sentence (see below).

4.24. Other default sentences would be needed for offences other than murder, robbery with violence and attempted robbery with violence. But as we understand it, this involves a very small cohort of prisoners.

**Principles supporting the suggested camp court resentencing parameters**

4.25. There are various considerations of principle that support our suggested approach to the sentencing parameters for the suggested camp courts.
4.26. Firstly and most importantly, the relative simplicity of this approach offers the prospect of a resentencing regime that can cope with the very large numbers of prisoners who will fall for resentencing. This accords with the basic principle that justice must be effective, not merely declaratory, and not delayed for many years.

4.27. Secondly, this approach reflects the fact that all the affected prisoners would have been the subject of unconstitutionally imposed mandatory death sentences and, for at least a period of time, would have been held on death row and liable to execution by virtue of an unconstitutionally imposed sentence. Our proposal reflects the important principle, noted earlier, that anyone who has suffered the consequences of unconstitutional acts by the State should be afforded a new sentence that incorporates an element of redress. By identifying the minimum corresponding sentence under the amended Penal Code as the default replacement sentence, this proposal helps to ensure that the new sentence is consistent with that principle and provides a degree of redress. For individuals whose offences under the new sentencing proposals would have attracted the minimum sentence in any event, the residual judicial discretion to vary the default sentence can ensure that they are adequately compensated.

4.28. Thirdly, this approach is compatible with the sentencing aims of retribution and public protection. In exceptionally serious cases, the resentencing judge would have a discretion to impose longer sentences. Furthermore, since these sentences would operate in tandem with the new parole regime, the ability to refuse parole in cases where this is warranted ensures public protection.

4.29. Fourthly, although prisoners would retain a right of appeal under the suggested camp court regime, it is very unlikely that the right of appeal would be exercised. This is because the default substitute sentences would be at the bottom of the usual sentencing range, so in most cases prisoner would have no basis for arguing that the new sentence was unduly punitive. The position might be different if in the exercise of a limited sentencing discretion, the sentencing judge departed from the default sentence (see below). But such cases would be few and far between.

The discretion to depart from default sentences

4.30. In our view, any exceptional sentencing approach should depart as little as possible from ordinary constitutional and judicial principles, including the principle of judicial independence when imposing individual sentences. With this in mind we would suggest that judges at camp courts should retain a limited discretion to depart downwards or upwards from the default replacement sentences. The resentencing regulatory regime, whether legislative and/or judicial (see below), should make it clear that judges may depart from default sentences in exceptional cases, but must give written reasons for doing so. And again, prisoners affected by such cases would have a right of appeal.

67 This principle is addressed in more detail in paragraphs 6.1-6.9 of Sentencing in Capital Cases, at Annex 2.
The resentencing regulatory regime for camp courts

4.31. In other comparable jurisdictions the resentencing regime has been regulated by either legislation (for instance in South Africa) or judicial rulings and guidelines (for instance in Malawi). In Kenya the task might be achieved by a combination of both, relying on both the resentencing regulation contemplated by the Task Force and judicial guidelines. The latter might be created by practice directions, sentencing guidelines adopted by the Chief Justice or the higher courts, sentencing guidelines in individual cases (such as were given by the Supreme Court in the Muruatetu case), or a combination of such guidance and the relevant procedures and sentencing principles.

SECONDARY PROPOSAL: DEFAULT SENTENCING AND STREAMLINING CASES WHERE THERE CAN BE NO PRACTICAL EFFECT OF A FULL HEARING

4.32. On 3 October 2018 the Task Force published “Summary of Recommendations of the Task Force on the Review of the Mandatory Death Penalty” for stakeholder consultation. In brief, the summary makes clear that the Task Force is considering full resentencing hearings for all prisoners entitled to one and not a resentencing scheme that provides streamlining. Accordingly, our secondary suggestion, outlined below, makes the case for a streamlined sentencing process to be taken for at least a portion of the Muruatetu cohort: the portion for whom we believe a resentencing hearing would be addressing a moot issue.

4.33. As a matter of principle, the sentencing process laid out in the “Summary of Recommendations” is admirable in the robust procedural safeguards it provides to protect the rights of those who have been sentenced unlawfully to death. However – particularly in light of our experience in other jurisdictions – we remain concerned by the logistical implications and expense of a plan that envisages individualised resentencing hearings for all prisoners as detailed in the summary recommendations. We wonder whether, in reality, this exercise would be necessary in practical terms since one of the goals must be to ensure that a remedy is provided for all of the Muruatetu cohort without undue delay.

4.34. Using the legislative amendments proposed in the current draft of the Task Force report there will be a category of people, for example, who were previously convicted of robbery of violence under current section 296(2) of the Penal Code, but who under the proposed revised legislation would be convicted of just felony robbery (liable to 14 years imprisonment). For these individuals who at the time of resentencing have served 14 or more years, the outcome of any sentencing hearing would be immediate release. An example would be an individual who, in the course of committing a robbery, committed a simple assault such as striking the victim. Under the existing Penal Code provisions, this person would have been convicted of robbery with violence and mandatorily sentenced to death. However, under the proposed revised law this conduct would amount to felony

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68 We understand that the legislative amendments as included in the draft Task Force report are not final. However, we are assuming that the final legislative amendments proposed by the Task Force will be similar and in any event the point made will still be applicable.

69 Under existing provisions in the Penal Code felony robbery is defined as “[a]ny person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its
robbery, liable to 14 years imprisonment. Such an individual – who would be identifiable from trial records alone – could not be sentenced to a further period of incarceration given the duration of imprisonment that he or she has already served. A full sentencing hearing would only delay their release and the processing of other resentencing hearings. Such cases could be dealt with sufficiently on the papers.

4.35. From the prison population data made available to DPP we can estimate that as many as 30 percent of the commuted prisoners who stand to be resentenced are robbery with violence convicts who have served 12 or more years in prison. A percentage of these people will fall into the category of people described in the above paragraph. In these cases, there is a good principled and practical argument for a more streamlined approach, avoiding a fully resourced resentencing hearing that would both delay matters and drain funds, only to produce an identical result.

4.36. An additional example of cases in this category would be individuals who, under the new legislation, would be sentenced to life imprisonment with a minimum period of detention before they are permitted to be considered for parole. An example is Second Degree Murder as defined on page 10 of the 3 October summary document, where an offender must serve a minimum period of detention of 20 years. In cases where a life sentence would likely be the substituted sentence and the prisoner has already served the minimum period of detention specified, such a case could be referred directly to the Parole Board to consider whether any further detention of the prisoner is, in fact, necessary. Again, sorting out whether there are offenders who fall into such categories could be a paper task.

THE QUESTION OF ENTITLEMENT TO A FULL RESENTENCING HEARING

4.37. We understand the Task Force to have taken the position that all prisoners who have been mandatorily sentenced to death or have been commuted following a mandatory death

being stolen or retained”. s. 295. When this offence is committed (or attempted) while “armed with any dangerous or offensive weapon or instrument, or [in] company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person” this amounts to robbery with violence and brings the mandatory death penalty. s. 292(2).

70 The proposed new definition of felony robbery is “any person who steals anything and, at or immediately after the time of stealing it, assaults any person or wilfully destroys or damages any property, or threatens to do either of these acts, in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery”, where assault is further defined as attempted, threatened or intentional application of force. Felony robbery brings a punishment of 14 years (see revised s. 296(1)) which rises to 25 years only when grievous harm results (revised s. 296(2)(a)) and rises to aggravated robbery only when committed while armed or with others. Revised s. 295(2). Thus a robber who “struck” a person in the course of the robbery but did not cause grievous harm would have been committing robbery with violence under the old law (and mandatorily sentenced to death), but under the new law this would be guilty of felony robbery, liable to 14 years imprisonment.

71 Assuming they are resentenced one year from now, and assuming a conservative one year discount for time spent on remand, those who have served 12 years would almost certainly be eligible for release if resentenced to 14 years.

72 Since the lawful sentence (the mandatory death sentence being unlawful) at the time the offender would have committed the offence would have been a fixed term of imprisonment, life imprisonment or death, that means any minimum period under the new legislative proposals would not be applicable, since it would amount to a retrospective penalty. Therefore, the viability of streamlining this category will depend much on the resentencing guidelines that the Task Force intend to produce and any recommended tariffs.
sentence are entitled to a resentencing hearing. Nevertheless, given the scale of this undertaking and despite our proposals above which we suggest operate universally, it is important to at least say something about the entitlement to a resentencing hearing, and any principled basis for why a sentencing hearing may not be required for all prisoners.

4.38. It is clear that an entitlement to a resentencing hearing is clear in the case of any prisoner sentenced to a mandatory death penalty under section 204 of the Penal Code (murder) because that death sentence has been found to be unlawful in Muruatetu. Although the Supreme Court limited the remedy it provided to the petitioners in that case, the fact that the Supreme Court declared the mandatory nature of the punishment under section 204 of the Penal Code violated the 2010 Kenyan Constitution means that the same entitlement to that remedy applies to anyone else mandatorily sentenced to death under that section. This is true regardless as to whether the prisoner was sentenced before or after the introduction of the current Constitution in 2010, because the decision in Muruatetu upholds the earlier judgment of Mutiso, which also found the mandatory nature of section 204 to be unlawful, when measured against the protections contained in the former 1963 Constitution.

4.39. But whether there is an entitlement to a resentencing hearing is not as straightforward for prisoners who have been sentenced to death for robbery with violence or other offences that carry a mandatory death sentence besides murder. Mutiso made no conclusive determination about the compatibility of the mandatory death sentence for other offences with the former 1993 Constitution. The decision of Mwaura, which was subsequent to Mutiso, upheld the mandatory death sentence for robbery with violence under section 296 of the Penal Code, finding that the mandatory nature of the sentence did not breach the 2010 Constitution. The judgment in Muruatetu does not expressly overrule the decision in Mwaura and it was only section 204 of the Penal Code that was challenged by the petitioners. However, the Court, in its reasoning, noted that Mwaura had, in practical terms, reversed Mutiso (at [28]-[30]), before it went on to prefer the Mutiso judgment (at [52]). Thus, the Supreme Court made clear that Mwaura is not to be followed and it is implicit in the Court’s judgment that a mandatory death sentence for an offence under section 296 of the Penal Code would equally violate the Constitution.

4.40. But, in respect of those prisoners whose death sentences were confirmed before the 2010 Constitution entered into force on 27 August 2010, the absence of any declaration of incompatibility of section 296 of the Penal Code with the 1963 Constitution means there remains a presumption that a mandatory death sentence imposed for an offence under that section (or for any other offence besides murder carrying a mandatory death sentence) is lawful.

4.41. The main reason why this is worth stating is that it allows for a different treatment of those prisoners upon whom mandatory death sentences for robbery with violence were imposed (or another offence carrying a mandatory death sentence), who had completed their

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73 Petitions 15 and 16 of 2015, 15 December 2017
74 Criminal Appeal 17 of 2008, 30 July 2010
75 Criminal Appeal 5 of 2008, 18 October 2013
criminal proceedings before new Constitution was introduced. They, of course, cannot be executed because their execution would be incompatible with the 2010 Constitution, given the Court has recognised that such a punishment is, inter alia, cruel and inhuman. But there may be a legal basis for adopting a more practical approach to individual, time-consuming and resource intensive resentencing hearings for the many prisoners who fall into this category.
5. **Part C: Legislative proposals**

5.1. We have noted and considered the proposals included in the first draft of the Task Force’s proposals at Appendix A for the replacement sentences for the various offences which currently attract a mandatory death sentence and make two further proposals, which we hope will be of assistance to the Task Force.

**DEFINITION OF MURDER**

5.2. We note the definition of murder in section 203 of the Penal Code is very broadly stated and includes premeditated, intentional and non-intentional killing. If legislative proposals are enacted which specify different sentences for different types of murder, then we would recommend, from a practical perspective, that the definition of murder is amended to reflect those changes. For example, under the current sentencing proposals, the definition of murder would be categorised into ‘planned and intentional murder’, ‘intentional murder’ and ‘non-intentional murder’. If murder is subdivided in this way, prosecutors would then indict an individual, according to the facts of the case, under one or more of the sections which define a type of murder. In turn, the jury would render a verdict for each of these ‘types’. This would greatly assist with the sentencing process by defining precisely the type of murder of which the offender stands convicted. The risk of not aligning the definition of murder with the specific sentences is that the judge would have to make a finding post-trial, which is likely to result in a further hearing with further evidence being called and to increase the likelihood of sentencing appeals.

**LIFE WITHOUT PAROLE**

5.3. The questions posed by the Supreme Court in *Muruatetu* about the practical consequences of a sentence of life imprisonment are challenging. One is an issue that has taxed many domestic and international courts in recent years, namely the compatibility of ‘whole life’ sentences, or life imprisonment without any prospect of parole, with fundamental constitutional rights.

5.4. In 2016 in the unanimous decision of *Obediah Makoni v Commissioner of Prisons and Minister of Justice Legal & Parliamentary Affairs*\(^\text{76}\) the Zimbabwe Constitutional Court declared life sentences without the possibility of parole to be both cruel and inhuman punishment and a violation of human dignity. This decision added to the increasing number of jurisdictions worldwide in which sentences that are irreducible, such as being passed for natural life or without parole, have been found to offend fundamental human rights.\(^\text{77}\) In *Makoni*, the Court ruled that periodic reviews of detention and rehabilitation programs with a view to re-integration into society must be provided equally to prisoners serving indefinite terms of imprisonment. Any imprisonment that continued unreasonably – that is beyond the duration of detention necessary to fulfil the aims of punishment, deterrence and rehabilitation – was liable to be quashed by the courts. Consequently, the

\(^{76}\) Const. Application No CCZ 48/15, Judgment No CCZ 8/16, 13 July 2016 (Constitutional Court of Zimbabwe) [Makoni].

\(^{77}\) See also *State v Tcoieb* (2001) AHRLR 158 (NaSC 1996) (Namibia).
Court held that the parole regime must be interpreted as applying to all long-term prisoners, and not just those with fixed term sentences.

5.5. The Death Penalty Project hopes that the Task Force will go the way of Zimbabwe rather than including life without parole sentences in its legislative reform proposals. We understand that individuals who may be sentenced to life without the possibility of parole in Kenya under the proposed legislation may retain the ability to seek clemency. However, we do not believe that this saves the sentence from being challenged as cruel and inhuman punishment.

5.6. Furthermore, we advise against legislating for mandatory minimum terms of imprisonment, or for mandatory minimum periods of detention before a prisoner may be considered for parole. Such sentences have the potential to be arbitrary and disproportionate, deny an offender proper fair trial rights and amount to cruel and inhuman punishment.\(^{78}\)

5.7. We understand that it is the intention of the Task Force that all non-parole periods proposed in the new legislative scheme may be departed from by the judge in exceptional circumstances.\(^ {79}\) Such a provision would save these minimum periods of detention from unconstitutionality. However, DPP suggests that there be clear legislation to implement this intent, which leaves no room for doubt that a judge may depart even from legislatively proscribed mandatory minimum periods of detention and not only the general minimum periods of detention or the norm that applies where no legislative minimum period of detention has been prescribed (for example, the proposal that there be general eligibility for parole after service of two-thirds of a fixed term sentence and that for parole purposes a life sentence is to be calculated as being 25 years).\(^ {80}\)

5.8. But, this discretion to vary non-eligibility for parole periods, however, does not address the question of mandatory minimum sentences. We refer in particular to mandatory minimum sentences of life imprisonment for all offences of murder – such as the mandatory minimum of life imprisonment without parole for aggravated murder and other mandatory minimum sentences for other offences that are contemplated.

5.9. DPP notes that section 26(2) of the Penal Code states that where an offender is ‘liable to’ a legislatively proscribed penalty, that penalty is a maximum penalty and not a fixed one. However, mandatory sentences are expressly excluded from this section. A simple reading of this section is likely to be understood to mean that if the words ‘shall be sentenced’ are used in the statute prescribing punishment, or that the offender must serve ‘not less than’ a prescribed period of detention before eligibility for parole, that this is a penalty prescribed by law and therefore outside of the discretion in s.26(2). If it is indeed intended that there no longer be any mandatory sentences\(^{81}\) under the Penal Code and a judge always

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\(^{78}\) See, for example, \textit{de Boucherville v The State of Mauritius} [2008] UKPC 37, relied upon in \textit{Makoni; August v The Queen} [2018] CCJ 7 (AJ) and \textit{R v Smith} [1987] 1 SCR 1045.


\(^{80}\) See p.122 of the Task Force’s draft report and note 67 above.

\(^{81}\) It should be noted that mandatory sentences can include a ‘automatic’ sentence or fixed sentence, which is the only sentence available for that offence, but mandatory sentences also include mandatory minimum sentences,
where a judge has no discretion but to impose a sentence of a certain prescribed severity, no matter the individual circumstances of the offence and whether that sentence would be a disproportionate outcome.
**ANNEX 1: REPORT ON DETERRENCE AND THE DEATH PENALTY**

**Deterrence and the Death Penalty Internationally and in Kenya**

**Jeffrey Fagan**

Many states that retain the death penalty do so with the belief that executions deter the targeted crimes. While some states execute solely on the basis of retribution or a belief in a moral imperative based on the harm of the act or crime, many others cling to the theory that executions prevent further crimes by deterring other people from committing those acts that are eligible for death. Leaders in those states and nations, as well as large segments of their populations, endorse this view. Deterrence is not just a justification for capital punishment in many of the retentionist countries, execution is critical to state legitimacy in such places. However, rarely do those states or their citizens reflect on the evidence that supports those beliefs or the theory that animates those beliefs. Were they to do so by tapping into a deep body of empirical evidence as well as challenging the core elements of the theory itself, their beliefs in deterrence might well be shaken, and that foundation of support for the death penalty would be removed.

**What do We Mean by Deterrence?**

The core ambition of deterrence is to make threats credible. In the case of capital punishment, retentionist states wish to signal to those contemplating murder, or any other offense eligible for execution, that there are substantial risks of having the state end their lives should they commit the crime and be sentenced to death. The premise is a would-be offender, knowing about the threat of execution, would forego the act because the costs – in this case, death – are unacceptably high and well in excess of any presumed marginal benefits from the crime itself. It assumes a rational actor whose risk-reward calculus would lead to the avoidance of a capital crime, and one whose perceptions of risk are well-calibrated to likelihood of execution. It also assumes that risks are substantial and observable.

This proposition leaves open many practical and empirical questions. How would we know about murders or other death-eligible crimes that are contemplated but abandoned because of the threat of death? How many averted murders are there, and what is the threshold to assume
that there is a deterrent effect? If we avert one murder, is that sufficient to claim deterrence? Are executions the reason for the abandonment of a capital crime? What about other punishment threats, like death in prison through an irreversible life sentence? What ratio of executions to capital crimes would present evidence of “deterrence”? How many executions are needed to signal a credible deterrent threat?

But what if the evidence of deterrence is weak, speculative, and otherwise inconclusive and uncertain? Then this logic is turned on its head. States that execute in the face of uncertainty about its deterrent effects are implicated in taking lives without a measurable return beyond vengeance or retribution. Executions of the innocent, or of those lacking in the requisite culpability for execution, also are moral hazards of execution. The costs to state legitimacy are potentially severe, with the risk of spillover effects of degrading respect for law. Much rides, then, on this evidence.

The Evidence: Deterrence, Executions and Murder

Five decades of research have shown that whether this offense is a murder, a drug offense, or an act of terrorism, the scientific evidence supporting the belief in deterrence is unreliable, and in many instances, simply wrong. This conclusion is based on the convergence of evidence from studies over decades, conducted under a wide range of scientific strategies. While there are no experiments on execution, nor can there be for obvious moral and ethical reasons, some of the studies have examined the effects of moratoria in places that have suspended capital punishments. Other studies compare places that practice capital punishment with carefully matched places that have abolished or suspended executions and found no differences in murder rates, regardless of the number of executions in the retentionist places.

From 1972-76, there was a moratorium on executions in the U.S. One of the reasons for the moratorium was growing doubts during the pre-moratorium decade about the deterrent effects of capital punishment on murder. Executions resumed following publication of research claiming that the death penalty did in fact deter homicides. The claims were quite strong: each execution deterred as many as eight future homicides. But that evidence was strongly contested, and a 1983 panel of the National Academy of Sciences found little evidence that claims of deterrence were accurate.

Still, belief in deterrence remained politically and culturally popular, even if scientific evidence didn’t support the claim. These beliefs persisted throughout the 1980s and 1990s, despite the fact that murder rates rose dramatically just as executions were increasing.

Two factors undermined those beliefs. First, new statistical evidence showed the empirical reality of declining executions and declining homicides. One was the fact that the murder rate began declining sharply in the second half of the 1990s, at the same time that executions rose

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85 Furman v Georgia, 408 U.S. 238, 315 (1972) (Marshall, Concurring).
sharply. Starting in 2000, as death sentences and executions began to decline, the murder still continued its decline.

The second factor was the emergence of a large body of statistical evidence showing that the claims of deterrence were fatally flawed. My own research showed that the decline in murders was no greater in states that continued to sentence and execute murderers than in states that didn’t. This included states with actual moratoria and states with ‘de facto’ moratoria, states such as California, Michigan and Illinois with very large numbers of condemned prisoners but no executions. In those places, despite the absence of executions, murder rates decline sharply.

The most recent and intensive review of the evidence on deterrence comes from the National Academy of Science in the U.S. The Committee on Deterrence and the Death Penalty concluded that there was no reliable evidence of deterrence based on its failure to once we consider its deterrent effects beyond the effects of the next most severe punishment: life in prison without the possibility of parole. In addition to the Committee Report, papers commissioned by the panel reached much the same conclusion. The panel and these companion analyses carefully noted that there was no credible evidence of deterrence, owing to the failures – if not the impossibility – of establishing the necessary conditions for making sufficiently strong conclusions. Other research specifically repudiated nearly all the studies claiming to show evidence of deterrence from capital punishment, including re-analyses of the original evidence claiming deterrence.

Despite the absence of experimental evidence on deterrence, as called for by the National Academy of Science, national trends in the U.S. confirm the absence of plausible evidence of deterrent effect of executions. In the U.S., murders have been declining across the U.S. in retentionist, moratorium, and abolition states. Figure 1 shows that since 1999, death sentences and executions have all been declining at the same time and at the same pace for over 18 years. Death sentences, in part a reflection of that peak in the mid-1990s, reached a peak rate in 1998, and have declined since. Executions reached a peak in 1999, and also have been declining since.

The homicide rate in the U.S. has been declining since 1996. The figure below shows that the murder rate was unaffected by these changes in execution or death sentence risk, indicating a secular decline in murder unrelated to the risks of executions. The murder rates in the U.S. since 2000 are similar to the murder rates in Kenya, suggesting a basis for comparison.  

Evidence from other countries shows similar secular trends. Following the abolition of capital punishment in Eastern Europe in the early 1990s, homicide rates have been declining. Figure 5 below, from a study comparing murder rates in Singapore, where executions for murder are common and persistent over time, with Hong Kong, where executions were banned, showed no difference in the murder rates over nearly three decades since the cessation of executions in Hong Kong. The figure shows the Singapore-Hong Kong comparison.

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90 See, The Death Penalty in Kenya, infra.
The authors conclude that “[o]ver a span of 50 years, during which these sanctions were being deployed in degrees that varied substantially, neither imprisonment nor death sentences nor executions had any significant relationship to homicides. In the years immediately following an appeals court’s determination limiting executions, the murder rate fell.”

Evidence from a study of capital punishment in Trinidad and Tobago shows much the same. The most comprehensive study showed no change in homicide rates over several decades despite increases in executions.93 In a multivariate analysis, the same research showed that changes in the rate or number of executions had no deterrent effect on murder over a 50 year period from 1960-2010, once the murder rate is adjusted for imprisonment and socio-economic factors. The two figures below, from that careful regression analyses of Greenberg and Agozino, show that murders were not responsive to changes either in the prison population or in the rate of death sentences.

The Death Penalty in Kenya

Kenya retains the death penalty in its constitution as part of its general sentencing objectives. In cases other than those carrying a mandatory death sentence, courts are required to follow Guidelines set forth in law to determine the length and conditions of punishment.\textsuperscript{94} In general matters of criminal sentencing, deterrence stands alongside other goals of punishment: retribution, rehabilitation, restorative justice, public security, and expressive condemnation.\textsuperscript{95} In cases without a mandatory minimum sentence or a mandatory death sentence, courts consider a sentence within the range of punishment specified by law, and the existence of mitigating and aggravating circumstances that may place the defendant either at the lower or upper boundary of the sentencing range.\textsuperscript{96} In cases where a life imprisonment sentence is permitted, the Guidelines state that a court should “endeavor to impose a sentence in keeping with the spirit of these guidelines.”\textsuperscript{97}

Death is based on a different jurisprudence in Kenya. A mandatory death sentence in Kenya forecloses the achievement of each of the stated goals of punishment. Yet there are signs that the jurisprudence underlying the mandatory death penalty may be more elastic than previously thought. Although the Supreme Court of Kenya confirmed the constitutionality of the death penalty in \textit{Muruatetu}, the Court held that a failure to consider mitigating circumstances violates guarantees of a fair trial.\textsuperscript{98} This suggests that a more nuanced and complex view of capital punishment may be emerging in Kenya, one where the proceduralization of the death penalty can lead to a more contextualized determination of deathworthiness and movement away from its strict and formalistic underpinnings.

Although Kenya retains the death penalty in its constitution, it is an abolitionist nation in practice, with a moratorium on executions in place since 1987, and two moratoria on new death sentences since 2009. Table 1 shows that Kenya’s murder rate of 4.9 per 100,000 in 2016 population ranks 22\textsuperscript{nd} among 57 African nations in 2016. On 3 August 2009, the death sentences of all 4,000 death row inmates were commuted to life imprisonment. While Kenya has not formally abolished capital punishment, current practice suggests that an unofficial moratorium on executions is in place, as none have been carried out since 1987.

Despite the moratorium, and in contradiction of the advice of a constitutional committee to abolish the death penalty,\textsuperscript{99} death sentences continued to be handed down by courts after the

\textsuperscript{95} Id. at 15.
\textsuperscript{96} Id. at 50.
\textsuperscript{97} Id. at 51.
\textsuperscript{98} [2017] eKLR, Petition No. 15 of 2015 (as consolidated with Petition No 16 of 2015) [\textit{Muruatetu}].
\textsuperscript{99} President Kibaki stated in 2009 that the decision to commute the death sentences of 4,000 prisoners was based on the advice of a constitutional committee that noted the “undue mental anguish and suffering, psychological trauma and anxiety” that come from “extended stays on death row.” See, Nick Wadhams, “Kenya’s Death Row Inmates Get Life Instead,” \textit{Time Magazine}, 5 August 2009, \url{http://www.time.com/time/world/article/0,8599,1914708,00.html} (last visited 7 February 2012). During this time, courts have noted the suffering of prisoners as a “death row syndrome.” \textit{Mutiso v. Republic}, Criminal Appeal No. 17 of 2008, para. 16.
2009 moratorium, and there were 2,747 prisoners on death row in Kenya as of 2016. A second moratorium was declared in 2016, after President Uhuru Kenyatta commuted the death sentences of all persons under sentence of death at the end of 2016. As of 2018 the number of new death sentences since the mass commutation in 2016 was 838.

These changes in death sentencing have had little effect on homicide rates in Kenya. Figure 1 shows that the homicide rate rose after the 2009 moratorium, but there has been little change in the homicide rate after that. Over the past five years, the number of homicides dropped from 2,878 in 2013 to 2,774 in 2017, a decline of 3.6%. Overall, the year-to-year percent changes in the homicide rates were narrow, ranging from a drop of 10.5% to an increase of about 11%. The narrow fluctuation in the homicide rates since 2009 follow the pattern of what statisticians refer to as a “random walk” with episodes of volatility that are typical of a

101 Id.
102 Figure provided to The Death Penalty Project via email on 30 October 2018 by the Kenya Task Force on Review of the Mandatory Death Sentence as reported to them by the Kenya Prisons Service.
103 Such a “phase shift” in the level of homicides is unusual outside of wartime experience, and we look to institute data capture practices as an alternative explanation. For instance, there may have been a change in the rules of how police or others in Kenya captured these statistics, or their ability to capture such information.
random pattern over time and not indicative of longer term increases.  


With respect to the question of deterrence of homicide, it is critical to note that throughout this period, and for over 30 years, there have been no executions in Kenya. The absence of year to year changes in murder rates in the face of two separate mass commutations suggests an absence of deterrence from the presence of a capital punishment regime in Kenya. The finding of no deterrent effect is consistent with the most recent and highly developed empirical evidence and jurisprudential reasoning.

Is The Death Penalty an Effective ‘Crime Control’ Measure Generally?

Finally, it is important to note the deterrence of murder is a special case in the scientific literature on deterrence. There is indeed evidence of deterrent effects of enforcement and punishment in other realms of antisocial and illegal behavior. Deterrence may be an effective crime control measure for crimes such as tax evasion, minor property crimes, and vehicular offenses.\(^\text{108}\) There also is some evidence that rapid criminal responses to marital violence can be an effective deterrent, but only for some types of offenders.\(^\text{109}\) But in general, deterrent


effects are weakest among the most serious crimes.\footnote{Nagin, supra note 11. See, also, Paul Robinson and John Darley, “Does the Criminal Law Deter?,” 24 Oxford Journal of Law 173 (2004).}

From these studies and prestigious study commissions, I conclude that there is no evidence of the deterrent effects of death sentences or executions on homicides.\footnote{Nagin and Pepper, supra note 4. See, also, Tomislav V. Kovandzic, Lynne M. Vieraitis, and Denise Paquette Boots, “Does the death penalty save lives? New evidence from state panel data, 1977 to 2006.” 8 Criminology & Public Policy 803 (2009). Fagan, Death and Deterrence Redux, supra note 6.} I am not alone in reaching this conclusion. A survey of over 1,000 leading criminologists in the world agreed with this conclusion, based on their reading of the evidence and their own studies.\footnote{Michael L. Radelet and Traci L. Lacock, “Do Executions Lower Homicide Rates: The Views of Leading Criminologists,” 99 Journal of Criminal Law Criminology 489 (2008).} In fact, there is conclusive evidence that deterrent effects are a function of the risks of arrest rather than the severity of the sanction, including death.\footnote{Nagin, Id. Steven N. Durlauf and Daniel S. Nagin, “Imprisonment and crime: Can both be reduced?,” 10 Criminology & Public Policy 13 (2011).}

In sum, there is no evidence that executions have a greater deterrent effect on homicides than other forms of punishment. Accordingly, there is no expectation that executions will deter homicides in the U.S. in Kenya, or elsewhere.
Sentencing in Capital Cases

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WITH

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Foreword

Over the past few decades, common law courts, especially those in the Caribbean and some parts of Asia and Africa, have constrained legislative and executive action that facilitated or permitted capital punishment. The jurisprudence reflects the growing concern of humankind with execution as a form of punishment. It is a concern that is well demonstrated in treaties and conventions, and in the judgments of international courts and tribunals.

The recent trend among national courts also marks an increasingly robust and enlightened role in the enforcement of specific fundamental rights – such as the rights to life, humane treatment, a fair trial and due process – and the observance by such courts of core constitutional values, including the rule of law and the separation of powers.

The emerging body of case law reflects the dynamism of constitutional and human rights interpretation. For example, it has been judicially determined that it is inhumane to keep a prisoner indefinitely on death row, with a view, perhaps, to executing him when the local murder rate is out of hand, and it is felt necessary to demonstrate that the government of the day is tough on crime. Another example is the finding that, where an unincorporated treaty permits a convicted murderer to petition an international tribunal to complain about his conviction or sentence, it would be a violation of due process to execute the prisoner while the petition remains pending. Mandatory, or automatic, death penalties for murder have been declared inhumane and an affront to the doctrine of the separation of powers, which itself has been given independent constitutional force such that its infringement could yield appropriate redress for an affected litigant.

One of the consequences of these determinations is that judges in many countries are now responsible for exercising discretion in the sentencing of those convicted of murder. In the case of August, recently decided by the Caribbean Court of Justice, I noted that:

‘Murder is a very serious offence. Society at large and the relatives of the deceased are entitled to expect that the murderer will serve a stiff sentence befitting the seriousness of the crime and the blameworthiness of the perpetrator. Civilisation has, however, long progressed beyond a brand of justice that is more in keeping with Hammurabi’s legal code. It plainly does not follow that, because in every crime of murder human life is lost, the sanction to be pronounced by the court on the offender after trial must always be the exact same … Modern penology does not conflate the consequence to the victim with the culpability of the offender.’

While, generally speaking, the exercise of discretion in the imposition of a sentence is a task to which judges are accustomed, in sentencing those convicted of murder there are added dimensions to this new responsibility. Judicial legitimacy and the rule of law require that the sentences given in capital cases should be appropriately justified, be convincingly explained and follow some common, logical approach. What then are the factors that should guide judges and advocates?

In clear and simple language this book, like its predecessor, provides welcome guidance on the vast variety of matters that should be taken into account by sentencers in capital cases. These include factors touching on the offence itself and those having to do with the offender. The reader is also provided with
commentary on the safeguards and procedural directions that are needed to protect the right to a fair sentencing hearing in capital cases. The authors are to be complimented for the manner in which the material has been systematised and supported by relevant cases. The book is a wonderful asset for all those in the common law world who must grapple with the problems involved in discretionary capital sentencing.

The Honourable Mr Justice Adrian Saunders
President of the Caribbean Court of Justice
August 2018
Editors’ preface

In 2007, we published A Guide to Sentencing in Capital Cases, authored by leading human rights barristers Edward Fitzgerald QC and Keir Starmer QC. The publication was commissioned after the abolition of the mandatory death penalty by the courts in the Caribbean, Uganda and Malawi. It addressed a critical need among judges, prosecutors and defence lawyers, and others working within the criminal justice system, for practical assistance on the application of discretionary sentencing principles in capital cases. The guide set out the appropriate legal tests, relevant factors to be considered in the sentencing exercise and procedural issues arising as a result of the discretion now vested in the courts.

Since publication of the guide in 2007, courts in other jurisdictions around the world have followed the reasoning previously established and ruled that mandatory death sentences are incompatible with fundamental human rights protections. Most recently, in 2017, the Supreme Court of Kenya held that the mandatory death penalty was in violation of the Bill of Rights enshrined in the Kenyan Constitution and, in 2018, the Caribbean Court of Justice struck down the mandatory death penalty in Barbados. These latest decisions reflect and reinforce a growing consensus that the mandatory death penalty is a cruel and inhuman punishment, which violates the right to life and the right to a fair trial by depriving defendants of the opportunity to have their sentence determined by the courts. New discretionary sentencing systems have been introduced that limit the circumstances in which the death penalty can be imposed.

This new book supersedes the earlier guide, bringing the text up to date with the latest legal developments. Its scope has significantly expanded to give commentary on the range of approaches adopted by the courts and key contemporary legal questions and issues. It provides a resource to assist legal professionals working in capital jurisdictions in navigating discretionary sentencing systems, with reference to comparative international practice. When addressing the issue of mental disorder at the sentencing stage, it should be read in conjunction with the Handbook on Forensic Psychiatric Practice in Capital Cases and the accompanying Casebook on Forensic Psychiatric Practice in Capital Cases, which we commissioned and published in 2018.

The abolition of the mandatory death penalty has drastically reduced, in most countries, the number of death sentences imposed. This is because the courts, having regard to the circumstances of the offence and offender, will frequently find the death penalty to be an excessive or inappropriate punishment. However, even reforming the law to permit the discretionary use of capital punishment cannot remove arbitrariness and cruelty in the administration of the death penalty. An element of subjectivity is inevitable in the decision-making of prosecuting authorities in deciding when the death penalty should be pursued and by judges (and in some jurisdictions, juries) in deciding whether the sentence should be imposed.
Whether the death penalty is mandatory or discretionary, the punishment is incompatible with fundamental human rights protections. The vast majority of the world’s nations have recognised that the only solution is to remove the death penalty from their statute books completely.

Saul Lehrfreund and Parvais Jabbar
Co-Executive Directors
The Death Penalty Project
August 2018
Authors’ acknowledgments

This short book draws on our shared experience of cases fought and won, and occasionally lost, across the common law world. In presenting our observations on discretionary capital sentencing we pay tribute to our colleagues who have acted in those cases. It has been our privilege to collaborate with many of these advocates in advancing written and oral arguments, developing ideas and strategies and, we hope, contributing to evolving jurisprudential principles. It is also right to recognise the many judges who have lent their authoritative insights and analysis to this process.

We gratefully acknowledge the work done by Sir Keir Starmer QC MP, who with Edward Fitzgerald QC appeared as counsel in some of the leading cases in this area and co-authored the original version of this text (A Guide to Sentencing in Capital Cases, 2007).

Chapter 6 includes a summary of the capital resentencing process in Malawi following the abolition of the mandatory death penalty in Kafantayeni. We are grateful to Sandra Babcock, Faculty Director at the Center on the Death Penalty Worldwide, Cornell Law School, for providing the data on which our summary is based. The Death Penalty Project assisted with the resentencing of the surviving Kafantayeni plaintiffs. The much larger cohort of prisoners who had already been sentenced to death when Kafantayeni was decided were resentenced in a collaboration between various organisations: Cornell Law School; Reprieve; the Malawi Human Rights Commission; the Law Society; Legal Aid; and the Paralegal Advisory Services Institute. Together they assisted more than 150 prisoners and provided remedies for some egregious miscarriages of justice, in many cases helped by members of the Malawi Bar acting pro bono. This model may provide inspiration in other common law jurisdictions facing the challenge of rectifying the unconstitutional imposition of mandatory death sentences.

Two other individuals deserve particular recognition. The first is Emile Carreau, a volunteer lawyer who served for many months as researcher, facilitator and general midwife for the post-Kafantayeni resentencing process in Malawi. His enduring commitment and dedication to this task had an enormous impact on its outcomes. The second is Andrew Novak, whose masterly exposition of the decline of the mandatory death penalty – particularly in Africa – is the subject of excellent academic publications.

This book would not have been possible without the support and patience of the executive directors of The Death Penalty Project, Parvais Jabbar and Saul Lehrfreund, and their colleagues. Any errors in the text are, of course, our sole responsibility.

Edward Fitzgerald QC CBE
Joe Middleton
Amanda Clift-Matthews
Chapter 1
Introduction
1.1. This book has been written for judges, defence lawyers, prosecutors and other participants in the criminal justice system. It provides a thematic resource for sentencing in discretionary capital cases, drawing on the experience of the courts in numerous common law jurisdictions where the mandatory death penalty has been replaced by a discretionary sentencing process.

The decline of the mandatory death penalty in common law jurisdictions

1.2. The original version of this book (A Guide to Sentencing in Capital Cases, 2007) was published more than a decade ago, shortly after the High Court of Malawi held in the Kafantayeni case that the mandatory death penalty was unconstitutional.² By that point the incompatibility of the mandatory death penalty with fundamental rights was well-established in the common law world. A consensus on this issue had emerged, based on constitutional challenges in the highest courts of the United States of America (US), India and common law jurisdictions in the Caribbean and Africa.

1.3. The principal finding in these cases was that the mandatory and automatic imposition of the death penalty amounted to cruel and inhuman punishment. It was cruel and inhuman to impose the ultimate sanction of death whenever a person is convicted of a particular offence (usually murder), with no possibility of mitigation by reference to the specific circumstances of the individual offence or the individual offender. In some cases the mandatory death penalty was also found to be incompatible with the right to life (including the right not to be arbitrarily deprived of life), the right to a fair trial and access to justice (including the right to a fair sentence and to an appeal against sentence) and the separation of powers.

1.4. In their judgments on the mandatory death penalty, the national courts often recognised that the imposition of a death sentence itself was protected from constitutional challenge, because the constitution in question contained an express qualification to the right to life in relation to the imposition of lawful punishment. But in all these cases the courts held that the mandatory imposition of death for a particular type of offence was neither protected from constitutional challenge nor compatible with the rights enshrined in the constitution.

1.5. These decisions were reinforced and supported by international courts and tribunals, with a series of decisions concluding that the mandatory death penalty was incompatible with international and regional human rights treaties. These domestic and international developments are addressed in more detail in the next chapter.

Developments since 2007

1.6. Since the original version of this book was published in 2007, this flow of constitutional challenges and determinations by domestic and international tribunals has continued in a broadly consistent direction. The decision in Kafantayeni was confirmed by the Supreme Court of Appeal, Malawi’s highest court, later in the same year.³ In 2009, the Supreme Court of Uganda upheld the

² Kafantayeni & Ors v Attorney General [2007] MWHC 1, 46 ILM 566
³ Twoboy Jacob v Republic, MSCA Criminal Appeal No. 18 of 2006
Constitutional Court’s earlier decision striking down the mandatory death penalty in the *Kigula* case, a class action brought by all 417 prisoners on death row in Uganda.4

1.7. The following year the Court of Appeal of Kenya, which at that time was Kenya’s highest court, adopted a similar line of reasoning in *Mutiso*.5 A different bench of the same court took the opposite view in 2013,6 which left the status of the mandatory death penalty in Kenya unsettled for several years.

1.8. The uncertainty in Kenya has now been authoritatively resolved by the Supreme Court, which is Kenya’s highest court under the 2010 Constitution. At the end of 2017, the Supreme Court held that the mandatory death penalty was ‘out of sync with the progressive Bill of Rights enshrined in our Constitution’, and was a ‘colonial relic that has no place in Kenya today’ (*Muruatetu & Mwangi v Republic, Death Penalty Project & Ors Intervening*7). The Court concluded that the mandatory death penalty for murder was incompatible with the broad principle of the rule of law8 and a number of specific clauses in the Bill of Rights:

> ‘We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.’ 9

1.9 In Ghana, the Supreme Court chose to depart from the established consensus in 2011 and upheld the constitutionality of the mandatory death penalty.10 But this left Ghana in breach of its obligations in international law, in particular its obligation to ensure respect for the right to life under article 6 of the International Covenant on Civil and Political Rights. So held the United Nations (UN) Human Rights Committee in 2014, when it upheld a complaint brought by the unsuccessful appellant in the Supreme Court proceedings.11

1.10. In 2012, the Supreme Court of India extended its previous jurisprudence by finding that the mandatory death penalty for homicide using prohibited arms was unconstitutional.12 And in 2015, the Supreme Court of Bangladesh held that the mandatory death penalty resulted in the deprivation of life without due process of law, and therefore violated the right to life as enshrined in the Constitution of Bangladesh.13

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1. Kigula & Ors v Attorney General [2005] UGCC 8 (Constitutional Court); Attorney General v Kigula & Ors [2009] UGSC 6 (Supreme Court).
3. Mwaura & Ors v Republic, Criminal Appeal No. 5 of 2008
4. Petitions No. 15 & 16 of 2015, paras 64 and 67
5. See para. 58 of the judgment.
6. See para. 59 of the judgment. Section 204 of the Penal Code imposes the mandatory death penalty for murder. The cited constitutional articles protect the right to a fair trial, respect for human dignity, access to justice, a fair hearing before an independent tribunal and an appeal to a higher court. As the Court of Appeal observed in *Mutiso*, the same principled analysis applies to robbery with violence and attempted robbery with violence, for which the death penalty is also mandatory in Kenya. In his submissions in *Muruatetu & Mwangi*, the Director of Public Prosecutions of Kenya acknowledged that the mandatory death penalty was unconstitutional for all offences, not just murder (see para. 15 of the Supreme Court’s judgment). This is important because robbery with violence accounts for the vast majority of death sentences imposed in Kenya.
7. *Johnson v Republic [2011] 2 SCGLR 601*
8. *Johnson v Ghana, Communication No. 2177/2012, CCPR/C/110/D/2177/2012*
10. *BLAST & Ors v State, 1 SCOB [2015] AD 1*
1.11. Elsewhere in Asia, in particular in Malaysia and Singapore, the mandatory death penalty has experienced both regressive and progressive developments in recent years. Judicial challenges to the mandatory death penalty have been unsuccessful, but legislative reforms have introduced limited discretion for sentencing in drug trafficking cases, and in Singapore the mandatory death penalty for murder has been confined to cases in which the offender intended to cause death. These developments are addressed in more detail in the next chapter.

1.12. Most of the judicial challenges to the mandatory death penalty were brought in murder cases, so the sentencing principles summarised in this book are focused on sentencing for murder. Subject to any specific statutory provisions or sentencing guidelines, the same principles will be applicable to other capital offences.

The purpose of this book

1.13. As a result of the successful constitutional challenges to the mandatory death penalty, judges imposing sentences for capital offences are now confronted with a discretion over sentence, where previously it was thought that death was the only lawful penalty. The introduction of discretionary sentencing helps to achieve sentences that are not only constitutional but also more just and proportionate. But the new sentencing regimes impose novel and difficult burdens on judges and other participants in the sentencing process. The importance of rising to these challenges is underscored in capital cases by the unique severity of the death penalty and its inevitable irreversibility.

1.14. In the new discretionary sentencing context, judges and advocates now need to address the following questions: ‘When is an offence eligible or ineligible for the death penalty?'; ‘What is the applicable test for imposing a death sentence?’; ‘What matters are relevant to the exercise?'; and ‘What special procedural steps are needed?’.

1.15. This book offers some suggested answers to those questions, based on the case law and practice in those jurisdictions where the courts have been grappling with these issues in recent years. It is intended to be a practical resource for professional participants in the capital sentencing process and draws widely on the case law from all the relevant jurisdictions.

1.16. The remaining chapters address the following topics:

- Chapter 2 provides a brief outline of the decline of the mandatory death penalty in the national law of common law jurisdictions and its parallel decline in international law
- Chapter 3 summarises the three broad approaches to discretionary capital sentencing
- Chapter 4 addresses the relevant mitigating and aggravating factors in the capital sentencing exercise
- Chapter 5 focuses on mental disorder as a specific and particularly complex mitigating factor, which has potential significance in any capital case
- Chapter 6 addresses the specific principles applicable to resentencing in capital cases. These considerations typically arise where the offender is being resentenced following the quashing of a previously imposed unlawful mandatory death sentence
Chapter 7 considers the specific procedural requirements and evidential issues arising in the discretionary capital sentencing process.

1.17. Of the three broad approaches to discretionary capital sentencing summarised in Chapter 3, the ‘rarest of the rare’ approach is by far the most common. This is also the only approach to have been developed in the recent common law jurisprudence, and this was the approach that was addressed in the original version of this book. The underlying principle is that there is a strong presumption in favour of life, and the death penalty must be reserved for the most exceptionally severe cases of the offence in question. But this is not the only approach. In some countries the position is more neutral, and there is no particular presumption either way: aggravating and mitigating circumstances are considered together. And in others there is, in principle at least, a presumption in favour of death, which is only avoided where the offender can establish extenuating circumstances. By addressing all three of the possible approaches to discretionary sentencing, this book aims to provide a more complete account of the different approaches adopted in different jurisdictions.

1.18. Chapter 5 addresses mental disorder as a relevant consideration in the capital sentencing process. Such emphasis is undoubtedly justified by the potential relevance of mental illness at the sentencing stage, and by the fact that the manifestations and significance of mental disorder are much neglected throughout the common law world. This issue is addressed in much greater detail in the latest edition of the *Handbook of Forensic Psychiatric Practice in Capital Cases* and the accompanying *Casebook*.

1.19. This book is based on developments in those common law jurisdictions that have retained the death penalty. Different approaches are applied in civil law and other jurisdictions outside the common law world, including those that have adopted Sharia law. Capital sentencing is no less important an issue in those countries, but the practices and principles deployed there are beyond our expertise.

**Legality and legitimacy of the death penalty**

1.20. Finally, nothing in this book should be viewed as endorsing the death penalty, or accepting that the death penalty is a legitimate punishment when imposed in accordance with certain principles or procedures. In our view the death penalty is abhorrent and has no place in a society that values justice and humanity. But it continues to be a fact of life, albeit in a dwindling number of countries. If the death penalty is imposed at all, then pending its complete abolition, it is better that it is imposed as consistently as possible, with constitutional safeguards and international legal principles rather than in violation of them. The rigorous examination of the circumstances of the offence and the offender, the evaluation of all relevant mitigation, and the application of appropriate evidential burdens and judicial procedures may help to protect a death sentence from a finding of illegality. But even measures of that kind, applied with the fullest rigour of the law, cannot detract from the conclusion that the deliberate taking of life is invariably a cruel, inhuman and illegitimate form of punishment.

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Chapter 2

The decline of the mandatory death penalty in national and international law
2.1. In every country where judges are developing new discretionary capital sentencing practices, the need to do so is the result of successful constitutional challenges to the mandatory death penalty. This process provides a striking illustration of how common law principles can develop and advance between different common law countries, with the courts in each jurisdiction refining the principles that have evolved elsewhere. At the same time, a succession of decisions by international and regional tribunals applying international law has reinforced the proposition that the mandatory death penalty is fundamentally incompatible with respect for human life and dignity. This chapter provides a brief outline of these developments in national and international law.15

2.2. Further details on the evolution of the three approaches to discretionary sentencing in the case law of national courts are provided in the next chapter.

Abolition of the mandatory death penalty by domestic courts

2.3. The abolition of the mandatory death penalty through judicial development of the common law, and in particular through the courts’ interpretation of constitutional protections, began in the US. This trend was followed in India and progressed through numerous common law jurisdictions in the Caribbean and Africa. To a much more limited extent the mandatory imposition of the death penalty has also been eroded in Asia. At the time of writing, only nine out of 52 Commonwealth nations retain a mandatory death penalty, and of those, only three continue to execute sentenced offenders.16

2.4. As early as 1937, the US Supreme Court recognised that the Eighth Amendment to the US Constitution, which prohibits cruel and unusual punishments, required that all criminal sentences should be individualised.17 By 1963, in all states where murder had carried a mandatory capital sentence the law had been amended to give juries a discretion on the death sentence. In Woodson v North Carolina18 this led the Supreme Court to conclude that the mandatory imposition of the unique and irrevocable punishment of death was an impermissible departure from ‘contemporary standards of decency’. As the Court observed:

‘The history of the mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offence has been rejected as unduly harsh and unworkably rigid.’ 19

2.5. Elsewhere in the common law world, the harshness of mandatory death sentences had been softened by the introduction of an exception, namely where there were ‘extenuating circumstances’ justifying a lesser sentence. This approach was adopted in South Africa and Southern Rhodesia from 1935, in Swaziland from 1938, in Lesotho from 1959 and in Botswana from 1964. As the Privy Council observed in the case of Bowe v R, the Board was unaware of any jurisdiction in
which, by 1973, ‘the mandatory death sentence was retained and it was considered just to execute all who were convicted: by one means or another, the harshness of the old common law rule was mitigated’.  

2.6. In India the death penalty has long been discretionary for most murders, but from the adoption of the 1860 Penal Code it was mandatory when committed by an offender serving a life sentence. In 1983 the Supreme Court of India held in Mithu v State of Punjab that the mandatory death penalty for all such offences was unconstitutional. There was no rational justification for denying sentencing discretion for such offenders and the punishment was therefore arbitrary and incompatible with the right to life and equality before the law. The Court struck down the mandatory death penalty for other offences in its subsequent decisions. The case law in India featured prominently in the reasoning of the Supreme Court of Bangladesh when it found the mandatory death penalty to be unlawful in 2015.

2.7. In the common law Caribbean jurisdictions, the breakthrough on this issue came not from the Privy Council but from the Eastern Caribbean Court of Appeal. In 2001, in the case of Spence & Hughes v R, the Court of Appeal struck down the mandatory death penalty in St Vincent and The Grenadines and Saint Lucia on the basis that it amounted to inhuman and degrading punishment. It held that the sentencing court must have a discretion to take into account the individual circumstances of the offender and the offence ‘if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process’. As Sir Dennis Byron CJ observed:

‘I am satisfied that the requirement of humanity in our Constitution does impose a duty for consideration of the individual circumstances of the offense and the offender before a sentence of death could be imposed in accordance with its provisions.’

In reaching this conclusion the Court took into account the approaches in other common law jurisdictions and state obligations under international law, including the jurisprudence of the Inter-American Commission on Human Rights.

2.8. Saint Lucia appealed against the judgment of the Eastern Caribbean Court of Appeal to the Privy Council. The appeal in that case was heard at the same time as the appeals on the same issue from Belize (Reyes v R) and St Kitts and Nevis (Fox v R). In its seminal judgment in Reyes, the Privy Council concluded that the mandatory death penalty was unconstitutional by reason of its fundamental inhumanity. As Lord Bingham explained:

‘[T]o deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him’
as no human being should be treated and thus to deny his basic humanity, the core right of which section 7 exists to protect.'

2.9. The Privy Council reached the same conclusion in appeals from several other Caribbean jurisdictions, including St Lucia, St Kitts and Nevis, Dominica, Barbados, Trinidad and Tobago, Jamaica, and The Bahamas.

2.10. In Africa, the first constitutional challenge to the mandatory death penalty was brought in Uganda, by all 417 prisoners who were then on death row. In 2005, the Constitutional Court ruled in *Kigula v Attorney General* that all 417 sentences were unconstitutional, because there had been no opportunity for the offenders to mitigate their punishments. This amounted not only to the imposition of inhuman punishment and a breach of the right to life, but also a violation of their right to a fair trial. The Supreme Court rejected the Government’s appeal and upheld the Constitutional Court’s decision. In setting out their reasoning, both courts acknowledged the earlier common law jurisprudence from the Privy Council on the mandatory death penalty, summarised above, adapting it as appropriate for the Ugandan context.

2.11. The next challenge in Africa was brought in Malawi. In *Kafantayeni & Ors v Attorney General* the High Court held that the mandatory imposition of death for the offence of murder violated fundamental constitutional protections. It amounted to inhuman and degrading treatment or punishment, in violation of section 19(3) of the Constitution, and by denying judicial discretion on sentencing, it violated the right to a fair trial under section 42(2)(f). The Supreme Court of Appeal approved the High Court’s decision that the mandatory death penalty is unconstitutional in *Twoboy v Republic*, and in *Yasini v Republic* it ordered that all murder convicts who had already been sentenced to the mandatory death penalty should be resentenced. The outcome of that resentencing process is summarised in Chapter 6.

2.12. Kenya followed in the footsteps of Uganda and Malawi and the preceding common law cases. The status of the mandatory death penalty was unsettled for several years, but the Supreme Court of Kenya has now resolved the uncertainty with a decisive ruling against the mandatory death penalty for murder in *Muruatetu & Mwangi v Republic, Death Penalty Project & Ors Intervening*. Further details are provided in para. 1.8 above.

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*Beyes v R* [2002] 2 AC 235, para. 43. Section 7 of the Belize Constitution is the clause prohibiting torture and other inhuman treatment: "No person shall be subjected to torture or to inhuman or degrading treatment or punishment".


* v R [2002] 2 AC 284.


* v R [2005] 1 AC 400. In both *Boye v R* and *Matthew v State* [2005] 1 AC 433, the Privy Council held that although the mandatory death penalty was inhuman and degrading, its constitutionality was protected by specific savings clauses in the constitutions of Barbados and Trinidad and Tobago, respectively. The decision in *Boye v R* has now been overturned by the Caribbean Court of Justice, which struck down the mandatory death penalty in *Nervais & Anr v R* [2018] CCJ 19 (AI).

* v * [2005] 1 AC 433.

*Watson v R* [2005] 1 AC 472.

*Boye v R* [2006] 1 WLR 1623.


* [2007] MWHC 1, 46 ILM 566.

*MSCA Criminal Appeal No. 18 of 2006.

*MSCA Criminal Appeal No. 29 of 2005.*

*See paras 6.29-6.32 below.

*Petitions No. 15 & 16 of 2015, paras 64 and 67. Apart from the issue of the mandatory death penalty, the Supreme Court also considered the meaning of a sentence of life imprisonment as an alternative to the death penalty. The Court held that although this was a matter for Parliament to decide, as a matter of principle a life sentence should not necessarily preclude the possibility of eventual release: ‘it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism’ (Muruatetu & Mwangi, para. 95). The Court went on to recommend that the Attorney General and Parliament ‘commence an enquiry and develop legislation on the definition of “what constitutes a life sentence”; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for specific circumstances to serve whole life sentences’ (para. 96). This accords with the approach adopted by the Supreme Court of Uganda in *Tigo v Uganda* [2011] UGCC 7. In that case the Court confirmed that a prisoner remains under a life sentence for the whole of his natural life, but that this does not preclude the possibility of his release from prison on account of remissions earned.

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Chapter 2: The decline of the mandatory death penalty in national and international law

**Different directions taken in Ghana, Singapore and Malaysia**

2.13. The decline of the mandatory death penalty in common law jurisdictions has not been universal or uniform. As noted in the previous chapter, a constitutional challenge in Ghana was rejected by the Supreme Court of Ghana in 2011. The UN Human Rights Committee subsequently held that Ghana was in breach of its obligations in international law, in particular under the International Covenant on Civil and Political Rights (ICCPR). But at the time of writing, Ghana had not taken steps to comply with its international obligations or give effect to the Committee’s findings.

2.14. In Asia, both Singapore and Malaysia retain the mandatory death penalty for murder, although in Singapore the Penal Code has been amended to restrict it to cases in which the offender intended to cause death. Neither country is a signatory to the ICCPR and, unlike Ghana, both countries continue to carry out executions.

2.15. A constitutional challenge to the mandatory death penalty for drug trafficking in Singapore failed in 2010. Since then, however, Singapore has introduced a limited restriction to the category of murders for which death remains the mandatory penalty. And in both countries, legislation has been introduced to impose limited restrictions on the mandatory death penalty for drug trafficking, which accounts for most capital sentences and executions in both Singapore and Malaysia.

2.16. The restrictions on the mandatory death penalty for drug trafficking in Singapore raise obvious concerns of principle. This is because as a necessary condition for the exercise of judicial discretion not to impose the death penalty, the prosecution must have certified that the offender provided material assistance to the authorities. In no other common law jurisdiction does the prosecution have the power to tie the judge’s hands in this way and prevent the exercise of discretion in capital cases. But the legislative amendments in both Singapore and Malaysia afford at least a degree of mitigation to the inhumanity of mandatory death sentences that has been rejected in the rest of the common law world.

**The decline of the mandatory death penalty in international law**

2.17. In parallel with the developing national case law outlined above, there is also an emerging consensus that the mandatory death penalty is incompatible with international and regional human rights law.

**The position under the American Declaration and American Convention**

2.18. All the common law jurisdictions in the Caribbean and Central America mentioned in this chapter are members of the Organisation of American States (OAS). As such, they are committed by the OAS Charter to respect the human rights enshrined in the American Declaration of the Rights and Duties of Man, which was adopted in 1948. In 2001, the Inter-American Commission on Human Rights held that the mandatory death penalty violates the right to life, the right to a fair...
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trial and the right to due process under the American Declaration. This was in the case of Edwards & Ors v The Bahamas,\textsuperscript{52} in which the Commission recommended effective remedies including commutation, compensation and legislative amendments.

2.19. The Inter-American jurisprudence on the mandatory death penalty is much more developed under the American Convention on Human Rights, which has been in force since 1978. Unlike the American Declaration, the Convention is binding in international law, although most of the common law countries in the Caribbean and Central America have not ratified it.\textsuperscript{53}

2.20. Article 4(1) of the Convention enshrines the right to life and prohibits arbitrary deprivation of life, and Article 4(2) permits the imposition of the death penalty only ‘for the most serious crimes’. Both the Inter-American Commission and the Inter-American Court of Human Rights apply a narrow and restrictive interpretation of these provisions. The unequivocal position of both bodies is that these provisions preclude the imposition of the mandatory death penalty.

2.21. The Commission has described the mandatory death penalty as ‘inherently antithetical’ to the protections under the American Convention.\textsuperscript{54} For both the Commission and the Court, the concept of ‘the most serious offenses’ cannot extend to all criminal acts falling within the legal definition of murder, even though all murders are undoubtedly very serious offences. The Convention requires a further degree of discrimination within the category of murder, by reference to the individual facts of both the offence and the offender. The Court has held that capital punishment is intended to be applied only in ‘truly exceptional circumstances’, and that:

\textit{The text of Article 4 as a whole reveals a clear tendency to restrict the scope of the death penalty both as far as its imposition and its applicability are concerned. }\textsuperscript{55}

2.22. The Inter-American Commission went further in McKenzie & Ors v Jamaica, when it spoke of a dynamic development in the region towards the restriction and eventual abolition of the death penalty:

\textit{Article 4 of the Convention... should be interpreted as imposing restrictions designed to delimit strictly the scope and application of the death penalty, in order to reduce the application of the penalty to bring about its gradual disappearance. }\textsuperscript{56}

The irrelevance of the prospect of executive clemency

2.23. In its analysis of the mandatory death penalty the Inter-American Commission has found that the existence of a right to seek pardon or commutation, which is an additional right under Article 4(6) of the Convention, does not cure other breaches of the Convention.\textsuperscript{57} This reflects the position adopted in domestic constitutional challenges\textsuperscript{58} and the approach taken by the Human Rights Committee under the ICCPR (see below).

\textsuperscript{52}Case 12.067, Report No. 48/01, OEA/Ser.L./V/II.111, doc. 20 (2000)
\textsuperscript{53}Of the common law Caribbean countries that retain the death penalty, Barbados, Dominica, Grenada and Jamaica have ratified the Convention. Trinidad and Tobago ratified it in 1991 but denounced it in 1998.
\textsuperscript{55}See the Court’s Advisory Opinion: Restrictions on the Death Penalty, OC-3/83, 4 HRLJ 352, paras 54 and 57.
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The position under the International Covenant on Civil and Political Rights

2.24. The developments in the Americas outlined above have been reflected in the jurisprudence of the UN Human Rights Committee (HRC). The HRC provides authoritative interpretations of the ICCPR, which like the American Convention is a source of binding obligations in international law. Nearly all common law countries have acceded to the ICCPR, although as noted above, Singapore and Malaysia are two of the few exceptions.

2.25. Article 6(1) of the ICCPR enshrines the right to life, and like Article 4(2) of the American Convention, Article 6(2) of the ICCPR limits the death penalty to ‘the most serious crimes’. In its General Comment on Article 6 the HRC notes that ‘the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure’. And in its findings (views) on communications submitted by individuals who have been mandatorily sentenced to death, the HRC has consistently held that imposing such a sentence for all offences of a particular category is incompatible with Article 6, for reasons similar to those adopted by the Inter-American Commission and Court. In short, the HRC has found in all of these cases that a system of mandatory capital punishment deprives the offender of the most fundamental of rights, the right to life, without considering whether this most drastic and final form of punishment is appropriate in all the circumstances of the case.

2.26. Like the Inter-American Commission, the HRC has held that the availability of a right to seek pardon or commutation, which is protected as a specific right under Article 6(4) of the ICCPR, is no substitute for the exercise of judicial discretion in the imposition of the death penalty. This reflects para. 7 of General Comment No. 6, which notes that the rights set out in Article 6 of the ICCPR ‘are applicable in addition to the particular right to seek pardon or commutation of the sentence’.

The approach of the African Commission and African Court on People’s and Human’s Rights

2.27. The African Commission has repeatedly encouraged the abolition of the death penalty for all its member states. In Resolutions 42 of 1999 and 136 of 2008 it urged state parties that retained the death penalty to limit its imposition to only the most serious crimes and further invited those countries to consider establishing a moratorium on executions, with a view to abolishing the practice of capital punishment entirely.

2.28. The compatibility of the mandatory death penalty with the African Charter on People’s and Human Rights has not yet been litigated in the African Commission or the African Court on People’s and Human’s Rights, although at the time of writing a case on this issue was pending before the Court.

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58 See, for instance, Murwatu & Mwangi v Republic, Petitions No. 15 & 16 of 2015, where the Supreme Court of Kenya rejected the Attorney General’s argument that the petitioners should rely on the prospect of pardon or remission by executive intervention. The petitioners were entitled to a remedy for the breach of their constitutional rights from the judiciary, not the executive: see paras 101-102 of the judgment.

59 See CCPR General Comment No. 6: Article 6 (Right to Life), HRI/GEN/1/Rev.9 (Vol. 1), p.177, para. 7. The issue is addressed in more detail in a draft superseding General Comment on Article 6, General Comment No. 36 (CCPR/C/GC/R.36/Rev.4), which at the time of writing was pending approval by the HRC.


61 See Thompson v St Vincent and The Grenadines (above), para. 8.2; Kennedy v Trinidad and Tobago (above), para. 7.3.
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2.29. In the light of the challenges brought in other courts and tribunals on this issue, there are obvious questions about the compatibility of the mandatory death penalty with the fundamental rights protected under the African Charter, including Article 4, which enshrines the right to life and prohibits the arbitrary deprivation of life, Article 5, which prohibits inhuman or degrading punishments, and Article 7, which enshrines the right to a fair trial. In *Forum of Conscience v Sierra Leone*, 223/98, the African Commission held that the implementation of a sentence of death imposed after an unfair trial breached the prohibition of arbitrary deprivation of life under Article 4. A similar analysis lends itself to the assessment of whether imposing a mandatory sentence of death is compatible with Articles 4, 5 and 7 of the Charter.

The position under other regional and international instruments

2.30. The Association of Southeast Asian Nations (ASEAN), of which both Malaysia and Singapore are members, set up the ASEAN Intergovernmental Commission on Human Rights in 2009 and universally adopted the ASEAN Human Rights Declaration in 2012. Article 14 of the Declaration prohibits inhuman and degrading punishment, but ASEAN has yet to adopt an express position on the application of the death penalty, or its mandatory application for specific offences.

2.31. In Europe, the death penalty only continues to be used in Belarus, which is not a member of the Council of Europe and is not a party to the European Convention on Human Rights. The death penalty itself is not expressly prohibited under the European Convention, which was drafted more than 60 years ago when the death penalty was not considered to violate international standards. But by 1989, it was clear from the case of *Soering v United Kingdom* 63 that the mandatory imposition of the death penalty would violate the prohibition of inhuman punishment under Article 3 of the Convention. This flows from the exclusion of consideration of the personal circumstances of the offender and the arbitrariness and disproportionality that are implicit in the mandatory death penalty.

2.32. Other than in Belarus, no one has been executed in Europe for many years, and since *Soering* was decided, the member states of the Council of Europe have achieved almost complete abolition of the death penalty in law. They have all signed Protocol No. 6 to the Convention, which recognises that the death penalty has been abolished, and all but Russia have ratified it.

2.33. In 2010, the European Court of Human Rights reiterated in *Al-Saadoon v United Kingdom* that the Convention is ‘a living instrument which must be interpreted in the light of present-day conditions’. The Court also noted the evolution towards the complete abolition of the death penalty in Council of Europe member states. These developments were ‘strongly indicative’ that Article 2 of the Convention, which protects the right to life, had been amended so as to prohibit the death penalty in all circumstances. It followed that Article 2 could no longer be regarded, as it was in *Soering*, as excluding the death penalty from the prohibition of inhuman punishment under Article 3.

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62 Article 11 of the Declaration recognises a qualified right to life, which may be deprived ‘in accordance with law’.

63 (1989) 11 EHRR 439

64 See *Soering*, para. 104.

65 See *Al-Saadoon*, para. 104.

66 See *Al-Saadoon*, para. 104.

67 See *Al-Saadoon*, para. 104.
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Status of international human rights obligations under domestic law

2.34. Most of the countries identified in this chapter have entered into binding international and regional human rights treaties, albeit with limited enforcement capabilities. Common law jurisdictions generally apply a dualist approach to international treaty law. It follows that national courts cannot rely on international law as binding authority for the interpretation of the constitution and other domestic laws. But the rejection of the mandatory death penalty in international law, as reflected in the cases discussed above, has exercised a tangible influence on national courts in their assessment of whether such a penalty is compatible with national constitutions. This is because wherever the interpretation of domestic law is uncertain, a nation’s international treaty obligations provide a legitimate source of persuasive guidance.68 That argument is particularly powerful where the normative standards, such as the right to life or the unequivocal prohibition of inhuman or degrading punishments, feature both in the domestic constitution and in an international human rights treaty to which the country in question has acceded.

2.35. There are many examples of this approach in the common law jurisprudence:

- In *Spence & Hughes v R*,69 the Eastern Caribbean Court of Appeal recognised the experience of other domestic courts, states’ obligations under international law, and the jurisprudence of international human rights bodies, all of which provide a legitimate guide to constitutional interpretation. As Sir Dennis Byron CJ observed:

> ‘[T]his is an area of law where it is important to identify and consider the international legal norms affecting this issue while ensuring that the words of the Constitution are given their full force and meaning.’ 70

Saunders JA (Ag) reinforced the point in the following terms:

> ‘[I]t is for this court and not the Inter-American Court to interpret the Constitutions at hand... But equally, this court should give great weight to the jurisprudence of the Inter-American Court...

> ‘... In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 [of the Constitutions in question, prohibiting inhuman or degrading punishment] imposes upon the State an obligation to conform to certain “irreducible” standards that can be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.’ 71

- In numerous cases the Privy Council has sought to interpret constitutional human rights provisions consistently with international human rights standards, thereby integrating and embedding contemporary international norms into domestic legal systems. In the landmark judgment of *Reyes v R*,72 Lord Bingham observed that when Belize adopted its own constitution

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69 Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia)

70 See para. 9 of the judgment.

71 See paras 213-214 of the judgment.

72 [2002] 2 AC 235
it adopted and gave primacy to the fundamental rights enshrined in the European Convention of Human Rights. By doing so, it cannot have been intended to diminish the rights that the people of Belize had previously been entitled to enjoy:

‘It is open to the people of any country to lay down rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does.’

- In the Ugandan case of *Kigula*, the Supreme Court recognised the importance of the African Charter and the ICCPR as part of the contextual guidance to the interpretation of the Constitution of Uganda.

- In Malawi, where consideration of international law and comparable foreign law jurisprudence is enshrined in the Constitution, the High Court acknowledged in *Kafantayeni* that the provisions of the ICCPR were relevant to the status of the mandatory death penalty under Malawi’s Constitution:

  ‘We accept and recognise that the Covenant forms part of the body of current norms of public international law and in terms of section 11(2) of the Malawi Constitution courts in Malawi are required to have regard to its provisions in interpreting the Constitution.’

- And in Ghana, the dissenting Justice of the Supreme Court in *Johnson* relied in part on the relevant provisions in the ICCPR and the jurisprudence of the Human Rights Committee for his conclusion that the mandatory death penalty was unconstitutional.

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73 *Attorney General v Kigula & Ors* [2009] UGSC 6
74 *Kafantayeni & Ors v Attorney General* [2007] MWHC 1, p.9, 46 ILM 566, p.570. Article 11(2) of the Constitution of Malawi provides: ‘In interpreting the provisions of this Constitution a court of law shall ... (c) where applicable, have regard to current norms of public international law and comparable foreign case law.’
75 *Johnson v Republic* [2011] 2 SCGLR 601: see the judgment of Dr Date-Bah JSC (Presiding). The other Justices of the Supreme Court made no mention in their judgments of Ghana’s obligations under international law.
Chapter 3
The ‘rarest of the rare’ test and other approaches to discretionary capital sentencing
3.1. The evolving consensus towards the abolition of the mandatory death penalty is based on a simple premise: no one should be sentenced to the ultimate and irreversible penalty of death without a meaningful opportunity to put forward mitigation, whether arising from the circumstances of the offence, the offender, or both. While this principle is shared in those jurisdictions with discretionary capital sentencing, its implementation is not. This chapter summarises the three different approaches to discretionary sentencing adopted in those jurisdictions.

- The first approach is a strong presumption in favour of life: capital punishment may only be imposed in the most exceptionally serious cases, the ‘rarest of the rare’ – this is by far the most common approach.
- The second approach involves considering aggravating and mitigating circumstances together, with no express presumption in favour of life or death.
- The third approach involves a presumption in favour of death, which is the mandatory sentence unless there are extenuating circumstances.

3.2. South Africa provides a striking case study of all three approaches evolving in the same country. When the mandatory death penalty was abolished in South Africa in 1935 the relevant legislation introduced an ‘extenuating circumstances’ test (a presumption in favour of death). The legislation was amended again in 1990 to introduce what appeared to be the middle approach, with a weighing of both aggravating and mitigating features. But by 1995, when the Constitutional Court abolished the death penalty altogether, South Africa’s courts had established a very strong presumption in favour of life, reserving the death penalty for the most exceptional cases.

3.3. Each of the three approaches to discretionary capital sentencing is analysed below. We also address the test applied in Singapore, where the courts have developed a specific approach that is unique to that jurisdiction.

The first approach to discretionary capital sentencing: a strong presumption in favour of life (the ‘rarest of the rare’ or ‘worst of the worst’ approach)

The presumption in favour of life

3.4. The first approach to sentencing in discretionary capital cases is that the ultimate penalty of death must be reserved for exceptional cases, the exceptionally serious offences of a particular category or the ‘rarest of the rare’ cases. This approach involves a strong presumption in favour of life. It recognises that execution is the ultimate penalty, which extinguishes the most fundamental constitutional right, the right to life itself, allowing for no corrections of errors or miscarriages of justice.

3.5. The ‘rarest of the rare’ test has been adopted by the judiciary in India, Bangladesh (albeit inconsistently), 77 Belize, throughout the Commonwealth Caribbean (with approval from both

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76 In several cases the High Court Division of the Supreme Court of Bangladesh has endorsed the ‘rarest of the rare’ doctrine as formulated by the Supreme Court of India. See, for example, State v Mir Hosaim alias Mia & Ors, 56 DLR (AD) (2009) 108. The doctrine has also been endorsed by the Appellate Division of the Supreme Court: see State v Anwar Hosaim Pinto, 61 DLR (AD) (2009) 108. But the doctrine has not been applied consistently, and in recent decisions of the Appellate Division of the Supreme Court, the Court has referred to a presumption in favour of death unless there are extenuating circumstances. See, for example, Begum v The State, 4 SCOB [2015] (AD) 25.
Chapter 3: The ‘rarest of the rare’ test and other approaches to discretionary capital sentencing

the Eastern Caribbean Court of Appeal and the Privy Council), and in Uganda and Malawi. It was also applied in South Africa until the death penalty was abolished in 1995.

The appearance and development of the ‘rarest of the rare’ test in India

3.6. The ‘rarest of the rare’ test can be traced to a decision of the Supreme Court of India in 1980, *Bachan Singh v State of Punjab*. The death penalty has long been discretionary for most murders in India, but the absence of sentencing standards led to a series of constitutional challenges. In 1980 the Supreme Court of India sought to redress this problem by finding, in *Bachan Singh*, that the death penalty in discretionary murder cases must be reserved for the ‘rarest of rare cases’. The Court held that the death penalty was compatible with India’s Constitution, but only if it was reserved for the most exceptionally serious offences. In a detailed analysis of constitutional principles, it concluded:

‘A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.’ 80

3.7. Although the Supreme Court identified no specific criteria for the ‘rarest of rare cases’ in *Bachan Singh*, in subsequent cases it has emphasised that the offence must be one that is truly exceptional. As the Court observed in *Santosh Bariyar v State of Maharashtra*:

‘To translate the [Bachan Singh] principle in sentencing terms, firstly, it may be necessary to establish [a] general pool of rare capital cases. Once this general pool is established, a smaller pool of rare cases may have to be established to compare and arrive at a finding of rarest of rare case.’ 81

3.8. Concerns remain, however, about the development of the ‘rarest of the rare’ test in Indian sentencing practice and the extent to which the concept has been understood in public discourse. As the Supreme Court jurisprudence makes clear, the doctrine should not be applied in a way that suggests that the rarity of the offence is the qualifying factor for the death penalty, with death being appropriate simply because the offence is unusually brutal, and is in that sense ‘rare’. As noted in a recent study on judicial perceptions in Indian capital cases:

‘Judges tasked with sentencing are supposed to be presented with a far more comprehensive and nuanced task, which goes far beyond merely determining whether the crime before them is “rare”.’ 82

3.9. Judges should firstly identify and balance aggravating factors (relating to the crime) and mitigating factors (relating to the circumstances of the accused). In doing so, *Bachan Singh* requires the sentencing judge to give a ‘liberal and expansive construction’ to mitigating factors, but not to aggravating factors. As part of the examination of mitigating factors, the state must also show that the accused is beyond the possibility of reformation. The sentencing framework in *Bachan*

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78 (1983) 1 SCR 145
79 The colonial Penal Code introduced in 1860 remains in force, albeit with many amendments. Section 302 provides: ‘Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to a fine.’ Section 303 provides an exception where the offence is committed by a person under sentence of life imprisonment, for which death is stated to be mandatory. But as noted in Chapter 2, the mandatory element of s. 303 was struck down in *Mithu v State of Punjab*. For a fuller account see *The Global Decline of the Mandatory Death Penalty* (fn. 15 above), pp. 36-37.
80 See para. 207 of the judgment.
81 (2009) 6 SCC 498, p.32
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*Singh* then requires judges to impose the death sentence in the ‘rarest of rare’ cases (‘rare’ in the sense of numerical rarity\(^83\)), when the alternative option of life imprisonment is unquestionably foreclosed.

3.10. This more nuanced approach can be seen in a series of Supreme Court decisions, including *Machin Singh v State of Punjab,\(^84\) Ronny v State of Maharashtra,\(^85\) Manohar Lal alias Mannu v State (NCT of Delhi),\(^86\) and Mohammed Chaman v State.\(^87\) As these cases illustrate, the presence of any significant mitigating factor justifies exemption from the death penalty, even in the most gruesome cases. The *Manohar Lal* case provides a particularly clear example of this.

3.11. Despite the guidance provided by the Supreme Court in these cases, the ‘rarest of the rare’ principle has not been applied consistently in India. In 2009 the Supreme Court felt compelled to reiterate that the death penalty was only potentially appropriate in truly exceptional cases of extreme culpability, but that even in such cases the sentence must also reflect the circumstances of the offender. In *Santosh Bariyar v State of Maharashtra,\(^88\) the Court noted that appellate courts had not been consistently considering both aspects, the offence and the offender, and that many death sentence confirmations focused only on the brutality of the offence. But in its more recent decisions, there has been no consistency in the Supreme Court’s practice when considering the prospect of reform as a mitigating factor in capital cases.\(^89\)

3.12. The problem of inconsistency and arbitrariness in Indian capital sentencing practice led to the Indian Law Commission’s recommendation in 2015 that the death penalty should be abolished for all offences other than those involving terrorism.\(^90\) The Law Commission concluded that India’s discretionary system for restricting the imposition of the death penalty was so flawed in practice, with capital sentencing having become a judge-centric phenomenon, that capital punishment was being ‘arbitrarily and freakishly imposed’.\(^91\)

**The approach in South Africa**

3.13. In South Africa, an approach of strict exceptionality developed in the years prior to 1995, when the death penalty was abolished completely in *S v Makwanyane*. As the Constitutional Court observed in that case, referring to the practice in South Africa up to that point:

‘The death sentence has been reserved for the most extreme cases, and the overwhelming majority of convicted murderers are not and, since extenuating circumstances became a relevant factor 60 years ago, have not been sentenced to death in South Africa.’\(^92\)

It had also become a prerequisite to the imposition of the death penalty that the offender had no reasonable prospect of reform: see paragraph 3.17 below.

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\(^{83}\) Ibid., p.54

\(^{84}\) (1983) 3 SCC 470

\(^{85}\) (1996) 4 SCC 148

\(^{86}\) (2000) 2 SCC 92

\(^{87}\) (2000) 2 SCC 28

\(^{88}\) (2009) 6 SCC 498

\(^{89}\) See Matters of Judgment (fn. 81 above), p.71.

\(^{90}\) See Report No. 262, The Death Penalty, Law Commission of India, August 2015, paras 7.1.5, 7.1.5, 7.2.4.


\(^{92}\) [1995] ZACC 3, para. 126
3.14. The ‘rarest of the rare’ approach has been adopted in all the Caribbean jurisdictions in which the mandatory death penalty has been abolished in recent years. A significant early step in this direction was taken by Sir Dennis Byron, Chief Justice of the Eastern Caribbean Court of Appeal, who held in *Spence & Hughes v R*:

> ‘It is only if the offense is of an exceptionally depraved and heinous character and constitutes on account of its design and the manner of its execution a source of grave danger to the society at large the court may impose the death sentence.’

3.15. A similar approach, adopting a very strong presumption in favour of life, was adopted by the Chief Justice of Belize in *R v Reyes*, in which Conteh CJ held that there the discretion in capital sentencing was a discretion *‘in favorem vitae*, for not imposing the death penalty… [I]t is the imposition of the death penalty rather than its non-imposition for murder that requires special justification’.

3.16. The stringency of this approach is further illustrated by cases such as *Trimingham v R*.95 The murder in that case was found to be ‘brutal’, ‘disgusting’ and ‘revolting’, involving the cold-blooded killing by decapitation of an elderly man in the course of a robbery and the mutilation of his body. But the Privy Council held that the offence was not one of the ‘rarest of the rare’ offences of murder. It did not appear to have been planned or premeditated and, although the manner of the killing was gruesome and violent, there was no torture of the deceased, nor was he subjected to prolonged trauma or humiliation prior to his death. And in *White v R*, where the victim was shot repeatedly in the course of a robbery, the Privy Council held that the offence was callous and serious but came ‘nowhere near’ meeting the ‘rarest of the rare’ criteria.

3.17. In addition to restricting the death penalty to the exceptionally serious offences of murder, a further and additional requirement emerged in South African case law: death should only be imposed ‘where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence’.97 The Supreme Court of India acknowledged this separate element as a component of the ‘rarest of the rare’ test in *Santosh Bariyar v State of Maharashtra* (above): the death penalty is a penalty of last resort, and there must be clear evidence that the offender is not fit for any kind of scheme for reform or rehabilitation.98 But in the Court’s more recent decisions there has been no consistency in considering the prospect of reform as a mitigating factor in capital cases: see paragraph 3.11 above.

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93 Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia), para. 33
94 [2003] 2 LRC 688, paras 18, 20
95 [2009] UKPC 25
96 [2010] UKPC 22 para. 16
3.18. The relevance of prospective rehabilitation in this sentencing approach is entrenched in the case law of the common law Caribbean jurisdictions and the Privy Council. In 2009 the Privy Council observed in Trimmingham v R that:

‘Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary…

‘It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, “the worst of the worst” or “the rarest of the rare”

… The second principle is there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled.’

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3.19. The Privy Council returned to this issue in Lockhart v R,100 and in doing so made a compelling argument for the preparation of a psychiatric report in every discretionary capital case. Without one, the sentencing court cannot hope to form a properly informed view on whether there is a reasonable prospect of reform. We return to this point in Chapter 7.101

The relevance of societal context

3.20. In determining whether an offence is the ‘rarest of the rare’, it should be judged in the context of the society within which the offence was committed. The Court of Appeal of Trinidad and Tobago expressed the point as follows:

‘[S]ome attention must be paid to the sensibilities of the particular society or community in which the offence was committed. It is perhaps ironic that, for the purpose of the imposition of the discretionary death penalty, the more depraved and brutish the society, the more heinous the behaviour needed to warrant it. Each set of circumstances must be measured against the experiences and sensibilities of the relevant jurisdiction.’102

In other words, the more violent a society, the less a death sentence will be justified for what might elsewhere be regarded as very serious crimes.

The irrelevance of public opinion

3.21 The common law does not permit judges to subvert their function as arbiters of the law to what they perceive to be the requirements of public opinion. That broad principle is no less relevant in matters of capital sentencing than to any other area of judicial activity. As Justice Powell observed in Furman v Georgia, however one might try to assess ‘the amorphous ebb
and flow’ of public opinion, ‘the assessment of popular opinion is essentially a legislative, not a judicial function’. And in West Virginia State Board of Education and Barnette, the Court noted that:

‘The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’

3.22 These cases were cited by the Constitutional Court of South Africa in its consideration of the constitutionality of the death penalty itself. In S v Makwanyane the Court declared that:

‘This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.’

3.23 In the specific context of discretionary capital sentencing this point has been made in clear and persuasive terms by the Supreme Court of India. In Bachan Singh v State of Punjab the Court explicitly prohibited judges from attempting to determine the demands of public opinion or the ‘collective conscience’ of society as a sentencing consideration in specific capital cases:

‘... Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion...

‘... The perception of “community” standards or ethics may vary from Judge to Judge. In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people.’

The irrelevance of previous convictions

3.24. There is broad agreement that an offender’s previous convictions should not be held against him as a justification for concluding that an offence is the ‘rarest of the rare’, even if the previous convictions are very serious. This is addressed further in the next chapter.

The impact of the ‘rarest of the rare’ test in the Caribbean

3.25. The net result of the emergence of discretionary capital sentencing in the Caribbean is that sentences of death are very rarely imposed. And even when imposed in very serious and gruesome cases, death sentences have been quashed on appeal because the stringent ‘rarest of the rare’ criteria have not been met.
Sentencing in Capital Cases

Adoption of the ‘rarest of the rare’ test in Uganda

3.26. In Uganda, general Sentencing Guidelines (including guidelines for capital cases) were issued by the Chief Justice in April 2013.108 These are the first and, at the time of writing, the only sentencing guidelines in East Africa that specifically address sentencing in capital cases.

3.27. Paragraph 17 of the guidelines confirms that the ‘rarest of the rare’ test applies to all capital sentencing in Uganda:

‘The court may only pass a sentence of death in exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate.’

3.28. Paragraph 18 of the guidelines lists examples of the ‘rarest of the rare’ offences, including:

• Planned or ‘meticulously premeditated and executed’ offences
• Murder of a law enforcement officer during the performance of their functions
• Causing death while committing or attempting to commit rape, robbery or other capital offences
• Offences committed in the furtherance of a common purpose or conspiracy

But the mere fact that an offence falls within the ‘rarest of the rare’ list in para. 18 does not mean that death is the appropriate sentence. If a case does fall within that list, the judge will need to consider whether the circumstances are exceptional and whether ‘the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate’ (para. 17). In doing so they should have regard to the aggravating and mitigating features set out in paragraphs 20-21 of the guidelines.109

3.29. The final stage of the capital sentencing process is to fix a sentence within the guideline sentencing ranges.110 The guideline range for all capital offences in Uganda, including murder, rape, robbery and treason, is the same. The starting point is a determinate sentence of 35 years’ imprisonment and the maximum is death, with life imprisonment implicitly included as a further option.111

3.30. Nothing in the Ugandan guidelines purports to remove judicial discretion in individual cases and, as the Court of Appeal has confirmed, that is not their effect. The guidelines are not binding, and they ‘do not take away the discretion of the court in sentencing a convicted offender. They are simply guidelines’.112

3.31. With these observations in mind, it is clear that the label ‘rarest of the rare’ is used in the Ugandan guidelines differently than it is used by the Privy Council or by the Supreme Court of India. As noted earlier in this chapter, in the Privy Council cases the decision that an offence is the ‘rarest of the rare’ encompasses an assessment of all aggravating and mitigating features, in relation to both the offence and the offender, in order to determine whether the murder is one of the

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109 See paras 19(2) and 24(2) of the Guidelines.
110 See the Third Schedule to the Guidelines.
111 See para. 24(1) of the Guidelines.
112 Nazima v Uganda [2014] UGCA 28, p. 18. The same point was made by the Supreme Court of Kenya when it gave guidance on relevant mitigating features in Maraiteta & Mwangi v Republic, Death Penalty Project & Ors intervening, Petitions No. 15 & 16 of 2015, para. 72: ‘… these guidelines in no way replace judicial discretion. They are advisory and not mandatory’.
worst offences; there is then the separate consideration of whether the offender is beyond hope of reformation (see para. 3.18 above). In India, the decision that the offence is the ‘rarest of the rare’ requires the judge to identify and balance aggravating and mitigating factors, including the obligation (on the state) to show whether the accused is beyond the possibility of reformation and then proceed to determine that the alternative option of life imprisonment is unquestionably foreclosed (see paragraph 3.9 above).

3.32. In Uganda, the assessment of whether an offence is the ‘rarest of the rare’, as described in the Sentencing Guidelines, is merely a starting point for the sentencing process. It focuses exclusively on the circumstances of the offence and ignores the circumstances of the offender. If an offence is aggravated within the terms of paragraph 18 of the guidelines (see para. 3.28 above), or perhaps if there are other reasons to regard the offence as the ‘rarest of the rare’, the judge proceeds to consider any relevant mitigating features and any other aggravating features before reaching a decision on the appropriate sentence.

3.33. On this analysis the Ugandan guidelines do not permit a broad interpretation of the ‘rarest of the rare’ test, and they respect the fundamental proposition that the death penalty should be reserved for the most exceptionally serious cases having regard to all relevant mitigation. This is illustrated by a number of recent decisions, such as Uganda v Twabaze & Julius. In that case, the victim had died a ‘cruel and painful death’ at the hands of the first appellant, who was given a determinate sentence of 30 years’ imprisonment (taking account of five years spent on remand). His co-accused was sentenced to six years’ imprisonment for compassionate reasons.

Adoption of the ‘rarest of the rare’ test in Malawi

3.34. The abolition of the mandatory death penalty in Malawi (as elsewhere) has led to a significant reduction in the number of death sentences imposed in capital cases. Although the ‘rarest of the rare’ approach was not expressly articulated in either Kafantayeni or Twoboy Jacob (in which the Supreme Court of Appeal approved Kafantayeni), it has been explicitly adopted in subsequent cases. In Republic v White the High Court underlined the very restricted circumstances in which a capital sentence might be appropriate:

‘The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again ... The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.’

These comments were made in relation to an offender who was being sentenced for murder for the first time. As will be seen in Chapter 7, the High Court has adopted an even more restrictive...
approach in cases where offenders have been resentenced following the earlier imposition of unconstitutional mandatory sentences of death.

The position in Kenya

3.35 In Kenya, both the Court of Appeal in *Mutiso v Republic*119 and the Supreme Court in *Muruatetu & Mwangi*20 cited the leading common law authorities on the incompatibility of the mandatory death penalty with fundamental rights, as summarised in Chapter 2. Both cases thereby lend implicit approval to the application of the ‘rarest of the rare’ test in Kenya. No doubt the position will be clarified in the sentencing and resentencing processes that will follow from the Supreme Court’s ruling.

Further observations on the ‘rarest of the rare’ approach

3.36. The following further observations can be made on the ‘rarest of the rare’ approach.

3.37. Firstly, with the exception of Singapore, which is addressed further below, the ‘rarest of the rare’ test is the only approach to discretionary capital sentencing to have been adopted in recent years.

3.38. Secondly, this is the only approach that has been developed as a common law principle through authoritative case law and judicial guidelines. The other two approaches summarised in this chapter were created by statute.

3.39. Thirdly, although the broad principle under this approach is shared – that death should be imposed only in exceptional cases for the most serious offences within a particular category of offence – the application of the principle as between jurisdictions and even within the same jurisdiction has not been identical. As noted above (see paragraph 3.8), India has faced particular problems with inconsistent sentencing practices. The potential for inconsistent sentencing obviously underscores the value of adopting sentencing guidelines for discretionary capital cases.

3.40. Fourthly, as one would expect, where the ‘rarest of the rare’ approach has been introduced it has led to a significant reduction in the number of death sentences imposed. The example of Malawi has already been mentioned, and Belize is another case in point. Since the Privy Council’s decision in *Reyes v R*, holding that the mandatory death penalty was inconsistent with Belize’s Constitution, not one sentence of death has been pronounced. Similar effects have been seen elsewhere in the Caribbean.

3.41. Fifthly, and importantly, this approach is the most consistent with principles of international law. In particular, it is consistent with the reservation of the death penalty exclusively for the ‘most serious crimes’ under Article 6 of the ICCPR, Article 4 of the American Convention and the Resolutions of the African Commission. In contrast, the other two approaches considered below do not treat the imposition of death as an exceptional penalty.
Chapter 3: The ‘rarest of the rare’ test and other approaches to discretionary capital sentencing

The second approach to discretionary capital sentencing: aggravating and mitigating circumstances are considered together, with no express presumption in favour of life or death

3.42. In some jurisdictions with discretionary capital sentencing there is no express presumption in favour of either life or death. The broad approach is that the sentence depends on the weighing of both aggravating and mitigating factors. Examples of this approach can be found in the federal criminal justice system of the US, in the individual states of the US that have retained the death penalty, and in Swaziland and Zimbabwe.

The United States of America

3.43. In the US, the procedures and relevant considerations for imposing the death penalty are set out in either federal or state legislation. In Arizona, for example, where the death penalty is imposed only for first degree murder, state legislation addresses both aggravating and mitigating circumstances. The list of aggravating features is exhaustive but the list of mitigating features is not. This follows a ruling of the US Supreme Court that there must be no closed categories of potentially mitigating features in capital cases.

Swaziland

3.44. In Swaziland, legislation continues to mandate the death penalty for murder and treason in the absence of ‘extenuating circumstances’ (the third approach, considered below). But in 2009, the High Court held that the ‘extenuating circumstances’ analysis is obsolete and the court has a discretion to substitute a lesser sentence in every case. This conclusion flowed from section 15(2) of the 2005 Constitution, which unequivocally prohibits mandatory death sentences: ‘The death penalty shall not be mandatory.’ The Court summarised the position by reference to an earlier judgment:

‘Whereas the position before the advent of the Constitution was that where there are no extenuating circumstances in a capital offence, the Court “shall” impose the death penalty, the post-Constitution scenario is that the Court is at large to exercise a discretion, even where there are no extenuating circumstances and decide whether in all the circumstances of the case, both mitigating and aggravating, taken individually and/or cumulatively, it is proper to impose the irreversible supreme penalty.’

Zimbabwe

3.45. Until recently, death was the mandatory sentence for murder in Zimbabwe in the absence of extenuating circumstances. This was changed by section 48(2) of the 2013 Constitution, which envisages a law limiting the death penalty to aggravated murder and underscores the court’s sentencing discretion in all such cases:

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 notas:
< Arizona Revised Statutes §§13-751, 13-752
< Lockett v Ohio, 438 US 586 (1978)
< See s.296(1) of the Criminal Procedure and Evidence Act, 1938.
< R v Dlamini [2009] SZHC 151, para. 39
< See s.47 of the Criminal Law (Codification and Reform) Act and s.337(a) of the Criminal Procedure and Evidence Act, as enacted.
‘48(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and (a) the law must permit the court a discretion whether or not to impose the penalty…’

The remaining provisions in section 48(2) include a complete prohibition on the imposition of the death penalty on women. They also limit its imposition to men aged 21 or above at the time of the offence and aged 70 or lower at the time of sentence.

3.46. The law anticipated in the opening words of section 48(2) is the General Laws Amendment Act, 2016. This amends section 47 of the Criminal Law (Codification and Reform) Act to provide a non-exhaustive list of aggravating features in murder cases. 127 This includes where the offence was committed in the course of certain other offences, such as terrorist acts, sexual assault or robbery, or where the offence was one of a series of murders committed by the offender.

3.47. As in Swaziland, the courts in Zimbabwe have interpreted the Constitution to displace any presumption in favour of death, even in the case of a particularly ‘bad murder’. 128 It is also clear that the presence of aggravating features is a necessary but not sufficient condition for the imposition of a death sentence. This is implicit from the constitutional requirement for sentencing discretion, even where aggravating circumstances are present. It is also consistent with the practice of the High Court prior to the 2016 amendments.

Application of the second approach in practice

3.48. Even without an express presumption in favour of life or death in the relevant statutory provisions, the application of this second approach to discretionary capital sentencing has in practice created a presumption in favour of life.

3.49. In Arizona, for instance, capital sentences are only imposed if two requirements are met. Firstly, at the ‘aggravation phase’ the prosecution must prove the presence of at least one statutory aggravating circumstance, such as where there were multiple victims or the defendant was paid for the killing. The aggravating circumstance must be proved beyond reasonable doubt, and the jurors must be unanimous on which aggravating factor they find to be present.

3.50. Secondly, at the ‘penalty phase’ the jury may impose a death penalty only if they find that ‘there are no mitigating circumstances sufficiently substantial to call for leniency’. Any finding that there are no such circumstances must be unanimous. It is for the defendant to prove the existence of mitigating features, but they must do so by a preponderance of the evidence (a lower standard of proof akin to the balance of probabilities). 129

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128 See, for instance, State v Tsumele [2015] ZWHHC 559. The High Court described the offence in that case as a ‘bad murder’, the offender having murdered his child from an adulterous relationship in order to conceal her existence. The judge nonetheless imposed a sentence of 30 years’ imprisonment rather than death, having weighed the aggravating and mitigating features of the offence. And in State v Malundu [2015] ZWHHC 68, the Court imposed a 10-year sentence for a ‘brutal and callous’ murder, even though the aggravating features ‘far outweighed’ the mitigating features. In part the sentence reflected the offender’s previous good character and the fact that he had spent six years awaiting trial, albeit on bail.
129 Arizona Revised Statutes §§13-751, 13-752. As to burden of proof to be applied when weighing mitigating and aggravating circumstances, see para. 7.39 below.
3.51. The stringency of this approach reflects the US Supreme Court’s observations that a death sentence is ‘an extreme sanction, suitable to the most extreme of crimes’, and that:

‘Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” whose extreme culpability makes them “the most deserving of execution”.’

In other words, although the ‘rarest of the rare’ test is not articulated in any of the relevant state or federal legislation in the US, or in sentencing guidelines or guideline cases, in practice there is a clear presumption in favour of life in US capital sentencing. The very narrow approach to exceptionality adopted by the Privy Council is not mirrored in the practice of the US courts, but the difference is one of degree.

3.52. In Swaziland too, although judges are required to weigh aggravating and mitigating factors, in practice the death penalty is rarely imposed, even where aggravating factors outweigh mitigating ones. Instead the courts have tended to reserve the death sentence for what is described as ‘depraved and evil conduct’. And as noted above, in Zimbabwe the courts have imposed non-capital sentences even where the aggravating features outweighed mitigating features.

The need for clearly and narrowly defined aggravating circumstances

3.53. While mitigating factors are generally unlimited, defining relevant aggravating features can be problematic. If aggravating factors are not defined at all, there is a risk that the death penalty is ‘wantonly and … freakishly imposed’. And if they are defined too broadly virtually all murders will qualify as capital murders, which is incompatible with an approach to capital sentencing that imposes no presumption in favour of death.

3.54. The breadth of definition of aggravating circumstances was a key issue for the US Supreme Court in Gregg v Georgia. In that case the petitioner challenged a statutory provision that made a murder death-eligible if it was found to be ‘outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim’. The petitioner’s complaint was that this description was so broad that it could apply to any offence of murder, and the provision was therefore unconstitutional. The Court rejected that argument. It accepted that all murders involve some form of depravity or aggravated battery, and that the courts must apply sentencing processes that avoid ‘standardless’ discretion; there must be a ‘meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not’. But it found that in practice the statutory language had been narrowed by judicial construction, so this provision in Georgia’s legislation was not inherently unconstitutional.
3.55. Just four years after its ruling in Gregg the US Supreme Court concluded that the practice of the courts in Georgia no longer survived constitutional scrutiny. In *Godfrey v Georgia*,[138] it accepted that the inferior courts were not applying a restrictive interpretation to the ‘vile, horrible or inhuman’ test, and that the death penalty had therefore been imposed in breach of the petitioner’s constitutional right to protection from cruel or unusual punishment. As the Court observed:

‘[I]f a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State’s responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates “standardless [sentencing] discretion”… It must channel the sentencer’s discretion by “clear and objective standards” that provide “specific and detailed guidance”, and that “make rationally reviewable the process for imposing a sentence of death”.’[139]

3.56. The Court also reiterated its dictum in *Furman v Georgia* that capital sentencing regimes must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.[140]

3.57. The Supreme Court’s judgment in *Godfrey* provides a compelling argument that aggravating criteria in capital cases should be narrowly defined. If not, there is an inherent risk of arbitrary and thereby inhuman capital sentencing practices.

**The third approach to discretionary capital sentencing: a presumption in favour of death, which is mandatory unless there are extenuating circumstances**

3.58. The third approach to capital sentencing involves a presumption in favour of death, but this approach has almost disappeared. In those few jurisdictions that retain it, the presumption is imposed by statute and is displaced only if there are ‘extenuating circumstances’. As noted earlier, this was the position in South Africa in the years after the abolition of the mandatory death penalty in 1935. But the test a defendant had to meet was not particularly exacting:

‘[N]o factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused’s moral blameworthiness in committing it, can be ruled out from consideration.’[141]

3.59. Although the ‘extenuating circumstances’ approach has long been displaced in South Africa and more recently in Swaziland and Zimbabwe, it continues to be applied by some of their neighbours, namely Botswana, Lesotho and Zambia, with varying degrees of rigour. In some cases in Botswana and Lesotho, the courts have applied a somewhat less restrictive approach to recognising extenuating circumstances.

3.60. The definition of extenuating circumstances in Botswana, Lesotho and Zambia is drawn from the South African case of *R v Letsolo*,[142] and focuses on the notion of ‘moral blameworthiness’.

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[139] 446 US 422
[140] 408 US 313
[141] *R v Fundakubi*, 1948 (3) SA 810 (AD), 818
[142] 1970 (3) SA 476 (AD)
Chapter 3: The ‘rarest of the rare’ test and other approaches to discretionary capital sentencing

Extenuating circumstances are ‘facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability.’

3.61 In their assessment of ‘moral blameworthiness’ the courts continue to address the three questions set out in *Letsolo*:

(a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);

(b) whether such facts, in their cumulative effect, probably had a bearing on the accused’s state of mind in doing what he did;

(c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.’

3.62. As these questions suggest, the court will look for mitigation in the events and circumstances that drove the offender to commit the offence. Failed defences at trial, which if successful might have reduced murder to manslaughter, may be relevant: provocation, heat of passion or intoxication are obvious examples. Impulsiveness, emotional conflict, a lesser role in the killing, belief in witchcraft and even the defendant’s rage have also been cited as examples of extenuating circumstances. But where this third approach is strictly applied, the court may disregard everything else, including the seriousness of the offence itself, the offender’s previous good character, and anything emerging from events after the offence, such as evidence of remorse or capacity for rehabilitation.

3.63 Traditionally, the burden of proving the existence of extenuating circumstances (on the balance of probabilities) lies with the defendant. The harshness of this approach has been softened to some extent in Botswana and Lesotho but the orthodox approach has continued to apply in Zambia. This is addressed in more detail in Chapter 7.

3.64. Although there has been some softening of the extenuating circumstances doctrine in recent years, its traditional application has profound limitations. Firstly, by disregarding the seriousness of the offence itself, this approach ignores the proposition that the category of murder (for which most capital sentences are imposed) covers a wide range of offences. Some murders are far more serious than others, and this should be reflected in the choice of sentence. As the Privy Council observed in *Reyes v R*: ‘In a crime of this kind [murder by shooting] there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed.’

There is no such broad assessment of all relevant circumstances when the traditional extenuating circumstances test is applied.

3.65. Secondly, this approach ignores the broad range of mitigating features that are regarded as relevant in all other discretionary regimes, as outlined in Chapters 4 and 5, and it rejects the humane and

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143 *Letsolo*, p.476
144 These questions were set out by the African Commission on Human and People’s Rights, with minor amendments, in *Interights & Ors (on behalf of Mariette Bosch) v Botswana* (2003) AHRLR 55, para. 34. Paragraphs 32-35 of the Commission’s decision in that case provide a concise, albeit orthodox summary of the extenuating circumstances test as it applies in Botswana.
146 *Letuka v R* (CA), 1991-96 LLB & LB 346 (Lesotho)
147 See paras 7.4241-7.4342 below.
148 *Reyes v R* [2002] 2 AC 235, paras 11, 44
149 *Reyes*, para. 43
compelling principle that there should be no closed categories of potentially relevant mitigation in capital cases. In these important respects the extenuating circumstances approach, at least in its traditional application, is out of step with capital sentencing in the rest of the common law world.

3.66. Thirdly, this approach creates real difficulties in achieving sentencing consistency. Wide sentencing disparities have emerged, in part because of the absence of sentencing guidelines and the lack of clarity as to what constitutes an extenuating circumstance, and in part because many judges are reluctant to sentence offenders to death by applying a presumption in favour of death.150

3.67. As long as the extenuating circumstances test is set out in legislation the courts are obliged to apply it. But the way they do so is a matter for the courts to decide, because the legislation does not define the scope of extenuating circumstances. The orthodox interpretation of the test described above is a common law construct derived from developments in South Africa in the 1930s.151 South Africa abandoned the extenuating circumstances test nearly 30 years ago, and Zimbabwe and Swaziland have moved on from this approach in the light of more recent constitutional developments. This leaves Botswana, Lesotho and Zambia, where the courts have an opportunity, if not an obligation, to develop the common law to reflect evolving standards of humanity. This may explain why, in some respects, the extenuating circumstances doctrine has been softened in recent years, at least in Botswana and Lesotho. There is plenty of scope for this process to continue to develop along principled lines in all three jurisdictions, whether through appellate court rulings, the adoption of suitable sentencing guidelines, or both.

The approach in Singapore

3.68. Until recently Singapore’s Penal Code imposed a mandatory death sentence for all offences of murder. This changed in 2012, when a discretionary death sentence was introduced for murders where the offender did not intend to cause death.

3.69. The relevant legislation does not prescribe any particular approach to sentencing in these discretionary capital cases, but the position was clarified by the Court of Appeal in *PP v Kho Jabing*.152 In that case the Court held that none of the three approaches considered above was applicable in Singapore. It expressly rejected the ‘rarest of the rare’ test and held that the death penalty should not be restricted to the most extreme and serious cases.153 The Court advanced its own test:

- Death would be appropriate if the offender’s conduct was so serious as to ‘outrage the feelings of the community’
- The assessment of such outrage required consideration of whether the offender had acted in a way that exhibited ‘a blatant disregard for human life’
- In turn, that assessment required consideration of the manner in which the offender acted and the savagery of the attack

151 Novak, op. cit., p.127
152 [2015] SGCA 1
153 See paras 41-43.
3.70. The significance of such factors will vary, and all circumstances must be considered, including the motive and intention of the offender:

‘While the offender’s regard for human life remains at the forefront of the court’s consideration, other factors such as the offender’s age and intelligence could well tilt the balance.’ ¹⁵⁴

3.71. It is too early to say how broadly the courts will apply the new criteria for discretionary capital sentencing in Singapore, although a restrictive approach to their interpretation seems unlikely. The outright rejection of the ‘rarest of the rare’ approach was not lost on the Court in *PP v Garing & Imba*:

‘The Court of Appeal [in *Kho Jabing*] was clearly of the view that the phrase “rarest of the rare” might lead judges at first instance to shove discretionary death penalty into a remote corner of legal material where it may rarely be heard of again. It therefore prefers a description that will admit more than the rare case.’ ¹⁵⁵

But the judge’s comments in that case also underlined the open-ended nature of the ‘outraging the feelings of the community’ test:

‘There is no scientific or mathematical formula that determines what conduct deserves the imposition of the death penalty. Linguistic descriptions can be helpful but can sometimes confuse and mislead. The court has to find the facts, and then decide whether on those facts the conduct of the accused and the circumstances of the case merit the punishment of death.’ ¹⁵⁶

3.72. While there is obvious force in these observations, there remains a need for guided discretion, of one kind or another, if capital sentencing is not to be subjective, arbitrary and inconsistent.

3.73. In India the courts introduced a test that was similar to the ‘outraging the feelings of the community’ test used in Singapore. Cases that caused abhorrence to society or shocked the collective conscience were deemed to qualify as ‘rarest of the rare’ cases meriting the death penalty.¹⁵⁷ Although the Supreme Court of India has rejected the relevance of public opinion to the determination of sentences in capital cases,¹⁵⁸ the courts in India continue to invoke community reactions and public opinion as a basis for imposing the death penalty. In a recent review the Law Commission of India has rejected these ‘amorphous standards’ on the basis that they have contributed to arbitrary capital sentencing. As the Law Commission explained:

‘Judges are likely to substitute their own assumptions, values and predilections in place of the perceptions of society, because even if one were to assume that society has determinate, stable and shared preferences in these matters, judges have no means of determining these preferences.’ ¹⁵⁹

The same principled criticism might be levelled against the approach now emerging in Singapore.

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¹⁵⁴ *Kho Jabing*, para. 51(d)
¹⁵⁵ [2015] SGHC 107, para. 10
¹⁵⁶ Ibid.
¹⁵⁷ *Machhi Singh v State of Punjab* (1983) 3 SCC 470, para. 32
¹⁵⁸ See para 3.23 above.
¹⁵⁹ See Report No. 262, *The Death Penalty*, Law Commission of India, August 2015, para. 5.2.23. See also paras 5.2.17, 5.2.23, 7.1.4.
Conclusions on the three approaches to discretionary capital sentencing

3.74. Our analysis of the three main approaches to discretionary capital sentencing shows a clear global trend away from the imposition of the death penalty, with its use restricted to the most extreme cases where there are no significant mitigating factors. This reflects the growing international emphasis on respect for the right to life and the prohibition of inhuman punishments as fundamental human rights. Even where the courts are required to balance aggravating and mitigating circumstances without a presumption in favour of life or death, or impose death in all capital cases unless there are extenuating circumstances, the imposition of the death penalty in practice is exceptional.

3.75. The ‘rarest of the rare’ test, with its strong presumption in favour of life, is most closely aligned with international human rights treaties, and it is this approach that has been favoured in countries that have abolished the mandatory death penalty in recent years. This approach also fosters consistent sentencing practices, particularly where discretion is guided by sentencing guidelines. But as the problems with capital sentencing in India have demonstrated, no system of discretionary sentencing can avoid entirely the risk of subjectivity, based on the personal predilections of the judges. Nor can it remove the inherent element of arbitrariness when determining which offences fall within the ‘rarest of the rare’ category and which do not. The clear articulation of relevant mitigating and aggravating features cannot remove the risk of subjectivity and arbitrariness, but it provides an important step towards more coherent and consistent sentencing. This is the topic of the next chapter.
Chapter 4
Factors to be considered in discretionary capital sentencing
4.1 Careful evaluation of aggravating and mitigating factors is a crucial part of the sentencing process. Without it, and without examination of the circumstances of both the offence and the offender, judges cannot hope to impose a sentence that fits the crime.

4.2 The importance of investigating aggravating and mitigating circumstances in capital sentencing is particularly acute, for obvious reasons. Life itself is at stake, and the death penalty is as irreversible as it is categorical. So even when resources are scarce, there is an exceptionally strong onus in capital cases to ensure that all relevant sentencing issues are explored and addressed.

4.3 As we saw in the last chapter, the articulation of aggravating and mitigating factors is an explicit part of both the first approach to discretionary capital sentencing (a strong presumption in favour of life, with death reserved for the ‘rarest of the rare’ cases), and of the second (no express presumption either way). In practice it also has an important role in the application of the third approach (a presumption in favour of death).

4.4 In some jurisdictions potential aggravating and mitigating circumstances in capital cases have been addressed in authoritative judgments, guidelines and practice directions. This includes India, Lesotho, Malawi and Uganda. The guidance that these sources provide to sentencing judges is informative for judges elsewhere, and the observations in this chapter are drawn from many of these judgments and guidelines.

4.5 There are two broad elements to the examination of aggravating and mitigating factors. The first involves consideration of the offence-based circumstances, including the way in which the offence was carried out, the consequences and the harm caused by the offence, and the offender’s role in committing it. The second examines the offender-based circumstances, in particular the personal circumstances and characteristics of the offender at the time of the offence and the imposition of sentence. Each of these components is considered below.

4.6 Like the rest of this book, the observations in this chapter focus on sentencing for murder, because murder accounts for most discretionary capital sentences in the common law world.

**The limited range of aggravating circumstances**

4.7 In most common law jurisdictions with discretionary capital sentencing, aggravating circumstances are identified in the decisions of the higher courts and sentencing guidelines. Although there are differences of detail, there is a broad consensus on the features that aggravate an offence of murder. These include such factors as where there was more than one victim, the offender inflicted deliberate suffering, the victim was a police officer killed in the line of duty, or the offence was committed in the course of a robbery or other serious offence. In most cases the aggravating circumstances are self-evident and raise no conceptual difficulties.
4.8. In the US and in a few other jurisdictions such as the Bahamas and Singapore, specific
aggravating factors are identified in state and federal statutes. A common feature of those laws
is that the statutory lists are closed. The prosecution must prove beyond reasonable doubt the
existence of at least one of the aggravating features set out in the legislation. If not, no other
aggravating feature will suffice to make the offence ‘death-eligible’. Moreover, the statutory
aggravating circumstances must be narrowly construed.

No closed lists of mitigating circumstances

4.9. The status of mitigating features is different. In no common law jurisdiction has there been
any attempt to prescribe closed lists of mitigating circumstances for capital sentencing
purposes. On the contrary, there is a firmly established principle that the categories of
mitigating considerations are never closed. Four examples from the common law
jurisprudence illustrate this proposition:

• In Lockett v Ohio the US Supreme Court held that there could be no exhaustive list of
  features that:
  ‘[P]rohibited the sentencer from considering, as a mitigating factor, any aspect of a
defendant’s character or record and any of the circumstances of the offense that the defendant
opposes as a basis for a sentence less than death.’ 167

• In Mithu v State of Punjab, the Supreme Court of India held:

  ‘The gravity of the offence furnishes the guideline for punishment and one cannot determine
how grave the offence is without having regard to the circumstances in which it was
committed, its motivation and its repercussions. The legislature cannot make relevant
circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their
discretion not to impose the death sentence in appropriate cases, compel them to shut their
eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty
of imposing a preordained sentence of death.’ 168

• In R v Makoliia, the High Court of Malawi enumerated a broad range of sentencing
  considerations and emphasised that the list was not closed:

  ‘Needless to say, the list of circumstances, mentioned by counsel, that are aggravating or
mitigating is not exhaustive. I see no reason why other factors such as remorse, lack of clear
motive, childhood deprivation and abuse, good conduct in prison, effect on the victim,…,
likelihood of committing further acts of violence, sense of moral justification and, in
appropriate cases, socioeconomic status, cannot be taken into account’. 169

• And in Muruatetu & Mwangi v Republic, the Supreme Court of Kenya gave guidance
  on potential mitigating features in capital cases. These broadly overlap with those set out in
this chapter and include ‘the possibility of reform and social re-adaptation of the offender’.

165 See para. 4.19 below.
166 See paras 3.53-3.57 above.
168 (1983) 2 SCR 690
169 Sentence Rehearing Cause No. 12 of 2015, p.6. These observations followed a detailed review of the Malawi case law on homicide sentencing
and mitigation generally. A fuller extract from the judgment is provided in para. 4.95 below.
170 Petitions No. 15 & 16 of 2015, paras 64 and 67
Court also confirmed that in addition to the mitigating factors identified in its guidance, the sentencing judge should also consider ‘any other factor that the Court considers relevant.’

4.10. The same open and unrestricted approach applies to the identification of extenuating circumstances, where such circumstances are required to displace a presumption in favour of death. When that assessment is being made, no factor that impacts on the moral blameworthiness of the offender at the time of the offence can be ignored.

**Offence-based circumstances**

4.11. The following factors touching on the offence itself are particularly important:

- The nature and seriousness of the offence
- The offender played a lesser role in the offence
- Lack of premeditation or significant planning
- Partial excuses
- The impact of the offence on victims and the views of the victims on sentence

Each of these is now considered in turn.

**The nature and seriousness of the offence**

4.12. One of the most important considerations in the exercise of capital discretion is the nature and seriousness of the offence, or its type and gravity. There are differences of approach on this issue depending on which of the three tests outlined in the previous chapter is applied.

*Applying the first sentencing approach (the ‘rarest of the rare’ test)*

4.13. When the ‘rarest of the rare’ test is applied in murder cases, it is a necessary precondition for the imposition of the death penalty that the particular offence is an exceptionally grave or heinous example of murder. All murders are grave and heinous, but the death penalty must be reserved for the most exceptionally serious cases of murder. In this sense, the suitability of the death penalty is influenced more by what the offence is not, rather than what it is.

4.14. In *White v R* (Belize) the Privy Council recognised that the offence in that case was callous and serious and the offender had behaved in a ‘revolting fashion’. But there was no element of sadism, torture or humiliation, the case was not comparable with the worst cases involving sadistic killings, and the ‘rarest of the rare’ test was not met.

4.15. In *Machhi Singh v State of Punjab* the Supreme Court of India identified five categories in which the nature of a murder might be so serious and exceptional as to satisfy the ‘rarest of the rare’ test.

- The first category was where the offence was committed ‘in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the
community’. The Court gave examples of where the victim was killed by subjection to inhuman acts of torture, or was dismembered in a fiendish manner.

• The second was where the offence was committed for a motive evincing ‘total depravity and meanness’, such as where an assassin murdered for reward.
• The third was where the offence was aggravated by its socially abhorrent nature, such as bride burning.
• The fourth was where the offence was aggravated by its magnitude and enormity of proportion, such as where many members of the same family were murdered.
• The fifth category was where the offence was aggravated by the status of the victim, such as a person rendered helpless by old age or infirmity. 174

None of this is to suggest that the death penalty will be appropriate if such indicia of seriousness are met, but it might be, depending on the strength of countervailing mitigating features: ‘Before opting for the death penalty the circumstances of the “offender” also require to be taken into consideration along with the circumstances of the “crime”.’ 175

4.16. In Republic v White 176 the High Court of Malawi described the exceptional circumstances that might justify the death penalty as follows:

‘The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and ... [the convict must be] highly likely to offend again ... The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such a human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.’ 177

4.17. In another case from Malawi the Court held that the circumstances would be ‘decrepit and gruesome’ where the victim’s body had been dismembered or mutilated, where there had been torture or sadism prior to the murder, the victim was murdered in furtherance of or escape from another serious felony, or where the victim was particularly vulnerable, such as a child under the age of 12. 178

4.18. Even when the court is confronted with an exceptionally grave or heinous offence the presumption in favour of life continues to operate, and the death penalty can only be imposed where there is no significant mitigation and no reasonable prospect of reform. This principle finds expression in all the jurisdictions in which the ‘rarest of the rare’ approach applies. The position in India has been mentioned above. In Uganda, the sentencing guidelines identify various circumstances that mitigate against a death sentence, such as where death resulted from a single isolated act, there was an element of self-defence or provocation, the offence was committed while the offender was intoxicated, or the defendant played a minor role in the killing. 179 These points are addressed in more detail later in this chapter.

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174 (1983) 3 SCC 413, 431-32. The Court confirmed death sentences for three men who had killed 17 members of a single family over the course of a single evening as they slept in their homes.
176 Criminal Case No. 74 of 2008
177 See p.2.
178 Republic v Bagala, Confirmation Case No. 24 of 2011 (Supreme Court of Appeal)
179 Part IV, para. 21
Applying the second sentencing approach (no express presumption in favour of life or death)

4.19. As for those countries where there is no express presumption in favour of life or death, in some there are closed lists of aggravating circumstances that go to the seriousness of the offence, and at least one such factor must be proved to make the offence ‘death-eligible’. The example of Arizona was given in the last chapter.180 In capital trials in Arizona, the offence is only death-eligible if one of the statutory aggravating factors is proved at the aggravation phase of the sentencing process. The statutory list is exhaustive. If at least one of these factors has been proved the case proceeds to the penalty phase, and the death penalty can only be imposed if ‘there are no mitigating circumstances sufficiently substantial to call for leniency’. So the penalty phase is focused on mitigation only, and to that extent the list of aggravating features is closed, albeit that the list is extensive. But the potential categories of mitigating circumstances are not closed: ‘The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death…’181

4.20 In Zimbabwe, there are now specified statutory aggravating factors that make an offence of murder eligible for the death penalty.182 But the statutory factors in Zimbabwe are not exhaustive, and other common law aggravating factors can be weighed in the balance, in the exercise of the judge’s discretion.

4.21. Other jurisdictions rely on traditional common law aggravating features entirely. An example is the case of State v Mlambo,183 which was heard before the statutory aggravating factors (above) were introduced in Zimbabwe. In that case the aggravating features found to weigh in favour of death were that the killing occurred in the course of a robbery and the defendant had fired shots indiscriminately at members of the public. And in Swaziland the death penalty can only be applied in exceptional cases of ‘depraved and evil conduct’.184

4.22. In all these cases the fact that aggravating features have been established does not create a presumption that the death penalty will be imposed. Mitigating circumstances must always be considered, and if they outweigh the aggravating circumstances, a lesser penalty will be appropriate. The example of Arizona was considered above. In the US federal system, the jury must weigh all the relevant aggravating and mitigating circumstances in order to decide on whether the death penalty is justified.185

Applying the third sentencing approach (presumption in favour of death unless extenuating circumstances are established)

4.23. Where the death penalty is mandatory in the absence of extenuating circumstances, the court need not concern itself with the aggravating features going to the seriousness of the offence. This is because the presence of such features is not a prerequisite for the imposition of the death penalty: all murders are capital offences if extenuating circumstances have not been established. But the absence of aggravating factors can be an extenuating factor in its own right. For example, in Masono

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180 See paras 3.43 and 3.49-3.50 above.
181 Arizona Revised Statutes §13-751G
182 See s.47 of the Criminal Law (Codification and Reform) Act, as amended in 2016.
183 [2015] ZWHHC 351
184 See Simelane v R (2012) SZSC 54, which was a case of serial killing.
185 18 US Code §3593(e)
v State (Botswana),\textsuperscript{186} the Court observed that the absence of premeditation would normally be an extenuating circumstance.

Singapore

4.24. In Singapore, the type and gravity of the offence is particularly important when it comes to non-intentional murders, for which the death penalty is discretionary. As we saw in the last chapter, this is because the primary concern of the court is whether the offender showed ‘a blatant disregard for human life’ such as to ‘outrage the feelings of the community’. The courts’ approach to this relatively new test is addressed in the previous chapter.\textsuperscript{187}

The offender played a lesser role in the offence

4.25. The fact that an offender played a lesser role in a joint enterprise is a mitigating factor in sentencing generally, and usually justifies a distinction in sentencing between the participants. This is no less true in capital sentencing, at least in those jurisdictions where the first two discretionary tests are applied. In those countries a lesser level of participation can, by itself, justify the non-imposition of a death sentence. For example, a ‘minor’ role is a statutory mitigating factor under the United States Code and in various states, including Arizona.\textsuperscript{188} Other examples can be found in St Kitts and Nevis,\textsuperscript{189} Lesotho\textsuperscript{190} and Singapore\textsuperscript{191} (see below).

4.26. This factor does not apply to the third approach to discretionary sentencing (the extenuating circumstances test), at least in its traditional application. Under that test, the only factors that are capable of amounting to extenuating circumstances are those relating to the offender’s state of mind at the time of the offence. The role of the offender as compared with other participants is irrelevant.

4.27. In Singapore the offender’s level of participation may be relevant. Each case turns on its facts. In \textit{PP v Garing & Imba}\textsuperscript{192} the trial judge sentenced Garing, who inflicted the fatal blows on the deceased, to death. But Imba, who played a lesser role in the attack, was sentenced to life imprisonment. His relatively minor role in the offence did not demonstrate such ‘blatant disregard for human life’ to justify the death penalty. The Court of Appeal rejected appeals against both sentences. In Imba’s case he would have been equally culpable, despite his lesser role, if he had been acting in accordance with a preconceived plan to inflict a brutal attack of the kind inflicted on the deceased. But in the absence of such a plan, and given the lesser role played by Imba, there was no reason to disturb the judge’s decision to impose a life sentence.\textsuperscript{193}

Lack of premeditation or significant planning

4.28. In all the tests for the discretionary death penalty the presence of premeditation or any meticulous planning can be an aggravating factor. Conversely, the lack of such premeditation or planning

\textsuperscript{186}2000 (1) BLR 46
\textsuperscript{187}See paragraphs 3.68-3.71 above.
\textsuperscript{188}18 US Code §3592 (a)(3); Arizona Revised Statutes §13-751G(3)
\textsuperscript{189}Mitcham & Ors v DPP, Criminal Appeals No. 10, 11 and 12 of 2002
\textsuperscript{190}Letuka v R, 1991-96 LLB & LB 346
\textsuperscript{191}PP v Garing & Imba [2015] SGHC 107
\textsuperscript{192}PP v Garing & Imba [2015] SGHC 107
\textsuperscript{193}Garing v PP; PP v Imba [2017] SGCA 07, paras 61-62
provides important mitigation or extenuation. Whichever test is applied, lack of premeditation can be sufficient reason of itself to avoid the death penalty. In Masono v State, for example, the Court of Appeal of Botswana held:

‘The crime committed by the appellant was both callous and cruel. It is difficult to understand how anyone, especially someone who, like the appellant is herself a mother, could destroy the life of a defenceless child. However, the crime of murder was not premeditated. The absence of premeditation, as the court itself correctly says, is normally an extenuating circumstance... The appellant should therefore have been convicted of murder with extenuating circumstances.’

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4.29. Similarly, in the case of White v R (Belize) the Privy Council described the offence as ‘callous and serious’ and found that the appellant behaved in a ‘revolting fashion’. But the killing did not appear to have been planned or premeditated, and this was a major reason for the Board’s conclusion that a death sentence was inappropriate.

Partial excuses

4.30. Where the facts of the offence are on the borderline of provocation or duress or other recognised defences, or an element of a defence is present, this may provide significant mitigation. This is so even if the offender did not advance the defence in question at trial, or did so unsuccessfully.

4.31. For example, where there is some evidence of provocation but not enough to reduce an offence of murder to manslaughter, this is firmly established as mitigation warranting a penalty other than death. This, for instance, was the position adopted by the High Court of Grenada in R v Ogilvie, where the offender had been the victim of protracted sexual abuse at the hands of the deceased. In Uladi v Republic the offender was provoked because he believed his victim had tried to steal a window. This was one of several matters that led the Supreme Court of Appeal of Malawi to conclude that a death sentence was inappropriate. And in R v Nelson the High Court of Antigua and Barbuda took into account as a mitigating factor a rejected claim of self-defence. The evidence was insufficient to establish a complete defence, but it was sufficient to justify the imposition of a lesser sentence than death.

4.32. Similarly, where the extenuating circumstances test applies, a borderline case of provocation or self-defence can amount to an extenuating circumstance sufficient to displace the presumption in favour of death.

4.33. The same approach applies to intoxication. Even if the defendant’s intoxication was not so extensive as to negate a necessary element of the mens rea, the fact that the offender had been drinking at the time of the incident may be treated as a mitigating factor or extenuating circumstance.
4.34. Where there is an element of duress or pressure to commit the offence that is ‘unusual or substantial’ but not a defence to the charge, this must be considered as a mitigating feature when determining whether the imposition of a death sentence would be justified under the US Criminal Code. Similar considerations will apply in other jurisdictions.

The impact on victims and the views of the victims on sentence

Victim impact statements

4.35. As a general sentencing principle the impact of an offence on its victims is relevant to the seriousness of the offence. Victim impact statements are sometimes obtained to inform the court’s assessment of the appropriate sentence. They provide victims with an opportunity to explain how they have been affected by the crime, thereby allowing the court to determine the extent of the harm caused.

4.36. On this issue, as with many others, specific considerations apply in capital cases. In most common law jurisdictions the court is usually dealing in capital cases with murder, so the direct victim is deceased. Those close to the victim, typically members of the immediate family, may be given the opportunity to make victim impact statements or family impact statements. But it is in the nature of a murder that the offence will have a profound and distressing impact on family members. So in capital cases, victim impact statements are unlikely to affect the assessment of whether the death penalty would be appropriate. The court may nonetheless seek to give a voice to the victims of capital offences before passing sentence. The scope for considering their impact statements has procedural implications: see paragraph 7.20 below.

The opinions of victims on whether the death penalty should be imposed

4.37. There is an important distinction between a victim’s description of the impact of an offence on the one hand, and the victim’s opinions about an appropriate sentence on the other. As noted above, as a general sentencing principle the impact of an offence, which is a matter of fact on which victims may be invited to give evidence, is potentially relevant to the seriousness of the offence, and so might be a legitimate consideration in determining the appropriate exercise. But with one caveat, a victim’s opinion about the appropriate sentence, and in capital cases their view on whether death should be imposed, is not relevant to sentence. This proceeds from the fundamental proposition that the determination of sentence lies within the exclusive prerogative of the sentencing judge, having regard to all the factual circumstances of the case, not to the opinions of others:

‘The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim. The opinions of the victim or the victim’s close relatives as to what the sentence should be are therefore not relevant, unlike the consequences of the offence on them.’

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201 18 USC §3592 (a)(2)
202 See, for instance, R v Perkins [2013] EWCA Crim 323, Criminal Practice Direction VII Sentencing F: Victim Personal Statements (England & Wales) and Archbold Criminal Pleadings 2018, para. 5-120.
4.38. The same principled approach undoubtedly applies in capital cases. Where a person has suffered a violent death, it is understandable for family members to seek vengeance and even the death of the perpetrator, but that has no bearing on the dispassionate process of criminal sentencing. There is no common law jurisdiction in which sentencers are permitted to consider a family member’s desire for the death penalty to be imposed as a consideration in the capital sentencing exercise.

An exception to the general rule

4.39. The caveat to the preceding observations arises in those rare cases where the victims of a capital offence express the view that the death penalty should not be imposed. In those cases, the overarching importance of considering any significant mitigating factor in capital cases justifies reliance on this circumstance as a reason not to impose a sentence of death. This proposition is supported by a series of decisions by the English Court of Appeal. These are to the effect that while the views of victims are generally irrelevant to the sentencing process, exceptions would be made either where the likely sentence would aggravate the victim’s distress, or where a victim’s forgiveness provided evidence that their suffering was much less than would normally be the case. In capital cases either or both of those considerations may arise if family members invite the court to impose a sentence less than death.

4.40. It follows that in those rare cases where family members of the victim in a capital case urge the court to show mercy, there is a principled basis for the court to adopt the exceptional approach of taking those views into account as a justification for not imposing a sentence of death.

Offender-based circumstances

4.41. There are many potential circumstances pertaining to the offender that may be relevant to the capital sentencing process, whichever of the three sentencing approaches is applied. As noted above, the categories of potential mitigation are not closed, but they may include the following:

- A capacity for reform or rehabilitation
- Mental disorder
- A guilty plea
- Young age
- Remorse
- Previous good character
- Significant delay in the criminal proceedings
- Harsh prison conditions

All but one of these points is addressed in turn in the rest of this chapter. The exception is mental disorder, which raises particularly complex issues and is addressed separately in the next chapter.

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See R v Perks [2001] 1 Cr App R (S) 19 and the cases referred to in Archbold Criminal Pleadings 2018, para. 5-119.
A capacity for reform or rehabilitation

4.42. In most common law jurisdictions an offender’s capacity for reform is a compelling if not decisive argument in favour of imposing a penalty less than death. The general assessment of capacity for reform may include specific consideration of the offender’s previous good character, young age at the time of the offence, a guilty plea, or evidence of remorse – or the sentencer may address those matters as separate mitigating features. Those issues are considered separately in the following sections of this chapter.

The ‘rarest of the rare’ test and the offender’s capacity for reform

4.43. In the application of the ‘rarest of the rare’ test the capacity for reform is not merely an important mitigating feature in assessing the appropriate sentence. Even where the facts of the case are exceptionally serious, the prospect of reform is a compelling argument in its own right in favour of imposing a sentence less than death.

4.44. The importance of rehabilitative potential was underscored by the Constitutional Court of South Africa in *S v Makwanyane*. The Court noted that the practice of the courts in South Africa was to reserve the death penalty for ‘the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence’.

4.45. The emphatic importance of capacity for reform has also been recognised in Malawi, as illustrated by the case of *Republic v William Mkandawire*. The High Court noted the aggravating factors in that case, including the use of a dangerous weapon and the absence of provocation. Its finding that the death penalty was nonetheless inappropriate turned on its conclusion that:

‘[T]he convict is a young man with no previous conviction who has tremendously reformed during his 11 years of incarceration such that there is a high probability of him seamlessly re-integrating into society upon his release …’

Further illustrations of this approach can be found in the case law of the Eastern Caribbean Court of Appeal and the Supreme Court of Belize.

4.46. The Privy Council has mandated that evidence from a mental health professional must be obtained in every capital case for sentencing. The rationale is that a sentencing court would need professional advice, and without expert psychiatric and/or psychological evidence, a judge cannot be expected to reach a properly informed view as to whether the accused has a reasonable prospect of reform (see Chapter 7 below at para. 7.14).
4.47. In India, however, expert evidence is rarely considered by the courts when addressing the individual’s capacity for reform. As noted in Chapter 3, whether the prospect of reform is relevant at all has become unclear as a result of inconsistent sentencing approaches in recent capital cases: see paragraph 3.11 above.

The offender’s capacity for reform when balancing aggravating and mitigating factors

4.48. The capacity for rehabilitation is also a potentially relevant mitigating feature in jurisdictions where mitigating features are weighed against aggravating features. In Arizona, for instance, a death sentence cannot be imposed unless the trier of fact (usually a jury) has unanimously concluded that the death penalty is appropriate, and it must not do so unless there are ‘no mitigating circumstances sufficiently substantial to call for leniency’. So positive evidence of capacity for reform may justify the imposition of a sentence less than death, by itself or when considered with other features of the case.

Capacity for reform and the extenuating circumstances test

4.49. The position in jurisdictions applying the extenuating circumstances test is different. Where that test is applied in its traditional and orthodox form, the court is only concerned with the offender’s state of mind at the time of the offence. So strictly speaking, capacity for reform or rehabilitation at the date of sentence cannot amount to an extenuating circumstance (see paragraph 3.62 above). But the prospect of rehabilitation may be implicitly relevant in other ways. For instance, an offender who was intoxicated at the time of the offence might be more responsive to reform than someone who acted in cold blood or for gain. Intoxication is considered as a separate factor above (see paragraph 4.33).

Previous convictions, continuing dangerousness and the risk of re-offending

4.50. For most sentencing purposes an offender’s previous good character or criminal convictions will operate as a mitigating or aggravating feature, respectively, at the sentencing stage. Specific considerations apply in death penalty cases.

Good character applying the ‘rarest of the rare’ test

4.51. Where the court is applying the ‘rarest of the rare’ test, a lack of previous convictions is almost invariably a definitive basis for imposing a sentence other than death. This is because a person whose offence was committed against a background of previous good character is likely to have a significant prospect of rehabilitation.

4.52. There are numerous cases in which the lack of prior offending contributed to the non-imposition of a death sentence. In the Reyes resentencing case in Belize, for example, the Chief Justice found that the offender’s good character and capacity for reform provided compelling reasons for not

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Arizona Revised Statutes §§13-752H, 13-751E
imposing the death penalty, even though the offence was a double murder by shooting. The Chief Justice observed:

‘[F]rom the testimony of the various witnesses I have summarized earlier, there would appear to be present in the prisoner’s favour, additional extenuating circumstances to justify this Court not to impose the death penalty. There is evidence of the prisoner’s good character; his good standing in his community and reputation for help and kindness and an exemplary family man; his profound remorse and absence of future dangerousness. All these impel me to believe that the shooting by the prisoner was quite out of character.’

Bad character applying the ‘rarest of the rare’ test

4.53. An offender’s bad character is almost invariably irrelevant when applying the ‘rarest of the rare’ test. This is for the reasons identified by the Court of Appeal of St Vincent and the Grenadines in *Trimingham v R*:

‘It has to be fundamental that a person cannot be sentenced to death for anything other than the offence for which he has been convicted and for which he is before the court for sentencing. Therefore, the “awful” character of the appellant should not have operated against the appellant to assist the case for the death penalty. In considering the imposition of the death penalty the character and record of the appellant can only work in his favour, if good, and cannot work against him if bad.’

This statement of principle was approved by the Privy Council in the same case and applied by the Court of Appeal of Jamaica in *Dougal v R*.

4.54. In *White v R* the Privy Council reiterated the ‘apparently absolute prohibition on taking into account against the offender his bad character and any other relevant circumstances that may weigh against him’, but added an exceptional caveat to the prohibition:

‘There may be cases where an offender’s previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity. An example might be where the index offence is the latest in a series of sadistic murders.’

4.55. The exceptionality of this caveat was confirmed by the Court of Appeal of Jamaica in *Dougal v R*:

‘The actual example given by the Board in White (“...where the index offence is the latest in a series of sadistic murders”), serves... to emphasise the highly exceptional nature of the cases that might fall within this category.’

4.56. There may even be cases where bad character provides an indication of relevant mitigation. An offender’s bad character or reputation may have its roots in a troubled and disadvantaged start in life, and conceal grounds for mitigation. In the notorious St Kitts case of ‘Mr Shit’ (David

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212 *R v Reyes [2003] 2 LRC 688, para. 34
213 *Criminal Appeal No. 32 of 2004, para. 30
216 [2010] UKPC 22
217 See para. 14 of the judgment.
218 [2011] JMCA 13, para. 108
Wilson) in 1998, the offender might not perhaps have been hanged if he had benefitted from a discretionary sentencing exercise and a social inquiry report. Wilson had acquired his unfortunate nickname at the orphanage where he was brought up, because he had been found as a baby in a latrine, where he had been abandoned by his mother. If the court in that case had exercised a discretion on sentence, it might have concluded that the neglect and cruelty that the offender had suffered from the very outset of his life gave rise to significant mitigation, and it might have imposed a sentence less than death.219

**Evidence of continuing dangerousness applying the ‘rarest of the rare’ test**

4.57 There are some capital cases in which the court is presented with positive evidence of the offender’s continuing dangerousness and a high risk of re-offending. This might be because the offender has a very bad history of previous serious offences (see above), or the risk might be identified by a psychiatrist or other expert. Far from offering the hope of rehabilitation, the evidence may suggest that the offender poses a serious continuing danger to the public.

4.58. On the face of it, such evidence might seem to be an aggravating feature weighing in favour of the death penalty in a discretionary sentencing process. But the weakness of that argument can be seen in cases such as *Trimmingham v R*.220 In that case the Court of Appeal of St Vincent and the Grenadines acknowledged the importance of public protection as a sentencing objective. But in capital cases the need for public protection does not justify the imposition of the death penalty, because the objective can be met by other means – by lengthy incarceration rather than execution. As the Court observed, ‘Imposing a sentence of life imprisonment can attain the objectives of keeping the appellant out of society entirely.’221 Moreover, evidence of continuing dangerousness does not necessarily nullify a capacity for reform. In time, rehabilitative programmes may reduce an offender’s future threat to the public.

**Weight of past character in the balance of aggravating and mitigating factors**

4.59. Where the second approach to discretionary capital sentencing is applied, previous convictions may be relevant if they are specified to be an aggravating factor in the relevant legislation. For example, an offence is ‘death-eligible’ under US federal law if the defendant ‘has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute’.222

4.60. The position is not the same in all the relevant jurisdictions. In Zimbabwe, for instance, previous convictions are not a statutory aggravating feature in capital cases.223

4.61. As for good character, a lack of previous convictions is highly relevant under this sentencing regime, and is expressly underlined in the relevant legislation.224
Chapter 4: Factors to be considered in discretionary capital sentencing

Continuing dangerousness in the balance of aggravating and mitigating factors

4.62. In nearly all jurisdictions where mitigating factors are weighed against aggravating factors, evidence of the offender’s continuing dangerousness is not regarded as a factor weighing in favour of a death sentence. This has not been identified as an aggravating feature in Zimbabwe or Swaziland, and in the US, only two of the 32 states retaining the death penalty (Texas and Oregon\(^{225}\)) allow an offender’s continuing threat to society to play a role in capital sentencing. None of the other states allow any evidence on this issue.

Previous convictions applying the ‘extenuating circumstances’ test

4.63. Previous character, good or bad, may be regarded as irrelevant where the ‘extenuating circumstances’ test is applied. This is because previous character would not normally be treated as falling within the category of ‘facts bearing on the commission of the crime’ that reduce the offender’s moral blameworthiness.\(^{226}\) But as we have seen, some flexibility has emerged in the application of this sentencing approach in practice. If the offender is of previous good character, a sentencing judge may be more amenable to concluding that there are circumstances pertaining to the commission of the crime that justify a sentence less than death.\(^{227}\)

The offender’s age

4.64. The young age of an adult offender at the time of committing the offence is an important consideration in all three of the discretionary sentencing regimes. This is not least because younger offenders are understood to show greater levels of impulsivity and lack of self-control, which reduces their overall blameworthiness, but also because younger offenders show a greater capacity for change as they mature. In Uganda v Gale,\(^{228}\) for example, the defendant was convicted of five murders and the prosecution called for the death penalty. But the Court sentenced the offender to life imprisonment rather than death, largely because of his young age and lack of prior offending.

4.65. In the US, in some death penalty states the defendant’s age is a statutory mitigating factor that the jury must consider when they consider whether leniency is justified.\(^{229}\)

4.66. The fact that an offender is particularly old may also be relevant to sentence, having regard to the potentially harsher effect that punishment may have on older prisoners.\(^{230}\)

Guilty plea

4.67. A plea of guilty has been long recognised as justifying a substantial reduction of sentence for all non-capital offences. If the principle that a guilty plea should attract a substantial discount is applied to capital cases, then this should clearly be a ground for not imposing the death penalty, even where it would otherwise be regarded as merited by the sentencing judge.

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\(^{225}\)See Texas Code of Criminal Procedure §37.071(2)(b)(1) and Oregon Revised Statutes §163.150(1)(b)(B).
\(^{226}\)See para. 3.60 above and Kelaletswe v State, 1995 BLR 100 (Botswana).
\(^{227}\)See para. 3.67 above.
\(^{228}\)[2014] UGHCCRD 31
\(^{229}\)See, for instance, Arizona Revised Statutes §13-751G(5).
\(^{230}\)See the extract from R v Makolija in para. 4.95 below.
4.68. In the US, where plea bargains are common, the prosecution may agree not to seek the death penalty in return for a guilty plea. But outside the US, guilty pleas to murder are extremely unusual. A rare example was Nicholas & Ors v State of Trinidad and Tobago. In that case the Court of Appeal was considering appropriate sentences where the offenders had pleaded guilty to felony murder. In Trinidad and Tobago, the death penalty for felony murder (unlike murder simpliciter) is discretionary. The Court of Appeal recognised that in such cases, if the offender pleaded guilty it was all but certain that a sentence less than death would be appropriate:

‘Consideration of the imposition of the death penalty ought to be reserved for cases in which there has been a finding of guilt and the circumstances are especially egregious and a flagrant assault on the sensibilities of all right thinking persons in the society. This is not to deny the discretion of a judge to impose such a sentence in a case in which there has been a plea of guilty, but that would apply only in the most egregious circumstances.’

4.69. The possibility of a guilty plea in capital cases may raise difficult questions for defence advocates. Ordinarily an advocate is likely to raise the prospect of a guilty plea in cases where the evidence against the offender is strong. But in a discretionary capital case, advocates will need to proceed with caution, particularly if the risk of a death sentence is significant because there are serious aggravating features and few if any mitigating features. In such cases, before discussing the possibility of a guilty plea with the defendant the advocate will need to seek a clear indication from the judge, and ascertain whether a guilty plea will be treated as a ground for not imposing the death penalty.

Remorse

4.70. The presence of remorse is undoubtedly an important mitigating factor, whether in its own right or as an indication that the offender has a capacity for reform and rehabilitation (see above). Remorse played a significant mitigating role in cases such as R v Reyes (Belize), Uganda v Bwenge, and Losike v Uganda.

4.71. The absence of remorse is not generally regarded as an aggravating feature in capital cases. This is because inflicting a more severe punishment on an offender who has failed to express remorse at the end of his trial would undermine the substance of the right to appeal. An authoritative statement of principle to that effect can be found in Mattaka and Ors v Republic, where the East Africa Court of Appeal held:

‘A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent as a matter of fact or law, and that belief may be upheld by an appellate court. If, however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency.’

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[231] Criminal Appeals No. 1-6 of 2013
[232] See para. 11 of the judgment.
[233] [2003] 2 LRC 688. See the Chief Justice’s sentencing comments set out in para. 7.12 below.
[235] Criminal Appeal No. 22 of 2005
[236] [1971] EA 495, 512
4.72. This passage from Mattaka was relied on more recently by the Supreme Court of Uganda, in Busiku Thomas v Uganda. In that case, as in Mattaka, the Court’s conclusions on the significance of remorse were made in the specific context of capital sentencing, although they were of more general application. The Court’s conclusion was unequivocal: ‘Absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial court should impose.’ This accords with the Ugandan Sentencing Guidelines, in which the presence of remorse is identified as a mitigating factor but its absence is not identified as an aggravating factor.

4.73. There have been some exceptions to this approach in the case law. In the ‘Cathedral Killings’ case in St Lucia, the absence of remorse was held to be one of several factors that made the offence ‘one of the worst cases of murder’ justifying the death penalty. But this was an unusual exception to the general rule, and there are no examples in the case law of the absence of remorse tipping the balance, by itself, between the death penalty and a lesser sentence.

**Delay in the criminal proceedings**

**The link between delay and sentence generally**

4.74. There is a broad consensus that significant delay in the criminal trial or appellate process should lead to a reduction of sentence. This flows from the right to a hearing (including any appeal process) within a reasonable time, a right that is recognised across the common law and is often enshrined as an explicit constitutional principle. Where that right has been violated the offender should be afforded a remedy. In relatively minor cases the payment of compensation might suffice, but in capital cases the only appropriate remedy is a reduction of sentence, and that can only mean that the death penalty is not imposed.

4.75. The link in criminal proceedings between delay and sentence has long been recognised. In Attorney General’s Reference (No 2 of 2001) the House of Lords held:

> ‘If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant.’

4.76. In Dyer v Watson & Anr, the Privy Council noted that in the practice of the European Court of Human Rights:

> ‘[U]nreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused’s Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in sentence.’
4.77. The application of this approach as a common law principle was more recently confirmed by the Privy Council in *Tapper v Director of Public Prosecutions (Jamaica)*.

4.78. In principle, once the court has a discretion on sentence, delay will always be a relevant mitigating factor. Most of these cases involve pre-trial delay, but the issue also arises where there has been significant post-trial delay. This includes cases that have been sent back for resentencing by a superior court, which is an issue addressed in more detail in Chapter 6.

**The link between delay and sentence in capital cases**

4.79. There is a long-established link between delay in capital proceedings and the imposition or re-imposition of sentence. This proposition sometimes arises in relation to pre-trial delays, but the case law is much more developed in relation to delays in the appellate process and other aspects of post-trial delay in capital cases.

4.80. So far as pre-trial delay is concerned, the courts have not identified a fixed period of delay beyond which a death sentence cannot lawfully be imposed. Much will depend on the reasons for the delay. If a case cannot proceed because an offender has absconded the delay is unlikely to have an impact on sentence, but pre-trial delays attributable to the prosecution or the judicial system may well be relevant, either in their own right or taken in consideration with other mitigating features. In *Hilaire & Ors v Trinidad & Tobago* the applicants argued that unjustified pre-trial delays spent in appalling prison conditions, and taken in conjunction with significant post-trial delays, violated the right to a trial within a reasonable time under Article 8(1) of the Inter-American Convention on Human Rights. The Inter-American Court of Human Rights held that the delay in these cases was one of the grounds for directing that the death penalty should be commuted.

4.81. Delays occurring after the completion of a trial, including the imposition of sentence, may also be relevant. The issue may arise where there has been a long delay in the subsequent appeal process, where there is a delay pending a decision on the exercise of the prerogative of mercy, or where the offender is being resentenced following the previous imposition of an unlawful mandatory death sentence.

4.82. As for delays in the appeal process, the leading case in the common law jurisprudence is *Pratt & Anr v Attorney General of Jamaica*. In that case the Privy Council effectively imposed a five-year limit between the imposition of a capital sentence and its execution. Any longer period facing the anguish of death row would render the execution of sentence inhuman or degrading, and therefore unconstitutional:

‘To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment.’

4.83. The Privy Council rejected the government’s argument that the delays in that case could be overlooked because they had been caused in part by the appellants exercising their right of

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244 [2012] 1 WLR 2712, para. 12
245 IACHR Series C No. 9, IHRL, 1477
246 [1994] 2 AC 1, p.35G. See also Mejia & Guevara v Attorney General of Belize and the Indian authorities referred to therein.
247 See p 33E.
individual petition to international tribunals, because that right was protected by Jamaica’s accession to international treaties and the appellants’ applications could not be characterised as frivolous.248

4.84. In some of its earlier cases the Supreme Court of India sought to qualify this principle by suggesting that the gravity of a particular offence could weigh against a finding that protracted delay on death row justified commutation. Those indications were firmly rebuffed in Shatrughan Chaughan & Anr v Union of India, in which the Court observed that for these purposes, “[c]onsiderations such as the gravity of the crime, extraordinary cruelty involved therein or some horrible consequences for society caused by the offence are not relevant”.249

4.85. In Pratt, the Privy Council indicated that the entire domestic appeal process, including any appeal to the Privy Council itself, should be completed within two years to ensure compliance with the prohibition of inhuman punishment.250 Similar conclusions have been reached in other cases in the Eastern Caribbean and the Caribbean Court of Justice.251

4.86. The issue of delay on death row featured prominently in the Ugandan challenge to the mandatory death penalty, Kigula & Ors v Attorney General.252 In that case, the Constitutional Court adopted a different analysis from the test applied in Pratt, and its approach was approved by the Supreme Court.253 The test for delay in capital cases in Uganda is whether a period of three years has passed, but time runs from the confirmation of sentence by the Supreme Court, not the imposition of sentence by the trial judge. If, at the expiry of three years from confirmation of sentence, no decision has been made on exercising the prerogative of mercy, the death sentence is deemed to be commuted to life without remission.

4.87. Separate considerations apply where a case is remitted for resentencing because the offender was given a mandatory and therefore unconstitutional sentence. Those cases are likely to involve significant delay in any event, but the offender has a separate and powerful argument for the imposition of a non-capital sentence. This is because he has been unlawfully held on death row, facing the anguish of execution, based on an unconstitutional and therefore unlawful sentence. The particular position of offenders facing resentencing in capital cases is addressed further in Chapter 7.

Prison conditions

4.88. The conditions in which an individual has been detained both before and after trial may be relevant to sentence.

4.89. In Hilaire v Trinidad & Tobago the Inter-American Court held that the applicants had been held in ‘grossly overpopulated and unhygienic’ prison conditions, both before and after trial. The lack of sufficient ventilation, natural light, nutrition, medical services and recreation meant that the applicants had endured ‘circumstances that impinge on their physical and psychological integrity’.

248See pp.29H, 33D.
249(2014) 3 SCC 1, para. 57
250[1994] 2 AC 1, p.34F
251See Moise v R, Criminal Appeal No. 8 of 2003, Eastern Caribbean Court of Appeal (St Lucia) and AG & Ors v Joseph & Boyce, Appeal No. CV 2 of 2005, Caribbean Court of Justice.
252Kigula & Ors v Attorney General, Constitutional Petition No. 6 of 2003, p.131
253Attorney General v Kigula & Ors [2009] UGSC 6, p.63
amounting to cruel, inhuman and degrading treatment.\(^\text{254}\) This was one of the grounds for the Court’s direction that the applicants should not be executed.

\[4.90\] In *Thomas v Baptiste\(^\text{255}\)* the Privy Council held by a majority that keeping condemned men in ‘appalling’ conditions, which unlawfully breached the Prison Rules, did not by itself provide a basis for commutation of an existing death sentence:

‘Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the applicants’ constitutional rights, commutation of the sentence would not be the appropriate remedy.’ \(^\text{256}\)

\[4.91\] But the Board recognised that it was a matter of degree, and the position would have been different if the prisoners’ mistreatment had been more extreme:

‘It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: “Enough is enough”. A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this.’ \(^\text{257}\)

\[4.92\] The approach adopted by the majority of the Board in *Thomas* would not bind a court at the sentencing stage on the exercise of capital sentencing discretion. That is because in *Thomas*, the Board was considering whether a sentence of death should be set aside as a remedy for post-conviction constitutional breaches (including attempted execution while international applications were pending, delay and prison conditions) – and underpinning the judgment was the fact that the sentence of death was lawful when passed.

\[4.93\] The question for a court sentencing at first instance is wholly different. It is not asking itself whether the prison conditions endured are so appalling as to justify setting aside an otherwise justified and lawful sentence of death. It is asking itself whether the case before it falls into the category of the ‘rarest of the rare’, such that the penalty of death may be imposed. The fact that the offender has endured appalling prison conditions is a mitigating factor weighing against the imposition of a death sentence, even if other aggravating factors might place the case into the ‘rarest of the rare’ category.

\[4.94\] The issue of prison conditions may be particularly relevant when considered cumulatively with other mitigating features, including any significant delay in bringing the defendant to trial or in hearing his appeal. That was the position in *Hilaire v Trinidad & Tobago*, above.

**The sentencing considerations set out by the High Court of Malawi in *Makolija***

\[4.95\] Finally in this chapter, it may be helpful to provide the summary of sentencing considerations set out by the High Court of Malawi in the case of *R v Makolija*.\(^\text{258}\) In the absence of equivalent

\[^{\text{254}}\text{See paras 84(m) and 169.}\]
\[^{\text{255}}\text{[2000] 2 AC 1.}\]
\[^{\text{256}}\text{[2000] 2 AC 1, 28A.}\]
\[^{\text{257}}\text{See p.28D. In his dissenting judgment, Lord Steyn held that: “Given that Thomas was subjected to such inhuman treatment over a prolonged period the only effective redress is now to quash the sentence of death.” (p.39A).}\]
\[^{\text{258}}\text{Sentence Rehearing Cause No. 12 of 2015.}\]
guidance from the Supreme Court of Appeal of Malawi, these concise and authoritative dicta of Kenyatta Nyirenda J were relied on in many of the sentence rehearings held in 2015-2017. They continue to serve as a concise distillation of the key common law principles for discretionary capital sentencing:

‘Counsel for both sides were agreed on the general principles that should apply where a person has been convicted of murder. Firstly, the maximum punishment must be reserved for the worst of offenders in the worst of cases...

‘Secondly, Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. The law generally favours relatively young or old people to protect them from being in custody for longer periods...

‘Thirdly, Courts will always be slow at imposing long prison terms for first offenders. The rationale being that it is important that first offenders avoid contact with hardened criminals who can negatively affect the process of reform for first offenders...

‘Fourthly, Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict’s arrest thus factoring in the time already spent in the prison...

‘Fifthly, Courts have also to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict’s individual circumstances at the time of committing the offence and at the time of sentencing, that is, their ‘mental or emotional disturbance’, health, hardships, etc...

‘Sixthly, the Court may take into account the manner in which the offence was committed, that is, whether or not (a) the crime was planned, rather than impulsive, (b) an offensive weapon was used or not, (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence: ...

‘Seventhly, duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.

‘Needless to say, the list of circumstances, mentioned by counsel, that are aggravating or mitigating is not exhaustive. For example, I see no reason why other factors such as remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim ..., likelihood of committing further acts of violence, sense of moral justification and, in appropriate cases, socioeconomic status, cannot be taken into account.’ 259

Conclusions

4.96. As will be clear, the potential issues calling for consideration in the discretionary capital sentencing exercise are wide-ranging. All parties to the proceedings will need to apply a critical and probing approach to identifying which of these issues is relevant on the facts of a particular case. Once the

259 See pp.4-6 of the judgment.
potential issues are clear, a separate process will be needed to gather appropriate evidence to assist the judge, including a social inquiry report, evidence on the offender’s character and a psychiatric report. This means that apart from the general sentencing principles addressed above, there will be specific procedural and evidential issues at the sentencing stage in discretionary capital cases. These are addressed below in Chapter 7.

4.97. We first turn to some specific issues relating to mental disorder as a specific consideration at the sentencing stage.
Chapter 5
Mental disorder as a consideration in discretionary capital sentencing
Sentencing in Capital Cases

Introduction

5.1. Of all the factors affecting discretionary capital sentencing, mental disorder is probably the most neglected and misunderstood. There are many potential pitfalls. The first is a lack of knowledge and exposure to the issue. Although the science and learning around mental disorder is well-developed, most lawyers, prosecutors and judges are relatively unfamiliar with the subject. Most have no training in identifying mental disorder, no expertise on the causes and manifestations of mental disorder and little understanding of the impact of mental disorder on an individual’s behaviour.

5.2. The second potential pitfall is scepticism. Claims of mental disorder in criminal cases are sometimes treated with a degree of suspicion. In this respect lawyers and judges may reflect a more widely held belief that mental disorder is sometimes invoked as a spurious excuse for committing serious offences. The error in that approach was noted by the High Court of Malawi in *R v Langanyiwa*. In that case the Court noted the findings of a neuropsychiatrist that the offender suffered from a particular cognitive disorder, was of sub-average intelligence and was easily led and manipulated by others. The judge then observed:

‘We should take heed of doctors’ advice all the time unlike the way we have overlooked them in the past, otherwise we miss something vital in our administration of justice at the crucial time of sentencing.’

The judge went on to note that the offender was not a habitual criminal and deserved to be treated with compassion, even though his offence was committed as part of a group and ‘in very gruesome circumstances’.

5.3. The third potential pitfall is a lack of resources, in terms of both funding and personnel. This problem is particularly acute in poorer countries, but it is a pervasive feature in all common law systems. Even where lawyers and judges are sensitised to mental health issues and forensic psychiatry, this may count for little if they are unable to obtain an appropriate expert report. This may be because funding is not available to pay for an expert’s fees, a suitable expert cannot be found (forensic psychiatrists are often in short supply) or both. But in any jurisdiction where the state has chosen to retain the death penalty, it is incumbent on the state to provide the resources necessary to ensure a fair and properly informed sentencing assessment.

5.4. In this book we refer to ‘mental disorder’ as a convenient generic expression to cover both mental handicap (formerly known to the law as ‘idiocy’) and mental illness (formerly known as ‘lunacy’).

5.5. Mental disorder is different from the other potentially mitigating factors in one important respect. Whichever approach to capital sentencing is applied, the presence of mental disorder will mean that even if the death penalty was lawfully imposed at the sentencing stage, it cannot be lawfully carried out. This distinction was particularly acute in a recent decision by the Privy Council (*Pitman & Anr v State of Trinidad & Tobago*), which is addressed in more detail below.
Chapter 5: Mental disorder as a consideration in discretionary capital sentencing

The Handbook of Forensic Psychiatric Practice in Capital Cases

5.6. The following observations address the key legal principles on mental disorder in capital cases. A more detailed guide to forensic psychiatry and its relevance and application in capital cases can be found in the latest edition of the Handbook of Forensic Psychiatric Practice in Capital Cases and the accompanying Casebook. These are both companion resources for use with the present book.

The potential relevance of mental disorder at different stages of the criminal process

5.7. The general principle is that the presence of mental disorder may operate at any stage of a capital case as a bar to trial or conviction, the imposition of a death sentence or the carrying out of a death sentence.

- Before or during a trial, mental disorder may preclude a conviction if the disorder is so severe as to amount to a defence of insanity under the M’Naghten rules or their equivalent.
- Mental disorder may also prevent a trial from proceeding if the accused is not fit to enter a plea or to stand trial.
- If it satisfies the tests for diminished responsibility, provocation or loss of control, mental disorder may operate as a partial defence to murder, resulting in a conviction for manslaughter.
- If an offender has been convicted of a capital offence, mental disorder should operate as a mitigating factor at the sentencing stage. If demonstrably present at the time of the offence or of sentence, it should bar the imposition of the death penalty.
- If a capital sentence has already been imposed, mental disorder is also relevant at the mercy stage (in an application for clemency or its equivalent), where the disorder is shown to have been present at the time of the offence or when the application for clemency is considered.
- Finally, even if a capital sentence has survived all the previous stages, mental disorder should operate as an independent bar to execution, as a matter of common law and constitutional principle, if it is present at the time of proposed execution. This applies even if the disorder was not present before.

5.8. In this book we focus on the significance of mental disorder specifically at the sentencing stage. At that point any evidence of mental disorder before the trial would not have been such as to preclude a trial at all, and any evidence of mental disorder during the trial would not have been sufficient to preclude a conviction for murder.

The underlying common law principle

5.9. The underlying principle in the common law is firstly that nobody should be convicted of a capital offence, sentenced to death or executed if they were suffering from significant mental disorder at...
the time of the offence. And secondly, nobody should be sentenced to death or executed if mental disorder develops later and is present at the time of either sentence or execution.

5.11. This principle can be traced at least as far back as 1680, when the English jurist Edward Coke acknowledged the inhumanity of executing the mentally ill. His reasoning was that executing offenders served as a deterrence, or as he put it, was ‘for example’; but no useful example would be served by executing the mentally ill, and doing so would be grotesquely cruel. In Coke’s words:

‘[B]y intendment of Law, the execution of the offender is for example, … but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.’ 265

5.11. A more developed statement of the common law principle appeared in Blackstone’s Commentaries in 1756. Blackstone recognised the significance of mental disorder (as described in the language of his time) at different stages in the criminal process: at the time of the offence, the time of trial and sentence, and the time of prospective execution. At all those stages, the ‘humanity of the English law’ blocked the path to execution. Blackstone expressed the principle in the following terms:

‘In criminal cases idiots and lunatics266 are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.’ 267

5.12. In the intervening centuries the humanity that Coke and Blackstone referred to has become the shared humanity of the common law. As the US Supreme Court put it in Ford v Wainwright: ‘This ancestral legacy has not outlived its time.’ 268 But inevitably, the principle precluding execution of those who suffer from mental disorder has been applied with variations between different common law jurisdictions.

5.13. There are two broad reasons for not imposing or carrying out the death penalty on offenders suffering from mental disorder:

- Firstly, people suffering from mental disorder may be limited in their ability to process or appreciate the consequences or wrongfulness of their actions, to act logically, and/or to exercise self-control. This means that the penal goals of retribution and deterrence will not be served by the execution of such offenders
- Secondly, the way in which mental disorder is dealt with during the investigatory and trial process may have a bearing on the appropriate sentence. People with mental disorder are at a significant disadvantage as they proceed through the criminal justice process. This may manifest

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265 Edward Coke, Institutes of the Lawes of England (6th ed.), p.6
266 As noted above, these terms were used to refer to those suffering from mental handicap (‘idiots’) and mental illness (‘lunatics’).
268 477 US 408 (1986), p.408
itself in a number of different ways. For example: they are vulnerable to giving false confessions; they are less able to assist their lawyers preparing their defence; they may be less articulate or presentable; or their words and behaviour in court may be interpreted by judges and the wider public as demonstrating a lack of empathy or remorse. It would be particularly inhuman to inflict capital punishment on an offender who has contended with such inherent disadvantages in the course of the criminal justice process.

Mental disorder, mental illness and mental impairment: what kind of mental abnormality is relevant?

5.14. The degree and types of mental disorder that preclude the death penalty are not always clear. Dealing firstly with mental illness, it is well-established that an offender suffering from schizophrenia or other serious psychosis should not be executed: see, for instance, *Ford v Wainwright* (above) and *Chaughan & Anr v Union of India*.269

5.15. But even where an offender’s mental illness is only moderately severe, it may well provide a cogent reason for not imposing the death penalty in a discretionary sentencing regime. For instance, in *R v Reyes*270 the Chief Justice of Belize held that a diagnosis of depressive illness justified a sentence other than death, even though a defence of diminished responsibility had been rejected by the jury at trial. The offence in that case arose from a long-running boundary dispute between neighbours, and the psychiatric evidence showed that the offender was suffering from a major depressive disorder, probably brought on by that dispute. As the Chief Justice observed:

‘This must have caused him to be unhinged, at least temporarily, to the extent that after shooting the deceased he turned the gun on himself in an attempted suicide, but only succeeded in inflicting serious wounds on himself, from which he still suffers today.’ 271

In these circumstances, sentences of life imprisonment were imposed instead of death.

5.16. Other examples are provided by the following cases:

- In *R v Berthill Fox*,272 the High Court of St Kitts and Nevis declined to impose the death penalty because the offender had killed his partner and mother-in-law in a fit of anger when his powers of self-control were diminished by years of steroid abuse.
- In *R v James*, 273 the fact that the defendant might well have been suffering from a form of mental illness at the time of the commission of murder was ‘the singular but important mitigating factor’ in the determination of sentence, and warranted a determinate sentence of imprisonment rather than death.
- In *Cannonier & Ors v DPP*,274 the Court of Appeal of St Kitts and Nevis accepted that the ringleader in the murder of an off-duty police officer was suffering from a personality disorder, although not from a mental illness as such. This was one of several grounds on which his death sentence was substituted with a sentence of life imprisonment.

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269 (2014) 3 SCC 1
270 [2003] 2 LRC 688
271 See para. 33 of the judgment.
272 Criminal Case No. 43 of 1997
273 High Court of St Lucia, unreported, 2001
274 High Court Criminal Appeals No. 19 to 22 of 2008, paras 175-179
Sentencing in Capital Cases

- In *R v Makolija*, the High Court of Malawi recognised the potential significance of an offender suffering from mental disorder either at the time of the offence or at the time of sentence. In that case the offender had been diagnosed with clinical depression and psychosis, but as the judge observed:

  ‘Evidence of “mental or emotional disturbance”, even if it falls short of meeting the definition of insanity, may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence.’

- In *State v Taanorwa*, the Supreme Court of Zimbabwe held that some background of mental disturbance less than a formally diagnosed mental disorder could provide a reason not to impose the death penalty:

  ‘A man may not be ... mentally disordered within the meaning of the criminal law, but nevertheless his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may not be relevant in considering verdict, may be very relevant indeed in determining whether or not, in a case such as this, a proper sentence should be the death sentence.’

- Similarly, in *Ndzombane v State*, which was decided under the ‘extenuating circumstances’ regime before Zimbabwe’s 2013 Constitution came into force, the Court of Appeal found that even the possibility of diminished responsibility at the time of the offence, which had not been thoroughly investigated, acted as an extenuating circumstance justifying a sentence other than death.

- Finally, in *Tlali Serine v R*, the Court of Appeal of Lesotho held that the trial judge was wrong to find there were no extenuating circumstances where the appellant had been in a state of ‘emotional turbulence’. He had been engaged in litigation with the deceased that threatened his livelihood, such that he must have been ‘in an emotionally vulnerable condition with some impairment of his judgement and his capacity fully to discipline and control his emotions’.

5.17 Turning to mental impairment, there is an international consensus that IQ below a certain level merits a diagnosis of ‘intellectual disability’, such that imposing or carrying out the death penalty would be inhuman. Where the line should be drawn is not universally agreed.

5.18 Two of the most authoritative collections of psychiatric diagnostic criteria are provided in the World Health Organization’s *International Classification of Diseases (ICD)* and the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM)*. Both these sources state that intellectual disability will usually be present in persons possessing an IQ of less than 70.

5.19 In *Atkins v Virginia*, the US Supreme Court made several important findings on the issue of mental disorder. Firstly, it recognised that there was an international consensus that executing the
mentally ill was inhuman. Secondly, it held that the prohibition on executing those who suffer from mental illness, which had been confirmed in *Ford v Wainwright*, also extended to those who were suffering from intellectual disability, or ‘mental retardation’. And thirdly, it held that an IQ of 70-75 or lower provided a *prima facie* indication of mental retardation. The Court left the refinement of the legal test for mental retardation to individual states.

5.20. More recently, in *Pitman & Anr v State of Trinidad & Tobago* the Privy Council confirmed that executing offenders suffering from substantial mental impairment would violate the constitutional prohibition of cruel and unusual punishment. The *Pitman* case is addressed in more detail at the end of this chapter.

**The position under international law**

5.21. The approach summarised above reflects a broad consensus in the domestic law of common law jurisdictions, under which the death penalty is precluded where the offender is suffering from mental disorder at the time of sentence or at the time of prospective execution. It also encompasses both mental illness and mental impairment or disability. All these elements are reflected in UN standards. Since 1984 the UN has taken a succession of measures aimed at protecting mentally disordered persons from execution. In 1984, the General Assembly endorsed the prohibition on the execution of ‘persons who have become insane’. In 1989 that prohibition was expressly said to include ‘persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution’. Since then UN bodies have consistently stated that the imposition of a death sentence on the mentally disordered is forbidden by international law. More recently, in 2012 the UN Special Rapporteur on Torture observed:

> ‘International law imposes severe restrictions on the death penalty and demands serious safeguards for it to be lawfully applied. It also outlaws it in some specific circumstances or with regard to specific groups of vulnerable persons... This conclusion originates from the fact that international law does not attribute a different value to the right to life of different groups of human beings, such as juveniles, persons with mental disabilities, pregnant women or persons sentenced after an unfair trial, but considers the imposition and enforcement of the death penalty in such cases as particularly cruel, inhuman and degrading and in violation of article 7 of the Covenant and articles 1 and 16 of the Convention against Torture.’

**Mental disorder at the sentencing stage and the need for a psychiatric assessment in every case**

5.22. As the cases discussed above show, significant mental disorder will preclude the imposition of a sentence of death when any of the three approaches to discretionary capital sentencing is applied. This has various evidential and procedural implications, of which the most important is that a psychiatric assessment is needed in *every* capital sentencing exercise. This is addressed in more detail in Chapter 7.
The significance of mental disorder after the sentencing stage

5.23. There will be some cases where the lawfulness of executing an offender becomes an issue after a death sentence has been imposed. This might be because mental disorder was not identified at the time of sentence, or because the disorder developed thereafter. In either case the same principles apply: the existence of mental disorder is a bar to carrying out a previously imposed capital sentence.

5.24. Examples of cases in which mental illness developed after the imposition of a capital sentence, and thereby justified commutation to life imprisonment, include the US Supreme Court’s ruling in *Ford v Wainwright*288 and the Indian Supreme Court’s ruling in *Shatrughan Chaughan & Anr v Union of India*.289 In both those cases the petitioners had developed mental illness while on death row. In *Chaughan* the Court confirmed that the right to life under the Constitution of India protects offenders with mental disorder, and held:

‘In view of the well-established laws both at national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment.’ 290

The Privy Council’s ruling in *Pitman*

5.25. The case of *Pitman & Anr v State of Trinidad and Tobago*291 raises unusual issues because of the history of the appeal and the particular constitutional savings clauses in Trinidad and Tobago. The key point in the Privy Council’s ruling is the unequivocal finding that where an offender suffers from *significant mental abnormality*, it is unconstitutional to carry out a sentence of death.292 The mental abnormality must be significant in the sense that it meets the level required to establish a defence of diminished responsibility. But the prohibition of execution applies whether or not diminished responsibility was raised at trial, and it may apply where it could not have been (see below).

5.26. The Board noted that for these purposes, an offender’s low IQ may be highly relevant to a finding of significant mental abnormality, but it is not determinative.293

5.27. Where evidence of significant mental impairment at the time of the offence is produced after the trial, the issue may be raised in an appeal against conviction. And if it is produced at a later stage, it may be appropriate to seek an appeal against conviction out of time.294

5.28. The Board also recognised in *Pitman* that in some cases an appeal against conviction would not be the appropriate course, for instance where an offender’s mental condition deteriorated significantly after the commission of the crime.295 The Board held that where an appeal against conviction is

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288 477 US 399 (1986)
289 (2014) 3 SCC 1
290 See para. 79 of the judgment.
291 [2017] UKPC 6, para. 50
292 See para. 50 of the judgment.
293 See paras 49 and 54 of the judgment.
294 See para. 48 of the judgment.
295 This is one of several reasons identified by the Board why mental abnormality might be relevant to the constitutionality of a capital sentence even though the issue was not raised at trial: see para. 46 of the judgment.
not appropriate, the correct course is to seek a remedy through the exercise of the prerogative of mercy, rather than an appeal against sentence.

5.29. This conclusion was reached with two significant provisos. Firstly, it was important that the exercise of the prerogative of mercy in Trinidad and Tobago is subject to judicial control through judicial review. And secondly, the prerogative must be exercised ‘in a way which takes proper account of the developing understanding of mental disability’.

5.30. It follows that in jurisdictions where the prerogative of mercy is not amenable to judicial review, or where an application for the exercise of the prerogative of mercy has been made but has failed to secure redress, the offender will be entitled to seek a judicial remedy. In other words, a person suffering from significant mental abnormality must be afforded effective redress by one means or other to prevent the carrying out of a death sentence.

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296 See Lewis v Attorney General of Jamaica [2001] 2 AC 50, which provides authority for the analogous position in Jamaica.
297 See para. 50 of the judgment.
Chapter 6
Resentencing following a breach of fundamental rights
The need for a replacement sentence

6.1. As we saw in Chapters 1 and 2, the mandatory death penalty has been struck down as a breach of fundamental rights in almost every jurisdiction where the issue has been litigated. This means that offenders convicted of capital offences in those jurisdictions now need to be sentenced with a full evaluation of aggravating and mitigating features before sentence can be passed, taking into account the matters explored in Chapters 4 and 5.

6.2. This chapter examines the considerations that arise when offenders need to be resentenced under a discretionary capital regime. The need for resentencing can arise in various scenarios:

- Where offenders were previously the subject of a mandatorily imposed (and therefore unlawful) death sentence
- Where offenders have suffered a significant delay on death row
- Where there have been other breaches of offenders’ fundamental rights since the original sentence was imposed
- Where there has been a combination of such breaches

Resentencing to provide a remedy for the previous imposition of an unlawful death sentence

6.3. The abolition of the mandatory death penalty has created historical challenges requiring corrective intervention by the courts. Offenders who have already been sentenced to death under a mandatory sentencing regime have been given unlawful and unconstitutional sentences, and therefore need to be given a new sentence that is lawful and constitutional. In recent years such resentencing has been effectively undertaken in Malawi and Uganda, and a similar process may unfold in Kenya following the Supreme Court of Kenya’s decision to strike down the mandatory death penalty for murder.\(^{298}\)

6.4. When resentencing takes place against the background of an unlawfully imposed death sentence, the resentencing assessment needs to reflect the aggravating and mitigating features that should have been considered when the offender was originally sentenced. But the new sentence must also provide a remedy for the fact that the offender has been given an unlawful and unconstitutional sentence, and that there has been a separate breach of their fundamental rights in that respect. Those rights include the right to a lawful sentence (in particular, the right not to be sentenced to death otherwise than in accordance with the constitution), and the right not to be imprisoned save in respect of a lawfully imposed sentence, all of which are implicit in the right to due process and a fair trial and the right to liberty.

Resentencing to provide a remedy for breaches of fundamental rights subsequent to the imposition of a lawfully imposed death sentence

6.5. The need for a replacement sentence is not limited to offenders whose original sentence was unlawful. In some cases there may be no challenge to the lawfulness of a death sentence as originally imposed, for instance because the death sentence was not mandatory, aggravating and

\(^{298}\)See para. 1.8 above.
mitigating features were explored, and there has been no successful challenge on appeal to the judge’s assessment of the aggravating and mitigating features. But if there has been a fundamental breach of the offender’s rights subsequent to the imposition of the original sentence, it may be unlawful to carry out that sentence.

6.6. Here the obvious example is where the offender has been detained for a prolonged period on death row in anticipation of execution. The issue might also arise where there have been other serious breaches of the offender’s rights, such as the infliction of some other form of inhuman or degrading treatment while awaiting execution. In such cases there may be a compelling argument that the need to afford a remedy for breaches of constitutional rights precludes the execution of a lawfully imposed death sentence. This is addressed in more detail in Chapter 4.

**Resentencing to provide a remedy for a combination of breaches of fundamental rights**

6.7. A third scenario is where the sentence needs to reflect a combination of a previously unlawful sentence and a breach of other rights, such as protracted detention on death row under an unlawfully imposed sentence. In such cases these are factors that should be weighed cumulatively in the determination of an appropriate sentence. For example, in *De Boucherville v Mauritius* the Privy Council declined to impose a new sentence for itself but gave the following direction to the resentencing court on its approach to the new sentence:

'It will bear in mind that the appellant was subject to an unconstitutional sentence of death, was kept on death row in breach of the constitution for nearly ten years and has more recently been subject to an unconstitutional sentence of penal servitude for life.'

6.8. The issue was addressed more recently by the High Court of Malawi in *Republic v John & Thobowa*:

'[T]he pronouncement of the unconstitutional death sentence then and the resultant long confinement under death row detention after declaring the death penalty unconstitutional, militate against the imposition at this stage of death or life imprisonment. This is sound reasoning on humanitarian grounds considering the pain and anguish, physically and emotionally suffered during all this long period, which could have been avoided if execution was carried out within reasonable time. As such a determinate term of imprisonment is preferred.'

6.9. Other examples of the courts imposing reduced determinate sentences to reflect cumulative breaches of constitutional rights include: *R v Cornwall* (Antigua and Barbuda), *Harris v Attorney General of Belize* and *Republic v Mtambo* (Malawi). In the last case, the President had commuted the defendant’s death sentence to life imprisonment by exercising his prerogative powers. In imposing a fresh sentence, the High Court recognised that Mtambo had been mandatorily sentenced to death for an offence he had committed as a 16-year-old juvenile. The Court held that this ‘starkly violated’ his rights under the Penal Code, which prohibits the death penalty for offenders who were

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299 See paras 4.81-4.87 above.
300 [2008] UKPC 37
301 See para. 24.
302 Sentence Rehearing Cause No. 13 of 2015, p. 8. The offenders were resentenced to determinate periods of 24 and 20 years, including time already served.
303 High Court Case No. 50 of 1995, paras 64-74
304 Supreme Court Claim No. 339 of 2006
305 Sentence Rehearing Case No. 2 of 2015
below the age of 18 at the time of their offence. This, combined with the fact that the death penalty was in any event unconstitutional, justified a new sentence of 17 years, resulting in Mtambo’s immediate release.306

Sentences available at the resentencing stage

6.10. Where the courts are imposing a new sentence to provide redress for a breach of constitutional violations, they are not limited to imposing the criminal penalties specified under statute for the offence in question. Instead, they are exercising their broad-ranging constitutional power to make any appropriate order to remedy the breach: see, for example, the cases of Cornwall and Harris cited above.307

6.11. For this reason, it would be wrong to assume that the only possible substitute for a death sentence is life imprisonment. Fixed terms of imprisonment are equally possible and might well be more appropriate if the offence was not of the most serious kind and was deserving of a punishment less than death at the outset. In cases of egregious breaches of rights or a combination of breaches, the only fair outcome might even be the imposition of a term of imprisonment that results in the defendant’s immediate release. There have been many examples of this approach in the recent resentencing process in Malawi and Uganda.

6.12. The preceding observations are subject to any express statutory provisions dealing with resentencing in capital cases. But at the time of writing, no such provisions had been made in any of the jurisdictions addressed in this book.

Other relevant considerations for resentencing

6.13. Another relevant consideration for resentencing, particularly where offenders have been incarcerated for lengthy periods of time, is any rehabilitative progress they have made in prison. The courts have been receptive to reports from the prison authorities on this issue: a report from the prison superintendent, a senior prison officer, chaplain or other official with significant contact with the prisoner can provide the court with a helpful insight into their capacity to reform and the extent to which further detention may be necessary. Evidence of this kind has been relied on at the resentencing stage in various jurisdictions, including Belize,308 Antigua and Barbuda,309 Uganda310 and Malawi.311

6.14. In the recent resentencing process in Malawi, the courts in a minority of cases held that they should not take the offender’s post-conviction conduct into account. This is what happened, for instance, in State v Njoloma,312 where the court took the view that if it did so, it would be behaving as if it were conducting a parole hearing. But that restrictive approach was subsequently rejected in Republic v Payenda.313 In that case the Court acknowledged its obligation to consider the personal

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306 See pp.7-9 of the judgment.
307 See para. 16 of Cornwall and paras 30 and 33 of Harris.
308 Harris v Attorney General, Supreme Court Claim No. 339 of 2006
309 R v Cornwall, High Court Case No. 50 of 1995
310 Losike v Uganda, Criminal Appeal No. 22 of 2005
311 Republic v William Mkandawire: Sentence Rehearing Cause No. 20 of 2015
312 Sentence Rehearing Cause No. 22 of 2015, p.4
313 Sentence Rehearing Cause No. 18 of 2015
circumstances of the offender, such as their capacity for reform, at the time of committing the offence and at the time of sentencing. As the judge in that case observed:

‘... since one of the things that a Court does in arriving at a particular sentence is to predict the convict’s capacity to, and prospects of, reform and social rehabilitation, when a sentence has been set aside after a significant passage of time as in the present case, the Court has the advantage of not simply predicting future post-conviction behaviour, but examining an existing significant post-conviction behavioural record of the convict.’ 314

**Right to a lawful sentence not defeated by commutation of an unlawful death sentence**

6.15. Where an offender has been mandatorily sentenced to death but the mandatory death penalty is subsequently held to be unconstitutional, it follows that the originally imposed sentence is unlawful and invalid. In virtually all common law jurisdictions the determination of sentence lies within the exclusive competence of a judicial officer.315 So if an earlier sentence was invalid, the resentencing function must be provided by a judicial officer acting in a judicial process, not by government or executive order.

6.16. For this reason, correction of an unconstitutional sentence by executive commutation to life imprisonment is incompatible with the separation of judicial and executive powers, which is a basic constitutional principle in all common law jurisdictions.316 The imposition of sentence and the exercise of the prerogative of mercy are two separate constitutional functions. The former is subject to defined legal criteria, scrutiny and appeal, but the latter is not. In other words, an executive act of clemency cannot defeat the right to a lawfully imposed sentence by commuting an unlawfully imposed death sentence. As Sir Dennis Byron CJ noted in *Spence & Hughes v R*:

‘[T]he granting of appropriate remedies to persons who complain of a violation of the right declared by section 5 (or of any of the other sections declaring fundamental rights and freedoms) is neither the duty of the executive nor the legislative branches of government. It is a specific, unqualified constitutional obligation of the judiciary. It would be equally remiss of the court to permit this task to be laid at the feet of the Advisory Committee on the Prerogative of Mercy or to sit back and await possible Parliamentary intervention.’ 317

6.17. Further applications of this principle in practice are provided by the following examples from Grenada, Malawi, Kenya and Uganda.

6.18. Firstly, in *Coard & Ors v Attorney General*, where unconstitutional mandatory death sentences had been commuted to life imprisonment in Grenada, the Privy Council held:

‘[T]he validity of the life sentence substituted by the warrant of commutation is dependent upon the validity of the sentence of death. In the absence of such a sentence [i.e. a valid sentence of death], the

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314 See para. 62.
315 The exceptions are to be found in the US, where juries make the key findings on aggravating and mitigating features that determine whether the death penalty is imposed: see para. 7.26 below. But this exception leaves untouched the principle that the executive branch must not usurp the role of the judicial branch in conducting criminal trials and imposing appropriate sentences.
317 Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia), para. 219. In both jurisdictions s.5 of the Constitution prohibits torture and inhuman or degrading punishment or treatment.
Governor-General has no power to order that the appellants be imprisoned for life and the appellants therefore remain held in detention without lawful authority.’ 318

6.19. When the Coard case was remitted for resentencing, the judge referred to these observations by the Privy Council and added:

‘The court is therefore left to consider two possibilities. These possibilities are firstly a sentence of life imprisonment and secondly a sentence of a term of years.’ 319

All the prisoners were resentenced to long determinate sentences.

6.20. Secondly, after the High Court of Malawi struck down the mandatory death penalty in Kafantayeni & Ors v Attorney General, all prisoners who had been mandatorily sentenced to death were included in the subsequent resentencing process, whether or not their death sentence had already been commuted to life imprisonment. The outcomes of that process are summarised in paragraphs 6.29-6.32 below.

6.21. Thirdly, in Mutiso and Mruuatetu & Mwangi, the Court of Appeal of Kenya and the Supreme Court of Kenya, respectively, entertained constitutional challenges to the mandatory death penalty and granted relief by way of orders for resentencing, notwithstanding the fact that the litigants’ death sentences had already been commuted to life imprisonment.

6.22. Fourthly, in Uganda the Constitutional Court adopted a somewhat different approach. In the Kigula case, which was a constitutional challenge brought by all 417 prisoners on death row in Uganda, the Court first concluded that the mandatory death penalty was unconstitutional. It then ordered the executive to consider within a two-year period the exercise of the prerogative of mercy in relation to those petitioners whose death sentences had been confirmed by the Supreme Court. Beyond that period the offenders would be entitled to return to court for redress. This was a pragmatic solution that may have been intended to divert prisoners from applying to be resentenced while the government considered the option of granting clemency. In any event, the vast majority of the affected prisoners returned to court in due course and were resentenced. Only a small minority were sentenced to life or had their death sentences confirmed. The rest were given determinate sentences or other disposals.

Practical significance of the right to be resentenced after commutation of an unlawful death sentence

6.23. The right to be resentenced after commutation of an unlawful death sentence has important practical implications. This is because in various jurisdictions offenders in this situation have been resentenced to determinate prison sentences, the courts having concluded that an indeterminate

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318 [2007] UKPC 7, para. 28
319 R v Bernard & Ors, Case No. 19 of 1984, para. 24
320 [2007] MWHC 1, 46 ILM 566
321 See, for example, Republic v Mwambo, Sentence Rehearing Cause No. 2 of 2015.
322 See paras 1.7-1.8 above.
324 See p.63 of the Constitutional Court’s judgment.
325 See ‘The death penalty in Uganda: obstacles to the adoption of the draft Protocol and strategies the civil society could undertake to mitigate them’, Lucy 318 Peace Nantume, p. 3, published by the 6th World Congress Against the Death Penalty (congres.abolition.fr).

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life sentence was not the appropriate penalty. So it is not merely a question of the resentencing judge imposing a life sentence that had already been substituted by an act of executive commutation. The right to be resentenced after commutation therefore has very significant consequences, as recent practice in Malawi and Uganda has shown.

**Dealing with cases where the case file has been lost**

6.24. A final potential question when dealing with capital resentencing is how the court should proceed if the case file has been lost. This problem is more likely to arise where many years have passed since the offender was tried and convicted and exhausted any appeals process, and it featured in many of the cases dealt with in the resentencing process in Malawi.

6.25. Judges in Malawi have adopted a consistent and principled approach to this issue, and not only in capital cases. Firstly, as a general principle they have acknowledged that cases cannot be left in abeyance. Judicial redress must be afforded even if there is no case file, because the alternative would be a denial of due process for reasons that were beyond the offenders’ control. In a case concerned with criminal appeals rather than capital resentencing, the judge observed:

'[I]f it be insisted that their appeals only proceed on production of their records of appeal, then it will be as good as saying they should not exercise their right to appeal.'

6.26. The loss of the case file does not mean that the resentencing judge must operate in a complete vacuum. It may be feasible to obtain some basic information on the offence and the offender from the prison authorities, and if the resources can be found the defence may be able to provide background evidence from the offender’s community and family, and even a mental health report. This is what happened in the *John & Thobowa* case, below. And in *Republic v James & Ors*, the judge noted:

'The State states that after tireless efforts to find any record of the proceedings, the same could still not be found. Both parties agree however that through efforts by the parties involved, a reconstruction of the case has been done through what the defendants themselves had to say about what transpired during the proceedings, as well as other witnesses. The State on its part states that it was able to trace the relatives of the deceased who were able to furnish the State with the facts therein.'

6.27. Where the case file has been lost in capital resentencing cases there are two distinct and compelling reasons for not re-imposing the death penalty. The first is the general point addressed in para. 6.4 above, namely that this would deprive the offender of a remedy for previous breaches of fundamental rights. The second is that if the case file has been lost, the court has no basis on which to conclude at the resentencing stage that the offence fell within the ‘rarest of the rare’ exceptional category. The latter point was expressly recognised in *Republic v Dzimbiri*, where the High Court of Malawi held that:

'[W]here the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence it would be completely inappropriate to impose a death sentence.'

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326 Mtambo & Ors v Republic, MSCA Criminal Appeal No. 1 of 2012, p.6.
327 Sentence Rehearing Cause No. 69 of 2015, para. 2
328 Sentence Rehearing Cause No. 4 of 2015, p.11
6.28. Similarly, in Republic v John & Anr, the High Court of Malawi noted:

‘One hurdle that this court has met is the fact that the trial record is missing and so the facts surrounding the crime are indeterminable, however, in these circumstances one cannot hold the offender responsible for the missing record, therefore the case cannot be considered to be “the worst of the worst or rarest of the rare” of homicides.’

Outcomes of the post-Kafantayeni resentencing process in Malawi

6.29. The Kafantayeni ruling, which struck down the mandatory death penalty in Malawi, meant that a substantial resentencing process was needed. This applied not only to the surviving plaintiffs in Kafantayeni, but also to the prisoners who had already been sentenced to a mandatory death penalty prior to the Kafantayeni decision, even if their mandatory sentences had subsequently been commuted to life imprisonment.

6.30. The ‘sentence rehearings’ in these cases took place in 2015-2017. By the end of this process the High Court of Malawi had conducted rehearings and given judgment in relation to 154 prisoners. The outcomes and judgments in these cases convey a remarkable judicial achievement and an effective collaboration between the judiciary, the Directorate of Public Prosecutions, the Legal Aid Bureau and the Bar, many of whose advocates provided pro bono representation.

6.31. The arguments in these cases on both aggravation and mitigation reflect the broad range of considerations addressed earlier in this book, and many of the cited cases have been drawn from the Malawi resentencing process.

6.32. Of the 154 new sentences:

- In 112 cases, the new sentence resulted in the prisoner’s immediate release. This was either because the court gave an order for immediate release, or it imposed a determinate sentence that, allowing for time served since the date of arrest, resulted in immediate release.
- In 41 cases, the new sentences were determinate sentences such that the prisoners had further time to be served in prison. At the time of writing, a significant proportion of that cohort had completed their sentences and been released.
- Where periods of determinate imprisonment were imposed, including those resulting in the prisoner’s immediate release, most of the sentences were between 20 and 30 years. The shortest sentences were suspended sentences of three years’ imprisonment and the longest individual sentence was 42 years’ imprisonment with hard labour.
- In just one case the prisoner was resentenced to life imprisonment.

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329 Sentence Rehearing Cause No. 13 of 2015, p.9
330 We are grateful to Sandra Babcock, Faculty Director at the Center on the Death Penalty Worldwide, Cornell Law School, for providing the data on which this summary is based. Cornell Law School and the Malawi Human Rights Commission have compiled a compendium of key cases from the Malawi sentence rehearings, comprising a summary of the key cases and the full text of selected judgments (Malawi Capital Resentencing Project: Selected Jurisprudence, 2017).
331 See Yassini v Republic, MSCA Criminal Appeal No. 18 of 2006.
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Conclusions on this chapter

6.33. The resentencing processes in Uganda and Malawi have allowed the courts to develop a rich body of jurisprudence on the principles that apply in the resentencing context. Of these principles, the most important is the right to have a resentencing hearing at all, even if the original capital sentence has been commuted to life imprisonment, and even if the case file has been lost.

6.34. The second core principle is that the new sentence should involve a wide-ranging examination of all relevant circumstances. This may well include the offender’s conduct since the offence took place, because that is an issue that goes to the prospect of reform and rehabilitation, and that in turn is an issue with well-established relevance in the capital sentencing process.

6.35. And thirdly, there is an overarching need to ensure that the new sentence affords a remedy for previous breaches of fundamental rights. There is a very compelling argument that this precludes the re-imposition of the death penalty altogether, but it also means that in many – if not most – cases, only a determinate sentence rather than life imprisonment will be appropriate. That proposition has been fully reflected in the resentencing practice of the courts in Uganda and Malawi.

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332 The three-year suspended sentences were imposed in a case where the prosecution acknowledged that the prisoners should never have been convicted, but the Court’s hands were tied because it was only dealing with sentence. Both prisoners were minors at the time of the offence and suffered a catalogue of egregious constitutional violations. One of them was sentenced to death aged 14, although ‘all indications are that he had nothing to do with the crime’. See R v James & Ors, Sentence Rehearing Cause No. 69 of 2015, paras 18-28.

333 R v Maonga, Sentence Rehearing Cause No. 29 of 2015. The longest composite sentence comprised consecutive sentences of 23 and 25 years, but even in that case a long period of time already served in prison and the prospect of remission mean that the offender would be eligible for release in 2024: see Khwalala v Republic, Sentence Rehearing Cause No. 70 of 2015.
Chapter 7

Procedural and evidential issues in the capital sentencing process
Sentencing in Capital Cases

7.1. This chapter examines procedural issues in discretionary capital sentencing cases. It examines the safeguards and procedural directions that are needed to protect the right to a fair sentencing hearing in capital cases. It also considers the potential sources of evidence in such hearings and the applicable burdens and standards of proof.

7.2. The right to a fair trial includes all stages of the criminal process, including sentence and appeal. This proposition is well-established both as a common law principle in domestic law and in international law. Even if the right to a fair trial is not expressly guaranteed in the constitution, it is protected as an inherent component of the right to due process of law. In capital cases the obligation to ensure scrupulous fairness is paramount, and any denial of fairness at the sentencing stage will render the imposition of a death sentence liable to challenge.

The key procedural safeguards for discretionary capital sentencing

7.3. At a minimum, fairness in the conduct of discretionary capital proceedings requires the following procedural protections:

- If the prosecution seeks the death penalty in a particular case they must give advance notice of that fact.
- Where the prosecution gives such notice it should identify the grounds on which the death penalty is sought, and it should provide the defence with copies of all the materials it proposes to rely on at the sentencing hearing.
- If the defendant is convicted, the court should adjourn for a separate sentencing hearing and make appropriate directions to give effect to the procedural safeguards.
- The directions should provide for the preparation of any appropriate background reports, including a social welfare report and a psychiatric assessment in all cases.
- The burden of proving any aggravating features lies with the prosecution and the standard of proof is beyond reasonable doubt.
- The defence is entitled to challenge the prosecution evidence and present any mitigating factors, including the calling of witnesses where appropriate.
- Full written reasons must be given for any decision to impose the death penalty, so as to record proper consideration of all relevant factors.

Guidance, practice directions and legislative safeguards

7.4. Guidance along the lines above have been given by the Chief Justice of Belize in *Reyes v R*,334 by the Chief Justice of St Kitts and Nevis in *Mitcham & Ors v DPP*,335 and by the Chief Justice of The Bahamas in a sentencing practice note.336 Similar guidelines have been approved elsewhere in the Caribbean and are used throughout the region. Procedural or due process obligations are imposed in guidance and legislation in other jurisdictions, including the US, India and Uganda, and must be complied with whenever the prosecution invites the court to impose a sentence of death.337

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334 [2003] 2 LRC 688, para. 26
335 Criminal Appeals No. 10-12 of 2002, para. 2
336 Practice Note No. 1 of 2006: Sentencing Procedures for Persons Convicted of Murder, para. 6
337 An example of safeguards enshrined in legislation is provided by the United States’ federal Code of Laws (18 US Code §3593)
7.5. The guidelines in Belize recognise the importance of the prosecution and defence seeking a broad range of material to assist the sentencing judge, such as evidence on the impact of the offence on the victim’s family, comparative sentencing case law and information as to a defendant’s family circumstances and dependants.

7.6. The importance of these procedural measures cannot be overstated, because their object is to ensure that a defendant is given every opportunity to present reasons why a death sentence should not be imposed. Failure to adhere to the procedural guidance can lead to a death sentence being set aside. This is what happened in *Mitcham & Ors v DPP* (above), where the prosecution failed to give adequate notice that they intended to seek the death penalty. And in *White v R* the Privy Council found that a failure to produce either a social enquiry or psychiatric report meant that the Belize Court of Appeal had insufficient information to pass a sentence of such finality. The Board held that it could not stress enough ‘the importance of following the carefully drafted sentencing guidelines’ provided by Conteh CJ in *Reyes*, above.

7.7. In *Santosh Bariyar v State of Maharashtra* the Supreme Court of India underlined the importance of scrupulous compliance with procedural safeguards in capital cases. In particular, a separate pre-sentence hearing (a ‘full fledged bifurcated hearing’) is required, and can only be effective if all relevant information has been prepared for the hearing. The sentencing materials should address the nature, motive and impact of the crime and the offender’s culpability. But the Court emphasised that this exercise must also produce information on the offender’s characteristics and socioeconomic background (see below), which was ‘sorely lacking in most capital sentencing cases’. Without a full complement of such information and rigorous compliance with procedural safeguards, the sentencing court cannot hope to identify the ‘special reasons’ that are required to be given whenever a capital sentence is imposed.

7.8. In Uganda the Sentencing Guidelines do not yet contain procedural provisions relating specifically to capital sentencing. The general guidance includes a requirement that the court allows a reasonable period not exceeding seven days (implicitly, from conviction) to determine the appropriate sentence. Both the prosecution and the defence have a duty to provide information to the court about the offender’s background and social status and the likelihood of reform. It is no doubt open to sentencing judges in capital cases to make appropriate adaptations to these guidelines in the interests of justice. For instance, such directions might allow more than seven days for the preparation of the sentencing hearing, allocate specific responsibility for the preparation of a social welfare report, and direct the preparation of specific evidence regarding the offender’s physical and/or mental health.

### The need for a social inquiry report in every case

7.9. In most jurisdictions with a discretionary death penalty the preparation of pre-sentence social enquiry reports in capital cases is either mandatory (in Jamaica and The Bahamas, for instance), or settled practice. Such reports are a convenient and efficient method of compiling information needed for the sentencing court to consider....

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338[2010] UKPC 22 (Belize)
339See *White v R*, para. 25.
340(2009) 6 SCC 498
341The requirement to give special reasons for death sentences is set out in the Indian Code of Criminal Procedure, s.354(3).
about the defendant’s past character, any previous history of offending, his conduct since the
offence (usually in detention) and his reputation within the community. An assessment of
whether the death penalty might be appropriate is virtually impossible without such evidence,
unless the circumstances leave no doubt that a lesser sentence should be imposed.

7.10. As noted above, trial courts in India have been criticised for systemic failures to obtain
background evidence of this kind. But judges in some cases have directed the prosecution to
obtain a social inquiry report as evidence of the accused’s conduct in prison, with a view to
clarifying the offender’s capacity for reform.343 While such a report may be able to address
the accused’s behaviour in prison, its ability to show that the accused has been involved in
productive activities is inherently limited. This is because prisoners facing capital charges in
India are not permitted to work or participate in rehabilitation programmes. They therefore
have little chance to demonstrate a willingness or ability to engage in constructive activity, and
thereby to demonstrate their capacity for reform.344

7.11. Such problems are not limited to India. In all jurisdictions with discretionary capital sentencing,
the courts may need to find creative solutions for obtaining meaningful evidence of an
offender’s background and their capacity for reform.

7.12. A report that reveals past good character, or other types of positive disclosures, is obviously
important mitigating evidence, but even evidence of bad character may provide an indication
of relevant mitigation. These issues are addressed in detail in Chapter 4.345

The need for psychiatric and/or psychological evidence in
every case

The need for psychiatric evidence in every case

7.13. In a series of appeals from the Caribbean the Privy Council has made a compelling argument
that a psychiatric report is needed in every discretionary capital case, whether or not the
offender exhibits obvious signs of mental disorder. As noted in Chapter 5, mental disorder is
potentially relevant whichever of the three approaches to capital sentencing is being applied,
and lawyers with no specialist training in mental health issues cannot be relied upon to identify
or assess an offender’s mental disorder.

7.14. The need for such evidence in every capital case is particularly clear in jurisdictions applying the
‘rarest of the rare’ approach, which is used in most common law countries that have retained the
death penalty. This is because the offender’s prospect of rehabilitation is a crucial element in the
application of the ‘rarest of the rare’ test, and without a psychiatric and/or psychological report,
the judge cannot hope to form a properly informed view on whether there is a reasonable prospect
of reform. As the Privy Council observed in Pipersburgh & Robateau v R:

‘It is the need to consider the personal and individual circumstances of the convicted person
and, in particular, the possibility of his reform and social re-adaptation which makes the
social inquiry and psychiatric reports necessary for all such sentence hearings.’ 346

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343 Bharat Singh v State (NCT of Delhi), Death Sentence Ref. No. 1 of 2013, Delhi High Court
344 State v Ravi Kapoor & Ors, Death Sentence Ref. No. 1 of 2016, Delhi High Court
345 See paras 4.50-4.56 above.
346 [2008] UKPC 11, para. 33
7.15. This issue was addressed in greater detail in the subsequent case of Lockhart v R, where the Board noted that when contemplating the possible imposition of the death penalty, a sentencing court would need professional advice on whether the possibility of reform existed. The prosecution had argued in that appeal that it would be wrong to impose a requirement for a psychiatric report in every case, irrespective of the contribution that such evidence might make to the sentencing assessment. The Board provided a clear and principled rejection of the prosecution’s position:

‘That argument proceeds, of course, on the premise that there are circumstances in which a report from a consultant psychiatrist would contribute nothing to the debate as to whether the reasonable possibility of reform existed. This proposition is not easily sustained. How is a sentencing court to face the task of deciding whether it is satisfied that there is no reasonable prospect of reform unless it has some professional assistance which provides an insight into the character and psyche of the individual whose execution is being contemplated? Judgments can of course be made on the basis of such evidence as is available... But an exercise confined to an evaluation of the available material does not address the anterior question that the court must confront – is this material sufficient to establish whether there is or is not a reasonable prospect of reform?’

The potential need for psychological evidence

7.16. In addition to a psychiatric report a sentencing judge may also need evidence from a psychologist, depending on the facts of the case. This was a further issue raised by the Privy Council in Lockhart v R (above), in which the Board provided the following explanation for the potential importance of psychological evidence in capital case

‘In some cases something more [than psychiatric evidence] will be required. In White v The Queen [2011] UKPC 33 at para 27 the Board adverted to the possibility that a report from a clinical psychologist might also be necessary. Psychology involves, among other things, the study of cognition, emotion, motivation, brain functioning, personality, behaviour, and interpersonal relationships. Many of these character traits can be assessed by the administration of psychometric tests and many may bear on the question whether an individual is capable of, and is likely to attempt to achieve, reform. Where, therefore, a sentencing court considers that it is impossible to decide whether the first aspect of the second principle in Trimmingham [prospect of reform] can be fulfilled without the assistance of a clinical psychologist, a report from such an expert will be indispensable to the proper consideration of that question.’

Funding and disclosure issues relating to psychiatric evidence

7.17. In various jurisdictions the courts have ruled that the state has a duty to ensure that funding is provided for a psychiatric assessment in capital cases. Such rulings have been made, for example, in the US and St Kitts and Nevis. Even in jurisdictions where no such rulings have been made, the constitutional duty to ensure that offenders are afforded a fair trial and sentencing process is a duty that lies with the state. And given the importance of psychiatric evidence in all capital cases,
that duty must encompass the specific duty to provide resources for such evidence, at least where offenders lack the means to do so themselves.

7.18. Psychiatric evidence in capital sentencing cases is often obtained at the court’s direction. But whatever the procedural position may be, as a matter of principle the state has a positive duty to disclose to the defence any relevant records or information it has in its possession that may bear on the issue of mental disorder.

7.19. The same considerations on funding and disclosure would obviously apply where the court concludes that psychological evidence is needed for a proper sentencing assessment.

Victim, family and community impact reports

7.20. Recent years have seen a significant increase in the use of victim and family impact statements in common law jurisdictions. In some cases sentencers are also provided with reports on the impact of a serious crime on the victim’s wider community. For instance, for all criminal offences in Uganda, the Sentencing Guidelines require the prosecution to provide relevant information on the impact of the crime on the victim, family members and the community.353

7.21. Material of this kind can serve a valuable function in giving a voice at the sentencing stage to the victims of crime. But there is an important distinction to be drawn between evidence on the impact of an offence, which goes to its seriousness, and any desire on the part of a victim or their family members for the death penalty to be imposed, which should form no part of the capital sentencing assessment. This issue is addressed further in Chapter 4.354

Resolution of factual disputes at the sentencing stage

7.22. In most common law jurisdictions the determination of sentence lies within the exclusive competence of the sentencing judge. If a jury has determined guilt, it does not determine or otherwise influence sentence, and it is for the judge to determine any factual disputes relevant to sentence.

7.23. Where factual disputes arise at the sentencing stage, judges can proceed in one of three ways.355 In a small proportion of cases factual disputes can be resolved by inference from the jury’s verdict. In other cases the judge can hold a separate hearing (in England, a ‘Newton hearing’) so that evidence can be called and tested before the judge determines the appropriate sentence. The third option is for the judge to deal with the matter on the basis of submissions by counsel, without hearing any further evidence. Where that option is adopted and there is a substantial conflict between the prosecution and defence, the defendant’s version of the facts should be accepted. For this reason the prosecution may prefer to seek a separate hearing so that the defendant’s version can be challenged.

7.24. The proposition that the disputed facts should either be resolved in the defendant’s favour, or tested through the calling of evidence, is of general application, but it is particularly important in capital cases.

354 See para. 4.38 above.
Chapter 7: Procedural and evidential issues in the capital sentencing process

7.25. In a Newton hearing evidence is called in the ordinary way. Each side will call the witnesses it seeks to rely on and the judge should not put questions until counsel have completed their examination. The judge must then make a decision according to the applicable burdens and standards of proof (see below).

7.26. In the US there are specific state and federal provisions governing the capital sentencing process. At both state and federal levels the jury has a sentencing function that is unique in the common law world. The US Supreme Court has held that having decided guilt, it is the jury, not the judge, that should determine whether aggravating circumstances justifying the death penalty have been established. The jury’s findings on the facts are binding on the sentencing judge, not merely the basis for a sentencing recommendation.

Burden and standard of proof

7.27. As for the burden and standard of proof in discretionary capital sentencing, there are differences of approach depending on which of the three sentencing tests is being applied.

Burden and standard of proof applying the ‘rarest of the rare’ test

7.28. In those jurisdictions applying the ‘rarest of the rare’ test, it is well-established that the burden is on the prosecution to prove the existence of any aggravating factors beyond reasonable doubt, and to disprove to the same standard the presence of mitigating factors relied on by the defendant. This approach reflects the fact that the penalty of death is reserved for the ‘rarest of the rare’ cases and can only be imposed where the strong presumption in favour of life has been conclusively rebutted.

7.29. This principle was reinforced and developed in the case of Trimingham v R,360 where the Eastern Caribbean Court of Appeal emphasised that:

‘22. The unqualified right to life that the cases affirm means that there is no mandatory death penalty. It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death…

‘27. … The appellant’s right to life can only be forfeited if the case for doing so has been established beyond all reasonable doubt. On that approach, as against the aggravating features of the murder, the appellant is entitled to the benefit of all mitigating features, even those not raised by him. It is then the duty of the crown to show beyond a reasonable doubt that, notwithstanding these mitigating factors, the court should nonetheless impose the death penalty.’

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356 R v McGrath and Casey 5 Cr App R (S) 460
357 R v Myers [1996] 1 Cr App R (S) 187
358 Hurst v Florida, 577 US ___ (2016). The case was remanded to the Supreme Court of Florida, which ordered a new sentencing hearing: Hurst v State, 202 So. 3d 40 (Fla. 2016). The Florida Supreme Court also struck down the provision in Florida law that permits jury decisions on capital sentencing to be made by a majority, rather than unanimously.
359 See, for instance, Sir Dennis Byron CJ’s emphatic statement to that effect in Mitcham & Ors v DPP, Criminal Appeals No. 10 to 12 of 2002 (St Kitts and Nevis), para. 2.
360 Criminal Appeal No. 24 of 2004 (St Vincent & Grenadines)
7.30. Separate considerations arise if there are several defendants in capital cases with varying degrees of culpability. This could be significant if the offence itself is so exceptionally serious as to be capable of crossing the ‘rarest of the rare’ threshold. If the individual culpability of the defendants cannot be proven to the required standard, none of them can properly be said to fall within the ‘rarest of the rare’ category. This was the approach adopted by the Supreme Court of India in Ronny v State of Maharashtra:

‘From the facts and the circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where, in a case like this, it is not possible to say as to whose case falls within the “rarest of the rare” cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment.’

7.31. The procedure for proving aggravating and mitigating factors will not be precisely the same. For aggravating factors, these must be proven by the prosecution beyond reasonable doubt. For mitigating factors, it will usually be for the defendant to raise the issue and, if possible, to adduce evidence in support. But as noted above, once mitigation is raised, the onus is then on the prosecution to disprove the mitigating factors to the same stringent standard of beyond reasonable doubt. This is enshrined as a general sentencing principle in the Ugandan Sentencing Guidelines, which provide that: ‘The prosecution shall disprove beyond reasonable doubt any assertion made by the defence in mitigation.’

7.32. Where there are clear mitigating circumstances, such as reduced involvement in the crime or previous good character, the prosecution may consider it appropriate to accept at the outset that it cannot discharge the burden and standard of proof required for the death penalty to be imposed.

Burden and standard of proof where the court weighs aggravating and mitigating circumstances

7.33. The second test for discretionary capital sentencing involves the weighing of aggravating and mitigating factors, with no express presumption for or against the death penalty. In those jurisdictions where this test is applied there are differences of approach to both the burden and the standard of proof.

7.34. South Africa operated under this regime prior to the complete abolition of the death penalty in 1995. In S v Nkwanyana the Supreme Court of Appeal held that once it has been established that findings on the presence of mitigating or aggravating factors have to be made, this cannot be done unless there is a burden or onus of proof on one party or the other. The Court held:

‘It has been held that the use of the term onus in relation to factors relevant to sentencing is inappropriate; and that no rigid rules governing the degree of proof can be satisfactorily laid down... But the position created by the new s.277(2) [of the Criminal Procedure Act, which requires the judge to have due regard to the presence or absence of any mitigating or aggravating factors] calls for a different approach. A finding

\footnotesize
\begin{itemize}
  \item This is the example from the criminal appeal no. 12 of 2004 (St Kitts and Nevis).
  \item See para. 59 of the Guidelines (footnote 342 above).
  \item See, for example, Maynard v R, Criminal Appeal No. 12 of 2004 (St Kitts and Nevis).
  \item See para. 3 of SCC 625, 654
\end{itemize}
or findings on the presence or absence of mitigating or aggravating factors has to be made. There may be a dispute about this. In these circumstances it would be difficult if not impossible to make the necessary findings unless the incidence of onus operates.

7.35. The court in *Nkwanyana* was clear that if there was a reasonable possibility that mitigating factors existed, the onus on the prosecution to show that a death sentence was the appropriate sentence had not been discharged. Moreover, this was the case even where a mitigating factor depended on matters ‘peculiarly within the knowledge of the accused’, so long as they were genuinely raised: ‘What is required is a factual basis for the mitigating circumstance. A speculative one will not suffice.’

7.36. In Zimbabwe the legislative framework on the death penalty has recently changed, but the new provisions are silent on the burden and standard of proof. It remains to be seen how the legislative amendments will be interpreted by the courts, but the pre-abolition case law in South Africa provides a helpful guide.

*The approach in the US*

7.37. In the US, where the minimum constitutional standards for the imposition of the death penalty are a matter of ongoing debate, the approach to the burden and standard of proof in capital sentencing is unsettled. As regards eligibility for the death penalty, there is general agreement that the burden is on the prosecution to prove one or more aggravating factors beyond reasonable doubt. The lesser standard of proof on a ‘preponderance of the evidence’, which was formerly applied in some states, is unconstitutional.

7.38. It is also generally accepted that the burden is on the defence to prove mitigating features and that these should normally be proved on a preponderance of the evidence. Contentiously, however, in the state of Georgia there is a statutory burden on the defence to prove beyond reasonable doubt that a defendant is suffering from ‘mental retardation’ (intellectually disabled) and is thereby exempt from the death penalty. That approach may be ripe for challenge in the US Supreme Court.

7.39. There is broader controversy over the standard that a jury should apply when deciding whether the proven aggravating factors outweigh the mitigating ones. While some states such as Delaware specify that the aggravating factors must outweigh mitigating factors beyond reasonable doubt, others do not. In Arizona, for example, the jury must find that there are ‘no mitigating circumstances sufficiently substantial to call for leniency’ in order to impose a death sentence.

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\[\text{See p.26-27 of the judgment, quoting the principle from Hoffman and Zeffert, *The South African Law of Evidence*: ‘Any rule of law which annexes legal consequences to a fact … must, as a necessary corollary, provide for which party is supposed to prove that fact.’}\]

\[\text{See para 3.45-3.46 above.}\]

\[\text{See *Rauf v State*, No. 39, 2016, Supreme Court of Delaware, applying *Hurst v Florida*, 577 US ___ (2016). As noted earlier, the ‘preponderance of evidence’ standard in the US is equivalent to the ‘balance of probabilities’ standard in England.}\]

\[\text{See, for instance, the Arizona Criminal Code, §13-751C, and at the federal level, 18 US Code §3593(c).}\]

\[\text{See the case note on *Hill v Humphrey* at (2012) 125 Harvard Law Review 2185, which warns that the federal courts’ ‘hyper-deferential posture’ in death penalty cases threatens the constitutional rights of mentally disordered offenders that *Atkins v Virginia* (see para. 5.19 above) was meant to protect (p.2185).}\]

\[\text{See *Rauf v State*, No. 39, 2016, Supreme Court of Delaware}\]

\[\text{Arizona Revised Statutes §17-751E}\]
level a decision must be made as to ‘whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death’.  

7.40. As will be apparent, the weighing of aggravating and mitigating factors involves an evaluative judgment in each case. In some states this has prompted the courts to distance themselves from the notion of a standard of proof on which a jury must be satisfied that the aggravating factors outweigh the mitigating ones. For example, in *Borchardt v State* the Court of Appeals of Maryland observed that:

‘Mitigating circumstances do not negate aggravating circumstances, as alibi negates criminal agency or hot blood negates malice. The statutory circumstances specified or allowed under § 413(d) and (g) are entirely independent from one another – the existence of one in no way confirms or detracts from another. The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case.’  

7.41. In any event, once a defendant becomes eligible for the death penalty, the decision on whether a death sentence will be imposed ultimately depends on the views of a particular jury, and how much weight jurors place on aggravating and mitigating factors. One of the criticisms of this discretionary death penalty system is that the lack of a uniform approach and the implicit dependence on the beliefs and attitudes of the jury leads to inconsistent application of the death penalty, and a marked contrast between different states in the number of death sentences passed.

**Burden of proof when the death penalty is avoided only in the absence of extenuating circumstances**

7.42. Traditionally, the burden of proving the existence of extenuating circumstances (on the balance of probabilities) lies with the defendant. This approach raised obvious concerns about ensuring a fair trial in capital cases, when life itself is at stake, because it ‘placed the greatest burden on the weakest link in the criminal justice system – that is, defense counsel – in a region that had only skeletal legal aid schemes for indigent defendants’.  The harshness of this approach has been reversed, or at least significantly mitigated, in Botswana and Lesotho. In both those countries the appeal courts have indicated that judges should conduct their own inquiry into the existence of extenuating circumstances, whether the defendant raises them or not.  The court must approach this exercise with ‘an anxiously enquiring mind’.  

7.43. In Zambia, however, the courts have not yet caught up with the sentencing practice of Botswana and Lesotho but continue to apply the orthodox approach of resting the burden of proving extenuating circumstances on the defendant.

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*18 US §3593(e). This determination is made by the jury or, if the defence and prosecution both agree, by the judge (§3593(b)). If made by the jury a decision to impose death must be unanimous (§3593(e)).


*Kelatetswe & Ors v State*, 1995 BLR 100 (Botswana); *Lenuka v R*, 1993-96 LLB & LB 346 (Lesotho)

*See Kelatetswe*, p.124

*People v Musonda & Ors* [2012] ZMCH 30
Chapter 8

Some conclusions on discretionary capital sentencing
8.1. There is no greater challenge for a judge in criminal proceedings than to decide whether to impose a sentence of death. It is hoped that this overview of recent developments in discretionary capital sentencing will help to inform that decision-making process. Judges will obviously have first recourse to any sentencing guidance in their own jurisdiction and their own professional skills and experience, but this review of comparative developments may provide an additional level of insight into how the particular difficulties of fixing sentences in capital cases have been addressed in different jurisdictions. Such comparative insights are an enduring feature of the common law and a legitimate source of potential inspiration in the development of judicial practice.

8.2. The decade that has elapsed since the original version of this book was published has seen the continuation of a worldwide movement towards the restriction of the death penalty and the imposition of ever tighter procedural safeguards before the death penalty can lawfully be imposed. The courts of the Commonwealth Caribbean, India, Africa and the US have all contributed to this development. So too have regional and international bodies and their respective courts and interpretive bodies.

8.3. The different national schemes for discretionary capital punishment span a continuum from a very strong presumption in favour of life to a presumption (in theory, at least) in favour of death. But the jurisdictions applying a very strong presumption in favour of life and the ‘rarest of the rare’ approach are not only in the majority but also most closely aligned with the global movement away from the death penalty and, where it survives, its highly restricted application under international law. And even in those jurisdictions that apply the other two approaches to capital sentencing (no presumption either way or a presumption in favour of death), judicial practice in recent years has seen ever greater reluctance to impose death sentences without giving full weight to relevant mitigating factors.

8.4. The significance in this process of mental disorder, a long-neglected issue often treated with unfounded scepticism, is now much better understood. This is the result of better-informed submissions by advocates, better use of appropriate expert evidence, and more confident reliance on such evidence by sentencing judges.

8.5. There has also been an increased tendency to particularise aggravating factors that might qualify a defendant for a death sentence, while the list of potential mitigating factors continues to be unequivocally open. The importance of procedural safeguards in order to maintain the legitimacy of capital punishment has also been increasingly recognised.

8.6. Most important of all is the willingness of the courts across the common law world to adopt an expansive approach to the enforcement of fundamental rights and ensure the strictest of interpretations is applied whenever those rights are threatened. Even in Singapore and Malaysia, where the mandatory death penalty has proven unusually resilient, its harshness has been ameliorated in recent years by judicial and legislative interventions.
8.7. All these trends are consistent with evolving standards of decency, which place an increasing value on human life and seek to restrict the application of the death penalty pending its complete abolition. No system of discretionary capital sentencing can erase subjectivity and arbitrariness altogether. But as illustrated by the cases cited in this book, a rigorous and structured approach to capital sentencing can reduce the risk of arbitrariness. Nothing less will suffice if the right to life, the most fundamental of rights, is to be afforded meaningful protection.
Authors’ biographies

Edward Fitzgerald QC CBE is joint head of Doughty Street Chambers and specialises in criminal law, public law and international human rights law. He has represented death row prisoners in the Caribbean at all levels and frequently appears in the Privy Council in death penalty appeals, cases involving the constitutions of the Commonwealth Caribbean, and extradition cases. He has won numerous important appeals in the House of Lords and the Privy Council establishing rights for life sentence prisoners and prisoners on death row. He has also appeared frequently in the European Court of Human Rights. He has been called to the Bar in numerous jurisdictions, including Belize, Grenada and St Vincent, and has been granted rights of audience to appear in cases in Hong Kong, Trinidad and Tobago, St Lucia, Bahamas and the British Virgin Islands. He gives frequent lectures and seminars and provides sentencing training to lawyers in the Caribbean. The winner of the Silk of the Year award in 2005 and The Times Justice Human Rights Award in 1998, he was named as Human Rights and Public Law Silk of the Year in 2013 and Legal Aid Lawyer of the year in 2009. In June 2008 he was awarded the CBE for services to human rights.

Joe Middleton has been a barrister at the Bar of England and Wales for 20 years. He has also been admitted to the Bar of Belize. He has been a member of Doughty Street Chambers in London since 1998. He has been working on issues related to the death penalty throughout his career and also practises in immigration and nationality law, extradition and other human rights, constitutional and international law challenges. He has appeared in the UK’s domestic courts at all levels and has also taken cases in the European Court of Human Rights, the Judicial Committee of the Privy Council, the UN Human Rights Committee, the Caribbean Court of Justice and the African Court on Human and People’s Rights. In collaboration with local counsel, he has acted in death penalty appeals and constitutional challenges in various jurisdictions in the Caribbean and in Africa, including three successful constitutional challenges to the mandatory death penalty in Africa. In 2015, he was awarded the Bar Pro Bono Award for his work on human rights and the death penalty.

Amanda Clift-Matthews is legal director of The Death Penalty Project and a barrister specialising in international human rights and criminal law, in particular: capital offences; serious miscarriages of justice; juveniles; the mentally disordered; and abused women who kill. Her notable cases before the Judicial Committee of the Privy Council include the lawfulness of the imposition of the death penalty on the mentally impaired, the treatment of juveniles in police detention and the constitutionality of life sentences. In addition, she has assisted local lawyers in Singapore, Malaysia, Zimbabwe, Kenya and Sierra Leone in connection with appeals and constitutional motions for prisoners facing the death penalty. She has also assisted local lawyers in numerous cases in the Caribbean region to correct serious miscarriages of justice. Her work before the Caribbean Court of Justice includes the constitutionality of mandatory life sentences and the lawful punishment for juveniles convicted of murder. She has been part-editor of Archbold Hong Kong, and has lectured on criminal law and written on contemporary legal issues.
About The Death Penalty Project

The Death Penalty Project is an international legal action charity, based in London, working to promote and protect the human rights of those facing the death penalty. We provide free legal representation to death row prisoners around the world, with a focus on Commonwealth countries, to highlight miscarriages of justice and breaches of human rights. We also assist other vulnerable prisoners, including juveniles, those who suffer from mental health issues and prisoners who are serving long-term sentences.

For more than three decades, our work has played a critical role in identifying miscarriages of justice, promoting minimum fair-trial guarantees in capital cases, and in establishing violations of domestic and international law. Through our legal work, the application of the death penalty has been restricted in many countries in line with international human rights standards. To complement our legal activities, we conduct capacity-building activities for members of the judiciary, defence lawyers and prosecutors, and commission studies on criminal justice and human rights issues relating to the death penalty.

We have brought and supported constitutional challenges to the death penalty in many jurisdictions in the Caribbean, Africa and Asia. Following successful legal challenges, we work with local lawyers and partners to provide training for legal professionals on the impact of the judgment, ensuring that the law is applied properly. We also engage members of the judiciary in dialogue around key issues and facilitate international exchange and knowledge-sharing. To accompany our capacity building initiatives we produce practical professional resources to assist those involved in capital cases, these include:

- **Casebook of Forensic Psychiatric Practice in Capital Cases (2018)** by Nigel Eastman, Sanya Kríjès, Richard Latham, Marc Lyall

These resources and other publications by The Death Penalty Project are available to view and download at www.deathpenaltyproject.org
This book on sentencing in capital cases provides a valuable resource for members of the judiciary, defence lawyers, prosecutors and others working within the criminal justice system. The authors examine the sentencing principles and procedures that have been adopted by the courts in different jurisdictions following the abolition of the mandatory death penalty, providing comparative analysis and expert critique throughout.


“This much anticipated resource will provide essential comparative and authoritative reference material for all judges, defence lawyers and prosecutors involved in sentencing in capital cases.”

Sir Keir Starmer QC MP (former Director of Public Prosecutions for England and Wales)
3.2 REPORT ON CONSULTATIONS WITH MALAWI EXPERTS

THE TASKFORCE ON REVIEW OF THE MANDATORY DEATH SENTENCE

REPORT ON CONSULTATIONS WITH MALAWI EXPERTS
INTRODUCTION

In Kafantayeni and Others v. Attorney General (2007), the Malawi High Court invalidated the mandatory death penalty and held that all prisoners initially given a mandatory death sentence were entitled to a new sentencing hearing. The Court ordered “each of the plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge in regard to the individual offender and the circumstances of the offence.” The High Court made clear that these individualised sentencing proceedings must provide each offender with an opportunity to present additional evidence and submissions in support of a lesser sentence — an opportunity denied to those sentenced under the mandatory death penalty regime. The Court emphasised that the sentencing scheme must provide convicted persons with the opportunity to mitigate based on the “detailed facts of the particular case or the personal history or circumstances of the offender.”

Reprieve is an organisation of human rights defenders based in the United Kingdom which litigates on behalf of prisoners on death row around the world, appealing their sentences and ensuring that their trials are fair and just. Additionally, it challenges governments to intervene where necessary to protect the rights and safety of their citizens. Following this decision, Reprieve worked alongside the Centre for Human Rights Education Advice and Assistance (CHREAA), the Director of Public Prosecutions (DPP), the Judiciary, Malawi Legal Aid Bureau, the Paralegal Advisory Services Institute (PASI), faculty and clinical students at Chancellor College and North-Western University School of Law in the United States (NU Law), and the Malawi Human Rights Commission (MHRC) in a project geared towards the implementation of the Kafantayeni judgment and ensuring that prisoners sentenced under the mandatory death penalty regime are afforded a sentencing re-hearing where a judge has the opportunity to consider mitigating evidence. This was referred to as the Kafantayeni Project, which entailed conducting community sensitization and mitigation investigations. The aim of the Project was to sensitize communities about the Kafantayeni judgement, the sentence rehearing exercise, and to find out how communities would react in the circumstance that prisoners were released.
3.2.1 MEETING WITH REPRIEVE, 12 SEPTEMBER 2018

Based on the above, the Task Force endeavoured to meet with Reprieve representatives, Ms Katie Campbell and Ms Bwighane Mwenifumbo who were largely involved in the Malawi resentencing project, on the 12th of September 2018. The objective of the meeting was to obtain valuable information on the resentencing process in Malawi in addition to the successes and challenges faced during the process. Ms Campbell took the members of the Task Force through the Malawi resentencing Project and noted the following in her presentation appended to this report:

- That it was not until three years later in 2010 that the case of Mclemonce Yasini v The Republic took the judgment made in the Kafantayeni case and applied it to all prisoners sentenced to death.
- She highlighted that in 2006, in the case of Chimunya v The Republic, the Court clarified that that courts should consider mitigation investigations in each case.
- Approximately 190 prisoners were incarcerated in Zomba Central Prison, for homicide, after being sentenced to death pursuant to the mandatory regime.
- Locating court records was a challenge faced during the Malawi resentencing project as there were a lot of lapses in so far as storage of these court records was concerned, especially those from a long time ago.
- It was not until 2013 that resentencing guidelines were produced by the Chief Justice, at which point the Malawi Human Rights Commission (MHRC) initiated a resentencing project. Sentence rehearing began in February 2015 and Reprieve and Cornell University joined the MHRC and other Malawian partners such as the Judiciary, the National Legal Aid Bureau, the Director of Public Prosecution, the Malawi Law Society and the University Chancellor College (the Law School) to facilitate the resentencing hearings.
- One of the key guiding principles in the resentencing process in Malawi was that the death penalty would be reserved for the “rarest of the rare” cases. In the Republic v. Margret Nadzi Makolija, the court established that evidence that may be considered in mitigation should encompass a wide range of factors relevant to the individual and the offence.
- Another key element of the resentencing hearings in Malawi was the conduct of mitigation investigations in every case. This was done through the Paralegal Advisory Service Institute (PASI), Malawi’s paralegal organization which conducted in depth
investigations in the villages. Victim outreach and community sensitisation, also key aspects of the resentencing process, was conducted by trained paralegals in conjunction with the mitigation investigations.

- With regards to case file location she explained that they sent out volunteers as well as interns specifically trained in case file location who worked in conjunction with law clerks in various court registries. However, only around one-third of the files were obtained which led to the establishment of a rule on missing case files which stated that in the instance that an offender’s file was missing, the facts unavailable would be interpreted in favour of the offender.

- Mental health, specifically in instances where insanity was not a defence when the crime was committed but the offender may have suffered mental health issues in the past which may have contributed to the commission of the crime, should count as mitigation.

- 158 offenders in Malawi have had their sentence rehearing and judgments completed. Out of these 158, 114 were granted total immediate release, 41 were sentenced to serve further time, 20 were released following service of a further term and 1 was sentenced to life.

Ms. Mwenifumbo stated that the resentencing project in Malawi took a lot of time and funding because of its intensive nature. She stated that another problem Malawi encountered was the issue of legal aid since it only has around 30 legal aid lawyers which posed a human resource issue. She also spoke about the fact that international law was incorporated during sentence rehearing in Malawi because the resentencing process presented unique circumstances which required persuasive jurisprudence. She added that human rights violations such as long stays on remand, maltreatment in prison and whether the offender was represented or not were also considered during resentencing. She mentioned that the issue as to whether an offender who had exhausted all levels of appeal to the highest Court was eligible for resentencing was addressed when it was stated by the Court that this presented unique circumstances and therefore such an offender would be entitled to resentencing. Ms. Mwenifumbo acknowledged that the media played a big role in the public’s views on the resentencing process as many were of the view that the offenders were being given a free pass which was not the case. She therefore emphasised that the Task Force should be keen on the public relations aspect of the resentencing process and proactively manage what the media puts out to the public.
There was an enquiry with regards to who the lead agency in terms of the mitigation report was and how the same was legally grounded. Ms Campbell explained that the work and reports from the paralegals were commissioned by commissioners of oath and well as analysed by lawyers. She added that the paralegals were trained in obtaining affidavits and these were accepted at the resentencing hearings without the need for the witness to be present. In addition to this the MHRC financially facilitated the process. Another enquiry was as to how those involved in the resentencing process mobilised the resources. Ms. Campbell explained that they sought external funding from donors which was channelled through the MHRC.

There was a question on how the courts in Malawi managed to deal with the caseload and whether the project was time bound. Ms Campbell explained that there was a set of regulations issued by the Chief Justice of Malawi to guide the process which did not bear on the discretion of the judicial officers but provided a guideline, but did not contain a time frame in which the process should take place. She noted that there was an agreement on a set list of judges designated as “Kafanatayeni Judges”. These judges sat at the same place and everyone else was brought where they were to help hasten the process and allow streamlining. Ms. Mwenifumbo added that few witnesses were brought forth to testify based on the fact that the case files were so detailed and extensive that oral submissions were sufficient. The documentation was all filed in advance to allow review by the judges and the oral hearings only served to deal with differentiating features of the case. She also mentioned that the state, defence counsel and the Court agreed that service of documents could be done electronically based on the circumstances and the fact that the existing rules of service would be an impediment to completion of the Project.

There was an enquiry as to how post-conviction behaviour was weighed in terms of mitigation. In response Ms. Campbell stated that indiscipline was taken into account by the Court, as was going the extra mile while incarcerated and involvement in beneficial activities in prison. She added that judges were trained on mitigating factors to avoid grave discrepancies in decision making. It was noted that the Malawi Project did not consider mediation/reconciliation in the informal set up with victims of these offences, which came highly recommended to be included in the Kenya process.

There was an enquiry as to how Malawi managed the issue of miscommunication by the media. Ms. Campbell stated that they engaged experienced law professors and experts on the issue of resentencing of offenders on death row, who had follow up TV interviews clarifying any
possible issues and questions the public had insofar as the process, and rectifying any misinformation.

Another question was on whether those in charge of the project followed up on those released after the resentencing with regards to reoffending and reintegration into society. Ms Campbell stated that they procured separate funding from donors to conduct “Well Being Checks” to look into those released and their progress. This entailed interviews with the offender as well as village headmen, and the response was remarkable. They found that there were no instances of reoffending and most village headmen ended up being against the imposition of the death penalty after seeing how productive the offenders were in the community. She also stated that she would share a report on the wellbeing check with the members. A follow up question was on why the number of those resentenced was so low (168) and how long the Project took. Ms. Mwenifumbo explained that very few offences were considered capital offences i.e. robbery with violence is not considered a capital offence in Malawi. Additionally, prior to the year 2000 trials by jury were conducted in which case legal principles were scanty, as a number of convictions were influenced by emotion. Once the jury system was abolished, death sentences were reduced. Insofar as how long the project lasted, she stated that it lasted around two years for both the investigations and hearings.

There was also an enquiry as to whether the resentencing process, as well as the review and amendment, took place as a parallel process. In response Ms. Campbell stated that the Penal Code was amended before resentencing began. Another enquiry was on what support was in place for offenders released following resentencing. She stated that they contacted family members of the offenders before their release so that they would be well prepared by the time the offender was released.

Lastly a question was raised with regards to how the Project went about scheduling cases and who exactly moved to the court. Ms Campbell stated that prioritisation was based on time served, age, significant vulnerabilities, disability and women, and the crimes that were most grievous were slotted in last because they would require more time. With regards to who moved the court, she explained that they worked closely with the Registrar of the Court to create cause lists that reflected the prioritisation.
3.2.2 MEETING WITH PROFESSOR BABCOCK, 30 OCTOBER 2018

On the 30th of October 2018 the Task Force also met with Professor Babcock from Cornell University, who was also largely involved in the Malawi resentencing Project. Professor Babcock is a clinical professor who led a group of law students to Malawi to assist with the resentencing. They worked very closely with the Judiciary, the Malawi Human Rights Commission, lawyers and paralegals.

Professor Babcock took the meeting participants through the Malawi resentencing Project and reiterated the information presented by Ms Campbell and Ms Mwenifumbo. She also proposed the introduction of sentence bargaining in Kenya, akin to plea bargaining, as a means to hasten the resentencing process. This was premised on the large number of those eligible for resentencing in Kenya. She emphasised this by stating that the Malawi resentencing project was focused on 158 offenders and took around two and a half years to complete. She also spoke on the aspect of funding with regards to the resentencing process, and urged the Task Force to engage with the various donors Reprieve worked with during the Malawi resentencing Project.

3.2.3 FOLLOW UP CONSULTATION WITH REPRIEVE, 19-20 NOVEMBER 2018

On 19 November 2018, the Task Force invited Ms Harriet McCulloch, Deputy Director of Reprieve, and Mr Chimwemwe Chithope-Mwale, Chief Legal Aid Advocate of the Malawi Legal Aid Bureau, to support the drafting retreat for the Task Force’s final report. Ms McCulloch made a presentation, appended below, on the initial analysis of the death row data made available by the Task Force. The members of the Task Force noted that the data availed was incomplete and the same was still in the process of collation, however the data represented a close approximation of the death row population. Ms. McCulloch stated that based on the preliminary analysis she was able to conduct, the Task Force should consider prioritizing those convicted of robbery with violence before those convicted of murder. This was based on the fact that murder cases tend to be more aggravated than robbery with violence. She then indicated that in Malawi, they began with hearings for mitigated facts and vulnerable offenders whilst simultaneously preparing the aggravated cases. Mitigated facts and vulnerable offenders set the precedent which benefitted the more aggravated cases, whereas aggravated cases required more investigation and preparation, particularly in relation to mental health.

She also emphasised the important role of mental health analysis in the resentencing process. She stated that in Malawi there were not sufficient resources to conduct full mental health assessments in every case, as would probably be the case in Kenya. Therefore they focused on
aggravated cases and prisoners with severe mental health problems, which presented a significant overlap.

Mr Chithope-Mwale made a presentation, appended below, on the successes, challenges and lessons learned in the Malawi resentencing Project. He noted that the implication of declaring the mandatory death penalty unconstitutional is that the same nullified the sentencing of all similar cases where the death penalty was passed mandatorily. He then stated that the appropriate forum for a sentence re-hearing would be the High Court or generally the trial court/court of first instance. Insofar as how a matter would be initiated before the High Court or trial court for sentence re-hearing, he stated that based on the fact that the duty of the Director of Public Prosecutions was to bring convicts before the High Court for a sentence re-hearing, the convicts need not apply and the High Court did not have to summon the parties under the exercise of its inherent jurisdiction.
ANNEX 3: PRESENTATION BY MS KATIE CAMPBELL AND MS BWIGHANE MWENIFUMBO ON THE KAFANTAYENI PROJECT

The formation of the project

- At the time of the Kafantayeni judgment, approximately 190 prisoners were incarcerated in Zomba Central Prison after being sentenced to death pursuant to the mandatory regime. Following the Yasini decision in 2010, all were entitled to be resentenced.

- However, from 2007 until 2013, little was done to implement the judgment in Kafantayeni. The affected prisoners continued to linger in Zomba prison and by 2014, the number dwindled to 168, as certain prisoners died, were released, or had their sentences reduced on appeal.

- In 2013, the Malawi Human Rights Commission initiated a resentencing project to ensure that the affected prisoners were given an opportunity to present mitigating evidence at a new sentencing hearing. Sentencing hearings began in February 2015. Reprieve and Cornell University joined the MHRC and other Malawian partners to facilitate the resentencing hearings.

Foundational jurisprudence

- In Kafantayeni v. Attorney General of Malawi, the High Court struck down the mandatory death penalty on the grounds that it violated the accused’s constitutional rights to a fair trial, access to justice, and to be protected from inhuman treatment or punishment.

- In Mcdononge Yasini v. The Republic, the Supreme Court of Appeal held that all persons sentenced to the mandatory death penalty were entitled to sentence rehearings before the High Courts, where they could present mitigating evidence relating to the personal circumstances of the offender as well as the facts of the offence.

- In 2006, the Court clarified that that courts should consider “the manner in which the murder was committed, the means used to commit the offence, the personal circumstances of the victim, the personal circumstances of the accused and what might have motivated the commission of the crime” (Chimunya v. The Republic).
Guiding principles

- A death sentence is only appropriate if the prosecution has rebutted the presumption in favour of life by proving that the offence is one of the worst of its kind, the "rarest of the rare".

- The Republic v. Margret Nadzi Malofij, one of the first resentencing cases, established that evidence that may be considered in mitigation should encompass a wide range of factors relevant to the individual and the offence, including:
  - That the maximum punishment must be reserved for the worst of offenders in the worst of cases;
  - The age of the convict at the time of the offence and at sentencing;
  - Whether the convict is a first offender;
  - The time already spent in prison by the convict;
  - The personal and individual circumstances of the offender, and as well as his or her possibility of reform and social re-adaptation, including their mental and physical health and other hardships they may have endured;
  - The manner in which the offence was committed, including facts establishing duress or lesser participation in the offence; and
  - Other circumstances of the offence, including whether the offender was intoxicated, whether a weapon was used, and whether the offender's acts were spontaneous or were planned in advance.
  - Other factors relating to the background of the offender, including remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim, likelihood of committing further acts of violence, sense of moral justification, and socioeconomic status.

Village Mitigation Investigation

- A key element of the resentencing hearings was the conduct of mitigation investigations in every case. PASI, Malawi’s paralegal organization, conducted in-depth investigations in the villages. The teams interviewed prisoners' family members, friends, village authorities, as well as witnesses, to gather information to support a determination of a new sentence. These investigations provided critical new evidence in each case. They were also the source of a huge amount of seminal jurisprudence.
Key statistics

<table>
<thead>
<tr>
<th>Category</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juveniles</td>
<td>17</td>
</tr>
<tr>
<td>Old age</td>
<td>20</td>
</tr>
<tr>
<td>Known Appeal</td>
<td>29</td>
</tr>
<tr>
<td>Missing case file</td>
<td>74</td>
</tr>
<tr>
<td>Partial case file</td>
<td>25</td>
</tr>
<tr>
<td>Mental Illness</td>
<td>55</td>
</tr>
<tr>
<td>Intellectual disability</td>
<td>11</td>
</tr>
<tr>
<td>First Offenders</td>
<td>138</td>
</tr>
<tr>
<td>Colourable claim of innocence/wrongful conviction</td>
<td>30</td>
</tr>
<tr>
<td>More than 2 years on remand</td>
<td>94</td>
</tr>
</tbody>
</table>

Key Jurisprudence on Mitigation

- Dire economic circumstances - crimes committed due to and during a time of great economic hardship should be considered in mitigation. (Rep. v. Richard Maulidi and Julius Khanawa)
- Old age - an offender should not be held longer than the life expectancy in the state which in Malawi is 55 years for men. (Rep. v. Benson Kaula)
- Reform/good character in prison, even post-conviction, was considered mitigating in multiple cases (Rep. v. Fusani Payenda, Rep. v. Chilikko Senti, Rep. v. Kachepa Tsogolani)
- Life of deprivation and hardship should be considered in mitigation (Rep. v. Patson Mtema)
- Evidence of mental illness, including Death Row Phenomenon and other post-conviction illnesses, should be considered in mitigation (Rep. v. Michael Khonje); Wartime trauma is mitigating (Rep. v. Phiri).
- Witchcraft - an offender’s sincere belief in witchcraft may weigh in favour of leniency at sentencing. (Rep. v. Laston Mukiwa)
# The Results

Results as of September 2018

<table>
<thead>
<tr>
<th>TOTAL CASES IN PROJECT</th>
<th>158</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing and judgment completed</td>
<td></td>
</tr>
<tr>
<td>Total immediate releases</td>
<td>114</td>
</tr>
<tr>
<td>Further time to be served</td>
<td>41</td>
</tr>
<tr>
<td>Total released following service of further time</td>
<td>20</td>
</tr>
<tr>
<td>Life imprisonment</td>
<td>1</td>
</tr>
</tbody>
</table>

- Immediate release
- Release after time served
- Further time to be served
- Life imprisonment
- Awaiting judgment
- Deceased before judgment

154
REPORT WRITING RETREAT OF THE TASKFORCE ON THE REVIEW OF THE MANDATORY DEATH PENALTY

Chapter Three: Sentence Rehearing

Harriet McCulloch, Reprieve and Chimwemwe Chithope-Mwale, Legal Aid Bureau, Malawi

INITIAL ANALYSIS OF DEATH ROW DATA

<table>
<thead>
<tr>
<th>Categories</th>
<th>Numbers</th>
<th>Percentage of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Offense: murder</td>
<td>262</td>
<td>43%</td>
</tr>
<tr>
<td>Offense: robbery with violence</td>
<td>328</td>
<td>54%</td>
</tr>
<tr>
<td>Offense: attempted robbery</td>
<td>9</td>
<td>7%</td>
</tr>
<tr>
<td>Age</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age: 18</td>
<td>4</td>
<td>7%</td>
</tr>
<tr>
<td>Age: under 25</td>
<td>96</td>
<td>16%</td>
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<tr>
<td>Age: over 67</td>
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<td>7%</td>
</tr>
<tr>
<td>Age: at time of conviction: 18</td>
<td>2</td>
<td>0.3%</td>
</tr>
<tr>
<td>Age: at time of conviction: under 25</td>
<td>108</td>
<td>17.8%</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gender: female</td>
<td>17</td>
<td>3%</td>
</tr>
<tr>
<td>Gender: male</td>
<td>509</td>
<td>96%</td>
</tr>
</tbody>
</table>
INITIAL ANALYSIS OF DEATH ROW DATA - PRISONS

- LODWAR PRISON - 11
- KISUMU MAXIMUM - 102
- KAMITI PRISON - 166
- NAIVASHA MAXIMUM - 103
- SHIMO MAXIMUM - 32
- ELDORAD MAIN - 14
- MARSA BIT - 4
- KERICHO MAIN - 16
- ELDORADO WOMEN - 1

- NAKURU WOMEN - 12
- SHIMO LA TEWA WOMEN - 1
- GARissa - 2
- MANYANI MAXIMUM - 9
- KISUMU WOMEN - 1
- KITUI MAIN - 4
- MWINGI - 4
- ELD - 13
- KIBOS MAIN - 102
- BUNGOMA PRISON - 7

INITIAL ANALYSIS OF DEATH ROW DATA - COURTS (INCOMPLETE)

<table>
<thead>
<tr>
<th>Competing court</th>
<th>Number of cases</th>
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</thead>
<tbody>
<tr>
<td>Bungoma</td>
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</tr>
<tr>
<td>Bura</td>
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</tr>
<tr>
<td>Bidibidi</td>
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</tr>
<tr>
<td>KAKAMBA</td>
<td>25</td>
</tr>
<tr>
<td>HOMABAY</td>
<td>9</td>
</tr>
<tr>
<td>Kiambu</td>
<td>55</td>
</tr>
<tr>
<td>BAYA</td>
<td>22</td>
</tr>
<tr>
<td>Ngori</td>
<td>21</td>
</tr>
<tr>
<td>HAMIS</td>
<td>30</td>
</tr>
<tr>
<td>NYAMIRA</td>
<td>5</td>
</tr>
</tbody>
</table>
DATA & PRIORITISATION - INITIAL REVIEW OF DEATH ROW DATA

• Some of the robbery with violence offences are aggravated by other offences (gang rape for example). The imposition of the death penalty may be more likely and if this is the case then a mental health assessment, mitigation investigation (and community sensitisation if the offence happened in the prisoner’s home) will be required

• There are death row prisoners in a number of prisons and large groups of prisoners in some prisons

• There are some very young offenders

• There are details of the sentencing court and the appellate courts - court records could be requested

• Summaries of court records will help identify mitigating and aggravating factors

SENTENCING REHEARING PRIORITISATION

• Robbery with violence
  • Mitigated facts (from court record/prisoner account - no weapon, intoxication etc.)
  • Vulnerable offender - young people, women, disabilities, poverty (from prison records, court records, probation officer interview)
  • Mitigation relating to offender - first offender, youth
  • Aggravated facts (from court record/prisoner account - accompanying offence, premeditated)
  • Offender claims innocence

• Murder
  • Mitigated facts (from court record/prisoner account - no weapon, intoxication etc.)
  • Vulnerable offender - young people, women, disabilities, poverty (from prison records, court records
  • Mitigation relating to offender - first offender, youth
  • Aggravated facts (from court record/prisoner account - accompanying offence, premeditated)
  • Offender claims innocence

• In Malawi we began with hearings for mitigated facts and vulnerable offenders whilst simultaneously preparing the aggravated cases. Mitigated facts and vulnerable offenders set precedent which benefited the more aggravated cases. Aggravated cases required more investigation and preparation, particularly in relation to mental health.
MENTAL HEALTH & PRIORITISATION

- ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984), Paragraph 3: "The death penalty shall not be carried out on persons who have become insane."

- The Economic and Social Council clarified in 1989 that in implementing paragraph 3 of the Safeguards, Member States should take steps to "eliminate[] the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." U.N. Economic and Social Council, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, p. 51, ¶ 1(d), U.N. Doc. E/1989/91 (1989).

- Where the offence is aggravated (either murder or robbery with violence) and the death penalty is likely/sought by the state it will be necessary to conduct a mental health assessment.

- Pipersburgh v. The Queen (JPC, 2008) “It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings.”

MENTAL HEALTH & THE DEATH PENALTY

- Harry Wilson v. The Queen (Court of Appeal, Saint Vincent and the Grenadines, 2005) "The Court should, in all cases, request a Probation and/or Social Inquiry Report, which should contain a psychiatric report of the convicted person."

- In Wilson, a psychologist filed a report that the prisoner was intellectually impaired. The sentencing judge refused to consider this testimony because it did not show that he was suffering from any diminished responsibility or mental defect prior to and after the date of the crime.

- On appeal, the court found the sentencing court erred by not considering the report of the psychologist. "The question is not whether the Appellant's mind was impaired at the time of the act, so as to afford him a defense to the charge of murder, but rather, whether or to what degree his state of mind should impact on his sentence for the crime of murder. The reports should have been used for objectively analyzing the factors that influenced the Appellant's conduct and his prospects for reform and social adaptation.” (para. 38)
MENTAL HEALTH & PRIORITISATION

- In Malawi, there were not sufficient resources to conduct full mental health assessments in every case. We focused on aggravated cases and prisoners with severe mental health problems (there was a significant overlap).

- Severe mental health problems will be a bar to a death sentence and execution.

- Mental health and mental state is also relevant as a mitigating factor, may not rise to defence or bar to prohibition but is still relevant for sentencing.

- Mental health or mental state as a mitigating factor could be evidenced by affidavits from family and community members and the prisoner and from prison officials, probation officers and other officials who have had interaction with the prisoners and by the facts of the offence (for example intoxication).

- Severe mental health problems should be evidenced by a mental health assessment.

MENTAL HEALTH & PRIORITISATION

- How to identify prisoners with severe mental health problems:
  - Aggravated offence or bizarre circumstances of the offence.
  - Prison officials can identify prisoners who appear to suffer from mental health problems.
  - Probation officers can ask questions relating to mental health when conducting family and community interviews.
  - It is not enough to interview only the prisoner – people with severe mental health problems, particularly intellectual disability, may mask their mental health problems because of associated stigma. Interviews must be conducted with the prisoner’s family.

- How to conduct a competent mental health assessment:
  - Collateral information from family members, particularly maternal and infant health.
  - Collateral information particularly relevant for intellectual disability and fetal alcohol syndrome.
  - Culturally competent tests/questionnaires should be developed for intellectual disability and mental health screening.
  - Need to involve mental health clinicians to supervise investigation and conduct interviews with prisoners.
ANNEX 5: PRESENTATION BY MR CHIMWEMWE CHITHOPE-MWALE


By: Chimwemwe Chithope-Mwale, Chief Legal Aid Advocate, Legal Aid Bureau (Malawi)

(Presented at the Report Writing Retreat of the Taskforce on the Review of the Mandatory Death Penalty, Hilton Hotel, Nairobi, Kenya (19-23 November, 2018)

1. **Effect of declaring the mandatory aspect of the death penalty unconstitutional**

   - Entitles all those who were sentenced to the mandatory death penalty to a remedy of sentence re-hearing: *McLemone Yasini v R* (2010); *Frantis Kafantayeni & 5 Others v AG* (2007).

   - Previous mandatory death sentence was Constitutionally “*invalid*” (thus it had no legal force): *R v Funsani Payenda* (2015)

   - *Francis Muruatetu v R* (2017): beyond ordering that the sentencing re-rehearing allowed was only applicable to the two petitioners therein, it acknowledged the right extended to other “existing or intending petitioners” with similar cases who were ordered to await appropriate guidelines for dealing with sentence re-hearing of cases relating to the mandatory nature of the death sentence, which was similar to that of the petitioners.(paragraph 111 and 112 (c) of the Judgment)

   - Note: *Task Force Report* refers to *Republic v Karisa Chengo & 2 others*[^1] which determined that specialized courts do not have constitutional jurisdiction to decide criminal matters and accordingly, all criminal matters decided on by the Environment and Land Court were a *nullity* and must be remitted to the High Court for re-trial.

2. **A sentence re-hearing**

[^1]: [2017] eKLR.
A hearing of **evidence** and **submissions**, both aggravating and mitigating, regarding circumstances of the offence and offender to inform the court as to the appropriate sentence to be passed. Evidence and submissions may be presented by or on behalf of the Prosecution and the Defence.

3. **Appropriate forum for a sentence re-hearing**

- High Court (or generally trial court/court of first instance)

**Francis Kafantayeni (2007)**

“We make a consequential order of remedy under s 46(3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the judge in regard to the individual offender and the circumstances of the offence.”

**McLemonce Yasin (2010)**

“We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.

**Francis Muruatetu (2017):** Court considered that the practice in Uganda and Malawi (as well as in Kenyan Mutiso case) was to remit the matter back to the High Court for a proper sentence. Court held that it saw no need to depart from the already established practice. It therefore held that the “appropriate remedy” for the petitioners was to “remit this matter to the High Court for sentencing” (paragraph 110).

The Court went further to state (paragraph 111): “It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners.”
• The practice is not only prudent but also constitutional.

• Why not Supreme Court of Appeal (or generally appellate court)?

  I. Non-existence of any death sentence to appeal against post invalidation

  (All such convicts were restored to a position they were as at the time of pronouncing a guilty verdict but before pronouncing the death sentence; it was as if a guilty verdict had just been pronounced against them and a sentence was yet to be passed)

  II. Deprivation of opportunity to adduce fresh evidence specific to sentence

  III. Deprivation of tier of appeal

4. Conduct of sentence re-hearings – how matter finds itself again before High Court for sentence re-hearing, order of address etc?

• McLemonce Yasini:

“The Court [in the Kafantayeni Case] clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court’s decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearings therefore accrued to all such prisoners. This default however did not and does not take away his rights to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.”

• Since it is the duty of the Director of Public Prosecutions to bring convicts before the High Court for a sentence re-hearing, convicts need not apply or the High Court need not summon the parties, apparently under the exercise inherent jurisdiction.

• Regarding procedure:
i. Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms of lawyers that represented the convicts.

ii. Cases be set down for sentence re-hearing before the judge who tried the case unless he or she is not available.

iii. When the case is called the State should address the Court first. The re-hearing process should follow the normal adversarial process. The State may call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.

iv. The Defence will be called upon to give its version and may, likewise, call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.

v. The State has a right to reply.

vi. The Judge will, after hearing both sides, pass sentence. The burden and standard of proof remain the same.

vii. The convict should still be advised that he or she has the right to appeal against the sentence to the Supreme Court of Appeal.”

- Section 321J of the Criminal Procedure & Evidence Code (Malawi) provides for receipt by the court of evidence for arriving at a proper sentence:

**Evidence in arriving at a proper sentence**

(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.

(2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

- Note: Section 329 of the Criminal Procedure Code for Kenya has provides:
“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

5. **Mitigating/aggravating factors**

- Consensus on most of what constitutes mitigating/aggravating factors.

- **Fransic Muruatetu (2017):**

> “As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors **are applicable in a re-hearing sentence for the conviction of a murder charge:**

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender based violence;

(f) remorsefulness of the offender

(g) the possibility of reform and social re-adaptation of the offender;

(h) **any other factor that the Court considers relevant.**

[72] We wish to make it very clear that **these guidelines in no way replace judicial discretion. They are advisory and not mandatory**. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.\(^{115}\)

\(^{115}\) Emphasis supplied
● Exceptional - Mental health (short of insanity): In *Venita Maiche v R* (2016) court accepted evidence of mental health (intellectual disability) as mitigating. She had beat to death a grandson who was caught stealing from a third party as a means of disciplining him. Thereafter took him to the river and places a stone on his chest.

There was evidence by Dr. Woods, a medical doctor and neuropsychiatrist, that “intellectual disability [is] a significantly reduced ability to understand new or complex information and apply new skills” and that “individuals with intellectual disability have difficulty understanding social cues, and may exercise poor judgment and impulse control. While they may understand right from wrong, their ability to process information is impaired. This can cause them to react inappropriately, especial in novel or stressful situations.”

6. **Cut off point for mitigating/aggravating factors**

● Whether post-conviction conduct and/or factors ought to be considered?

i. **No:** A convict ought to be sentenced as he stood at the time of conviction/imposition of the mandatory death penalty. A sentence re-hearing is not a parole hearing and it is not the duty of the Courts to conduct parole hearings, which is a function of the executive (Prison Authorities)

**Republic vs Alex Njoloma, Homicide (Sentence Re-Hearing) Case No. 22 of 2015 (Justice Kalembena):**

“I remind myself that this is not a parole hearing. This is a resentencing hearing, meaning that I must at all times keep in mind and remind myself that what is expected of the court is to consider what would have been an appropriate sentence at the time the convict was convicted. What would have been the primary considerations at the time? Though the court cannot pretend that the circumstances of the convict might have changed, the court must not behave as if it is conducting a parole hearing and must at all times avoid turning the re-sentencing hearing into a parole hearing. If it were a parole hearing, before the court, then the court would have been obliged to consider, inter alia, the good behaviour of the convict in custody, the views of the Prison Chaplain, the views of his family and community, as well as his health. These considerations would have been paramount.”
ii. **Yes:** All relevant factors, aggravating and mitigating, at the time of sentencing ought to be considered, including post-conviction factors.

**R v Funsani Payenda (2015) – Justice Dr. Kapindu:**

“The precise issue of whether, when an initial sentence has been invalidated after a substantial passage of time since conviction, post-conviction factors of the convict must be taken into account on resentencing, recently came up for determination before the US Federal Supreme Court in the case of **Pepper vs United States**, 131 S. Ct. 1229 (2011). The Court was unanimous, with Justice Sotomayor delivering the decision of the Court.

... 

58. **According to Article 10 of the International Covenant on Civil and Political Rights,**

*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*

59. Thus according to the ICCPR, which Courts in Malawi have held to form part of our domestic law, it is therefore clear that the prime purpose for punishment is rehabilitation of the offender.

... 

Further, the idea that the Court should close its judicial eyes to any development related to the defendant, that is relevant for sentencing from the date of conviction, runs into some conceptual difficulties. During argument, I asked State Counsel whether, if a convict became terminally ill just before being sentenced, that would, or ought not to affect, sentencing. I pointedly asked whether the Court ought to close its eyes to the condition and, if it were originally minded to pass say a harsh 50-year prison sentence with hard labour, it ought to proceed and mete it out all the same. Counsel responded that the Court would have to take into account the terminal illness as a relevant factor when sentencing. He proceeded to state, however, that that would be an exceptional case. The impression that State Counsel therefore
gives is that he would pick and choose instances in which post-conviction circumstances may be considered, and those where they should not be considered. This is obviously problematic.

62. The point to be taken is that since one of the things that a Court does in arriving at a particular sentence is to predict the convict’s capacity to, and prospects of, reform and social rehabilitation, when a sentence has been set aside after a significant passage of time as in the present case, the Court has the advantage of not simply predicting future post-conviction behavior, but examining an existing significant post-conviction behavioral record of the convict. As the Court observed in Pepper, the likelihood that the offender will engage in future criminal conduct is a central factor that courts must assess when imposing sentence.

...

64. There is another way of looking at the consideration of post-conviction circumstances. One may look at the negative dimension. One may conceive of a convict who was sentenced to death in 2004 and was, at the time of committing the offence, generally of a good disposition and having a wide array of mitigating factors, that would have suited him to a much shorter sentence but for the mandatory nature of the death sentence then. If at the time of the sentence rehearing post the Kafantayeni decision, he has now gone rogue, becoming a very disturbing and violent character in prison who is a menace to the whole prison establishment, should the Court close its eyes to this bad development, and give a light sentence as might have been imposed in light of the circumstances as they were in 2004, that might now lead to the immediate release of such a murder convict? In my view, it would not be wise for the court to close its judicial eyes to the post-conviction record of the defendant, mete out a relatively light sentence and let such a dangerous criminal loose so soon onto the free society on the basis that the Court was tied to consider only the favourable circumstances as they obtained in 2004. The parole process, where available, would be no answer in such a scenario.

It seems to me in justice, that the answer ought to be that such a prisoner should be given a much longer sentence. This would only be possible where the Court accepts to examine post-conviction circumstances.
65. As is already apparent from Paragraph 33 above, I have therefore taken post-conviction circumstances of the defendant herein, Mr. Payenda, into account in arriving at the sentence herein. I affirm the principle articulated in Pepper, that the court’s duty is always to sentence the defendant as he or she stands before the court on the day of sentencing. Evidence of Mr. Payenda’s rehabilitation since his initial sentencing is very relevant to the selection and imposition of an appropriate sentence in this case. Evidence of Mr. Payenda’s conduct in custody since his conviction in February 2004 provides the most up-to-date picture of Mr. Payenda’s individualised history and characteristics relevant for sentencing.

Fransis Muruatetu (2017)

[91] Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

[92] The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. **Community protection: To protect the community by incapacitating the offender.**

   No. 29 of 2014

6. **Denunciation: To communicate the community’s condemnation of the criminal conduct.**

   The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.

[93] In addition, and in accordance with Article 2(6) of the Constitution, “**any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution**”. In 1972, Kenya ratified the International Covenant on Civil and Political Rights of 1966, and for that reason, the Covenant forms part of Kenyan law. Article 10(3) of the Covenant stipulates that—“**the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.**”

   ...

[95] We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, **it is also for the rehabilitation of the prisoner** as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

7. **Missing Court Record**

   - **R v Lackson Dzimbiri (2015)**

   In spite of my extensive research, I have not been able to find any decided case directly on point. Most of the cases cited by Counsel, if not all, relate to situations where the convicts were questioning both the conviction and sentence, and not just the sentence. My view is that the issues decided in those cases were much broader than what I am being called upon to decide in respect of the re-sentencing of the Convict.
To my mind, the starting point is for the Court to adopt the reasoning in the Mtambo Case to the effect that the mere fact that the whole trial record is missing ought not to deprive a convict an opportunity of a sentence re-hearing. This would appear to be the ultimate objective of the Guidelines on Homicide Sentence Re-Hearing. The Guidelines are a product of a Special Committee that was appointed by the Chief Justice to oversee the implementation of the principle of sentencing espoused in the Kafantayeni Case and the Yasini Case. In order to guide the homicide sentence re-hearing, the Special Committee agreed on the following guidelines:

“2. Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms of lawyers that represented the convicts.

3. Cases be set down for sentence re-hearing before the judge who tried the case unless he or she is not available.

4. When the case is called the State should address the Court first. The re-hearing process should follow the normal adversarial process. The State may call witnesses or submit relevant reports in terms of section 260(2)\textsuperscript{116} of the Criminal Procedure and Evidence Code.

5. The defence will be called upon to give its version and may, likewise, call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.

6. The State has a right to reply.

7. The Judge will, after hearing both sides, pass sentence. The burden and standard of proof remain the same.

8. The convict should still be advised that he or she has the right to appeal against the sentence to the Supreme Court of Appeal.”

\textsuperscript{116} Even though the judge uses section 260 of the Criminal Procedure and Evidence Code the same is applicable in the Magistrate Courts as it falls under Part VII of the code. The specific and applicable section in the High Court is 321 J of the code. It’s a minor point though as the two provisions are similar in content.
S.260 of the Criminal Procedure and Evidence Code (CP&EC) provides for receipt by the court of evidence for arriving at a proper sentence:

(1) The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence."

I fully agree with the Guidelines on Homicide Sentence Re-Hearing and, accordingly, endorse them. I think that the broad principles stated in the Guidelines can be extended to the situation obtaining in the present case and to any other case of homicide sentence re-hearing where the trial record is wholly or partially missing or destroyed. The point being made may be illustrated by reference to the commonplace factors taken into account in homicide sentencing and mitigation generally.

....

Where the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence it would be completely inappropriate to impose a death sentence. Such a position would apply with equal force where the homicide re-sentencing is based on evidence received under s. 260 of the CP&EC but such received evidence is from sources other than the trial record.

The other factor is the age of the convict both at the time of committing the offence and at the time of sentencing. In my view, I see nothing wrong in principle why resort to s. 260 of CP&EC cannot be made, where the trial record is wholly or partially missing, in so far as the issue of the age of the convict is concerned subject to the following caveat: it is trite that it is not open to any party to question the conviction within the context of sentence-rehearing. S. 260 of CP&EC may also be conveniently resorted to in dealing with the following factors:

(a) whether or not the convict is a first offender;
(b) the time already spent in prison by the convict;
(c) the manner in which the offence was committed; and
(d) the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict.

Needless to say, the Court will have to carefully assess pieces of evidence adduced by the State and the convict under s.260 of CP&EC before accepting them. The Court is not bound to admit statements that are obviously ridiculous merely on account of the fact that the trial record is missing and the other party has not rebutted them.

- All other sentence rehearings for cases whose records were partially or fully missing proceeded on the basis of Lackson Dzimbiri decision.

Fransis Murutetu (2017)

[41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.

[42] Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:

The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

Section 329 of the Criminal Procedure Code provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in
order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

[44] In *Sango Mohamed Sango & another v Republic* Criminal Appeal No. 1 of 2013 [2015] eKLR, *Makhandia, Ouko, M’inoti JJA* observed that although Sections 216 and 329 of the Criminal Procedure Code were couched in permissive terms, the Appellate Court has held over time that it is imperative for the trial court to afford an accused person an opportunity to mitigate and the trial court should record the mitigation factors. This applied even when accused persons had been convicted of offences where the prescribed sentence was death. The Appellate Court noted that the mitigating circumstances would be relevant if the matter went on appeal or before a clemency board or with regards to the age of the offender or pregnancy in the case of women convicts. Similar decisions can be seen in *Henry Katap Kipkeu v. Republic*, CR. APP. NO. 295 OF 2008 and *Dorcas Jebet Ketter & Another v. R*, CR. APP. NO. 10 OF 2012.

- S. 321 J CP&EC
- Similar provision in Kenya Code – s 329

8. **Any remedy for the unconstitutional mandatory death penalty?**
- reduces sentence

9. **Effective date of sentence and remission**
- Date of arrest

10. **Convicts whose sentences were already upheld by appellate court?**

   Jackson Chimkango
   Venita Maiche
   Charles Khoviwa