

THE AFRICAN CHALLENGE TO GLOBAL DEATH PENALTY ABOLITION

THE AFRICAN CHALLENGE
TO GLOBAL DEATH
PENALTY ABOLITION

International Human Rights
Norms in Local Perspective

Andrew NOVAK



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:

NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortselsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

The African Challenge to Global Death Penalty Abolition. International Human Rights Norms in Local Perspective

© Andrew Novak 2016

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Cover image: Masque anthropo-zoomorphe, région de Mopti, village de Bamani © musée du quai Branly, Dist. RMN-Grand Palais / Patrick Gries / Bruno Descouings

ISBN 978-1-78068-294-5
D/2016/7849/75
NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

FOREWORD

It is often contended that the death penalty is as old as humanity. The reason is simple. Any human society needs protection against incorrigible, dangerous and undesirable criminals. A 2011 research of the African Commission on Human and People's Rights on the *Question of the Death Penalty in Africa* states that African societies were no exception: "the death penalty existed in all precolonial African societies." The argument that the death penalty is part of the African tradition has constituted a barrier to the abolitionist movement in some parts of the continent. Abolishing the death penalty is there assimilated to abolishing customary law and, mostly, African identity. Colonial laws that were imported from apparently more "civilized" nations strengthened this view by legalizing the death penalty and formalizing its methods of execution all over Africa, except in Portuguese colonies. On the eve of independence, postcolonial governments chose to maintain the *status quo*.

The contention that the death penalty is enrooted in the African culture has become debatable. In the *Makwanyane* case, the South African Constitutional Court ruled in 1995 that the death penalty is the antithesis of the African value of *Ubuntu*. However Justice Albie Sachs stressed, in his concurring judgment, that there was an absence of authoritative materials on traditional African jurisprudence. Available sources were from historians and anthropologists. The learned Justice thus concluded, "if these sources are reliable, it would appear that the relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder." The inference that the death penalty was not part of African tradition is not only seductive, it also carries the message that African ancestors, though deemed to be savage, primitive, barbaric by their colonial masters, had a greater sense of human rights than do contemporary African leaders. It would mean also that African societies started valuing the right to life and dignity long before Western societies that are still battling for complete abolition of the death penalty.

The ruling in the *Makwanyane* case has now induced legal researchers such as Andrew Novak to fill the vacuum and assess the correctness of Justice Albie Sachs' finding. In this impressive study, *The African Challenge to Global Death Penalty: International Human Rights Norms in Local Perspective*, Professor Novak distances himself from generalizations that have often led to wrong conclusions and undertakes an objective analysis. He establishes that a factual reality in one area and for some people does not lead to a general conclusion about all other Africans in other areas. Each society has conceived justice

differently. The way each large or small community has defined its criminal law in terms of prohibited behavior and their punishments proves this discrepancy.

His overview of the death penalty in Sub-Saharan Africa is enriched by country studies from West to East and North to South. The Gambia, Ghana, Botswana, Lesotho, Swaziland, Zimbabwe, Kenya and Uganda, which are subjects of this study, are all former British colonies. That is not a unifying factor however. Colonial law was imported at different times and in different ways. It was superposed on customary laws whose conception of justice varied depending on the tribe concerned.

The death penalty was a valid penalty for treason among the Akan of Ghana and Ivory Coast, for disobedience and conspiracy against the rulers among the Dagaaba of Ghana and Burkina Faso, and for adultery among the Baganda of Uganda and the Ashanti of Ghana. The Baganda had an aversion to thieves of food and they sentenced them to death. The Nandi of Kenya also imposed the death sentence for repeated witchcraft.

At the same time, the Pokot of Kenya, the Iteso of Uganda, the Bemba of Zambia and Democratic Republic of Congo and the Shona of Zimbabwe and Mozambique punished adultery and non-consensual sexual intercourse with compensation. Restitution for homicide also existed among the AmaXosa, Tsonga and Nguni of South Africa, the Luo of Kenya and the Shona of Zimbabwe and Mozambique. Ostracism was also the relevant penalty for the most serious crime in precolonial Africa, namely witchcraft, among the Bantu of Kavirondo in Tanzania, the Luo of Kenya and Zimbabwean tribes.

Colonial law was superposed on these traditional plinths. In British colonies, courts regularly sentenced people to death. The abuse of the death penalty appeared to be legally authorized. Attitudes of colonial courts varied however depending on the status of the colony. Some territories were settlement. Others were protectorates or colonies. A settlement was assimilated to an overseas British territory and, there, judicial practices were not only biased but also inconsistent and arbitrary. In Kenya, offenders were at risk of receiving a death sentence where the victim was a European or an Indian. In the 1950s, the abuse of the death penalty reached its peak. It was politicized and heavily relied on in order to control the *Mau Mau* insurrection. Early before 1960, also called the year of independence in Africa, colonial powers resorted to the death penalty as a way of silencing demands for freedom.

At independence, dictatorial regimes resorted to similar techniques as the colonizer in order to keep people obedient and silent. New governments, including former Portuguese colonies that were death penalty-free under colonial rule, justified the retention of the death penalty on the grounds of stability and sovereignty. Retentionist countries in Africa view standards on the abolition or limitation of the death penalty as a threat to their sovereignty. There is no doubt that political context shapes the use of the death penalty, whether it is imposed for political offences or ordinary crimes such as voluntary homicides.

New criminal phenomena have served as a justification in some African retentionist countries for the extension of the list of capital offences. Terrorism in West Africa and East Africa has led the Nigerian and Kenyan governments to review their penal policies and reserve a death sentence to crimes related to terrorism activities. Though the Ugandan Constitutional Court struck out the anti-homosexuality act, which extended the death penalty to aggravated homosexuality, because Parliament passed it without the required quorum, the threat of this punishment being reinstated still looms. Reports indicate that Uganda is planning to table a new bill on the Prohibition of Promotion of Unnatural Sexual Practices. Gay and lesbian communities are worried that this bill contains a harsher penalty than the repealed act. Extending the death penalty is not new among retentionist countries. Even abolitionist countries have, over time, reinstated the death penalty for crimes that were previously otherwise punished. For instance, Liberia had abolished the death penalty in 2005. It immediately acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights that prohibits the reintroduction of the death penalty. However, in 2008, it passed a law punishing armed robbery, terrorism, and hijacking with the death penalty. It is still questionable whether Liberia is abolitionist or retentionist.

Nevertheless, Professor Novak proves that Africa stands as a reference for other continents where the death penalty still lingers. Progressive attitudes are rooted in customary law and in modern concepts of human rights. It should also be recalled that Botswana, the Gambia and Uganda are not only full retentionist countries. They are also parties to the Rome Statute of the International Criminal Court. These countries cannot continue to ignore that, in ratifying the Rome Statute, they joined the community of states that excluded the death penalty for the most dreadful crimes before the world's highest court in criminal matters. The African Commission on Human and Peoples' Rights has already called on African retentionist states that have ratified the Rome Statute to observe its Article 77, which provides for a maximum penalty of life imprisonment for crimes within the court's jurisdiction, rather than relying on its Article 80 which is interpreted as giving the go-ahead to the death penalty. Ghana, Kenya, Swaziland, Lesotho and Zimbabwe are among the *de facto* abolitionist states that are on the right path towards legal abolition. Eloquent lessons from this book go beyond the countries studied and constitute the basis for abolition of the death penalty in other African countries and beyond.

Dr. Aimé Muyobokey Karimunda
Justice, Supreme Court of Rwanda
Guest Senior Lecturer, University of Rwanda
Kigali, Rwanda

ACKNOWLEDGEMENTS

This book would not have been possible without collaboration and assistance from colleagues across four continents. I offer my most sincere thanks to David Johnson and Daniel Pascoe for comments on the opening chapter and to Timothy Bryant for comments on the Kenya chapter. Kuda Hove at Veritas Zimbabwe and the staff at the Death Penalty Project in London, including Annette So, Parvais Jabbar, and Saul Lehrfreund, offered documents and analysis that shaped my discussions of the pending constitutional litigation in the Kenya and Zimbabwe chapters. Joseph Middleton at Doughty Street Chambers provided inestimable assistance for the Ghana, Kenya, Uganda, and Zimbabwe chapters. The Ditshwanelo Botswana Centre for Human Rights, where I interned in the summer of 2007, was a critical source of information for the Botswana chapter. On the Gambia chapter, I would like to thank François Patuel and Sabrina Mahtani at Amnesty International's West Africa office, Jim Wormington at Human Rights Watch, and Jeffrey Smith, formerly of the Robert F. Kennedy Center for Justice and Human Rights. On these and other projects, I would also like to thank Sanaz Alasti, Lill Scherdin, Roger Hood, Sarah Lucy Cooper, Carolyn Hoyle, Sandra Babcock, Jesse Fecker, Jay Michaelson, and the staff at Intersentia. During the 2016 academic year, I did a Ph.D. by publication at Middlesex University London School of Law. I appreciate the assistance of my advisors Nadia Bernaz, William Schabas, and Alice Donald in helping me conceive a broader social and political context for my writings on the death penalty, including in Sub-Saharan Africa.

Thanks to several students in my Law and Justice Around the World class in Spring 2016 who helped me review the final proofs: Aysha Babar, Joseph Boehnlein, Angela Castaneda, Anudari Chuluundavaa, Ursula Delgadillo, Caroline Earhardt, Alexa Gohl, Won Lee, Catherine Rochon, Troy Serafin, Aleeza Stone, Christine Su, Kyle Tusing, and Jongbum Weon. Finally, I would very much like to thank Hon. Aimé Karimunda of the Supreme Court of Rwanda, not only for writing the foreword to this volume but for his detailed comments on each chapter.

CONTENTS

<i>Foreword</i>	v
<i>Acknowledgements</i>	ix
<i>List of Abbreviations</i>	xv

PART I.

INTRODUCTION

Chapter 1.

An Overview of the Death Penalty in Sub-Saharan Africa	3
1. Introduction	3
2. The History of the Death Penalty in Sub-Saharan Africa	4
2.1. The Precolonial Period	4
2.2. The Colonial Period	9
2.3. The Independence Period	12
2.4. The Democratic Era	15
3. African Resistance, African Accommodation	17
4. The African Contribution to Global Death Penalty Jurisprudence	20
5. Local Norms in Comparative Perspective	24
6. About this Book	28

PART II.

COUNTRY STUDIES

Chapter 2.

The Gambia	33
1. Introduction	33
2. The Death Penalty and the Gambian Constitution	35
3. The Legal Status of the Death Penalty in The Gambia	36
4. Constitutional Challenges to the Death Penalty in The Gambia	39
5. The August 2012 Executions	44
6. Prospects for Abolition of the Death Penalty	49
7. Conclusion	52

Chapter 3.	
Ghana	53
1. Introduction.....	53
2. The Death Penalty in the Precolonial and Colonial Periods	54
3. The Death Penalty and State Power after Independence	58
4. The Constitutional Framework of Capital Punishment in Ghana	63
5. Application of the Death Penalty for Murder.....	69
6. Prospects for Abolition of the Death Penalty.....	71
7. Conclusion	74
Chapter 4.	
Botswana	75
1. Introduction.....	75
2. The Death Penalty in Colonial and Precolonial Times.....	76
3. The Constitutional and Legal Framework of the Death Penalty in Botswana	78
4. The Doctrine of Extenuating Circumstances in Practice.....	82
5. International Law and the Doctrine of Extenuating Circumstances.....	85
6. Prospects for Abolition of the Death Penalty.....	91
7. Conclusion	94
Chapter 5.	
Lesotho and Swaziland	95
1. The Death Penalty in the Precolonial and Colonial Period in Lesotho ...	96
2. Constitutional Framework of the Death Penalty in Lesotho.....	98
3. The Death Penalty in Precolonial and Colonial Swaziland	107
4. The Constitutional Framework of the Death Penalty in Swaziland.....	109
5. Prospects for Abolition	116
6. Conclusion	118
Chapter 6.	
Zimbabwe	119
1. Introduction.....	119
2. The Death Penalty in Precolonial Zimbabwe	120
3. The Death Penalty in Colonial Southern Rhodesia.....	121
4. The Death Penalty in Independent Zimbabwe.....	127
5. The Doctrine of Extenuating Circumstances.....	131
6. The Death Penalty in the 2013 Constitution.....	134
7. Prospects for Abolition of the Death Penalty.....	139
8. Conclusion	140

Chapter 7.	
Kenya	143
1. Introduction.....	143
2. The Death Penalty in Precolonial Kenya.....	143
3. The Death Penalty During the Colonial Period.....	147
4. The Death Penalty for Extraordinary Crimes in Late Colonial Kenya. . .	149
5. The Criminal Justice System and Eroding Democracy after Independence.....	152
6. Constitutional Reform and the Death Penalty after 1987	156
7. The Abolition and Revival of the Mandatory Death Penalty.....	161
8. Prospects for Abolition of the Death Penalty.....	166
9. Conclusion	169
 Chapter 8.	
Uganda	171
1. Introduction.....	171
2. The Death Penalty in Precolonial Uganda	172
3. The Death Penalty during the Colonial Era	175
4. The Death Penalty after Independence	177
5. The Constitution and the Death Penalty in Uganda	178
6. The Abolition of the Mandatory Death Penalty.....	182
7. The Proposed Anti-Homosexuality Bill	191
8. Prospects for Abolition	193
9. Conclusion	197
 <i>Index</i>	199

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AFPRC	Armed Forces Provisional Ruling Council (The Gambia)
CSAG	Civil Society Associations Gambia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
FLN	Front de Libération Nationale
ICCPR	International Covenant on Civil and Political Rights
KADU	Kenyan African Democratic Union
KANU	Kenyan African National Union
MDC	Movement for Democratic Change (Zimbabwe)
NARC	National Rainbow Coalition (Kenya)
NDC	National Democratic Congress (Ghana)
NGO	Non-governmental organization
NLC	National Liberation Council (Ghana)
NPP	New Patriotic Party (Ghana)
NRM	National Resistance Movement (Uganda)
PEPFAR	President's Emergency Plan for AIDS Relief (United States)
PNDC	Provision National Defence Council (Ghana)
SADC	Southern African Development Community
SERAP	Socio-Economic Rights and Accountability Project (Nigeria)
UN	United Nations
UNHRC	United Nations Human Rights Committee
ZACRO	Zimbabwe Association for Crime Prevention and Rehabilitation of Offenders
ZANU	Zimbabwe African National Union

