THE AFRICAN CHALLENGE TO GLOBAL DEATH PENALTY ABOLITION
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International Human Rights Norms in Local Perspective

Andrew Novak
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.

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