



## Removing legal barriers to treatment: Legal training on health and human rights

Wednesday, 29 June 2016

### Workshop 2 (14:45-16:15): Prison health

#### Case study 2: Exclusion of terminally ill serious offenders from early release mechanisms

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Jurisdiction: Malawi

#### Problem statement:

In Malawi, the prerogative of mercy is the only hope for release of prisoners convicted of serious offences including those who are terminally ill. Moreover, the pardon process implicitly excludes offenders serving death/life sentences by requiring that “prisoners must have served at least half of their sentences” to be eligible for mercy. In practice, only offenders convicted of minor offences and who have served at least half of their sentences are granted mercy.

#### Background information:

The Prisons Act permits the prison authority to only grant remission to offenders serving fixed sentences of more than one month. Prisoners serving life sentences or imprisonment for less than a month may be recommended for remission by the President. It is the Minister of Internal Security who is charged with recommending such prisoners to the President. There is no guidance on the procedure for this.

Furthermore, the Prison Regulations state that a medical officer must submit a report to the officer in charge where he is of the view that:

- a. the life of a prisoner is likely to be endangered by his further confinement in prison; or
- b. a sick prisoner is unlikely to survive his sentence; or
- c. a prisoner is totally and permanently unfit to undergo prison discipline; or

- d. the mental health of a prisoner appears likely to become impaired by his further confinement in prison.

The officer in charge must 'immediately' forward the report to the Commissioner for transmission to the Minister who 'may' forward it to the President.

Lastly, the Prison Regulations also allow a prisoner to petition the Minister "with respect to any matter relating to his imprisonment or in mitigation of sentence". Such petitions are also to be forwarded to the President at the discretion of the Minister.

The purpose of making recommendations to the President is that s/he may exercise the prerogative of mercy. Section 89(2) of the Malawian Constitution provision details that the President may "pardon convicted offenders, grant stays of execution of sentence, reduce sentences, or remit sentences" in consultation with the Advisory Committee on the Granting of Pardon. The Advisory Committee on the Granting of Pardon Act, which has only four sections, creates the advisory committee and directs that it shall be chaired by the President with the right to decide when the committee is to meet. The Act also states that the committee shall regulate its own procedure. So far, there is no specific legislation that lays out the procedure that prisoners must follow to have their cases heard.

In 2005, the Attorney general drafted a document titled "Amended Guidelines for the Exercise of Prerogative of Mercy Adopted by the Advisory Committee on the Granting of Pardon". The Guidelines prescribe the overarching principles, eligibility criteria and factors that the Pardons Committee should consider in the exercise of its functions. The guidelines state that the public protection is the paramount consideration in the exercise of mercy. Other considerations include whether "the prisoner's release will cause no undue risk that he will reoffend before his sentence expires" and whether his release "will contribute to the welfare and protection of the community by helping or furthering his reintegration into the community as a law-abiding person". The Guidelines set down three general rules for eligibility:

- a. first, pardon "shall generally be reserved for cases of miscarriage of justice after the matter has been thoroughly exhausted through the judicial system";
- b. second, prisoners must have served at least half of their sentences to be eligible for presidential remission or reduction of sentence; and
- c. third, serious offenders convicted of "murder, violent offences such as robbery and burglary; serious sexual offences such as rape and defilement; and grand corruption" should not benefit from the prerogative of mercy.

While the guidelines do not state the circumstances in which the first and second rule may be departed from, it makes it clear that departure from the third rule is permissible if the prisoner is terminally ill or if "for the sake of promoting peace, tolerance and harmony in society", a victim or his close relative petitions the President for mercy.

The Pardons Committee Guidelines further state that where the offender is “terminally ill and the Commissioner of Prisons ... is desirous of recommending their names” to the Pardons Committee, the Commissioner’s report must contain the information on an assessment of character and history during imprisonment, medical and psychiatric reports, and a report of a chaplain where appropriate.

Relief sought:

A terminally ill prisoner serving two life sentences for murder and manslaughter wishes to challenge the status quo after he is not considered for mercy.

*How could such a challenge be framed?*