Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

OBSERVATOIRE SUR L'UNION AFRICAINE N. 2/2020

2. RAJABU AND OTHERS V. TANZANIA: A STEP TOWARD THE ABOLITION OF DEATH PENALTY IN AFRICA OR A MISSED OPPORTUNITY?

1. Introduction

On November 28th 2019, within the framework of its 55th ordinary session, the African Court on Human and People Rights (the Court hereafter) delivered its judgment on the case of *Ally Rajabu and others v. United Republic of Tanzania* (*Rajabu and others v. Tanzania* hereafter, Application No. 007/2015). The case concerns three different but related objects: Tanzania's violation of the right to a fair trial, of the right to life and of the right to dignity.

The applicants are five Tanzanian nationals convicted for murder after a full trial in November 2011 and sentenced to death by hanging. They were arrested in 2006 and charged with murder in 2008. As said, they were convicted in 2011 by the High Court of Tanzania. The applicants appealed the decision to the Court of Appeal of Tanzania, but their appeal was dismissed in 2013. The same year, the applicants filed an application for review to the same Appeal Court. The application for review was still pending before the Court of Appeal when they filed the case before the African Court, on 26 March 2015. On 18 Marc 2016, the Court issued an Order for Provisional measures, asking the State not to implement death sentence until the final Court's decision on the merits of the application.

The applicants complain, first of all, that their trial did not respect the requirements set forth in Article 7(1) of the Charter (right to a fair trial). In particular, they claim that they were wrongfully sentenced on the basis of manifest error and that their conviction is based on contradictory evidence. Moreover, they allege that their death sentence is in violation of the right to life and of the right to dignity under the Charter (Articles 4 and 5 of the Charter). The applicants also invoke Article 1 of the Charter, which provides that State parties to the Charter shall give concrete application to the provisions set forth in the Charter. the applicants claim that arguing that the State acted against the provision by failing to amend its Penal Code and to remove mandatory death sentence.

In this light, the case is of particular relevance in relation to the right to life and the right to dignity. In particular, for the first time in the history of the Court, the right to life is tested against the issue of the death penalty. The matter had already been the object of a

previous case (*Dexter Eddie Johnson v. Republic of Ghana*, Application No. 016/2017), which was however dismissed at the stage of the admissibility assessment.

As to the right to dignity, the judgment examines the question as to whether the methods used to implement the death penalty in the present case infringe the right to dignity, namely the prohibition of torture and cruel, inhuman and degrading treatments enshrined in Article 5 of the Charter.

2. Admissibility

The judgment under examination highlights a number of relevant issues concerning admissibility, namely with respect to the exhaustion of local remedies and the distinction between ordinary and extra-ordinary remedies. The Respondent State complained that, by failing to address the Tanzanian Constitutional Court by means of a petition, the applicants had not exhausted domestic remedies. Moreover, it also objected that the applicants should have complained the infringement of their right to be heard in front of the Appeal Court.

By failing to do so, as they did not explicitly address the matter within their request to the Court of appeal, the State contended that they circumvented the exhaustion of domestic remedies requirement. The Court dismissed both the allegations.

First of all, it embraced the applicants' view with respect to the qualification of the constitutional petition as an extraordinary remedy. Drawing upon its case law (*inter alia Mogosi Mwita Makungu v. United republic of Tanzania*, Application No. 006/2016), it affirmed that the type of remedies considered under Article 56 are *ordinary* remedies. The Court noted that the applicant appealed their death sentence to the Tanzanian Court of Appeal, which is the country's highest court.

Being the constitutional petition an extraordinary remedy, they were not expected to make use of it (para 40). Secondly, the Court rejected also the State's argument concerning the failure to address the violation of their right to be heard. Importantly, the Court recalled that the rights invoked by the applicants, namely the right to be heard, «is part of a bundle of rights and guarantees, which form the basis of the proceedings before the High Court and the Court of Appeal» (para 41). Therefore, since the applicants appealed the highest court of the country, domestic courts had a chance and, most importantly, the duty to evaluated if the right to be heard was infringed, irrespectively of whether the appellants raised the issues explicitly. In this light, the Court considered the domestic remedies requirement satisfied.

Finally, the Court dealt with another relevant principle concerning the admissibility stage. The State contended that the claimants failed to address the Court within a reasonable time, as provided in Article 56(5) of the Charter. The applicants filed the application two years after they received the last domestic judgment. The State referred to the case *Michael Majuru v Zimbawe* (Communication No 308/2005), which was dismissed as inadmissible because the applicants filed the application six months after exhausting domestic remedies. On their side, the applicants pledged that attention shall be paid to their specific subaltern situation, and the difficulties they faced as they are indigent and in detention. The Court's position stressed the need to carry out a case-by-case assessment, when it comes to consider the matter of the "reasonable time".

The Court based its reasoning on two elements. First of all, whether the «delay» was unreasonable due to the circumstances of the applicants. Secondly, whether it was attributable to the applicants or to the State.

By reiterating its established case-law on the matter, the Court dismissed the State argument and considered that the time of two years within which the applicants filed their case is not unreasonable in the light of the circumstances of the case. First of all, part of the delay was due to the time of the appeal procedure itself, which cannot be attributable to the applicants. Most importantly, relevance was given to the actual state of the applicants and the hardship they might have faced as indigent and detained. In sum, the Court refused an automatic interpretation and application of the reasonable time requirement, confirming the importance of a case-by-case assessment and the need to give particular consideration to the condition of vulnerability of the applicants.

3. Framing the right to life in relation to the death penalty

For the first time in the history of the Court, the issue of death penalty is analysed in relation to the right to life. The Court had the chance to deal with the issue within the case of *Dexter Eddie Johnson v. Republic of Ghana*. However, the application was judged inadmissible, as the Court considered the matter had already been settled by another international organ, namely the Human Rights Committee (Communication No. 2177/2012). We will see how the outcomes of the latter are actually close to those of the present case.

The rights invoked by the applicants are Article 1 of the Charter in conjunction with Article 4. The latter protects the right to life and integrity of the person, whereas Article 1 provides that State shall give full application to the provision of the Charter. In this light, the claimants allege that mandatory death penalty, as provided in the Tanzanian Penal Code (Section 197 of the Tanzanian Penal Code), violates their right to life. Moreover, they claimed that the failure to amend Section 197 of the Penal Code and to remove the mandatory character of death penalty, stands as an infringement of the its duty to give full application to the Charter under Article 1.

In this context, the Court made some preliminary considerations explaining the purpose of the right to life as opposed to deprivation of life. The Court recognised that the matter has to be contextualised within the global trend towards the total abolition of death penalty, which is supported by, *inter alia*, the adoption of the Second Protocol to the International Covenant on Civil and Political Rights. However, according to the Court, such a prohibition is still not absolute.

With regards to Article 4 of the Charter, the Court explained that it does not mention death penalty specifically. It protects the right to life and to the integrity of the person but only prohibits *arbitrary* deprivation of life. Therefore, death penalty itself does not stand against international law and against Article 4 of the Charter and shall be conceived as an exception to the right to life. Such an exception, in the view of the Court, is allowed as long as it is not made in an arbitrary fashion.

4. Mandatory death penalty as arbitrary deprivation of life and violation of the principle of due process

In this light, the Court clarified that the first question to be answered is whether the imposition of death penalty in the present case represented an arbitrary deprivation of life. In order to do so, the Court recalls the criteria examined in the case of *Interights and others v. Botswana* (Communication No. 240/2001): firstly, it must be provided by law; secondly, it must be imposed by a competent court; finally, it must abide by due process. With regards

to the first requirement, the Court found that the Tanzania Penal Code provides for mandatory death penalty and therefore, the legality requirement is met in the present case. The second requirement is also met, as it is not in contention between the parties that the tribunal which issued the sentence was competent to do so.

However, the main issues arose in relation to the due process requirement. Here, the Court articulated its reasoning around a joint reading of Article 1, 7(1) and 26 of the Charter. Accordingly, such rights must be applicable not only at a strictly procedural level, but also to the manner in which the Tribunal evaluates the elements. This means that the Tribunal carrying out the evaluation must be given full independence, therefore full discretion, in determining issues in fact and in law related to the case it examines.

At this stage, the Court links the mandatory nature of the death penalty as set out in the Tanzanian Penal Code to the infringement of the principles of due process. Indeed, the Court finds that the wording of Section 197 of the Penal Code imposes death penalty as mandatory for crimes of murder. The mandatory nature of the penalty, according to the Court, deprives the convicted persons of a real chance to have their case re-evaluated, as it implies an automatic and mechanical application of the law, with no room for mitigation according to the circumstances of the case. Moreover, this means that the trial court has no other option than to impose such a penalty and is therefore deprived of the discretion it shall have in order to make independent judgments. Consequently, no proportionality between the circumstances of the case and the penalty is *de facto* allowed.

For all of the above, the Court stated that, first of all, the mandatory character of death penalty in the present case renders it arbitrary and stands in breach of the fair trial rights, namely of the principle of due process as enshrined in Article 7(1) of the Charter.

5. Mandatory death penalty as a violation of the right to life

Only after having analysed the violation of the principle of due process the Court focussed on the alleged breach of Article 4. It has been explained that the Court based its argumentation on a preliminary clarification: the prohibition of the death penalty is not an absolute one under international law. Indeed, such a statement reveals, *in nuce*, the outcome that the Court will reach.

The Court's reasoning, indeed, revolves around the qualification of the death penalty as mandatory. It is precisely this attribution, and not death penalty as such, that allows the Court to find a violation of Article 4 of the Charter.

The Court stressed out that the right to life, as worded in Article 4, aims at protecting the integrity of the person and the sanctity of human life, the latter being qualified as inviolable. Moreover, the Court highlights that death penalty is not mentioned in Article 4, and that the limitation to the right to life under paragraph 2 of the Article is an exception to the aim of protecting human life. In this light, any exception must be fair and cannot outweigh the limitations to be applied to the clause under para 2 of Article 4, namely that deprivation of life must not be arbitrary. In sum, deprivation of life stands as a derogation to para 1 of Article 4 and is allowed as long as it is not arbitrary and as long as it passes the fairness test.

In this light, the Court finds that the mandatory nature of death penalty as provided in the Tanzanian Penal code does not pass the fairness test required under Article 4. Therefore, it represents an arbitrary deprivation of life, in violation of Article 4. It followed

that Tanzania, by failing to remove mandatory death penalty from its Penal Code, violated also Article 1 of the Charter.

We can see how the violation of Article 4 is strictly connected to the violation of Article 7 and the principles of due process in this case. Indeed, it is precisely the lack of room for a balance between conflicting interests that violates the procedural rights under Article 7 and the substantive protection of life under Article 4.

The Court's decision seems to align with a part of the trend in international law regarding death penalty. If, on the one hand, it is arguable that a number of international bodies are militating for the abolition of death penalty as such, on the other, the need not to interfere with domestic affairs limits the possibility of adopting more radical decision on the matter. The African Commission itself engaged in the discussion and set up a working group on death penalty. The study that followed critically examined the practical challenges to the abolition of death penalty, revealing a controversial and somehow contradictory approach worldwide (Working Group on Death Penalty in Africa, African Commission on Human and Peoples' Rights, Study on the question of death penalty in Africa, November 2011). According to the study, indeed, the African Charter itself «does not speak unequivocally to this nagging question» (Study on the question of Death Penalty in Africa, page 8), as Article 4 itself does not mention death penalty and allows it in some cases.

This shaded and cautious approach is reflected in a number of decisions of the UN bodies. As an example, in the case of *Johnson v. Ghana*, the HRC, similarly to the African Court, did not condemned death penalty as such, but found that its mandatory nature violated the right to life and to a fair trial under the ICCPR (Articles 6 and 7 of the International Convention on Civil and Political Rights).

Europe is currently an exception. Indeed, all States belonging to the EU and to the Council of Europe, except from Armenia, Russia and Azerbaijan, have ratified Protocol n. 13 to the European Convention on Human Rights (ECHR hereafter), making Europe the one and only death penalty-free area worldwide. However, it must be recalled that the path towards a total abolition of death penalty in Europe was not a linear one and that the first decisions on the issue followed a similar cautious pattern. As a matter of facts, the European Convention on Human Rights also allows for deprivation of life when it is provided by law and followed a court decision (Article 2 ECHR). It was the will to interpret the ECHR as a "living instrument" that allowed the Court to develop a sensitive approach to the matter, together with the political will of State parties towards an abolitionist approach.

6. The violation of the right to dignity

As to the violation of the right to dignity, the applicants claimed that their death sentence violated the right to dignity as enshrined in Article 5 of the Charter. It must be underlined that the applicants referred to the death sentence generally, but did not mention the methods used to implement it. It can be argued that in this case, again, the Court adopted a somewhat narrow reading of the lamentations of the applicants and of the right to dignity in relation to death penalty. Indeed, the Court's reasoning in this case revolves around the specific method used to implement the sentence which, in the applicants' case, is by hanging.

Accordingly, the Court observed that many of the methods of implementation of death penalty have the potential to amount to torture or other degrading treatments. For

this reason, in situations where such a penalty is allowed, the way of implementation shall exclude suffering as much as possible. These findings are indeed supported, in the Court's view, by the international jurisprudence on the matter (see ECtHR, *Jabari v. Turkey*, Application No. 40035/98; HRC, *Chitah Ng v. Canada*, Communication No. 469/1991).

In the applicants' case, the Court found that death by hanging is inherently degrading, as it inevitably involves a degree of suffering and humiliation, standing in violation of the prohibition of torture and other inhuman and degrading treatments.

The parallelism between the facts of the case and those of the *Soering* case (ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88) seem obvious. However, differently from the ECtHR in *Soering*, the Court decided not to take into account the whole context of the death penalty and did not mention the so-called "death row syndrome" in the assessment of the alleged violation of Article 5. Interestingly, the Court considered the matter only secondarily, when it evaluated the damages suffered by the applicant and the related compensation.

In this context, the Court stated that «being sentenced to death is one of the most severe punishment with the gravest psychological consequences as the sentenced persons are bound to lose their ultimate entitlement that is life» (para 147). Referring explicitly to the *Soering* case, the Court assessed the moral damages on the basis of a number of criteria connected to the conditions of the applicants. Accordingly, the Court affirmed that in the time elapsed between the applicants' sentence to death and the outcome of their appeal to the African Court (eight years) the applicants lived a situation of uncertainty, knowing that they could be sentenced at any time. Therefore, the length of this period, together with the uncertainty related to their situation, aggravated and prolonged that applicants' feelings of anguish.

In his light, the Court recognised that the death penalty, together with the prolonged detention waiting for the execution, the lack of consideration for the applicants' circumstances and the disproportionality between the offences committed and the sentence, caused moral and psychological suffering, which entitled the applicants to receive moral damages.

It might be noted that the issue of the death row condition in the present case, in the light of the moral and psychological distress that it caused to the applicants, could have been dealt with also within the substantive analysis of the violation of Article 5. In this case, again, the Court seems to take a "cautious" and compromising approach, in line with the tenor of its substantive analysis on the alleged violations lamented by the applicants. Such an attitude seems, again, a way to reconcile the need to develop an evolutive jurisprudence and the need to respect the domestic sphere of State parties, in the attempt not to adopt excessively radical decisions.

7. The dissenting opinion by judge Blaise Tchikaya

In a separate opinion, judge Tchikaya criticised the Court's conclusions. His criticisms addressed two issues: the distinction between mandatory and non-mandatory death penalty and the Court's reading of Article 4.

Tchikaya's standing point affirms that the evolution of international law on the matter of death penalty does not allow for a distinction between different types of death penalty: it goes towards the abolition of the penalty as such. Accordingly, by means of

distinction between mandatory and non-mandatory death penalty, the Court is showing an unclear position on the matter.

Tchikaya criticises such a distinction showing how, in his view, it is highly relative and not justified on legal nor on operational grounds. «The emptiness» of the distinction (para 5 of the separate opinion) stands in the fact that the punishment and the effective application of the mandatory death penalty depend on a judge assessment. Such elements are equally found in non-compulsory death sentences. Therefore, there is no evident procedural difference between the two versions of the death sentence.

This given, on a legal ground, mandatory death penalty is only an embodiment of death penalty. Mandatory or not, a death sentence "is still a death sentence". Because these two embodiments are not sufficiently distinguishable, a single legal regime shall be applied.

Regarding the reading of Article 4, Tchikaya accuses the Court of maintaining a "chiaroscuro" on the matter, ignoring the fact that the distinction set by the Court between mandatory and non-mandatory death penalty does not find support in international law, which is moving towards a rejection of the penalty in all its manifestations. Indeed, the African continent is also part of this movement, with nearly twenty countries not carrying out executions and nearly forty being abolitionist in law and in practice. This position finds support in a number of international law instruments, such as Resolution 1997/12 of the International law commission, the Second Protocol to the Declaration of Human Rights and the Second Protocol to the ICCP.

This is the reason why Tchikaya suggests that a less limited reading of Article 4 would have been in line with the international trend and would have contributed to it. In sum, as Tchikaya affirms, «[t]he court, while asking Tanzania to review its legislation on a category of death penalty-the mandatory death penalty-is refusing to direct its decision to condemn the death penalty. It allows islands of tolerance to persist» (para 28 *Rajabu and others v. Tanzania*, Separate Opinion By Judge Blaise Tchikaya).

8. Conclusion

For the first time in its history, the Court had the chance to rule on the death sentence. The Rajabu case represents an important but also controversial precedent for the African context. It can be argued that the Court seems to have adopted a "compromising" approach between the condemnation of death sentence and the need not to interfere with matters "internal" to the States. Indeed, we have seen how the Court based its reasoning on the distinction between mandatory and non-mandatory death penalty, and ruled that the latter only violates Article 4 of the Charter. By doing so, the Court managed not to condemn death sentence as such, keeping an ambiguous attitude towards the issue. The same can be said about the violation of the right to dignity.

On the one hand, it can be argued that the Court missed an opportunity to take a more radical and "praetorian" position on death penalty. This is what judge Thcikaya criticised with regards to the judgment.

On the other, it must be recalled that, despite the international general attitude on the matter, Europe is the only death free regional area worldwide. However, even in the case of Europe, it took decades to reach a political agreement towards an abolitionist approach.

When it comes to assessing whether death penalty violates the right to life, a similar compromising attitude is adopted by international bodies, as for example in the case of

Johnson v Ghana, where the ICHR reached conclusions similar to those of the Rajabu case.

It must be considered that the African system is a "young" system compared to other realities, such as the European one, where the evolution of human rights protection has been equally slow and progressive. The Rajabu case is the first case concerning the issue of death penalty. It is arguable that the Court will be able, in the future, to build upon this judgment and to sense the attitude of African States towards the gradual abolition of the death penalty.

FRANCESCA RONDINE